Diakonia International Humanitarian Law Centre Jerusalem

RESPONSIBILITY UNDER INTERNATIONAL LAW FOR SETTLER VIOLENCE IN THE OCCUPIED PALESTINIAN TERRITORY

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1. Introduction

Settler violence in the West Bank, including East Jerusalem, has reached record levels since the Hamas attacks on 7 October 2023 and the launch of Israel's military offensive in Gaza. As used here, the term 'settler violence' refers to threats or acts of violence by Israeli citizens who live in the occupied Palestinian territory (oPt) against Palestinians or their property, including for the purpose of forcing Palestinians off their land.[1] Settler violence has resulted in numerous deaths, loss of livelihoods and property, and the displacement and rupturing of entire communities in the West Bank.[2]

Settler violence occurs against the backdrop of an illegal settlement enterprise and creeping annexation of Palestinian territory, for which Israel bears responsibility under international law.[3] The apparent impunity with which settler violence is perpetrated, alongside emergent reports of Israeli security forces' involvement in some of the incidents, raise critical questions about Israel's responsibility for the harm, damage, and displacement caused by settler violence.[4] This publication seeks to address those questions.

Under international law, a State is responsible for acts or omissions in breach of its international law obligations if the conduct in question is attributable to the State. Israel, as an occupying power that exercises effective control over persons and territory in the oPt, is bound by obligations under international humanitarian law (IHL) and international human rights law (IHRL) in relation to the treatment of Palestinians in the West Bank.[5] Some of these obligations are negative in nature, requiring Israel to refrain from certain acts, while others are positive, calling on Israel to take action to protect or ensure the rights and wellbeing of Palestinians in the oPt. While all acts and omissions by Israeli organs and officials acting with apparent authority are attributable to Israel, it is only in limited circumstances that the conduct of private persons can be considered the conduct of the State for the purpose of establishing its responsibility under international law.

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[1] Settler violence 'has taken many forms, including physical violence, shooting with live ammunition, torching of fields and livestock, theft and vandalization of property, trees and crops, stone-throwing and tenacious intimidation of herders and their families'. 'Press Release: UN Experts Alarmed by Rise in Settler Violence in Occupied Palestinian Territory' (*Office of the United Nations High Commissioner for Human Rights (OHCHR)*, 10 November 2021) <https://www.ohchr.org/en/press-releases/2021/11/un-experts-alarmed-rise-settler-violence-occupied-palestinian-territory> accessed 29 May 2024.

[2] 'Humanitarian Situation Update #178 | West Bank' (*OCHA oPt*, 12 June 2024) <https://www.ochaopt.org/content/humanitarian-situation-update-178-west-bank> accessed 13 June 2024; 'Humanitarian Situation Update #175 | West Bank' (*United Nations Office for the Coordination of Humanitarian Affairs (OCHA) oPt*, 5 June 2024) <https://www.ochaopt.org/content/humanitarian-situation-update-175-west-bank> accessed 13 June 2024; 'Protecting Palestine Refugee Herding Communities in Area C Amidst Heightened Levels of Settler Violence' (*United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)*, 5 April 2024) <https://www.unrwa.org/newsroom/features/protecting-palestine-refugee-herding-communities-area-c-amidst-heightened-levels-0> accessed 13 June 2024; 'Settler Violence Rises in the West Bank during the Gaza War' (*Crisis Group*, 6 November 2023) <https://www.crisisgroup.org/middle-east-north-africa/east-mediterranean-mena/israelpalestine/settler-violence-rises-west-bank-gaza-war> accessed 29 May 2024.

[3] Including with respect to the prohibition on the occupying power to transfer parts of its own civilian population into the territory it occupies. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 28 (GC IV) art 49(6).

[4] See Part 2.

[5] See Part 3.

Following a brief account of the escalation of settler violence and Israeli security forces' alleged involvement therein, this note examines the responsibility of Israel for:

(1) Failure by Israeli officials or authorities to take action required under IHL or IHRL in relation to settler violence; and
(2) Acts of violence by settlers and other action by Israeli officials in support of settler violence contrary to IHL or IHRL.

The publication concludes by also considering possible war crimes and crimes against humanity that might have been committed in connection with settler violence, warranting further investigation to determine individual liability.

2. Escalation of settler violence and alleged involvement of Israeli security forces

Settler violence in the oPt has been on the rise for the past decade. It is most pronounced in Area C, which makes up 60% of the West Bank and remains under Israeli control.[6] Violence peaked following the inauguration of the current Israeli government in December 2022 (a right-wing coalition that supports the expansion of Israeli settlements in the oPt) and again in the wake of the Hamas attacks on 7 October 2023.[7] At the current rate, 2024 is expected to set a new record high for incidents of settler violence, with devastating humanitarian consequences.[8]

In 2023, OCHA reported 1,227 incidents of settler violence resulting in Palestinian casualties and/or property damage in the West Bank, including East Jerusalem.[9] This was the greatest number recorded in any given year since OCHA began recording such incidents in 2006.[10] More than one third of the incidents in 2023 involved settlers using firearms to threaten or shoot Palestinians.[11] Following 7 October 2023, the weekly average of incidents of settler violence went up from 21 to 30.[12] Between 7 October 2023 and 10 June 2024, 968 settler attacks were recorded in the West Bank resulting in the deaths of at least 10 Palestinians and over 230 injured, the displacement of over 1,380 Palestinians, including 650 children, and the destruction of livelihoods and private property, including around 43,600

[6] Crisis Group (n 2).

[7] The IHL Centre has previously related to settler violence committed during the time period of 7 October 2023 until the end of December 2023: '2023-2024 Hostilities and Escalating Violence in the oPt | Account of Events' (*Diakonia IHL Centre*, last updated 12 January 2024) <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/> accessed 29 May 2024. See also Crisis Group (n 2); Hagar Shezaf '"There's War, Blood Is Boiling": Settlers Force Palestinians Out Their West Bank Homes' *Haaretz* (Tel Aviv, 17 October 2023) <https://archive.is/k80iW> accessed 4 June 2024.

[8] 'West Bank Situation Report' (*Anera*, 19 April 2024) <https://www.anera.org/wp-content/uploads/2024/04/April-2024-West-Bank-Situation-Report.pdf> accessed 29 May 2024.

[9] 'Hostilities in the Gaza Strip and Israel | Flash Update #82' (*OCHA oPt*, 2 January 2024) <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-82> accessed 29 May 2024.

[10] ibid.14

[11] 'The Other Mass Displacement: Settlers Advance on West Bank Herders' (*OCHA oPt*, 1 November 2023) <https://www.ochaopt.org/content/other-mass-displacement-while-eyes-are-gaza-settlers-advance-west-bank-herders> accessed 29 May 2024.

[12] OCHA oPt Flash Update #82 (n 9).

Palestinian-owned trees.[13] During the same period, five settlers were reportedly also killed in the West Bank.[14]

Israeli security forces were present in nearly half of all recorded incidents of settler violence in 2023.[15] In some of these cases, Israeli security forces reportedly did nothing to stop the settler violence. For example, in mid-October 2023, a settler allegedly shot an unarmed Palestinian at close range in the village of al-Tuwane while Israeli soldiers 'stood idly by'.[16] In other documented cases, Israeli security forces appear to have actively supported settlers attacking Palestinians and their property, including by shooting teargas, stun grenades, rubber bullets, and live ammunition at Palestinians trying to protect themselves against settler violence.[17] There have also been reports of settlers threatening and harming Palestinians and damaging their property while wearing Israeli military or police uniform.[18] In several cases, Israeli security forces have reportedly responded to settler violence by arresting Palestinians or ordering Palestinians to leave the area, including Palestinian-owned land.[19] Moreover, Israeli security forces have allegedly obstructed ambulances trying to reach Palestinians injured in incidents of settler violence.[20]

In the aftermath of 7 October 2023, humanitarian aid convoys seeking to alleviate the suffering of Palestinians in Gaza have increasingly been intercepted and attacked by settlers who claim that aid is being diverted to Hamas.[21] For example, on 13 May 2024, a convoy of between 50 and 60 lorries carrying aid to Gaza was attacked by approximately 400 settlers near the Tarqumiya checkpoint in the West Bank, while Israeli soldiers escorting the convoy reportedly did nothing to stop the attack.[22] Media

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[13] ibid; 'Humanitarian Situation Update #178 | West Bank' (*OCHA oPt*, 12 June 2024) <https://www.ochaopt.org/content/humanitarian-situation-update-178-west-bank> accessed 13 June 2024; 'West Bank: Israel Responsible for Rising Settler Violence' (*Human Rights Watch*, 17 April 2024) <https://www.hrw.org/news/2024/04/17/west-bank-israel-responsible-rising-settler-violence> accessed 29 May 2024; OCHA oPt Flash Update #82 (n 9).

[14] OCHA oPt Flash Update #178 (n 13).

[15] OCHA oPt Flash Update #82 (n 9).

[16] Crisis Group (n 2). See also Ali Sawafta, 'Israeli Forces, Armed Settlers Kill Three Palestinians in Rising West Bank Violence' *Reuters* (Ramallah, 15 April 2024) <https://www.reuters.com/world/middle-east/israeli-forces-kill-palestinian-teen-west-bank-military-raid-2024-04-15/> accessed 13 June 2024.

[17] OCHA oPt Humanitarian Situation Update #178 (n 13); 'State Business: Israel's Misappropriation of Land in the West Bank Through Settler Violence' (*B'Tselem*, November 2021) 10

<https://m.btselem.org/sites/default/files/publications/202111_state_business_eng.pdf> accessed 29 May 2024.

[18] Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel (COI), 'Detailed Findings on the Military Operations and Attacks Carried Out in the Occupied Palestinian Territory from 7 October to 31 December 2023' (10 June 2024) UN Doc A/HRC/56/CPR.4 para 344; Mohammed Torokman, 'Settlers Incensed Over Teen's Slaying Rampage in Palestinian Towns' *Reuters* (Al-Mughayyer, West Bank, 13 April 2024) <https://www.reuters.com/world/middle-east/missing-israeli-teen-found-dead-west-bank-military-says-2024-04-13/> accessed 29 May 2024.

[19] OHCHR (n 1); OCHA oPt Flash Update #178 (n 13); COI (n 18) para 360.

[20] 'Occupied Palestinian Territory: Türk Condemns Over 500 West Bank Killings, Calls for Accountability' (*OHCHR*, 4 June 2024) <https://www.ohchr.org/en/press-releases/2024/06/occupied-palestinian-territory-turk-condemns-over-500-west-bank-killings> accessed 10 June 2024.

[21] Loveday Morris, 'Far-Right Israeli Settlers Step Up Attacks on Aid Trucks Bound for Gaza' *The Washington Post* (Tarqumiyah, West Bank, 26 May 2024) <https://www.washingtonpost.com/world/2024/05/26/west-bank-aid-trucks-gaza-settlers/> accessed 13 June 2024.

[22] Lorenzo Tondo, Sufian Taha, and Jason Burke, '"Barbaric": Palestinian Lorry Drivers Recount Settlers' Attack on Gaza Aid Convoy' *The Guardian* (Jerusalem, 16 May 2024)

sources further suggest that some members of the Israeli security forces have shared information with settlers about the location of aid convoys so that these can be intercepted.[23]

The rise in settler violence following 7 October 2023 has garnered international attention. Several States and the European Union (EU) have expressed 'grave concern about the record number of attacks by extremist settlers against Palestinians in the West Bank' and over 'Israel's failure to protect Palestinians and prosecute extremist settlers'.[24] The EU and a number of States, including the US, UK, Canada, and France, have imposed sanctions against Israeli individuals and entities linked to settler violence.[25]

3. Legal assessment of Israel's responsibility for harm caused by settler violence

The escalation of settler violence in the West Bank and the ostensible failure of Israeli authorities to effectively prevent and address the violence prompt questions about Israel's responsibility under

<https://www.theguardian.com/world/article/2024/may/16/palestinian-lorry-drivers-israeli-settlers-attack-gaza-aid-convoy> accessed 13 June 2024.

[23] Lorenzo Tondo and Quique Kierszenbaum, 'Israeli Soldiers and Police Tipping Off Groups that Attack Gaza Aid Trucks' *The Guardian* (Jerusalem, 21 May 2024) <https://www.theguardian.com/world/article/2024/may/21/israeli-soldiers-and-police-tipping-off-groups-that-attack-gaza-aid-trucks> accessed 5 June 2024; Morris (n 21).

[24] Eg 'West Bank Settler Violence: Joint Statement' (*UK Foreign, Commonwealth & Development Office*, 15 December 2023) <https://www.gov.uk/government/news/joint-statement-on-west-bank-settler-violence> accessed 13 June 2024.

[25] Matthew Miller, 'Sanctioning Israeli Group for Disrupting and Destroying Humanitarian Aid to Civilians' (*US Dept of State*, 14 June 2024) <https://www.state.gov/sanctioning-israeli-group-for-disrupting-and-destroying-humanitarian-aid-to-civilians/> accessed 15 June 2024; 'Extremist Settlers in the Occupied West Bank and East Jerusalem: Council Sanctions Four Individuals and Two Entities Over Serious Human Rights Abuses Against Palestinians' (*Council of the EU*, 19 April 2024) <https://www.consilium.europa.eu/en/press/press-releases/2024/04/19/extremist-settlers-in-the-occupied-west-bank-and-east-jerusalem-council-sanctions-four-individuals-and-two-entities-over-serious-human-rights-abuses-against-palestinians/> accessed 13 June 2024; Gareth Evans and Tom Bateman, 'US Sanctions Israeli Settlers Over West Bank Violence' *BBC* (Washington, 1 February 2024) <https://www.bbc.com/news/world-us-canada-68173904> accessed 13 June 2024; James Landale and Andre Rhoden-Paul, 'UK Sanctions Four Israeli Settlers Accused of Violence' *BBC* (London, 12 February 2024) <https://www.bbc.com/news/uk-68274777> accessed 13 June 2024; 'France Sanctions 28 "Extremist" Israeli Settlers' *Le Monde with AFP* (Paris, 13 February 2024) <https://www.lemonde.fr/en/international/article/2024/02/13/france-sanctions-28-extremist-israeli-settlers_6521516_4.html> accessed 1 June 2024; 'UK Sanctions Extremist Groups and Individuals for Settler Violence in the West Bank' (*UK Foreign, Commonwealth & Development Office*, 3 May 2024) <https://www.gov.uk/government/news/uk-sanctions-extremist-groups-and-individuals-for-settler-violence-in-the-west-bank> accessed 13 June 2024; Pierre Emmanuel Ngendakumana, 'EU and US Impose Sanctions on Extremist Settlers Over Violence in West Bank' *Politico* (Brussels, 19 April 2024) <https://www.politico.eu/article/eu-imposes-sanctions-on-extremist-settlers-and-entities-over-violence-in-west-bank/> accessed 13 June 2024; 'Canada Imposes Sanctions on Perpetrators of Extremist Settler Violence Against Civilians in West Bank' (*Global Affairs Canada*, 16 May 2024) <https://www.canada.ca/en/global-affairs/news/2024/05/canada-imposes-sanctions-on-perpetrators-of-extremist-settler-violence-against-civilians-in-west-bank.html> accessed 13 June 2024.

international law for the harm, loss, and displacement inflicted on Palestinians. Under international law, [26] Israel is responsible for acts or omissions that:

> **(i) are attributable to Israel under international law, and**
> **(ii) constitute a breach of an international obligation of Israel.**

Since 'States can act only by and through their agents and representatives',[27] **rules of attribution** determine what conduct shall be considered an 'act of the State' for the purpose of State responsibility.[28] A general distinction is drawn between the conduct of State organs or agents on the one hand, and the conduct of private persons and entities on the other. The former is prima facie considered an act of the State, while the latter is not.[29] In the absence of formal (legal) incorporation of private persons or entities into the State apparatus or adoption by the State of their conduct as its own, it is only in limited circumstances that the behaviour of private actors is attributable to the State, requiring an assessment of the factual relationship between the private actors engaged in the conduct and State organs or officials.[30] Subsection (B)(1)(iii) below considers in more detail the factual link or relationship required for that purpose.

Meanwhile, a **'breach'** of international law can result either from an act or an omission, depending on the governing primary obligation. Legal obligations applicable to Israel in relation to the treatment of Palestinians in the oPt include those emanating from the provisions of IHL that form the law of occupation, set out in the Hague Regulations of 1907,[31] the Fourth Geneva Convention of 1949 (GC IV),[32] and customary international law; as well as obligations derived from IHRL, including the provisions of the International Covenant on Civil and Political Rights of 1966 (ICCPR).[33] The concurrent applicability of the law of occupation and IHRL in the oPt is well established in international jurisprudence.[34] These two bodies of law complement and reinforce the protection which Palestinians are owed by Israel in occupied territory.[35]

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[26] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 2 Yearbook Intl L Com (ARSIWA) art 2.

[27] *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Series B No 6 22.

[28] For a discussion, see Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 Eur J Intl L 387, 395.

[29] ARSIWA (n 26) arts 4 and 8 with commentaries.

[30] ibid art 8 and commentary thereto, para 1.

[31] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague Regulations).

[32] GC IV (n 3).

[33] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[34] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (Wall Advisory Opinion) [107–113]; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 (DRC v Uganda) [216–220].

[35] Eg Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel' (18 August 1998) UN Doc CCPR/C/79/Add.93. For a discussion, see 'Legality of Restrictions on the Freedoms of Expression, Assembly, and Association in the Occupied Palestinian Territory' (*Diakonia IHL Centre*, 12 June 2024) <https://www.diakonia.se/ihl/news/legality-of-restrictions-on-the-freedoms-of-expression-assembly-and-association-in-the-occupied-palestinian-territory/> accessed 13 June 2024.

Under these legal frameworks, Israel is subject to **negative obligations**, compelling it to refrain from certain acts (including all forms of ill-treatment, murder, collective punishment, forcible transfer or deportation, etc.) and **positive obligations**, requiring it to protect against and suppress prohibited treatment of Palestinians in the oPt and ensure their rights and wellbeing. In general, acts in breach of negative obligations and omissions in breach of positive obligations that are attributable to Israel engage Israel's responsibility under international law.

Once a State's responsibility under international law is engaged, **secondary remedial obligations** are triggered, including obligations to cease and not repeat the unlawful conduct and to make full reparation for the injury or harm caused.[36] Consequences may also follow for third States. In case of a serious breach of a peremptory norm, States must cooperate to bring an end to the breach through lawful means and must not recognise the situation created as lawful or render aid or assistance in maintaining that situation.[37] Third States are also under an obligation not to knowingly aid or assist in the commission of any other international law violation, such as by providing material assistance.[38] Furthermore, the obligation to 'ensure respect' for IHL, set out in Article 1 common to the four Geneva Conventions of 1949 and reflected in customary IHL,[39] implies an obligation on third States to take all means reasonably available to them to safeguard compliance with IHL by parties to a conflict and to exert their influence, to the degree possible, to stop violations of IHL.[40] Failure to do so will give rise to international responsibility for the third State.

Based on factual accounts of settler violence and the legal criteria for State responsibility, the following subsections consider Israel's responsibility under international law for:

(a) Failure by Israeli security forces or authorities to protect against or suppress settler violence; and
(b) Acts of violence by settlers and other acts by Israeli security forces and authorities in support of settler violence.

A. Failure by Israeli authorities to protect against and suppress settler violence

With respect to failure by Israeli security forces and authorities to protect against and suppress settler violence, the element of attribution is straightforward. Any conduct – acts or omissions – of State agents or organs, including the State's security forces and other bodies exercising executive, legislative, or judicial functions, carried out in an apparently official capacity, is attributable to the State for the purposes of international responsibility.[41]

[36] ARSIWA (n 26) arts 29-31; ICCPR art 2(3).

[37] ARSIWA (n 26) art 41.

[38] ibid art 16.

[39] Study on Customary IHL by the International Committee of the Red Cross (ICRC) 'Customary IHL Database' (*ICRC*, first published in 2005) (CIHL) r 144.

[40] Article 1 common to the Geneva Conventions of 1949; CIHL r 144; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14 (Nicaragua v US) [220]; Wall Advisory Opinion [158]. For a discussion, see Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' [2014] 96 Intl Rev Red Cross 707.

[41] ARSIWA (n 26) art 4.

As for the element of breach, a failure to act is more likely to constitute a breach of a positive obligation, i.e., an obligation requiring the State to take certain action, than a negative obligation, requiring the State to refrain from certain action.[42] However, as discussed below, there may be circumstances in which failure to protect against prohibited conduct can also amount to a violation of a negative obligation.

Relevant positive obligations of Israel under IHL and IHRL that may be implicated by settler violence include, among others:

- The obligation to take all available measures to restore and maintain public order and civil life in the occupied territory;[43]
- The obligation to protect the population of the occupied territory against all acts of violence or threats thereof;[44]
- The obligation to ensure respect for IHL;[45]
- The obligation to ensure the rights set out in the ICCPR, including the right to life and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment;[46]
- The obligation to ensure unhindered provision of basic services and humanitarian assistance needed by the population in the occupied territory;[47] and
- The obligation to investigate and prosecute persons responsible for violations of IHL or IHRL and provide victims with effective remedies.[48]

Under the law of occupation, an occupying power has a fundamental obligation to take all available measures to restore and maintain public order and safety or civil life in the occupied territory.[49] This means, inter alia, that an occupying power must do everything in its power to ensure the safety of the population of the occupied territory, including protecting them against acts of violence by private actors. Israel's obligation to protect Palestinians in the oPt against all acts of violence is further specified in Article 27 of GC IV, which prescribes that protected persons 'shall be protected especially against all acts of violence or threats thereof'. This implies a positive duty to exercise due diligence in preventing

[42] For an example of an instance in which a State's failure to act was deemed to constitute a breach of its positive obligations, see *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* (Judgment) [1980] ICJ Rep 3 (US v Iran) [63, 67], where the ICJ held that Iran was responsible for the 'inaction' of its authorities, which 'failed to take appropriate steps' in circumstances where positive action was called for.

[43] Hague Regulations art 43.

[44] GC IV art 27; ICCPR arts 6 and 7; Human Rights Committee, 'General Comment No. 31: The Nature of the General Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13 (General Comment 31) para 8.

[45] GC IV art 1; CIHL r 144.

[46] ICCPR arts 2, 6, and 7.

[47] Hague Regulations art 43; GC IV art 55, CIHL rr 32, 55, and 56; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* ICJ Orders of 26 January, 28 March, and 24 May 2024 <https://icj-cij.org/case/192/orders> accessed 13 June 2024. For updates on the *South Africa v Israel* proceedings, see 'Contentious Case Before the ICJ: South Africa v. Israel' (*Diakonia IHL Centre*) <https://www.diakonia.se/ihl/jerusalem/proceedings-before-international-courts-relating-to-israel-and-the-opt/contentious-case-before-the-icj-south-africa-v-israel/> accessed 29 May 2024.

[48] GC IV art 146; CIHL r 158; ICCPR arts 2(3) and 6; General Comment 31 (n 44) para 18; Human Rights Committee, 'General Comment No. 36: Article 6 (Right to Life)' (3 September 2019) UN Doc CCPR/C/GC/36 (General Comment 36) paras 27 and 28.

[49] Hague Regulations art 43. Eyal Benvenisti, *The International Law of Occupation* (2nd ed, OUP 2012) 69 (describing art 43 as a 'sort of mini-constitution for the occupation administration').

protected persons from being harmed by others.[50] The graver and more imminent the threat of harm, the more will generally be required of the occupying power.

In addition, the obligation incumbent on Israel to 'ensure respect' for IHL encompasses a duty of due diligence to prevent and repress acts infringing on the protections set out in IHL, including when committed by private persons over which Israel exercises authority, even if their conduct is not attributable to Israel.[51] As an obligation of conduct or means, its precise content depends on the circumstances, including the foreseeability of violations, their gravity, the means reasonably available to the State, and the level of influence the State exercises over the private actors.[52]

Articles 6 and 7 of the ICCPR, though directly applicable to Israel as a State party to the Covenant, can also be applied to elaborate on the meaning of Israel's obligations under the law of occupation to maintain public order and civil life as per Article 43 of the Hague Regulations and to protect against acts of violence according to Article 27 of GC IV. Pursuant to the right to life in Article 6 of the ICCPR, Israel must 'take reasonable, positive measures that do not impose disproportionate burdens on [it] in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State'.[53] It is also implicit in Article 7 of the ICCPR that Israel must take reasonable positive measures to protect persons within its power against torture or cruel, inhuman or degrading treatment or punishment inflicted by private persons or entities.[54]

While obligations of conduct leave some discretion to the duty bearer as to the precise action to be taken,[55] the apparent failure of Israeli security forces present during incidents of settler violence to take any effective steps to stop the violence and to protect Palestinians constitute clear breaches of these obligations. The duty to protect may also be violated by a failure by Israeli authorities to allocate necessary security resources to protect Palestinians against settler violence, in circumstances where it was reasonably foreseeable that acts of violence would be committed.[56] Based on the pre-existing pattern of violence against Palestinians in the West Bank, Israeli authorities cannot plausibly claim to be unaware of the need for special protection of Palestinians against settler violence. The threat of violence faced by Palestinians in the West Bank has also been explicitly brought to the attention of Israeli authorities, including in a petition submitted to the Israeli High Court of Justice in November 2023 on behalf of six Palestinian villages in Area C, demanding that Israeli security forces and other State agencies protect their residents from harm and displacement as a result of settler violence.[57]

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[50] *Federal Democratic Republic of Ethiopia v State of Eritrea* (Partial Award – Civilians Claims, Ethiopia's Claim 5) [2004] paras 43, 99 <https://pcacases.com/web/sendAttach/756> accessed 13 June 2024.

[51] Robin Geiß, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds) *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 117-118; *Commentary on the Third Geneva Convention. Convention (III) Relative to the Treatment of Prisoners of War* (2nd ed, CUP 2020) (2020 Commentary on GC III) para 183; Dörmann and Serralvo (n 40) 708-9.

[52] 2020 Commentary on GC III (n 51) para 183.

[53] General Comment 36 (n 48) para 21.

[54] General Comment 31 (n 44) para 8.

[55] Eg Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' [2017] 28 Eur J Intl L 563, 565.

[56] Pursuant to the right to life in Article 6 of the ICCPR, special measures of protection are required where individuals are known to be particularly vulnerable to threats or acts of violence. General Comment 36 (n 48) para 23.

[57] 'Update on Haqel's Petition to the High Court of Justice' (*Haqel*, 2 May 2024) <https://fmep.org/wp/wp-content/uploads/Update-from-Haqel-on-court-order.pdf> accessed 4 June 2024.

Moreover, the apparent failure of Israeli security forces to use available means to prevent or stop settlers from attacking or otherwise interfering with humanitarian aid convoys in the West Bank engages Israel's responsibility for failing to ensure the unhindered provision of humanitarian aid to Gaza.[58] Even if Israeli security forces were acting contrary to orders by not protecting aid convoys, their conduct would be attributable to Israel provided they were acting in an apparently official capacity.[59]

There is also strong reason to believe that Israel bears responsibility under international law for failing to discharge its duties to investigate incidents of settler violence, to prosecute the perpetrators, and to provide victims with an effective remedy.[60] Article 146 of GC IV requires State parties to search for, prosecute, or extradite perpetrators of grave breaches and to suppress all other breaches of the Conventions, including breaches committed by private persons.[61] It also follows from Article 2, read alongside Articles 6 and 7, of the ICCPR that States must investigate, punish, and redress harm caused not only by their own agents but also by private persons.[62]

Yet in the large majority of cases, settlers seem to face no legal repercussions for acts of violence against Palestinians or their property, and Palestinian victims of violence are routinely left without reparation, including compensation for losses incurred and assistance returning to land from which they have been displaced.[63] Yesh Din, an Israeli human rights organisation, has found that 93% of complaints filed by Palestinians in relation to settler violence were dropped by Israeli authorities without any legal action taken, and only 3% of the cases investigated led to a conviction.[64] Given the escalation of settler violence in the West Bank, and absent information about measures taken by Israeli authorities to reverse this alarming trend, Israel may also be in breach of its positive obligation to prevent the occurrence of similar violations in the future.[65]

In some cases, consistent failure to act can also amount to a breach of a negative obligation, that is, an obligation *not* to engage in certain action. Notably, Israel may be responsible for breach of the prohibition of forcible transfer or deportation even if Israeli officials have not personally ordered or carried out the relocation of Palestinians in incidents of settler violence.[66] International jurisprudence suggests that intent to force part of the civilian population to leave their residence can be deduced from the circumstances, such as from the creation of an unsafe or coercive environment leaving people

[58] Morris (n 21).

[59] ARSIWA (n 26) art 7 and commentary on art 4, para 13.

[60] COI (n 18) para 507; OHCHR (n 1); Ronen Bergman and Mark Mazzetti 'Takeaways from the Times Investigation Into "The Unpunished"', *The New York Times* (New York, 16 May 2024) <https://www.nytimes.com/2024/05/16/magazine/takeaways-investigation-settler-violence-impunity.html> accessed 29 May 2024.

[61] GC IV arts 146, 147; 2020 Commentary on GC III (n 51) para 184.

[62] General Comment 31 (n 44) para 8.

[63] For example, in relation to the 372 settler attacks recorded by OCHA between 7 October 2023 and 2 January 2024, no indictments are known to have been issued. COI (n 18) para 346. There have, however, been reported cases of Israeli settlers involved in violence against Palestinians being placed in administrative detention. Eg 'Five Settlers Arrested Over Deadly Reprisals Following Teen's Murder in West Bank' *The Times of Israel* (Jerusalem, 29 April 2024) <https://www.timesofisrael.com/five-settlers-arrested-over-deadly-reprisals-following-teens-murder-in-west-bank/> accessed 1 June 2024.

[64] 'Data Sheet, December 2023: Law Enforcement on Israeli Civilians in the West Bank (Settler Violence) 2005-2023' (*Yesh Din*, 21 January 2024) <https://www.yesh-din.org/en/data-sheet-december-2023-law-enforcement-on-israeli-civilians-in-the-west-bank-settler-violence-2005-2023/> accessed 13 June 2024.

[65] ICCPR art 2; General Comment 31 (n 44) 17.

[66] GC IV art 49; CIHL r 129(A).

no realistic alternative to departure.[67] Intent to forcibly transfer Palestinians can arguably be inferred from Israel's continuous failure to protect against settler violence, rendering both the departure of Palestinians necessary and their safe return impossible.

B. Acts of violence by settlers and other acts by Israeli security forces and authorities in connection with settler violence

Having concluded that Israel is responsible for breaches of several of its obligations under IHL and IHRL owing to a failure of its officials and authorities to protect against and suppress settler violence, this section considers whether Israel is also responsible for (1) acts of violence by settlers and (2) other acts committed by Israeli officials in connection with incidents of settler violence. With respect to (1), the principal question concerns attribution, while for (2) the main question is whether there has been a breach of an obligation of Israel.

(1) Acts of violence by settlers

Based on the information reviewed, acts of violence by settlers – if attributable to Israel – could engage Israel's responsibility for breach of several of its negative obligations under IHL and IHRL, including (but not limited to) the prohibitions of:

- murder;[68]
- inhumane treatment, torture, and any other measures of brutality;[69]
- forcible transfer or deportation of parts of the civilian population;[70] and
- destruction of property not rendered absolutely necessary for military operations.[71]

To determine whether conduct in breach of these obligations is attributable to Israel, it is helpful to distinguish between three categories of settlers:

> **(i) settlers who are members of the Israeli military forces, including reservists called up following 7 October 2023 and deployed to 'regional defence' battalions in the West Bank;**
> **(ii) settlers who form part of so-called 'civilian security squads' or 'civilian defence units'; and**
> **(iii) settlers who do not exercise any government functions.**

For victims and others reporting on incidents of settler violence, it is understandably difficult to identify which category perpetrators of violence belong to. For example, in one reported incident on 28 October

[67] *Prosecutor v Radislav Krstic* (Trial Judgment) IT-98-33-T (2 August 2001) [529]; *Prosecutor v Milorad Krnojelac* (Trial Judgment) IT-97-25-T, T Ch II (15 March 2002) [475]; *Prosecutor v Milomir Stakic* (Appeals Judgment) IT-97-24-A (22 March 2006) [281]; *Prosecutor v Jadranko Prlic et al* (Appeals Judgment) IT-04-74-A, Vol I (29 November 2017) [493]; *Prosecutor v Ratko Mladic* (Trial Judgment) IT-09-92-T, Vol III (22 November 2017) [3167–3170].

[68] GC IV art 32; ICCPR art 6; CIHL r 89.

[69] GC IV arts 27 and 32; ICCPR art 7; CIHL r 90.

[70] GC IV art 49; CIHL r 129(A).

[71] GC IV art 53; CIHL r 51. Interference with the property rights of Palestinians may also amount to violations of Hague Regulations arts 46 and 55.

2023, armed men, some of them masked and wearing military fatigues but driving civilian cars, allegedly beat up the father of a Palestinian household and threatened the family that unless they demolished their own home they would be killed.[72] These could have been settlers pretending to be soldiers, members of civil defence units, reservists assigned to West Bank defence battalions, or regular conscripted soldiers.[73] This ambiguity, exacerbated by the apparent privatisation of security in the West Bank, complicates attempts to ensure accountability for violations of the rights of Palestinians.

(i) Settlers who are members of the Israeli military

About 5,500 settlers who were Israeli army reservists were reportedly called up following 7 October 2023 and assigned to West Bank 'regional defence' battalions.[74] This resulted in a fivefold increase of these battalions, which are composed mainly of local residents who serve near their homes.[75] According to the Israeli military, the mobilisation was necessary due to the redeployment of regular forces from the West Bank to the south and north of Israel following 7 October 2023.[76] While regional defence battalions in settlements are purportedly limited to overseeing 'the settlement's security zone', there have been reports of units from these battalions venturing into Palestinian villages, threatening and using force against Palestinians and their property, and in some cases carrying out demolitions of homes.[77] Conscripted settlers, including members of the so-called 'Desert Frontier Unit', have also been documented harassing and attacking Palestinians or their property in the West Bank.[78]

Reservists assigned to regional defence battalions and conscripted soldiers fall within the same category of individuals already considered in subsection (A) ('Failure by Israeli authorities to protect against and suppress settler violence'): they are organs or agents of Israel whose conduct is attributable to Israel provided they act with apparent authority, even if they abuse their authority in breach of orders and regulations.[79] By wearing military uniforms or using their status as soldiers to intimidate Palestinians, they are acting under colour of authority. Measures taken by the Israeli military in response to acts of violence against Palestinians by members of these units, which has reportedly included dismissals, confiscation of weapons, and 'clarif[ying] the regulations',[80] appear wholly inadequate to ensure justice for the victims of violence and to prevent recurrence of similar incidents in the future (which would likely require, among other measures, more stringent vetting procedures and closer oversight).

(ii) Settlers who are members of community security squads/civilian defence units

Israel's National Security Ministry has reportedly established more than 700 new 'community security squads' or 'civilian defence units' since 7 October 2023.[81] These units are comprised of Israeli civilians,

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[72] Hagar Shezaf, 'Israel's Army Drafted and Armed Thousands of Settlers. Accounts of Their Violence Are Piling Up' *Haaretz* (Tel Aviv, 17 January 2024) <https://archive.is/fMeOn> accessed 4 June 2024.

[73] ibid.

[74] ibid. The number cited is as of 17 January 2024.

[75] ibid.

[76] Shezaf (n 72).

[77] ibid.

[78] COI (n 18) para 352.

[79] ARSIWA (n 26) arts 4 and 7.

[80] Shezaf (n 72).

[81] Avi Bar-Eli, 'U.S. Threatens to Stop Supplying Guns After Ben-Gvir Gives Them Out at Political Events' *Haaretz* (Tel Aviv, 28 October 2023) <https://www.haaretz.com/israel-news/2023-10-28/ty-article/.premium/u-s-

including settlers, who are supplied with uniforms and weapons.[82] Apparently, the Ministry, led by National Security Minister Itamar Ben-Gvir, has purchased 10,000 assault rifles to be distributed to these squads.[83] In response to concerns expressed by the US that weapons exported to Israel could end up in the hands of civilians engaged in violence against Palestinians, Israel reportedly clarified that 'the community security squads are seen as an auxiliary force of the Israel Police and the Border Police, and that their weapons use will be overseen by the security forces'.[84]

As auxiliary police forces, these squads or units are likewise organs of the State of Israel and the conduct of their members is attributable to Israel for the purposes of international responsibility, to the extent that they act with apparent authority as opposed to in a purely private capacity.[85]

(iii) Private citizens who do not exercise government functions

The conduct of private citizens who have not been empowered to exercise government functions is generally not attributable to the State for the purpose of establishing State responsibility. There are exceptions to this general rule, requiring an examination of the factual relationship between the private actors or their conduct and the State.

The first exception is in case of 'proof of a particularly great degree of State control' over the private actors in question, such that they operate in 'complete dependence' on the State and merely serve as instruments of the State.[86] In such case, the private actors can be equated to de facto State organs, whose conduct is attributable to the State in the same way as the conduct of de jure State organs and agents (i.e., entities legally incorporated into the State).[87] A second exception is that conduct of private actors carried out on the instruction of, or under the direction or control of the State, is attributable to that State.[88] The level of control required to impute specific conduct by non-State actors to the State, although debated,[89] is according to ICJ jurisprudence 'effective control', which requires that the State 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged'.[90]

It is well documented that settlers in the West Bank receive various forms of support from the Israeli government, including financial, infrastructure, and security assistance. In addition, their actions aimed at forcing Palestinians off their land could be seen as serving the government's agenda of annexing the

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threatens-to-stop-supplying-guns-after-ben-gvir-gives-them-out-at-political-events/0000018b-77eb-d1da-a1bb-7ffb96dc0000> accessed 4 June 2024; COI (n 18) para 350.

[82] Eg Philippe Pernot, 'Itamar Ben-Gvir and Israel's Pandora's Box of Violent Extremism' *The New Arab* (London, 27 May 2024) <https://www.newarab.com/analysis/israels-pandoras-box-violent-extremism> accessed 13 June 2024; Jeremy Sharon, 'Distribution of 300 Assault Rifles to West Bank Civilian Security Squads Underway' *The Times of Israel* (Jerusalem, 24 October 2023) <https://www.timesofisrael.com/distribution-of-300-assault-rifles-to-west-bank-civilian-security-squads-underway/> accessed 4 June 2024.

[83] Sharon (n 82)

[84] Bar-Eli (n 81).

[85] ARSIWA (n 26) art 4.

[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (Bosnia v Serbia) [392-393].

[87] ARSIWA (n 26) art 4 and commentary. Eg Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' [2020] 96 Intl LS 295, 319.

[88] ARSIWA (n 26) art 8.

[89] Eg Milanovic (n 87).

[90] Nicaragua v US (n 40) [115]; Bosnia v Serbia (n 86) [399]. See also US v Iran (n 42) [58]; DRC v Uganda (n 3434) [160].

West Bank.[91] One organisation has even described settler violence as 'a major informal tool at the hands of the state to take over more and more West Bank land'.[92] Settlers perpetrating acts of violence against Palestinians have possibly also benefitted from the relaxed gun regulations that the Knesset National Security Committee approved following 7 October 2023, and might even have received guns directly from the Ministry of National Security.[93] This level of support does not, however, suffice to equate settlers or groups thereof to de facto Israeli organs, falling short of demonstrating a relationship of 'complete dependence' on the State.

Nor does the information reviewed reveal that acts of violence by settlers were carried out on the instruction of, or as part of an operation under the direction or control of Israeli security forces or other Israeli organs or agents, which would permit attributing those acts to Israel for the purpose of State responsibility. Providing logistic or financial support or even arming settlers would not be sufficient to satisfy the test of effective control (or the lower threshold of 'overall control' used by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its *Tadić* decision to attribute conduct by private actors to a State for the purpose of classifying the conflict as an international armed conflict).[94]

The effective control test has been criticised for imposing too high of a threshold, effectively granting States 'the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore'.[95] However, the stringency of that test makes it all the more important to emphasise the occupying power's positive obligations to ensure order and safety in the occupied territory and to protect against all acts or threats of violence, including from non-State actors, as discussed in subsection (A) above.

Finally, conduct that is not attributable to the State may nevertheless be considered an act of the State if and to the extent that the State acknowledges and adopts the conduct in question as its own.[96] In the *US Diplomatic and Consular Staff in Tehran* case, the ICJ held that what was initially conduct not attributable to Iran because it was carried out by private actors was subsequently transformed into acts of Iran when the Iranian government adopted a policy expressly approving and maintaining the unlawful seizure of the US embassy and detention of its personnel.[97]

Although certain members of the Israeli government have expressed sympathy for settlers engaged in violence against Palestinians,[98] others, including Prime Minister Netanyahu, have ostensibly condemned settler violence.[99] No official policy has been publicly issued endorsing the violence as such.[100] While the retroactive recognition by Israel of outposts constructed in the West Bank in violation of international law is an explicit approval of private persons acting in furtherance of the settlement

[91] B'Tselem (n 1717) 6.

[92] ibid.

[93] COI (n 18) para 351.

[94] *Prosecutor v Duko Tadic* (Appeals Judgment) [1995] ICTY-94-1 [131, 137].

[95] Bosnia v Serbia (n 86) (Dissenting Opinion of Vice-President Al-Khasawneh) [39]. Eg Lanovoy (n 55) 578.

[96] ARSIWA (n 26) art 11.

[97] US v Iran (n 42) [74].

[98] Eg 'Five Settlers Arrested Over Deadly Reprisals Following Teen's Murder in West Bank' *The Times of Israel* (Jerusalem, 29 April 2024) <https://www.timesofisrael.com/five-settlers-arrested-over-deadly-reprisals-following-teens-murder-in-west-bank/> accessed 1 June 2024; Pernot (n 82); Bergman and Mazzetti (n 60).

[99] Louisa Loveluck, 'Settler Violence is Erasing Palestinian Communities in the West Bank' *The Washington Post* (Umm al-Kheir, West Bank, 9 November 2023) <https://www.washingtonpost.com/world/2023/11/09/west-bank-israel-settlers-violence/?itid=ap_louisaloveluck> accessed 14 June 2024; Bergman and Mazzetti (n 60).

[100] Eg Crisis Group (n 2) 3-4.

project,[101] it is more debatable whether it can also be viewed as an endorsement of settler violence. Still, a plausible argument can be made that the repeated acquiescence in settler violence by the Israeli government is indicative of a policy, albeit not an official one, in support of it.

If Israel has indeed adopted the unlawful conduct as its own, then from that moment on it can be held responsible under international law for the harm and damage inflicted on Palestinians by settler violence, irrespective of the status of those carrying out the violence as State or non-State actors. To determine the exact point in time when Israel adopted the unlawful conduct as its own (thus engaging its responsibility under international law) may pose some difficulties, as a policy embracing the violence is being inferred from the repeated acquiescence in settler violence over many years.

(2) Other acts by Israeli security forces and authorities in connection with settler violence

With respect to other acts by Israeli security forces and authorities in connection with settler violence, the core question is whether acts were committed in breach of an international law obligation of Israel, the element of attribution being straightforward. As already stated, the actions of Israeli security forces and other State officials are attributable to Israel, provided they were acting in an apparently official capacity.[102]

Publicly available information suggests that Israeli security forces have used force against Palestinians attacked by settlers, including for the purposes of protecting the settlers and removing Palestinians from the area.[103] Such use of force, including shooting live ammunition, raises serious concern about excessive use of force and failure by Israeli security forces to comply with the IHRL rules on the use of force in law enforcement operations. Even if force is applied for a lawful purpose (i.e., to protect the lives of others), the burden is on Israel to demonstrate that there was an imminent threat of death or serious injury and that no greater force than was absolutely necessary to protect against that threat was used, while minimising the damage and injury caused.[104]

Moreover, accounts that Israeli security forces have blocked ambulances trying to reach Palestinians injured in settler attacks, if verified, would engage Israel's responsibility for violation of its obligation to ensure that wounded and sick persons receive, to the fullest extent practicable and with the least possible delay, the medical care that their condition requires.[105] Such actions could also amount to inhumane treatment in breach of Article 27 of GC IV and a violation of the right to life in Article 6 of the ICCPR.[106]

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[101] Yonatan Kanonich, 'The New Stage in the Evolution of Israel's West Bank Settlement Project: Shepherding Outposts, Settler Violence, and the 7th of October' [2024] 12 Oxford Dipl Dispatch 37, 39.

[102] ARSIWA (n 26) art 4.

[103] B'Tselem (n 17) 10; COI (n 18) para 356.

[104] ICCPR art 6; General Comment 36 (n 48) para 12; UN 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' (7 September 1990) UN Doc A/CONF.144/28/Rev.1; 'Use of Force and Law Enforcement in Israel-Palestine' (*Diakonia IHL Centre*, 31 May 2021) <https://www.diakonia.se/ihl/news/law-use-of-force-israel-palestine/> accessed 30 May 2024; '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 30 May 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 30 May 2024.

[105] GC IV art 16; CIHL rr 109, 110, and 111.

[106] GC IV art 27; CIHL r 87; ICCPR art 6.

In addition, the arrest of Palestinian victims of settler violence by Israeli security forces could render Israel responsible for breach of the prohibition of unlawful or arbitrary arrest and detention.[107] Although it is not publicly known on what grounds Palestinians were apprehended in these incidents, the fact that Israeli settlers who initiated the attack on Palestinians or their property were not arrested points to discriminatory treatment of Palestinians in breach of Israel's obligations under the law of occupation and IHRL.[108] Arrest on discriminatory grounds is 'also in principle arbitrary'.[109]

Furthermore, accounts of Israeli authorities ordering Palestinians who have been subjected to settler violence to leave their land indicate a possible breach of the prohibition of forcible transfer or deportation of protected persons set out in Article 49 of GC IV and reflected in customary IHL.[110] While the evacuation of protected persons is permissible if the security of the population or imperative military reasons require it, evacuated persons 'shall be transferred back to their homes as soon as hostilities in the area in question have ceased'. [111] According to interviews conducted by Human Rights Watch, Palestinians evicted from their homes in connection with settler violence have been unable to return; '[t]he Israeli military either rejected or did not answer requests to allow residents to return, leaving [them] without protection' from further settler violence if they attempted to return.[112]

In addition, the reported distribution of weapons to settlers by Israeli officials may constitute a violation of the duty to ensure the right to life pursuant to Article 6 of the ICCPR, the obligation to protect against acts of violence in Article 27 of GC IV, and the duty to ensure respect for IHL based on a foreseeable risk that the weapons will be used to commit violations.[113] While Israel is likely to argue that arming settlers in the West Bank is justified based on a security threat, distributing weapons without close oversight and accountability for their use in a context where there is a known pattern of violence by settlers against Palestinians likely constitutes a breach of the obligations mentioned.

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[107] CIHL r 99; ICCPR art 9. Arrest or detention is 'unlawful' if it is not in accordance with the established law and procedure; 'arbitrary' further 'include[s] elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality [footnote omitted]'. Human Rights Committee, 'General Comment No. 35: Article 9 (Liberty and Security of Person) (16 December 2014) UN Doc CCPR/C/GC/35 paras 11, 12. Israel declared a derogation from its obligations under Article 9 of the ICCPR when ratifying the ICCPR in 1991. Declaration of Israel at the United Nations High Committee for Human Rights, Declarations and Reservations as of August 8, 2000 <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-4&src=ind> accessed 31 May 2024. It is questionable whether Israel could still rely on this derogation since derogations must be limited in scope and duration to what is 'strictly required by the exigencies of the situation'. Human Rights Committee, 'General Comment No. 29: Article 4: Derogations During a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/ Rev.1/Add.11 para 4. Moreover, the prohibition of 'arbitrary' detention is non-derogable. General Comment 35 (n 107) para 66. Pursuant to Article 78 of GC IV, a civilian in occupied territory may only be interned as a last resort for 'imperative reasons of security'. It is highly doubtful that this condition is met in the case of Palestinians merely trying to protect themselves and their property against settler violence, in which case the detention would likely also be considered 'arbitrary' under human rights law.

[108] GC IV art 13; CIHL r 88; ICCPR arts 2 and 26. For a discussion on adverse distinction based on nationality in occupied territory, see George Dvaladze, 'Unveiling Claims of Discrimination Based on Nationality in the Context of Occupation under International Humanitarian and Human Rights Law' (2023) 105(923) Intl Rev Red Cross 947.

[109] General Comment 35 (n 107) para 17.

[110] CIHL r 129(A).

[111] GC IV art 49(2). See 'Displacement and IHL' (*Diakonia IHL Centre*) <https://www.diakonia.se/ihl/resources/international-humanitarian-law/ihl-displacement/> accessed 13 June 2024.

[112] Human Rights Watch (n 13).

[113] General Comment 36 (n 48) para 21.

4. Individual responsibility under international criminal law

In light of the International Criminal Court (ICC)'s ongoing investigation into alleged war crimes and crimes against humanity committed in the oPt, it is relevant to note that settler violence may also give rise to individual liability under international criminal law, separate from the question of State responsibility.[114] Crimes within the jurisdiction of the ICC that could be implicated by settler violence include the:[115]

- **crime against humanity of deportation or forcible transfer of population** (Article 7(1)(d));
- **crime against humanity of persecution** (Article 7(1)(h));
- **crime against humanity of other inhumane acts** (Article 7(1)(k));
- **war crime of wilful killing** (Article 8(2)(a)(i));
- **war crime of extensive destruction and appropriation of property** (Article 8(2)(a)(iv));
- **war crime of unlawful deportation or transfer** (Article 8(2)(a)(vii)); and
- **war crime of the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory** (Article 8(2)(b)(viii)).

To establish the commission of a war crime, the alleged conduct must have taken place in the context of and be associated with an armed conflict.[116] While the crime must have been committed against a person protected under IHL, the perpetrator can be a State official or a private person.[117] Settler violence in the West Bank is carried out in the context of an international armed conflict, brought into being by the occupation by Israel of the Palestinian territory, and is perpetrated against Palestinians protected under GC IV. The violence is arguably associated with that conflict given that it is driven, at least in part, by an ambition to expand the possession of land by Israelis in occupied territory.[118]

As defined in Article 7 of the ICC Statute, a crime against humanity involves the commission of certain prohibited acts (such as murder, torture, or forcible transfer of a population) as part of a widespread

[114] International crimes may also have been committed in the West Bank outside the context of settler violence. While such conduct falls outside the scope of the present note, it merits further investigation and judicial action.

[115] Pursuant to the Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute).

[116] ICC Statute and ICC Elements of Crimes (adopted in September 2002, amended in June 2010) ICC-ASP/1/3 and Corr.1 and ICC Pub RC/9/11 (Elements of Crimes) art 8; 2020 Commentary on GC III (n 51) para 5186. According to the Appeals Chamber of the ICTY, '[t]he armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed'. *Prosecutor v Dragoljub Kunarac et al* (Appeals Judgment) IT-96-23 & 23/1 (12 June 2002) [58].

[117] For example, businessmen and industrialists have been held guilty of war crimes. 2020 Commentary on GC III (n 51) para 5194.

[118] Kanonich (n 101) 37.

or systematic attack against a civilian population, carried out pursuant to, or in furtherance of, a State or organisational policy.[119] While settler violence against Palestinians in the West Bank likely satisfies the criterion of 'widespread or systematic attack' against a civilian population, it is more questionable whether these acts can be considered to have been carried out pursuant to, or in furtherance of, a State or organisational policy.

If the argument raised above in relation to State responsibility for settler violence, namely that Israel's acquiescence in settler violence is indicative of a State policy endorsing the violence, is accepted, then this criterion would likely also be met. The ICC Elements of Crimes suggest that a State policy can exceptionally be established by 'deliberate failure to take action, which is consciously aimed at encouraging such attack'.[120] The 'intent behind the inaction [must be] to further the attack', rather than an inability 'to prevent it'.[121]

In any event, the use of the disjunctive 'or' confirms that State involvement is not strictly necessary to prove a crime against humanity, as an organisational policy can emanate from a non-State group.[122] According to the ICC Pre-Trial Chamber in confirming the charges in the *Katanga* case, '[t]he policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion'. [123] It is possible that at least certain settler groups that have been involved in violence against Palestinians (such as the Hilltop Youth) could satisfy this condition, subject to further investigation.

[119] ICC Statute (n 115) and Elements of Crimes (n 116) art 7.

[120] Elements of Crimes (n 116) art 7 fn 6.

[121] Charles Chernor Jalloh, 'What Makes a Crime Against Humanity A Crime Against Humanity' [2013] 28 Am U Intl L Rev 381, 426.

[122] *Prosecutor v Duko Tadic* (Trial Judgment) IT-94-1-T (7 May 1997) [653]. Eg 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine' (*ICC*, 20 May 2024) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state> accessed 27 June 2024. See also Draft Code of Crimes Against the Peace and Security of Mankind (8 July 1996) UN Doc A/CN.4/L.532 [and Corr.1 and 3] art 18 (defining a crime against humanity as certain prohibited acts 'when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group'); Charles Chernor Jalloh, 'What Makes a Crime Against Humanity A Crime Against Humanity' [2013] 28 Am U Intl L Rev 381.

[123] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) [396].

In addition to persons who have committed acts of violence against Palestinians, Israeli officials who have assisted in the commission of such acts or failed to exercise their authority to prevent or repress violations may also be criminally liable under international law for the harm and damage inflicted on the victims. Depending on the facts, several forms of liability under the ICC Statute may be triggered by incidents of settler violence, including:[124]

- **liability as perpetrator or co-perpetrator** (Article 25(3)(a));
- **liability for ordering, soliciting, or inducing the commission of a crime that occurs or is attempted** (Article 25(3)(b));
- **liability for aiding, abetting or otherwise assisting in the commission or attempted commission of a crime for the purpose of facilitating the commission of such a crime, including by providing the means for its commission** (Article 25(3)(c));
- **liability for, in any other way, contributing to the commission or attempted commission of such a crime by a group of persons acting with a common purpose** (Article 25(3)(d)). Such contribution shall be intentional and shall either (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime, or (ii) be made with the knowledge of the intention of the group to commit the crime; and
- **liability of superiors for failing to take all necessary and reasonable measures within their power to prevent or repress the commission of a crime** (Articles 28(1) and (2)).

Establishing the liability of any specific individual requires a careful investigation of the facts, measured against the elements of the crimes under consideration.[125] The scope of such investigation should include Israeli military and civilian decision-makers who have seemingly contributed to or failed to exercise their authority to prevent and supress settler violence. For example, Israel's National Security Minister Itamar Ben-Gvir, who is in charge of law enforcement with respect to Israeli nationals in the West Bank,[126] has reportedly criticised efforts to hold settlers accountable for acts of violence against Palestinians as 'antisemitic', contributing to a climate of impunity for attacks against Palestinians.[127] Moreover, under his direction, more than 50,000 personal firearm licenses were said to have been approved between 7 October and 17 December 2023 pursuant to an expedited process, possibly

[124] ICC Statute (n 115).

[125] Elements of Crimes (n 116).

[126] Under the law of occupation, responsibility to enforce the law in the occupied territory rests with the commander of the occupying power's military forces in the territory ('the Military Commander'). While Israeli nationals in the oPt are therefore formally subject to the authority of the Military Commander, Israel's policy is to subject them only to concurrently applicable Israeli law, enforced by the Israel Police rather than the Israeli military. See 'One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank' (*ACRI,* October 2014) <https://law.acri.org.il/en/2014/11/24/twosysreport/> accessed 2 July 2024. Ben-Gvir's Ministry of National Security is responsible for the Israel Police.

[127] 'Five Settlers Arrested Over Deadly Reprisals Following Teen's Murder in West Bank' *The Times of Israel* (Jerusalem, 29 April 2024) <https://www.timesofisrael.com/five-settlers-arrested-over-deadly-reprisals-following-teens-murder-in-west-bank/> accessed 1 June 2024; Pernot (n 82).

including for settlers engaged in acts of violence against Palestinians.[128] Bezalel Smotrich, Israel's Minister of Finance and Minister in charge of the civil administration in the West Bank under the Ministry of Defence, has likewise criticised efforts to hold settlers accountable for acts of violence against Palestinians and at one point called for the village of Huwara in the West Bank to be 'wiped out' after the killing of two Israeli settlers.[129]

5. Conclusion

As hostilities rage on in Gaza, settler violence against Palestinians in the West Bank has escalated, resulting in numerous casualties, loss of livelihoods and property, and the displacement and rupturing of entire Palestinian communities. Rather than protecting Palestinians and bringing the perpetrators to justice, Israeli authorities have seemingly turned a blind eye to the violence or, worse, have actively supported settlers engaged in acts of violence against Palestinians and their property.

Settler violence engages Israel's responsibility under international law for the apparent failure of Israeli officials and authorities to exercise due diligence to maintain order and safety in occupied territory, to protect Palestinians against all acts of violence or threats thereof, to protect humanitarian aid convoys and to ensure that humanitarian aid reaches those in need, to facilitate medical assistance to injured Palestinians, and to investigate and prosecute perpetrators of violence and provide victims with effective recourse to justice.

Israel is also responsible for the conduct of its organs and agents in breach of negative obligations under IHL and IHRL, including the prohibitions of murder and inhumane treatment, the forcible transfer of protected persons, and the destruction of property not absolutely required for military operations. This includes the actions of settlers acting as members of the Israeli military or auxiliary police forces. As for settlers who have not been authorised to exercise government functions, the information reviewed does not demonstrate a sufficiently close factual relationship between the settlers in question and the State to equate the former to de facto organs or to attribute specific acts of violence to Israel.

Nevertheless, the repeated acquiescence of Israel in acts of violence by settlers is arguably indicative of a policy that the State endorses the violence. On that basis, Israel may be considered to have adopted the conduct of settler violence as its own, thus rendering it responsible from that moment on for breach of several of its negative obligations under IHL and IHRL, irrespective of whether the direct perpetrators of the violence were State officials or private persons.

Conclusions about State responsibility are without prejudice to the separate question of potential individual liability under international criminal law for conduct in relation to settler violence. Several crimes within the jurisdiction of the ICC may be implicated by incidents of settler violence, and liability extends beyond the immediate perpetrators of acts of violence to any Israeli civilian or military leader who has contributed to the commission of crimes or failed to exercise their authority to prevent and repress the crimes in question.

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[128] Josh Breiner, 'Head of Israel's Gun Licensing Authority Says Ben-Gvir's Policy Leading to "Loss of Control"' *Haaretz* (Tel Aviv, 17 December 2023) <https://www.haaretz.com/israel-news/2023-12-17/ty-article/.premium/head-of-israels-gun-licensing-authority-ben-gvirs-policy-leading-to-loss-of-control/0000018c-767f-db38-a9fc-fffffa160000> accessed 14 June 2024.

[129] Bergman and Mazzetti (n 60).