

Challenges to international humanitarian law: Israel's occupation policy

Peter Maurer

President of the International Committee of the Red Cross



The complexity of the ever-shifting humanitarian landscape in the Middle East region – where the effects of perennial conflict and instability have rarely been contained within one country – is a major preoccupation for humanitarian organisations like the International Committee of the Red Cross (ICRC).

As fighting continues in Syria, unprecedented levels of displacement and destruction have resulted in a region that has already suffered various forms of violent upheaval for most of its modern history. The humanitarian catastrophe that has unfolded in Syria is bound to have long-term repercussions there, and in neighbouring countries too. With huge numbers of people fleeing across borders to escape the fighting, and many more displaced within Syria, the strain on host communities and governments is immense. The lack of tangible progress on both the political and humanitarian fronts is having a profound impact on the region and putting pressure on fragile ethnic and religious balances within numerous communities.

The ICRC is particularly concerned with the situation in Lebanon, which is hosting hundreds of thousands of refugees amidst a fragile equilibrium between different communities. Another cause for concern is the serious deterioration of the situation in Iraq, where resurging sectarian violence is claiming a heavy death toll.

For many, the regional instability resulting from the Arab Spring, be it in Egypt, Yemen, Bahrain, or Tunisia, has outlasted the euphoria of social transformation. While this transformation is of critical importance in addressing

the rising needs and expectations of the vast majority of the population – namely those under the age of 30 – governments seem insufficiently prepared to engage with their demands and to find innovative ways to tackle rampant poverty, unemployment, and ineffective public services.

Perhaps the most protracted and entrenched humanitarian situation in the region is the continued alienation of the Palestinian population living under occupation in the West Bank and the Gaza Strip, or displaced in refugee camps across the region. Their dire situation further demonstrates the need to find practical steps to rebuild basic human capital within Palestinian communities, which is sorely needed to generate hope and stability in the region as a whole.

All these situations must be seen against the background of an international order undergoing profound transformation, with power centres moving southwards and eastwards and the traditional international system shifting towards a multi-polar world. Critically, the disintegration of traditional power bases is hindering the stability and resilience of fragile states and increasing the risk of civil disturbance and even war in today's global environment. These developments naturally pose extraordinary challenges for states, international organisations, and legal systems.

Without renewed commitment from governments to address growing social inequities and other sources of instability in the region, any quest for peace and prosperity will remain elusive. As a neutral and independent humanitarian organisation, the ICRC can only remind the parties to these conflicts that without respecting the basic tenets of international humanitarian law (IHL) in these testing times, it is most unlikely that the various communities will find their way toward reconciliation or be prepared to share the burden of a just peace after decades of conflict. Considering that the customary core of that law is older than the state-based system itself, the specific nature and extraordinary significance of IHL in today's armed conflicts provide a legitimacy beyond the current international system. Far from being outdated, humanitarian law is very much a contemporary and future-oriented body of law.

While respect for IHL is a crucial element of the protection of victims of armed conflict, and ultimately of fostering stability in such contexts, a critical analysis of the policies underpinning the status quo in conflict-affected states is also indispensable.

Turning specifically to the situation in Israel and the Occupied Palestinian Territory, the particular challenges facing humanitarian action there cannot be tackled without an honest look at certain Israeli policies that have become key features of the occupation.

Israel has exercised 'actual authority'¹ over the West Bank and the Gaza Strip for almost half a century, making its presence in these areas one of the longest sustained military occupations in modern history. While the shape and degree of this military occupation have varied, Israel has continuously maintained effective

1 The Hague Convention of 1907 specifies that 'territory is considered occupied when it is actually placed under the authority of the hostile army'. The form of administration by which an Occupying Power exercises government authority over occupied territory is called 'military government'.

control over the territories it occupied as a result of the Six Day War in 1967, and over the Palestinian population living there.

The constant pressure that Israeli occupation has imposed on the Palestinian population has had a profound impact on both the Palestinian and the Israeli economies, cultures, and societies. Beyond the recurring excesses of armed violence, the ensuing grief among the people affected, and the trauma among the broader community, the lack of progress on issues of major humanitarian concern further illustrates the inability of a generation of decision-makers to find constructive ways to bring concrete improvements to the lives of millions of Palestinians.

At the same time, the Israeli population has had to deal with difficult and diverse security challenges and threats over the decades due to direct attacks against civilians and indiscriminate attacks perpetrated by various Palestinian groups, resulting in civilian loss of life and undeniable suffering.

The ICRC's role is to work together with the parties to the conflict to ensure proper implementation of IHL in these situations; to find practical ways to improve the life, health, and dignity of those affected; and to offer its humanitarian services when needed. Providing humanitarian assistance goes alongside ensuring protection against violations of IHL, and with working to prevent violations from happening in the first place.²

As its name implies, international humanitarian law is primarily designed to serve the basic humanitarian interests of people affected by armed conflict. Whether displaced, under siege or occupation, facing attacks from a regular army or rebel groups, in detention or held hostage, all are in dire need of protection. The international community is well aware of the dangers inherent in armed conflict marked by unregulated violence. The purpose of humanitarian law is to lay down a series of inviolable standards of humanity, as well as to preserve and safeguard core values even in the midst of horrendous violence.

International humanitarian law is meant to strike a balance between military necessity and humanitarian considerations. It does not allow military endeavours that aim to make permanent changes to occupied territory; to force people to leave their homes; or to unlawfully seize land and resources from communities. Humanitarian law is and will remain a tool for the protection of the life and dignity of civilians and combatants and thus for a modicum of stabilisation in the midst of conflict.

This is obviously a difficult mission. At first sight, the call for military force to put an end to existential threats cannot be easily counter-balanced with the requirements for discriminate targeting and proportionate use of force under international humanitarian treaties. In this regard, most military commanders would agree that respect for the core rules of IHL is an essential component of successful military operations, once 'success' is defined in the context of the long-term legitimate security goals of a state, recognised under international law.

2 For more information on the ICRC's activities in favour of people affected by armed conflict and other situations of violence, see: www.icrc.org/eng/what-we-do/index.jsp. All internet references were accessed in April 2013.

Nevertheless, in the age of terror and counter-terror operations, the political objectives of military campaigns are increasingly predicated on the concrete outcome of particular military operations. The eradication of threats becomes the end goal of political strategies without much vision on how to address potential disparities and bring back stability. In this context, it may be legitimate to ask how one can achieve an acceptable balance between intrinsic humanitarian considerations and short-term political and security objectives.

These are critical questions for which there are no easy answers. From an ICRC perspective, there are several key points that are essential to maintaining a regulated framework for the conduct of hostilities and military occupation, and thereby ensuring basic standards of humanity in conflict.

First and foremost, the rules set out in the 1949 Geneva Conventions represent universal legal standards recognised by states and international courts alike as paramount in armed conflicts and military occupation.

In the Occupied Palestinian Territory – that is, the West Bank, East Jerusalem, and the Gaza Strip – the applicable legal framework is the law of belligerent occupation. This consists of the rules enshrined in the 1907 Hague Regulations, the Fourth Geneva Convention, and customary IHL. The latter provides a critical and universally accepted legally binding framework to ensure respect for the life and dignity of people living under military occupation.

While the Israeli government has consistently contested that the Fourth Geneva Convention is applicable *de jure* to the situation prevailing in the Occupied Palestinian Territory, it does nevertheless accept a *de facto* application of what it calls the 'humanitarian provisions' of the Convention. Moreover, the Israeli Supreme Court has clarified that certain provisions of the Convention as well as the rules of the 1907 Hague Regulations reflect customary IHL and are therefore binding on the authorities in the territories.

Beyond certain legal discussions on the applicability of specific provisions of the Fourth Geneva Convention to the situation in the Occupied Palestinian Territory – which in the ICRC's view is beyond doubt – the relevance of IHL goes further. The ICRC is convinced that compliance with and respect for IHL – while by no means a panacea – would significantly reduce human suffering on both sides, and would help restore confidence and ultimately offer the best chance of preparing the ground for a peaceful resolution of the conflict.

The critical issue to consider is what steps are needed to restore and improve the living conditions of affected Palestinians with a view both to ensuring respect for their basic rights and offering the prospect of a future political solution to the conflict.

In these circumstances, the positions expressed by the ICRC over the years on recurring violations of IHL in the Occupied Palestinian Territory remain central.³ Since the beginning of Israel's occupation of the West Bank

3 See, for example, 'Implementation of the Fourth Geneva Convention in the occupied Palestinian territories: history of a multilateral process (1997–2001)', *International Review of the Red Cross*, Vol. 84, No. 847, 2002.

(including East Jerusalem) and the Gaza Strip in 1967, the ICRC has been systematically monitoring and reporting violations of IHL by all sides to the conflict, regularly submitting recommendations for corrective measures, while providing humanitarian assistance and protection to the people living under occupation.

One of the key features of the occupation is the Israeli government's settlements policy. The ICRC's publicly stated position is that this policy amounts to a violation of IHL, in particular the provision of the Fourth Geneva Convention prohibiting the transfer of part of the population of the Occupying Power – in this case Israeli citizens – to the occupied territory. This provision aims to prevent the Occupying Power from modifying the social, demographic, and economic pattern of the occupied territory, against the interests of the population living there. The Israeli government's decisive and systematic support over the years to the establishment of settlements, including by taking away land, has effectively achieved just that: a profound alteration of the economic and social landscape of the West Bank, which hinders its development as a viable nation and undermines future prospects for reconciliation.

Another key feature of the occupation is the West Bank Barrier. The Barrier, to the extent that it deviates from the Green Line established at the end of the 1948 Arab–Israeli War, not only violates IHL but further undermines the living conditions of the affected communities – depriving them of normal economic and social connections, and hindering their access to their jobs, their fields, their schools, their health-care centres, and their places of worship. The fact that the Barrier now reaches deep into Palestinian territory, with a projected total length of more than twice that of the 315 km Green Line, is seriously curtailing freedom of movement in certain areas of the West Bank and effectively cutting the land into small isolated parcels. The simultaneous expansion of settlements throughout the West Bank, served by those settlements' own road network, is effectively increasing the isolation of Palestinian communities.

The ICRC's position⁴ – that the construction and management of the Barrier has entailed various violations of IHL provisions, including those prohibiting disproportionate security measures, destruction and seizure of property, and restrictions of access to land, work, and basic services – is by no means unique. For example, the 2004 Advisory Opinion of the International Court of Justice stated that the West Bank Barrier contravenes several of Israel's international legal obligations, including rules of IHL.⁵

The effects of occupation have been particularly stark for Palestinians living in East Jerusalem ever since Israel occupied the eastern part in 1967, gradually expanded the municipal boundaries, and formalised its annexation in 1980.

4 'Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier causes serious humanitarian and legal problems', Press Release No. 04/12, 18 February 2004, available at: www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/5wacnx.htm.

5 'Legal Consequences of the construction of a wall in the Occupied Palestinian Territory (July 2004)', available at: www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6.

This annexation – prohibited under public international law⁶ – cannot deprive the Palestinians living there of protection under the Fourth Geneva Convention.⁷ On the ground, however, restrictions imposed on urban planning, residency permits, and access to the West Bank have imposed constant pressure on the Palestinian community, which is unable to lead a normal life even after decades of occupation.

Finally, the social and economic situation of the population living in the Gaza Strip represents one of the most depressing sights in the region. Even though Israel has not had a permanent presence in Gaza since its official disengagement in 2005, it has in fact maintained effective control over the Strip and its borders since 1967. In addition, it has employed various coercive measures that continue to impede the Strip's development. These closure measures have severely limited economic and social contacts with the West Bank, and undermined efforts to stabilise the social situation. They have also impeded efforts to build proper democratic institutions across areas under Palestinian administrative authority. In the ICRC's view, Israel continues to be bound by obligations under occupation law that are commensurate with the degree to which it exercises control.

While significant exchanges of views and technical cooperation are taking place regarding the humanitarian consequences of the continued closure of the Gaza Strip, the ICRC has been unable to engage in any meaningful dialogue with the Israeli government on the impact for Palestinians of Israel's annexation of East Jerusalem, the routing of the West Bank Barrier, and the presence and further expansion of Israeli settlements. The ICRC has therefore opted to engage with civil society, academia, and the Israeli public directly in explaining its position regarding the discrepancies between IHL and the Israeli government's policies in the Occupied Palestinian Territory. Each of these policies has distinct and complex consequences from a humanitarian viewpoint. The main common feature is undoubtedly the steady loss of Palestinian land, coupled with severe restrictions in terms of movement and access to services. Both the demographic balance and the physical map of the Occupied Palestinian Territory have been transformed over the years, to the clear detriment of Palestinian communities.

The ICRC certainly recognises the Israeli government's need to ensure the security of its own population and territory. This is an inalienable right of any state, though with the understanding that any measures to ensure national security must remain in accordance with the rules and procedures prescribed by international law. There may be no exceptions to compliance with the rules of humanitarian law, given its unique and universal humanitarian character.

The West Bank Barrier is a case in point. In the way it has been planned, constructed, and operated, the Barrier cannot be justified as a security measure, consolidating and perpetuating as it does the illegal presence of settlements.

6 See UNSC Res. 242 of 1967, available at: <http://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C-85256EE700686136>.

7 See 'Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory', statement by the ICRC at the United Nations General Assembly, resumed tenth emergency special session, New York, 13 November 1997, available at: www.icrc.org/eng/resources/documents/misc/57jntp.htm.

Its cumulative effects have led to consequences of a magnitude and gravity well out of proportion with what may be the legitimate security concerns of Israel. As such, it cannot be reconciled with the duties of an Occupying Power.

As the ICRC witnesses the Middle East region's tragic descent into further instability and armed violence – with the resurgence of radical ideologies purporting to justify unspeakable violence against civilians – it has grave concerns about the uncharted territory to which unrestrained military power and dominance will lead the region.

International humanitarian law is probably the last universal bulwark against such unacceptable abuses. While that law has never prevented any state from maintaining its basic security prerogatives in times of crisis, it does provide not only a minimum binding legal framework but also a space for thinking and engaging critically on the human consequences of security policies. It is therefore paramount that a sincere and effective dialogue be maintained at all levels on how consistent the policies and practices of the parties to conflict really are with the basic provisions of IHL.

The ICRC's role in such dialogue may raise legitimate questions about its traditional policy of confidentiality.⁸ As in other regions of the world, the ICRC remains fully committed to engaging with all sides in bilateral confidential dialogue on issues of humanitarian concern in order to offer a space for pragmatic improvements. The purpose of confidentiality is precisely to enable candid talks in an atmosphere of trust, to explore with the parties concerned the best possible practices, and ultimately, to find practical solutions in compliance with international norms and standards. This is particularly important in situations of armed conflict, which sometimes pose difficult dilemmas for those responsible for actual implementation of the law. The ICRC intends to remain a reliable partner in approaching these sensitive tasks, whether in the context of active hostilities, detention, or use of force. Such dialogue is critical to maintaining a proper balance between legitimate military necessity and imperative humanitarian interests.

However, when confidential dialogue is unsuccessful in bringing concrete improvements to the affected populations, it becomes untenable to remain silent on important discrepancies between public policies and legal frameworks. In such cases, the ICRC believes that it has the responsibility under its humanitarian mission to engage in a more public manner on violations of IHL. Sustained and unwavering attitudes of parties violating some of the core rules of the law not only result in a tragic cost to the people affected by those violations, but are also to the profound detriment of that party's own strategic thinking, its planning capabilities, and ultimately, its own long-term national interests. The role of the ICRC is to maintain

8 See 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005; 'The International Committee of the Red Cross's (ICRC's) confidential approach', policy document, December 2012, in *International Review of the Red Cross*, Vol. 94, No. 887, Autumn 2012, available at: <http://www.icrc.org/eng/resources/documents/article/review-2012/irrc-887-confidentiality.htm>.

a watchful eye on these choices, propose its guidance when necessary, and offer humanitarian assistance when needed.

The importance and value of comprehensive dialogue on core humanitarian challenges cannot be overestimated. International law has established clear legal obligations for the parties to armed conflict and for States party to the Geneva Conventions in terms of ensuring respect for IHL. Yet the reality is that humanitarian organisations such as the ICRC are facing growing dilemmas in working towards the implementation of those rules and in deciding how best to orientate their work in connection with armed conflict, whether in Israel and the Occupied Territories the broader Middle East, or anywhere else in the world.

These dilemmas facing humanitarian action may be synthesised into three key questions. Firstly, how can one determine a practical and acceptable balance between the legitimate security requirements of the parties to conflict while effectively protecting the civilian population? Secondly, how can one remain committed to confidential dialogue on humanitarian concerns with the parties to conflict and at the same time meet the growing requirement for greater public engagement and transparency? And thirdly, to what extent should one focus on the short-term humanitarian needs of populations affected by protracted conflicts, as opposed to investing more in the resilience and self-sufficiency of these communities?

The future of humanitarian action depends on our ability to engage on these issues with the parties to armed conflict in a practical and proactive manner. The ICRC's role is not to impose standards and give lessons on these dilemmas, but rather to engage in real dialogue and find the best possible outcomes in any given context. Rather than pushing a strict advocacy or doctrinal line, the ICRC proposes to establish a structured dialogue on these dilemmas, to share experiences, and to identify practical solutions in line with IHL. The ICRC remains convinced that improved compliance with IHL – in the Occupied Palestinian Territory as in other situations of armed conflict or occupation anywhere in the world – is a crucial factor in helping to reduce the suffering of all those affected.