



**The Right to Demonstrate
in the Occupied Territories**
Position Paper, July 2010

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Cover: A demonstration in Bil'in, Activestills.org

Introduction

In the last few years, Palestinian, Israeli, and foreign activists have held regular demonstrations at several locations in the West Bank against the building of the Separation Barrier. In recent months, the Israeli military has changed its response to these demonstrations and has begun taking various steps to quell them.

As part of these efforts, the armed forces have arrested many of the organizers of the demonstrations; occasionally use violence to disperse the protests; and have deported some of the foreign activists who participate in them. In addition, on 17 February 2010, OC Central Command signed two orders of “Declaration Regarding Closure of Area” defining the areas adjacent to the Separation Barrier in the villages of Bil’in and Ni’lin as closed military areas every Friday, during the hours at which the demonstrations regularly take place.

The legality of demonstrations in the West Bank is regulated by the “[Order Regarding Prohibition of Incitement and Hostile Propaganda Actions](#)” (Order 101) from 1967. This order imposes extreme restrictions on the right of Palestinians to organize or attend demonstrations. B’Tselem wrote to the military and requested statistics on the number of cases in which demonstrators have been prosecuted in accordance with the order and charged with participating in an unauthorized procession, assembly or vigil. Due to technical limitations, the IDF only supplied us with data regarding verdicts given between 2004-2010, and only with partial figures for those years. According to the information supplied by the army, there was only one conviction for this offence, given in 2010. According to discussions B’Tselem held with attorneys who represent Palestinian demonstrators arrested by the military, Israel has not used this order consistently over the years. The order was commonly used during the first intifada, but its use declined after the beginning of the Oslo process. Since the beginning of 2010, the military has again increased the use of the order, and accordingly it is appropriate to re-examine its content and ramifications. As is the case with all Israeli military legislation, the order applies solely to Palestinians in Areas B and C; Israeli citizens and third party nationals are tried under the Israeli legal system.

In the past, B’Tselem has discussed the military’s policy for [dispersing demonstrations](#). In this paper, we seek to examine the theoretical framework of the right to demonstrate in international law, Israeli law, and the military law that applies in the West Bank.

A first and isolated attempt to renew the use of Order 101 against the organizers of demonstration was made in 2009 against Ahmad Hassan Khalil 'Awad from the village of Budrus, who was then in administrative detention. 'Awad was charged with organizing demonstrations against the Separation Barrier which took place in his village, without proper military authorization. The indictment did not contain detailed information concerning when these demonstrations took place and the number of participants therein, and therefore, 'Awad's attorney argued on March 8 2009 that in light of the flaws in the indictment the defendant could not prepare a proper defense. She claimed that the charges were unspecific, and that the demonstrations in the village were a property issue and not a political one, and therefore he was not in breach of Order 101. In light of these arguments, the Military Prosecution retracted the indictment on July 20, 2009.

Freedom of demonstration in Israeli law

The freedom to participate in demonstrations and processions is a basic right in any democratic regime. This freedom is perceived as a manifestation of human dignity and the individual's liberty to fulfill his wishes. Although this right has not been enshrined in a Basic Law in Israel, it has been recognized in case law as a central human right. Justice Aharon Barak, the former president of the Supreme Court, established that "a demonstration of a political or social character is a manifestation of the autonomy of individual will, freedom of choice and freedom of negation that are included in the framework of human dignity as a constitutional right."¹ The Supreme Court has emphasized that it is particularly important to protect this right in the case of those holding minority views: "The freedom of expression and demonstration is intended to protect not only those who hold accepted and popular opinions, but also – and herein lies the principal test of freedom of expression – opinions that are liable to incur anger or outrage."²

Nevertheless, freedom of expression and freedom of demonstration are not absolute rights and may be restricted under certain circumstances. Due to the importance of freedom of demonstration, however, it may only be restricted in exceptional cases:

Restricting assembly or demonstration is not the first resort but the last. Before this step is taken, it must be examined whether the assembly or demonstration can be held while at the same time preventing the occurrence of the danger and reducing its dimensions, by means of police details directed at those persons who are creating the danger... It must be made a high priority – alongside the protection of public well-being and security, in general – since it is intended to ensure the freedom of expression that is so vital to a democratic system.³

Justice Barak offered the following definition of the need to balance the various considerations:

As with other liberties, here, too, a balance must be struck between the will of the individual – and of individuals – to express their views by way of assembly and demonstration, the will of the individual to protect his well-being and property, and the will of the public to protect public order and security. Without order there is no liberty. Freedom of assembly does not mean the abandonment of all public order, and freedom of procession does not mean the freedom to riot.⁴

By law, the authority to strike the balance between these liberties and other rights and interests lies with the police, through the establishment of the obligation to grant a permit for demonstrations. Such a permit is required when more than 50 people are expected to participate in the demonstration, and when speeches are made during its course. If either of these conditions is not present, there is no need for a permit. The

¹ HCJ 2557/05, *Mateh Harov v Israel Police et al.*, paragraph 13.

² HCJ 8988/06, *Yehuda Meshi Zahav et al. v Jerusalem District Police Commander*, paragraph 9.

³ HCJ 1928/96, *Yeshu Council v Commissioner Aryeh Amit*, paragraph 5.

⁴ HCJ 148/79, *Zvi Saar v Interior Minister and Police*, paragraph 2.

police are entitled to refuse to grant a permit only if they can prove there is “near certainty” of harm to public security, public order, or the freedom of movement or rights of other persons. The police are also permitted to take into consideration their ability to cope with the demonstration, in the context of the other challenges they face.

In examining the probability that violent incidents or disturbances of public order will occur, Supreme Court justices have established that while past events may create such concern, they cannot justify a priori denial of the right of demonstration. Here, too, “near certainty” that the danger will be fulfilled is required.⁵

In cases brought before the Supreme Court, justices have preferred to create alternatives enabling the demonstration to be held without ignoring the public interest. The court regards restricting the duration of the demonstration, or altering its location, as proportionate measures. For example, in 1996, the justices suggested to the Yesha Council that it reschedule a demonstration so as not to hold it during visits to Israel by the president of the US and the president of Turkey, due to the serious burden this would impose on the police.⁶ In 2005, the court rejected a petition by the Yesha Council to hold a consecutive 36-hour demonstration that was planned to block a main road in Jerusalem, citing the restrictions such a demonstration would impose on the residents of the city. The justices established that the police restrictions, which included the closure of the thoroughfare for short, defined periods, were proportionate and proper.⁷ At a hearing in 2006 concerning the Pride Parade in Jerusalem, the justices ruled that the police proposal to hold the parade in a restricted format enabled “realization of freedom of expression and demonstration, on one hand, and protection of public well-being without surrendering to violence on the part of a hostile public, on the other... The said decision of the district commander thus lies within the realms of reasonableness.”⁸ In a recent ruling concerning the demonstrations in the Sheikh Jarrah neighborhood of East Jerusalem, the High Court of Justice accepted the police position that the demonstration should be held at a certain distance from the location requested by the demonstrators. However, the court permitted the holding of a limited procession reaching the homes next to which the participants sought to demonstrate. The justices determined that this solution balances the difficulties faced by the police in securing the demonstration and the participants’ freedom of demonstration.⁹

⁵ HCJ 411/89, *Temple Mount and Land of Israel Faithful Movement v Jerusalem Region Police Commander*, paragraphs 7-8.

⁶ See note 3 above.

⁷ HCJ 2979/05, *Yesha Council v Internal Security Minister*.

⁸ Note 2 above, paragraph 11. Similar arguments were raised on the same subject the following year, in HCJ 5277/07, *Baruch Marzel v Jerusalem District Police Commander*.

⁹ HCJ 1654/10, *Nasser al-Rawi et al. v Israel Police*.

Name: ‘Abdallah Mahmoud Muhammad Abu Rahma, member of the Popular Resistance Committee in Bil’in.

Case details: ‘Abdallah Abu Rahma, a high-school teacher by profession, is one of the organizers of the demonstrations in the village of Bil’in. Abu Rahma was arrested on 10 December 2009, and on 21 December 2009 he was served with an indictment including three charges: incitement, stone throwing, and possession of weapons. In the incitement charge, he was accused of organizing and leading processions toward the Separation Barrier on Fridays, while inciting the demonstrators to harm the security forces. In the stone-throwing charge, it was alleged that he threw stones during the demonstrations. The charge regarding possession of weapons stated that he held weapons used by the military against the demonstrators in order to stage an exhibition on the matter. On 18 January 2010, the military prosecution filed an amended indictment including an additional charge: “Organizing and participating in a procession without a permit, an offense in accordance with sections 1, 3, and 10 of the Order Regarding Prohibition of Incitement and Hostile Propaganda Actions (Judea and Samaria) (No. 101)” on dozens of occasions in the village of Ni’lin (this despite the fact that Abu Rahma is a resident of Bil’in and a member of the committee in his village).

Freedom of demonstration in international law

Freedom of demonstration is enshrined in Article 21 of the International Covenant on Civil and Political Rights, which also permits the balancing of this liberty against other interests. The article states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Israel frequently argues that human rights law does not apply to its actions in the Occupied Territories.¹⁰ However, this position enjoys almost no support among non-Israeli jurists or among other states. The accepted argument today is that human rights

¹⁰ For example, this claim was raised in a letter dated 3 September 2009 from Col. Liron Liebman, head of the IDF International Law Department, to the attorney general. Israel also expresses this opinion in every report it submits to any of the UN committees responsible for the implementation of human rights conventions. For example, see: Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum: Israel, Economic and Social Council E/1990/6/Add.32 16 October 2001, paragraph 5; and Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Second Periodic Report, Addendum: Israel, Human Rights Committee CCPR/C/ISR/2001/2, 4 December 2001, paragraph 8. See also the rejection of this position by the UN Committee on Economic, Social and Cultural Rights: Concluding Observations of the Committee on Economic, Social and Cultural Rights - Israel. 23/05/2003, Economic and Social Council, E/C.12/1/Add.90, 23.5.03., paragraph 15.

law continues to apply alongside International Humanitarian Law, which applies in a situation of armed conflict or occupation. According to this argument, human rights law applies in all situations, though on occasions it is overruled by concrete provisions of Humanitarian Law in situations of combat. Accordingly, in the absence of any concrete provision in Humanitarian Law permitting infringement of the rights granted to civilians in accordance with human rights law, the latter must be observed.¹¹ Since International Humanitarian Law does not address the right of demonstration, its observance in an occupied territory is to be examined in accordance with human rights law.

Moreover, the authors of International Humanitarian Law envisaged an occupation lasting for a limited period of time. The restrictions this law imposes, both on the occupier's powers and on the rights of civilians, derive from the temporary nature of the occupation.¹² However, the situation is different in a case of protracted occupation. It is unreasonable that a population subject to occupation for decades be denied basic rights on the grounds that these are not enshrined in International Humanitarian Law.¹³

Muhammad 'Abd al-Karim Mustafa Khatib and Muhammad Ibrahim Ahmad Abu Rahma are both members of the Separation Barrier Committee in the village of Bil'in. Khatib and Abu Rahma were arrested in August 2009. An indictment against Khatib was served on 25 August 2009, while the indictment against Abu Rahma was only served on 7 March 2010. Both men are charged with offenses of incitement during the processions they organized in Bil'in. Khatib is also charged with disturbing a soldier in the performance of his duties and performing a service for an unlawful association. Abu Rahma, against whom the later indictment was served, is also charged with organizing, and participating in, an unpermitted procession – a violation according to Order No. 101. This last charge appears in all the indictments against participants in the demonstrations in Bil'in and Ni'lin examined by B'Tselem and served in 2010, some 20 in total. This item does not appear, however, in the indictment against Khatib, despite the fact that the indictment suggests that his role was identical to that of many other members of the Separation Barrier committees who were charged under this item.

¹¹ See, for example: Y. Dinstein, *The International Law of Belligerent Occupation*, New York: Cambridge University Press 2009, pp. 69-71. For a comprehensive summary of this position and a discussion of its positive and negative ramifications, see: A. M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?", *EJIL* 18 (2007), pp. 1-35 ; C. Droegge, "Elective Affinities? Human Rights and Humanitarian Law," *International Review of the Red Cross* 90, 871 (2008), pp. 501-548 ; O. Ben-Naftali and Y. Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories", *Israel Law Review* 37 (2004), pp. 41-58.

¹² For example, see an analysis of this component of occupation in: O. Ben-Naftali, A. M. Gross and K. Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley Journal of International Law* 551 (2005), pp. 592-594.

¹³ See Dinstein (note 11 above), pp. 116-120.

Demonstrations under military law

In August 1967, two months after the end of the war, OC Central Command signed Order No. 101 – “Order Regarding Prohibition of Incitement and Hostile Propaganda Actions”. Since then, the order has been amended several times and is still valid in the West Bank.

According to the order, any assembly, vigil, or procession of ten or more persons requires a permit from the commander of the military forces in the area, if the gathering is intended for the purpose of “a political matter or one liable to be interpreted as political, or to discuss such a matter,” or “for a political goal or for a matter liable to be interpreted as political.” These provisions apply to any gathering – both in the public realm and in the private realm, including in a person’s home. The military commander may order the closure of any place where a public gathering is taking place.

Under the heading “Incitement,” the order prohibits any person from attempting “to influence public opinion in the Area in a manner liable to impair public well-being or the public order.” The order also prohibits the intention to do so, or to facilitate the execution of such an action. The order further prohibits any activity in a public place attesting to identification with, or support for, hostile organizations or unlawful associations, as these are defined in military law.

The order also restricts publications of any kind that “contain material that has political meaning,” and prohibits the distribution of such materials without the approval of the security forces. The types of prohibited publications include any printed, photographed, recorded, or filmed material, or material of any other form, including newspapers, journals, files, and documents, even if these are produced on a one-time basis. The display of national symbols is also prohibited unless a special permit is obtained from the military commander.

The power to grant permits in accordance with the order rests with the military commander, though he is “permitted to empower any soldier or police officer from the police forces to exercise his powers in accordance with this order.” In addition, “any soldier shall have the authority to use the required degree of force” to enforce the order.

The order establishes that a person who violates its provisions shall be liable to ten years’ imprisonment, a fine, or both penalties together.

According to statistics collected by B'Tselem, in 2008 the military shot dead three demonstrators in Ni'lin during demonstrations against the Separation Barrier. [Ahmad Musa](#), 10, was killed on 29 July 2008 by live fire during a demonstration against the Barrier. In demonstrations held the next day during Musa's funeral, Yusuf 'Amira, 17, was injured by a rubber-coated metal bullet. 'Amira died from his injuries five days later. On 28 December 2008, 'Arafat and Muhammad Khawaja were shot with live ammunition. 'Arafat died on the spot, while Muhammad was fatally wounded and died from his injuries on 1 January 2009. Another person was also injured in this incident. During 2009, another demonstrator in Ni'lin, ['Aqel Sarur](#), was shot and killed by a 0.22-inch caliber bullet, a less lethal form of live ammunition. [Bassem Abu Rahma](#), who demonstrated in Bil'in, was killed when a gas grenade was fired directly at him.

The problematic nature of Order No. 101

The provisions of Order No. 101 are contrary to Israeli law and international law, both of which recognize the importance and centrality of the right to demonstrate, and permit infringement of this right solely by way of an exception, when it clashes with other interests that are also worthy of protection. Order No. 101, by contrast, does not recognize the right to demonstrate; instead, it focuses on establishing prohibitions and restrictions on various types of gatherings and expressions.

The order raises several key problems:

A. Vague definitions

Order No. 101 prohibits any assembly, vigil, procession, or publication relating to “a political matter or one liable to be interpreted as political.” The order does not include a precise definition of what is to be considered such content. This vague and sweeping phrasing is open to interpretation, and, accordingly, could be used to restrict a broad range of subjects on which people wish to express their opinions. Such restriction is not compatible with freedom of expression.

Moreover, the order does not define who is entitled to determine that the content of the gathering or publication “is liable to be interpreted as political.” This, too, increases the ability to restrict freedom of expression.

The order permits the use of “the required degree of force” for the purpose of its enforcement, but does not clarify what this degree is, leaving considerable room for discretion and creating an opening for the excessive use of force.

B. Far-reaching restrictions on freedom of expression and demonstration

The order imposes far-reaching restrictions on freedom of expression and the freedom to demonstrate, exceeding the cautious restrictions permitted by international and Israeli law:

- The obligation to obtain a permit for any gathering in the West Bank assumes that a group of ten persons presents an intrinsic and a priori danger to the public order – despite the fact that such a gathering does not require any special preparation on the part of the security forces.
- Since the order does not relate solely to gathering in public places, it follows that it also restricts gathering in private places. The small number of participants determined in the definition of a gathering in the order – just ten persons – may turn many persons into offenders simply because they expressed their positions within the home and in their family. This brings the order to the point of the absurd.
- The lack of proportionality can also be seen in the prohibition imposed by the order on any publication “that has political meaning.” The order applies in a generalized and sweeping manner to all types of publication, whatever their circulation, and even if they are issued on a one-time basis. Even the publication in a Palestinian newspaper of an opinion piece criticizing the authorities might be considered a violation of the order.
- The order emphasizes the prohibition on political protest and prohibits the bearing of national symbols in the framework of a peaceful procession, or even on the level of the private individual. Such actions cannot be considered to constitute an attack on the military government and cannot be considered ones that by definition create a disturbance of public order.

Alongside these sweeping prohibitions, the order establishes a maximum penalty of ten years’ imprisonment or a heavy fine, despite the fact that these offenses do not injure life, body, or even property. By way of comparison: the penalty for a prohibited gathering in Israeli law is one year’s imprisonment, without a fine.

C. The delegation of powers

The order permits the military commander to delegate his powers under the order to any member of the security forces. Thus any soldier serving in the Occupied Territories may be empowered to prohibit gatherings and publications and to close public places for such periods as he establishes. Granting such sweeping powers to junior echelons shows gross disrespect for the residents’ rights and for the importance of protecting freedom of demonstration and freedom of expression.

According to B’Tselem’s statistics, during January 2010, at least 13 members of the Separation Barrier Committee in the village of Ni’lin were arrested. The indictments served against all these individuals were virtually identical, even including repeated typing errors that appeared in several indictments, reflecting a process of mechanical copying. All the indictments included the charge of violating Order No. 101 – organizing and participating in an unpermitted procession. Most of the indictments include the charges of incitement and stone-throwing. The charges are worded in a vague manner. In many cases, the prosecution does not know when the defendant began his activity in organizing the demonstrations against the Barrier, nor does it know what precise role the defendant played in organizing the demonstrations and in encouraging others to participate in them. Instead, the indictment includes a series of alternative options regarding the defendant’s action, such as: “Organized a procession, assembly, or vigil without a permit or urged or incited or encouraged the holding thereof or in any manner took part therein” (emphasis added).

Conclusion

Commenting on the demonstrations against the building of the Separation Barrier, a senior military official recently claimed that “there is no problem with people coming to the place with signs, with songs, but they must not commit any act of violence.”¹⁴ However, the claim that the military only restricts the demonstrations in the West Bank because of the violence that occurs during them is inaccurate.

The assumption underlying Order No. 101, signed some two months after the Territories were occupied, is that the residents have no vested right to demonstrate or right to freedom of expression. Even non-violent resistance and civil protest, including a peaceful gathering, are prohibited. The order conditions virtually any form of expression of personal opinions on the receipt of a permit from the military in advance, and imposes far-reaching and vague restrictions on the content presented in gatherings or publications. The order imposes a disproportionate obligation to secure permission, to the point that a modest gathering of ten persons without prior permission is considered prohibited, even if it takes place in the private domain. The order was issued in 1967, and its renewed employment more than 40 years later does not take into account the political changes the region has undergone in the interim, particularly those concerning the accords between Israel and the Palestinian Authority. The order is anachronistic with regard to its content, the punishments it subscribes, and the disregard of updated court rulings, especially High Court Rulings concerning the right to demonstrate.

Over the years since 1967, few Palestinians have submitted requests to hold a demonstration. Among other reasons, this constitutes an act of protest against the occupation and a refusal to recognize its authority. However, in view of the sweeping provisions in the order and its implicit basic assumptions, it is reasonable to assume that even if such requests were submitted, many would be rejected. An example of disregard for the residents’ right to demonstrate are the orders issued by OC Central Command prohibiting the demonstrations in Bil’in and Ni’lin in advance. A sweeping, a priori prohibition imposed for a protracted period of time cannot be considered lawful, since the appropriate balances are not considered for each specific demonstration.

The rule of law in the West Bank is unequal and discriminates against the Palestinian population. Although the settlers live in the same geographical area in which the military government is imposed, Israel has decided that they are not to be subject to military law, but rather to Israeli law. The application of two distinct legal systems in a single territory constitutes gross discrimination. Thus, actions committed by Palestinians are liable to lead to ten years’ imprisonment and a fine, whereas the same actions, if committed by Israelis, would not even be considered offenses.

¹⁴ See Hanan Greenberg, “IDF in Message to Palestinians: Calm Down the Demonstrations,” *Ynet*, 14 April 2010: <http://www.ynet.co.il/articles/1,7340,L-3875701,00.html>. Site visited on 20 June 2010.