

12 February 2024

The Legal Framework Regulating the Use of Force in the West Bank, Including East Jerusalem

As the hostilities between Israel and armed groups in Gaza persist and the levels of violence in the West Bank, including East Jerusalem, remain high, the Diakonia IHL Centre provides regular updates regarding legal aspects of the evolving situation.¹ This update clarifies the applicable legal framework regulating the use of force by Israeli forces in the West Bank, including East Jerusalem.

The use of force by State officials in situations of armed conflict, including situations of occupation, is regulated by two distinct legal frameworks contained in international law. The first of these consists of a set of rules concerning the conduct of hostilities that form part of international humanitarian law (IHL). These relatively permissive rules regulate the conduct of belligerent parties during active hostilities. The second applicable framework consists of rules that delineate when and how State officials can resort to the use of force for purposes of law enforcement. These rules on law enforcement, which derive primarily from international human rights law (IHRL) and apply both in peacetime and in times of armed conflict, impose more stringent constraints on the use of force than the rules on the conduct of hostilities. Among other things, while the conduct of hostilities rules allow belligerents to intentionally direct lethal force against certain persons (enemy fighters), the rules on law enforcement prohibit such use of force except when absolutely necessary, as a last resort, to protect against an imminent threat of death or serious injury, and provided that the force used is proportionate to the threat it seeks to avert. Moreover, State forces implementing operations that are subject to rules on law enforcement are required to plan effectively for eventualities that they can reasonably be expected to foresee, and to prepare operations with a view to preventing, avoiding, or at least minimising the need to resort to force.²

Prior to the outbreak of the current hostilities in Israel and Gaza on 7 October 2023, it was widely agreed that the situation in the West Bank, including East Jerusalem, did not amount to one of active hostilities. This was the case because the altercations that Israel was involved in in these parts of the occupied Palestinian territory (oPt) did not cross a threshold of violence that was

¹ '2023-2024 Hostilities and Escalating Violence in the oPt | Legal Updates' (*Diakonia IHL Centre*) <<https://www.diakonia.se/ihl/jerusalem/2023-2024-hostilities-escalating-violence-opt/legal-updates/>> accessed 12 February 2024.

² For elaboration see, 'Q&A: Use of Force in Law Enforcement' (*Diakonia IHL Centre*, 22 December 2021) <<https://www.diakonia.se/ihl/news/use-of-force-israel-law-enforcement/>> accessed 12 February 2024; 'The Use of Force in Law Enforcement Operations in the Occupied Palestinian Territory' (*Diakonia IHL Centre*, 16 December 2022) <<https://www.diakonia.se/ihl/news/the-use-of-force-in-law-enforcement-operations-in-the-occupied-palestinian-territory/>> accessed 12 February 2024; 'Excessive Force: A Legal Analysis of Israel's Operation in Jenin Refugee Camp' (*Diakonia IHL Centre*, 13 July 2023) <<https://www.diakonia.se/ihl/news/excessive-force-a-legal-analysis-of-israels-operation-in-jenin-refugee-camp/>> accessed 12 February 2024.

sufficient for them to amount to hostilities, nor did they involve members of an organised armed group with which Israel was engaged in hostilities elsewhere. Accordingly, the rules on the conduct of hostilities were deemed inapplicable in those areas, and any use of force by Israel within them was understood to be regulated by the rules on law enforcement rooted in IHRL.³

The hostilities now raging between Israel and armed groups in Gaza (to which the rules on the conduct of hostilities clearly do apply) and the related escalation of violence in the West Bank have prompted some commentators to conclude that the conduct of hostilities framework is now applicable in the West Bank in certain circumstances. This was apparent in recent public debate about an undercover operation by Israeli forces, which took place in the West Bank city of Jenin on 29 January 2024. In the operation in question, Israeli troops disguised as hospital patients and staff raided Jenin's Ibn Sina Hospital and killed three men: Mohammed Jalamneh and the brothers Basel and Mohammed Al-Ghazzawi. According to the Israeli military, the three men, who were said to be affiliated, respectively, with Hamas, Islamic Jihad, and the Jenin Battalion, belonged to a 'terrorist cell' that 'planned to carry out a terror attack in the immediate future'.⁴ In public commentary on these events, a number of leading international law experts analysed the Israeli forces' actions on the basis of the IHL rules on the conduct of hostilities.⁵ Their reasoning for doing so appears to be the assumption that the persons attacked were members of armed groups that are engaged in the hostilities currently underway in Gaza. As one commentator put it, '[t]he raid was a classic "conduct of hostilities" operation against individuals who were members of a party to the conflict'.⁶ Based on the presumption that the conduct of hostilities framework applies, it has been argued that the Israeli forces appeared to have violated the prohibition to kill, injure, or capture an adversary by resort to perfidy, and that, depending on the facts, they may also have violated other conduct of hostilities rules, notably the prohibition on attacking persons *hors de combat*.⁷

³ For elaboration on the criteria for the conduct of hostilities rules to apply in the oPt, see, eg, Diakonia IHL Centre, 'Excessive Force' (n 2).

⁴ 'Neutralized: Hamas Terrorist Cell Hiding in Iba Sina Hospital in Jenin' (*Israel Defense Forces*, 30 January 2024) <<https://www.idf.il/en/mini-sites/idf-press-releases-regarding-the-hamas-israel-war/january-24-pr/neutralized-hamas-terrorist-cell-hiding-in-iba-sina-hospital-in-jenin/>> accessed 12 February 2024.

⁵ 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 12 February 2024; '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 12 February 2024; 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 12 February 2024.

⁶ Schmitt *ibid*.

⁷ Ellie Kaufman, Helena Skinner, and Nasser Atta, 'Israeli Security Forces May Have Violated International Law in West Bank Hospital Raid, Experts Say' *ABC News* (New York, 30 January 2024) <<https://abcnews.go.com/International/idf-may-have-violated-international-law-west-bank-hospital-raid/story?id=106810456>> accessed 12 February 2024.

If one accepts that the rules on the conduct of hostilities are indeed the relevant legal framework, then concerns about perfidious attack and attacks on persons *hors de combat* are very much warranted (notwithstanding reservations that some have expressed).⁸ However, **in the view of the IHL Centre, the international legal framework that in fact applied to the Israeli operation in Ibn Sina Hospital, and which continues to apply in all cases where Israeli forces resort to force in the West Bank, including East Jerusalem, is the more restrictive framework regulating law enforcement.** We hold this position because, unlike the situation in Gaza, the current level of violence in the West Bank, although troubling, has not yet reached the threshold of active hostilities. Moreover, there is insufficient indication that armed groups, cells, or individuals active in the West Bank are part of the organisational structure of the armed groups that are party to the hostilities in Gaza.

Pursuant to the rules on law enforcement, the Israeli forces involved would have been required to plan the raid on Ibn Sina Hospital with a view to minimising the foreseeable risk that they would need to resort to potentially lethal force (or indeed any force). Any such use of force during the operation would have been unlawful, unless it was absolutely necessary to protect the Israeli soldiers involved or others against an imminent threat of death or serious injury that could not have been averted through less harmful means. It is extremely doubtful that these demanding conditions were in fact met, and there are instead strong grounds to conclude that the killing of Jalamneh and of the Al-Ghazzawi brothers constituted an unlawful killing. Moreover, if the purpose of the operation was to kill rather than capture these individuals, it amounted to an extrajudicial execution implicating all those responsible in the commission of an act of wilful killing, a war crime.

⁸ Schmitt (n 5).