



Lawyers for Palestinian Human Rights' briefing on the human rights impact of illegal Israeli settlements in the occupied Palestinian territory and related third-state legal duties

February 2017



About Lawyers for Palestinian Human Rights (LPHR)

LPHR is a legal charity in the UK that works on projects to protect and promote Palestinian human rights. Our trustees include leading human rights lawyers Sir Geoffrey Bindman QC, Michael Mansfield QC and Daniel Machover.

Contact

Tareq Shourou
Director of LPHR
Direct Line 07949 212 795
Email: contact@lphr.org.uk



Introduction

1. Since 1967, some 250 settlements and settlement outposts in the occupied West Bank, including occupied East Jerusalem, have been established in contravention of international law, either with or without official Israeli Government authorisation. The total number of Israeli settlers living in occupied Palestinian territory is estimated by the Israeli non-governmental organisation, Peace Now, to be nearly 600,000.¹
2. Israel's settlements in the occupied Palestinian territory have been established in clear violation of international humanitarian law. As an occupying power, Israel is prohibited from making permanent changes to the Palestinian territory it occupies, nor permitted to relocate its own citizens to occupied Palestinian territory.
3. UN Security Council Resolution 2334², passed on 23 December 2016, reaffirmed the illegality of Israeli settlements (the significance of the resolution is addressed at paras 18-33 below). Contrary to the uniform position held by the international community, the Government of Israel views the settlements built with its approval in the occupied Palestinian territory as legal³.
4. Illegal settlements are a central and fundamentally aggravating feature of Israel's prolonged military occupation of the occupied Palestinian territory. They have led to the dispossession of Palestinians, the fragmentation of their land and the exploitation of their natural resources. They have a substantially adverse impact on the basic human rights of Palestinians and fundamentally undermine the international rule of law.
5. An independent fact-finding mission commissioned by the UN Human Rights Council found in its 2013 report that "the impact of settlements on the human rights of the Palestinians is manifested in various forms and ways."⁴ These include serious and pervasive infringements against basic human rights to land and housing, equality, the right to water and sanitation, freedom of movement, and the right to education and to health. Illegal settlements further severely impedes the Palestinian people from being able to exercise their fundamental right to self-determination.

1 385,900 settlers in the occupied West Bank and 200,000 settlers in occupied East Jerusalem:
<http://peacenow.org.il/en/settlements-watch/settlements-data/population>

2 [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2334\(2016\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2334(2016))

3 Page 4, From occupation to annexation – the silent adoption of the Levy Report on retroactive authorisation of illegal construction in the West Bank, Yesh Din: <http://www.yesh-din.org/en/from-occupation-to-annexation-the-silent-adoption-of-the-levy-report-on-retroactive-authorization-of-illegal-construction-in-the-west-bank/>

4 Paragraph 31, Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem:
http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf



6. The substantial impact of Israel's illegal settlements on Palestinian human rights is best understood when recognising that settlements have an associated infrastructure built on expropriated Palestinian land, including settler-only roads, the 'separation barrier' built predominantly within the occupied Palestinian territory in violation of international law, and military checkpoints. This inextricably connected infrastructure supporting illegal settlements cumulatively contribute to the vast range of pervasive and serious human rights infringements against Palestinians in the occupied Palestinian territory.
7. Legal duties fall on all states, including the United Kingdom, not to recognise, nor aid or assist Israel's illegal settlements and associated infrastructure, due to the fact that they impede Palestinians' from exercising their fundamental right to self-determination. These duties on all states, arising under international law, require necessary and proportionate implementation in response to the continuing existence and expansion of Israel's illegal settlements. The necessity of implementing third state legal duties in this context is underscored by reference to one of the conclusions of the independent fact-finding mission commissioned by the UN Human Rights Council:

“The establishment of the settlements in the West Bank, including East Jerusalem, is a mesh of construction and infrastructure leading to a creeping annexation that prevents the establishment of a contiguous and viable Palestinian State and undermines the right of the Palestinian people to self-determination.”⁵
8. Similarly, the international community “stressed” in Security Council resolution 2334:

“the status quo is not sustainable and significant steps are urgently needed in order to stabilize the situation and to reverse negative trends on the ground, which are steadily eroding the two-State solution and entrenching a one-State reality.”
9. The UN commissioned independent fact-finding mission also highlights that, “business enterprises have, directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements”. Many states, including the United Kingdom, have committed to implementing the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and accordingly have an important role to play in promoting companies respect for human rights in the context of involvement in settlement activities in the occupied Palestinian territory.
10. In this context, the UK government should properly reconsider its abstention from the vote and critical statement, made before the UN Human Rights Council in March 2016, on the establishment of a business and human rights database by the Office of the High Commissioner for Human Rights, that will list companies involved in settlement activities which adversely impact Palestinian human rights. It was the only state to

5 Ibid. Paragraph 101



declare that the database was “inappropriate” and that “it would not cooperate in the process” of its implementation⁶.

The context of illegal settlements and their adverse impact on Palestinian human rights

11. The following excerpts of a UN commissioned independent report⁷ on the human rights implications of settlements on the Palestinian population are included below so as to provide context on the magnitude of Israel's illegal settlement enterprise and its extensive adverse impact on Palestinian human rights, including against children:
- “Since 1967, the Governments of Israel have openly led and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements by including explicit provisions in the fundamental policy instrument (basic policy guidelines), establishing governmental structures and implementing specific measures. These specific measures include (a) building infrastructure; (b) encouraging Jewish migrants to Israel to move to settlements; (c) sponsoring economic activities; (d) supporting settlements through public services delivery and development projects; and (e) seizing Palestinian land, some privately owned, requisitioning land for “military needs”, declaring or registering land as “State land” and expropriating land for “public needs.” (Paragraph 20)
 - “Since the beginning of the occupation, Palestinians have seen over 1 million dunams of their land seized, enabled by a combination of military orders and selective interpretation of the Ottoman Land Code that ruled land tenure throughout the Ottoman, Mandatory and Jordanian periods. In particular, land has been lost through seizure for military needs, absentee property laws and the declaration of State lands. (Paragraph 63)
 - “In December 2012, the UN Office for the Coordination of Humanitarian Affairs reported that, while the fenced areas of settlements cover only 3 per cent of the West Bank, in reality 43 per cent of the territory is allocated to local and regional settlement councils. (Paragraph 37)
 - “The processes of dispossession and displacement in the vicinity of settlements and the seam zone include preventing access of Palestinians to their agricultural lands, the takeover and demolition of springs and wells, and movement restrictions. Settler violence and intimidation also play a significant role. (Paragraph 67)
 - “The settlements, including the associated restrictions, impede Palestinian access to and control over their natural resources. In his report, the UN Secretary-General noted that Palestinians had virtually no control over the water resources in the West Bank. Eighty six per cent of the Jordan Valley and the Dead Sea is under the de facto jurisdiction of

⁶ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18535&LangID=E>

⁷ See Supra Note 4



the settlement regional councils. Settlements exploit mineral extraction and fertile agricultural lands, denying Palestinians access to their natural resources. (Paragraph 36)

- “The vast majority of restrictions on the freedom of movement of Palestinians seem to be directly linked to the settlements, and include “restrictions aimed at protecting the settlements, securing areas for their expansion, and improving the connectivity between settlements and with Israel itself”. The restrictions themselves come in many forms, including settler-only roads, a regime of checkpoints and crossings (closure obstacles), impediments created by the wall and its gate and permit regime, as well as administrative restrictions. The human rights treaty bodies have expressed their deep concern at restrictions on freedom of movement, describing them as being targeted at a particular national or ethnic group and amounting to gross violations of economic, social and cultural rights.” (Paragraphs 72 and 76)
- “Information presented to the mission demonstrates that distinct legal systems exist in the Occupied Palestinian Territory and are applied separately to Israeli settlers and Palestinians. Broadly, Israelis in Area C are subject to Israeli domestic law enforced by the police and courts in Israel. A patchwork of Israeli military orders and Ottoman, British and Jordanian legislation is applied to Palestinians, who are also subject to a military court system with a wide jurisdictional reach. (Paragraph 39)
- The legal regime of segregation operating in the Occupied Palestinian Territory has enabled the establishment and the consolidation of the settlements through the creation of a privileged legal space for settlements and settlers. It results in daily violations of a multitude of the human rights of the Palestinians in the Occupied Palestinian Territory, including, incontrovertibly, violating their rights to non-discrimination, equality before the law and equal protection of the law. (Paragraph 49)
- “Most children are arrested at friction points, such as villages near settlements or on roads used by the army or settlers and that run by a Palestinian village. From point of arrest, they face multiple violations of their rights to liberty and security and fair trial through interrogation, arbitrary detention and abuse, trial and sentencing. (Paragraph 48)
- “Information and testimonies corroborate the impact of settlement expansion on the right to water of Palestinians, including, as pointed out by, inter alia, the Committee on Economic, Social and Cultural Rights, the great discrepancy between water allocation for Palestinians and settlers, and inequitable access. (Paragraph 80)
- “The mission considers that the right to self-determination of the Palestinian people, including the right to determine how to implement self-determination, the right to have a demographic and territorial presence in the Occupied Palestinian Territory and the right to permanent sovereignty over natural resources, is clearly being violated by Israel through the existence and ongoing expansion of the settlements. The transfer of Israeli citizens into the Occupied Palestinian Territory, prohibited under international



humanitarian law and international criminal law, is a central feature of the practices and policies of Israel.” (Paragraph 38)

12. The UN Office of the Coordination of Humanitarian Affairs has additionally noted the following observations of the adverse impact of illegal settlements, including the issue of settler violence, on Palestinian human rights:

“The official allocation of public land to settlements, along with the takeover of private land by settler groups, have contributed to the shrinking of space available for Palestinians to sustain their livelihoods in an increasingly fragmented West Bank, and have impacted their enjoyment of a range of human rights.

“The longstanding phenomenon of settler violence, compounded by insufficient law enforcement by the Israeli authorities, has also undermined the physical security and livelihoods of Palestinian communities. Documented cases of settler attacks, trespassing and forceful takeover of land, suggest that violence is often being carried out as part of a calculated effort by settlers to push Palestinian farmers from what has subsequently become de facto Israeli-controlled areas. This phenomenon has continued despite the efforts by the Israeli authorities to improve law enforcement against violent settlers.

“Combined with the restrictive and discriminatory zoning and planning policy applied in Area C and in occupied East Jerusalem, these settlement-related phenomena have undermined the living conditions of Palestinians and rendered them increasingly vulnerable, including to the risk of individual or mass forcible transfer.”⁸

13. On 1 February 2017, the UK Foreign Minister for the Middle East, Tobias Ellwood, made the following statement on the Israeli Government’s latest announcement of settlement construction, this time to build 3,000 settlement units in the West Bank:

“The announcement of further settlement units in the West Bank is part of a growing trend which we condemn. We have consistently been clear that settlements are illegal under international law, and not conducive to peace. This spike in settlement activity undermines trust and makes a two state solution – with an Israel that is safe from terrorism and a Palestinian state that is viable and sovereign - much harder to achieve.”⁹

14. Currently, the Israeli Knesset is on the verge of passing into legislation the Regularisation Bill which violates Palestinian property rights by retroactively legalising unauthorised outposts built on private Palestinian land. Outposts are a covert version of illegal settlement. They substantially support the settlement enterprise and are often perpetuated by more ideological - rather than economic - settlers, who can prove more disruptive and aggressive towards Palestinians. According to the Israeli human rights

⁸ http://www.ochaopt.org/content/2015-overview-settlements-key-driver-humanitarian-vulnerability#_ftn7

⁹ <https://www.gov.uk/government/news/minister-for-the-middle-east-statement-on-settlement-units-in-the-west-bank--3>



organisation, Yesh Din, the specific locations of outposts are chosen to create contiguous Israeli settlement blocs by connecting isolated communities to larger, existing settlement blocs, thereby heightening the fragmentation of the West Bank and severely infringing on the Palestinians' right to self-determination.

15. Yesh Din further notes that the goal of the pending legislation is already reflected on the ground by highlighting that of 100 unauthorized outposts in the West Bank, about a third (32) have been retroactively authorized or are undergoing the authorization process.¹⁰ It observes that:

“The institutionalization of land grab and dispossession increases the impression that Israel is working toward pushing Palestinians out of Area C, where the settlements and outposts are located, and reducing their presence there, which in turn, increases concern that the ultimate purpose of this dispossession is to facilitate the official annexation of Area C to Israel.”¹¹

16. The adoption of this law will mark the first time that Israel will pass legislation which applies only to the occupied West Bank, despite it being an area that is outside the sovereignty of Israel. The Palestinian residents that will be affected by the law do not have the right to vote for the Knesset.
17. Looking further to the future, the newly developed Jerusalem 5800 Master Plan (“Jerusalem 2020”), outlines a framework whereby in some suggested scenarios the metropolitan area of occupied East Jerusalem would be extended towards Bethlehem, Ramallah and Jericho in the occupied West Bank by 2040.¹² The advised demographic balance being promoted for this urban area – large parts of which are now predominantly Palestinian – is 65 percent Jewish Israelis to 35 percent Palestinians.

Legal value of Security Council Resolution 2334 and the relevance of third-state legal duties to the UK government

18. On 23 December 2016, the UN Security Council reaffirmed the illegality of Israeli settlements in resolution 2334. The passing of this resolution does not break new legal ground, but nonetheless has legal value for a variety of important reasons. These factors can best be examined after observing the constitutive elements of the resolution.
19. An overriding observation of resolution 2334 is that its substance and language on settlements is firmly grounded in basic principles of international humanitarian law.

¹⁰ <http://www.yesh-din.org/en/from-occupation-to-annexation-the-silent-adoption-of-the-levy-report-on-retroactive-authorization-of-illegal-construction-in-the-west-bank/>

¹¹ <http://www.yesh-din.org/en/yesh-din-presents-un-security-council-figures-israel-handles-ideologically-motivated-crime-palestinians/>

¹² Rightists plan mega-Jerusalem in 2040 with invisible Palestinians, 24 November 2016, <http://www.haaretz.com/israel-news/.premium-1.754943>



20. In its preamble, the resolution reaffirms “the inadmissibility of the acquisition of territory by force”, and “the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention.” It recalls the International Court of Justice’s 2004 advisory opinion on the legal consequences of the construction of a Wall in the occupied Palestinian territory (which found, inter alia, that the combination of Israeli settlements and the barrier’s construction alters the demographic composition of the occupied Palestinian territory and impedes the Palestinians’ right to self-determination).
21. The preamble then, “condemns all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions.” It further expresses “grave concern” that Israeli settlement activities undermine the viability of a two state solution based on the 1967 lines, and recalls “the obligation under the Quartet Roadmap, endorsed by its resolution 1515 (2003), for a freeze by Israel of all settlement activity, including “natural growth”, and the dismantlement of all settlement outposts erected since March 2001.”
22. In the operative part of the resolution, it:
1. Reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;
 2. Reiterates its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respects all of its legal obligations in this regard;
 3. Underlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations;
 4. Stresses that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperilling the two-State solution;
 5. Calls upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967;
 6. Calls for immediate steps to prevent all acts of violence against civilians, including acts of terror, as well as all acts of provocation and destruction, calls for accountability in this regard[...];



7. Calls upon both parties to act on the basis of international law, including international humanitarian law[...].

23. A number of important factors illuminate that resolution 2334 can be assessed as possessing a legal value that is not negligible. These are: i) the resolution reinforces the legal invalidity of settlements; ii) the resolution's call on all states to differentiate between the territory of the state of Israel and the territories it has occupied since 1967; and iii) the influence the resolution may have on the Office of the Prosecutor of the International Criminal Court. The overarching theme that runs through these factors is the paramount need to protect and promote Palestinian human rights, including the fundamental right to self-determination, which are heavily compromised by Israel's vast settlement enterprise.
24. The resolution's reaffirmation that "settlements have no legal validity and constitute a flagrant violation of international law" coupled with its "demand that Israel immediately and completely cease all settlements activities", is compelling additional legal authority that Israeli settlements in the occupied Palestinian territory are indeed illegal. The language of "have no legal validity" is taken verbatim from the last resolution (resolution 465 in 1980) that focused on settlements. The international community's explicit reliance on legal reasoning to buttress its position on Israeli settlements speaks to the value of international humanitarian law when addressing urgent issues of justice, peace and security.
25. The resolution also has legal value in reinforcing the implementation of the legal principle that third states have the legal duty not to recognise, nor aid or assist Israeli settlements because they severely impede Palestinians from being able to exercise their fundamental right to self-determination. This principle appears to be implicit in operative paragraph 5 of the resolution, which calls on all states in its relevant dealings to distinguish between the territory of Israel and the occupied Palestinian territory.
26. The resolution's provision of this clear delineation is valuable authority to counter any current and possible future attempts to unacceptably conflate the state of Israel proper with the Palestinian territory that it occupies. The need to avoid conflation is highlighted in the UK context by considering the UK government's long-standing and clear policy recognising the illegality of Israeli settlements in the occupied Palestinian territory as reinforced by its affirmative vote for resolution 2334; the UK government's current guidance issued to UK businesses which does not encourage business activities with settlements; and last year's statement by all EU member states – including the UK - "unequivocally and explicitly" making the distinction between Israel and all territories occupied by Israel since 1967.¹³

¹³ Council Conclusions on the Middle East Peace Process, paragraph 8, dated 18 January 2016. It is available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/01/18-fac-conclusions-mepp/>



27. The UK Foreign and Commonwealth Office (FCO) has published guidance which explicitly does “not encourage” UK businesses from operating within illegal settlements. This Overseas Business Risk advice for Israel states: “The UK has a clear position on Israeli settlements: The West Bank, including East Jerusalem, Gaza and the Golan Heights are territories which have been occupied by Israel since 1967. Settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution to the Israeli-Palestinian conflict impossible.”¹⁴ Set against this clear legal context, the guidance then states: “There are therefore clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity.”¹⁵
28. As alluded to in previous paragraphs to this briefing, it is important to be aware that there are significant legal consequences flowing from the illegal status of settlements. The establishment of illegal settlements and their related infrastructure obstructs the Palestinian right of self-determination. The right to self-determination is recognised by the International Law Commission as a norm of such importance – called a ‘peremptory norm’ – that it includes a separate and additional legal obligation on all states, including the United Kingdom, to respect and promote this specific right.
29. The International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts¹⁶, clarify that this legal duty on states consists of an obligation not to recognise as lawful, or act in a manner that implies recognition for, a situation resulting from a violation of a peremptory norm, even if committed by another state. Nor may they render aid or assistance in maintaining that situation. The International Court of Justice has confirmed, in the context of its advisory opinion on the construction of the separation barrier in the occupied West Bank, that the legal duty on all states of non-recognition and non-assistance applies to the obstruction of the right of self-determination for Palestinians. Local authorities, as an organ of the state, share this legal duty.
30. The call upon all states, in operative paragraph 5 of resolution 2334, to distinguish in their relevant dealings between the territory of Israel and the Palestinian territories occupied by Israel since 1967, appears to reinforce the existing legal duty on all states not to recognise, nor aid or assist illegal settlements or their associated infrastructure. The resolution is therefore relevant to further legitimising steps that have been taken by

utm_source=dsms-auto&utm_medium=email&utm_campaign=Council%20conclusions%20on%20the%20Middle%20East%20Peace%20Process

14 The FCO Guidance is available at: <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel--3>

15 Ibid.

16 The ILC Articles on State Responsibility for Internationally Wrongful Acts is available at: <http://www.un.org/documents/ga/docs/56/a5610.pdf>



some states, including the UK, to i) distinguish between trade that emanates from settlements as opposed to Israel proper and, ii) and to “not encourage” business enterprises engagement in economic and financial activities with settlements. Potentially in the future, the resolution could also assist to legitimise significant possible moves from states to withhold incoming and outgoing trade with settlements, in accordance with its legal duty not to recognise, nor aid or assist them.

31. Operative paragraph 5 of resolution 2334 also provides added legitimacy to the pending business and human rights database on companies involvement in settlements activities that adversely impact Palestinian human rights, which is currently being developed by the Office of the High Commissioner for Human Rights. The UK government should appropriately reconsider its abstention from the vote and declaratory critical statement, made before the UN Human Rights Council in March 2016, that the establishment of a business and human rights database was “inappropriate” and that it “would not cooperate in the process” on the implementation¹⁷. This position is inconsistent with the UK government’s policy commitment to the UN Guiding Principles on Business and Human Rights, as indicated by being the first state to implement them when it published its first National Action Plan on business and human rights in September 2013.¹⁸
32. Finally, the resolution is additional material evidence for the ICC prosecutor to consider in her ongoing preliminary examination into Israel’s actions in the occupied Palestinian territory. A significant aspect of her examination is on the issue of settlements. The Security Council’s clear reaffirmation of the illegality of settlements, plus the reference in operative paragraph 6 to a “call for accountability”, may factor into her decision-making when determining whether or not to open a full criminal investigation.
33. The legal value of resolution 2334 in the context of the serious and pervasive human rights impact of Israel’s illegal settlements and associated infrastructure on Palestinians living in the occupied Palestinian territory should not be understated. The safeguarding and promotion of Palestinian human rights, including the fundamental right to self-determination, is heavily dependent on the substance of resolution 2334 being fully observed and implemented by all relevant international actors.

Tareq Shrourou

¹⁷ See Supra Note 6

¹⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf