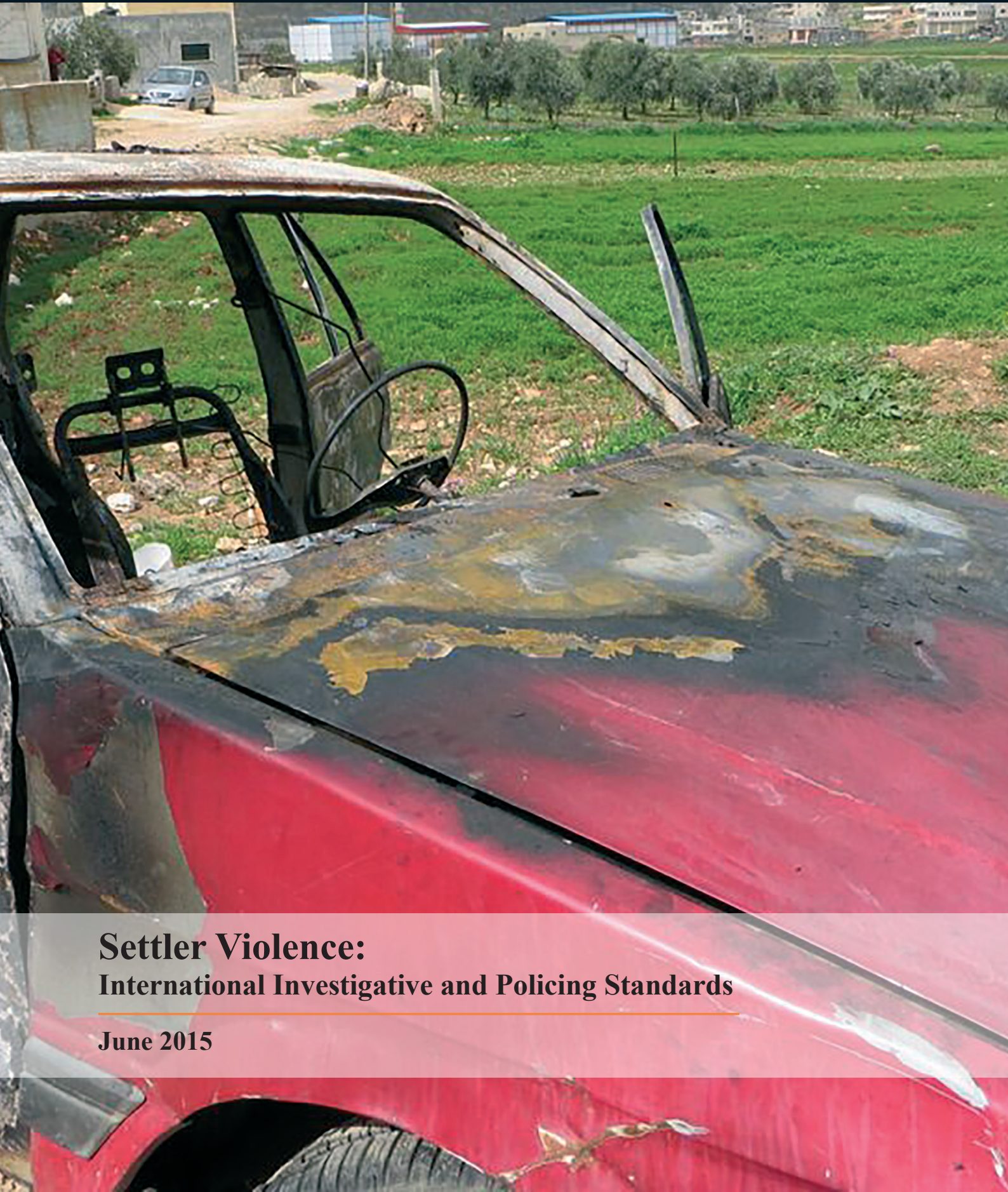


The logo of the Norwegian Refugee Council (NRC) is an orange square with the letters 'NRC' in white.

NORWEGIAN  
REFUGEE COUNCIL  
المجلس النرويجي للاجئين



## Settler Violence: International Investigative and Policing Standards

---

June 2015



NORWEGIAN  
REFUGEE COUNCIL  
المجلس النرويجي للاجئين

# **Settler Violence:**

## **International Investigative and Policing Standards**

---

**June 2015**

Researched by Ruth Hugo and David Beer  
Edited by Alon Margalit

Cover photo (front): A car that was set on fire by settlers, Nablus (Mathew Truscott, 2013).  
Cover photo (back): A settler with a gun, Yanoun (EAPPI, 2007).

The **Norwegian Refugee Council (NRC)** is an independent, international humanitarian non-governmental organisation that provides assistance, protection and durable solutions to refugees and internally displaced persons worldwide.

EUROPEAN COMMISSION



Humanitarian Aid and Civil Protection

**This report has been produced with the financial assistance of the European Union.** The views expressed herein should not be taken, in any way, to reflect the official opinion of the European Union, and the European Commission is not responsible for any use that may be made of the information it contains.



# Table of Contents

1. Introduction.....	4
2. Settler Violence and Deficiencies in Law Enforcement Response .....	6
3. The Duty to Investigate Settler Violence: Sources of Law .....	8
3.1 International Humanitarian Law .....	8
3.1.1 Hague Regulations .....	8
3.1.2 Fourth Geneva Convention .....	9
3.2 International Human Rights Law .....	11
3.2.1 Investigation: An Essential Element of Effective Remedy and Combat Against Impunity .....	12
3.2.2 A Duty to Investigate under Specific Conventions .....	13
3.3 The Protection Against Private Violence: An Obligation of Due Diligence .....	14
4. International Standards Relevant to Investigation and Prosecution of Settler Violence in the West Bank .....	17
4.1 International Standards of Investigation .....	17
Adequate .....	17
Ex officio .....	18
Prompt.....	19
Thorough.....	20
Impartial and Independent .....	21
Victim Participation and Public Scrutiny.....	21
4.2 Investigative Standards under International Humanitarian Law .....	23
4.3 International Standards of Prosecution .....	24
4.3.1 Duty to Prosecute .....	24
4.3.2 Duty to Punish.....	25
4.3.3 Essential Requirements for Prosecution.....	25
5. International Standards of Policing.....	27
5.1 Service-Oriented Policing Focused on Proactive Crime Prevention .....	27
5.2 Unbiased Policing .....	28
5.3 Crime Investigation Techniques .....	29
6. Conclusion .....	31
Annex 1: Checklist of Investigation Standards.....	32
Annex 2: Excerpts of Key Sources of Law Clarifying the Obligations of States in relation to Investigation and Prosecution of IHL and Human Rights Violations, including by Private Individuals .....	33
Treaty Law .....	33
Soft Law Principles and Other Guidance.....	34
Jurisprudence .....	36

# 1. Introduction

Israeli settler violence against Palestinians and their property in the West Bank, including in East Jerusalem, has continued to be a major source of tension, conflict and displacement for Palestinian communities since it was first documented in the 1980's.<sup>1</sup> Violent crimes continue to be on the rise, and include shooting incidents, physical and verbal assaults, trespassing, damage to homes, stealing livestock, burning olive trees, stone throwing, vandalization of churches and mosques, as well as various forms of harassment.<sup>2</sup> Whilst violence occurs in the West Bank on all sides, the prevalence of settler violence targeting Palestinian communities has reached extremely high levels. The vast majority of such crimes remain 'unsolved' despite the heavy military and policing presence of Israeli authorities in the West Bank. Conversely, the majority of crimes committed against settlers in the West Bank receive a much stronger investigative response, despite the fact that settlements remain unlawful under international law.

Palestinians affected by settler violence, as with all other victims of crime, have a right to prompt redress for the harm they have suffered. Under international law, acts or omissions by private persons, such as settlers, in violation of humanitarian law or human rights law, and usually also in breach of domestic criminal law, entail positive obligations on states to act with due diligence through the effective prevention, protection, investigation and prosecution with respect to these violations. In other words, whilst the state is not necessarily responsible for the acts of private individuals, it bears legal responsibility for the investigation of such acts. It may also be liable for the acts themselves if state actions have played a role in the facilitation of the crimes.

This Practitioner's Guide does not aim to report on the prevalence of settler violence, or to provide comment on any trends or patterns of such violence. Rather, it presents a reference tool for practitioners assisting victims of settler violence, and for other interested parties. The Guide focuses on the typical crimes committed in the context of settler violence attacks, such as damage to property, trespass and injury to person, and the standards owed for the state's response to such types of crimes.<sup>3</sup> It is intended to outline the standards under international law to which duty-bearers, such as Israeli authorities, should be held accountable when investigating, prosecuting and policing settler violence in the West Bank.

The Guide commences with an overview of the phenomena of settler violence. Following this introduction, Section 2 of the Guide provides details on the context of settler violence and the response by Israeli authorities. Sections 3-4 examine how both the duty to investigate and the duty to prosecute have been conceptualised in international humanitarian and human rights law. These sections include an overview of the key sources of international law prescribing standards of investigation and prosecution. In Section 5 relevant policing standards and practices, highlighted by international bodies, are discussed. These standards may assist in preventing settler violence, and when it occurs, in dealing with those incidents effectively.

States have a duty to take all reasonable measures with due diligence to prevent harm, even when the violations are perpetrated by private actors, and in this context to investigate complaints and other information regarding settler violence. Investigating violations of international humanitarian and human rights law is an integral part of guaranteeing an effective remedy to victims and combating impunity to the offenders. The duty to investigate and prosecute in appropriate cases also stems from the duty of an occupying power to secure the rights of protected persons living under occupation, and to maintain law and order in the occupied territory.

---

<sup>1</sup> Judith Karp, *The Investigation of Suspicions Against Israelis in Judea and Samaria (the West Bank)*, 1982 [in Hebrew].

<sup>2</sup> For example, UN Office for the Coordination of Humanitarian Affairs occupied Palestinian territory (OCHA-oPt), *Israeli Settler Violence and the Evacuation of Outposts*, November 2009, available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_settler\\_violence\\_fact\\_sheet\\_2009\\_11\\_15\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_settler_violence_fact_sheet_2009_11_15_english.pdf) (last visited 18 May 2014); The Palestine Centre (Educational Program of the Jerusalem Fund for Education and Community Development), *When Settlers Attack*, 2012, pp. i, 5, available at: <http://www.thejerusalemfund.org/ht/a/GetDocumentAction/i/32678> (last visited 18 May 2014); B'tselem, *Means of Expulsion: Violence, Harassment and Lawlessness Toward Palestinians in the Southern Hebron Hills*, July 2005; Yesh Din, *Law Enforcement on Israeli Civilians in the West Bank: Data Sheet*, 2014, available at: <http://www.yesh-din.org/infoitem.asp?infocaid=636>.

<sup>3</sup> Additional and particular standards may be owed by other types of crimes, such as murder or sexual violence.

The duty of investigation is a duty of means, not of a certain result. Nevertheless, investigations must be genuine and conducted in good faith. Allegations of human rights violations should be dealt with by the authorities' own initiative (*ex officio*), in a prompt, thorough and impartial manner, and while allowing a certain degree of victim participation and public scrutiny. When appropriate, the investigation should lead to a criminal action against those involved in the wrongdoing in accordance with domestic and international law.

With this in mind, the Guide is designed to assist practitioners in urging the Israeli authorities to investigate settler violence, ensuring that investigations were carried out properly, and challenging the authorities' decision-making when the law enforcement process did not meet the requirements of international law.



Settlers in the old city of Hebron escorted by Israeli soldiers (YAS, 2014).

## 2. Settler Violence and Deficiencies in Law Enforcement Response

The root cause of the settler violence phenomenon, widespread throughout the West Bank including East Jerusalem, can be found in Israel's decades-long policy of illegally facilitating the settling of its citizens inside the occupied Palestinian territory in violation of international law.<sup>4</sup> This practice has resulted in the progressive takeover of Palestinian land, natural resources and transportation routes and created two separate systems of rights and privileges, favouring Israeli citizens at the expense of over 2.5 million Palestinian residents of the West Bank.<sup>5</sup>

The phenomenon of Israeli settler violence has been, since the early 1980's, a key factor undermining the security and livelihoods of Palestinians in many areas throughout the West Bank. Violent acts committed by Israeli settlers include live shooting, physical assault, damage to homes, livestock, property and olive trees, trespassing, vandalism and damage to cars and community infrastructure, including schools. Stone throwing and arson are also prevalent methods of settler violence.<sup>6</sup>

The number of settler attacks resulting in Palestinian casualties and property damage continues at high levels with many of the violent acts being part of the so-called 'price tag' strategy.<sup>7</sup> This form of violence, which emerged during 2008,<sup>8</sup> entails the exertion of indiscriminate violence against Palestinian civilians (as well as against Israeli security forces). This often occurs in response to actions by Palestinians taken to protect their land or property, Palestinian actions against settlers, or following actions taken by Israeli authorities that are perceived as harming the settlement enterprise, such as rare attempts to evacuate settlement outposts.<sup>9</sup> As with other forms of settler violence, price tag attacks also include physical violence against Palestinians, blocking of roads, throwing stones at houses and cars, slashing of tyres, graffiti and other vandalization of churches, schools and mosques, incursions into Palestinians villages and land, torching fields, uprooting trees and other damage to property. Often a racial motive is associated with these attacks as racist anti-Arab or anti-Christian slogans are sprayed or shouted.<sup>10</sup>

Apart from the damage caused by settler violence to the physical integrity and property of Palestinians, a UN Fact-Finding Mission, appointed to examine the implications of settlements for the rights and living conditions of the Palestinian population in occupied Palestine, concluded that settler violence "gravely affects the right to the enjoyment of the highest attainable standard of physical and mental health". Depression, anxiety, symptomatic stress, mood disorder and behaviour problem, as well as post-traumatic stress, are some of the most common conditions found among victims of settler violence and reported by specialists. The feeling of injustice and impunity, typical recurrence of events and the anticipation of renewed abuses, especially on relatives and children, lead to the worsening of these conditions.<sup>11</sup> Settler violence not only intimidates and threatens Palestinian individuals living in

---

<sup>4</sup> See Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 1949 ('Fourth Geneva Convention'), art 49.

<sup>5</sup> UN OCHA-oPt, *Israeli Settler Violence in the West Bank*, November 2011, available at: [http://www.ochaopt.org/documents/ochaopt\\_atlas\\_settler\\_violence\\_december2011.pdf](http://www.ochaopt.org/documents/ochaopt_atlas_settler_violence_december2011.pdf) (last visited 18 May 2014).

<sup>6</sup> UN OCHA-oPt, *Israeli Settler Violence and the Evacuation of Outposts*, *supra*, note 2; The Palestine Centre, *supra*, note 2.

<sup>7</sup> UN OCHA-oPt, *Protection of Civilians Update*, weekly report 6-12, May 2014, p. 2 available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_protection\\_of\\_civilians\\_weekly\\_report\\_2014\\_5\\_15\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2014_5_15_english.pdf) (last visited 18 May 2014): 129 incidents of settler violence were reported so far in 2014 resulting in Palestinian casualties or property damage (399 in 2013); UN OCHA-oPt, *Israeli Settler Violence in the West Bank*, *supra*, note 5. An increase of settler violence by 32 percent in 2011 compared to 2010, and by over 144 percent compared to 2009; The Palestine Centre, *supra*, note 2: in the five year period from 2007 through 2011 there has been a 315 percent increase. Conversely, over the same 5-year period, there has been a 95 percent decrease in Palestinian violence in the West Bank.

<sup>8</sup> UN OCHA-oPt, *Israeli Settler Violence and the Evacuation of Outposts*, *supra*, note 2, p.1; The Palestine Centre, *supra*, note 2; B'tselem, *Background on Violence by Settlers*, updated 3 June 2012, available at: [http://www.btselem.org/settler\\_violence](http://www.btselem.org/settler_violence) (last visited 18 May 2014). Note that the latter source also considers settler attacks in response to Palestinian violence against settlers a part of the price tag strategy.

<sup>9</sup> 'Ya'alon: Settler Attacks on IDF Acts of Terror', *Jerusalem Post*, 10 April 2014. An outpost is a term used to describe Israeli housing settlements which are established in occupied Palestine while not being officially authorised by the Israeli government.

<sup>10</sup> Peace Now, 'Price Tag' Escalation Timeline: Jan 1, 2011 – Present, available at: <http://peacenow.org/entry.php?id=1077#U31Nak2KBjo> (last visited 22 May 2014).

<sup>11</sup> UN HRC, *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*, A/HRC/22/63, 7 February 2013, paras 56-57, available at:



proximity to settlements, but it can have a major psychological impact on the entire community. Repeated incidents of settler violence may therefore contribute to the displacement, either temporarily or permanently, of an entire community and cause major economic loss to its members' livelihood.

Depending on the factual circumstances, such forms of violence breach various Palestinians' rights, such as the right to physical integrity, to dignity, to property, to food, housing and adequate standard of living, and to education. As will be discussed below, under international law, an alleged violation of these rights requires an investigation. The failure to protect Palestinians and to prevent settler violence, including by investigating these allegations and prosecuting those involved, perpetuates this phenomenon.

The Karp report, a review led by the then Deputy Attorney General of Israel in 1982, examined 70 files of police investigating offences committed by Israeli civilians against Palestinians and their property. It was found that in only 21.4 percent of these cases the investigation was 'fruitful', i.e. leading to the transfer of the file to the prosecution authority with the recommendation that the suspects be indicted.<sup>12</sup> Similar reviews in 2006 and 2013 by the human rights organization Yesh Din found even lower 'success' rates – 10 and 8.5 percent respectively – in cases of settler violence investigated by the Israeli Police.<sup>13</sup> In June 2006, Israeli Police reported that it had so far indicted Israeli civilians in 14.5 percent of the cases opened in 2005 and in which Palestinians are the complainants.<sup>14</sup>

The 2006 analysis by Yesh Din revealed serious faults in all stages of the law enforcement process; a process that ought to suppress such offences and provide an effective remedy, including investigations resulting in the prosecution of suspects in appropriate cases. Files examined in the report showed that Israeli military forces who are present at the scene tend to ignore violent acts by settlers. Moreover, Palestinians face physical and bureaucratic difficulties when they attempt to file complaints. Above all, the investigation stage showed faults in the examination of evidence, failure to implement the required investigatory steps, and sometimes unwillingness to undertake even a cursory investigation.<sup>15</sup>

A 2013 analysis by Yesh Din shows that failures in the police investigation of settler violence persist in 84 percent of the cases examined. Deficiencies include the failure to locate and identify suspects, to collect or consolidate sufficient evidence to prosecute suspects who have been located, losing files and prematurely concluding that no offence was committed or that a suspect has no connection to the offence.<sup>16</sup> The analysis of a specific but vital subset of settler violence, namely violence that involves damage to Palestinians olive trees, reveals an even higher rate (94.7 percent) of files closed due to, what Yesh Din describes, investigative failures by the Israeli Police.<sup>17</sup> These findings were affirmed in a recent report by Yesh Din which reviewed a larger sample of investigation files.<sup>18</sup>

What may appear to be an attitude of indifference by Israeli soldiers towards settler violence, inadequate investigations and the low rate of indictments, all these in fact demonstrate a deeper lack of political will to address settler violence in a serious and assertive manner through taking appropriate enforcement measures. Such practices of under-enforcement are in violation of the investigation, prosecution and policing standards developed in international law. These standards form part of an effective remedy a state is required to grant victims of serious violations of international humanitarian law and human rights law. The relevant standards will be discussed in the following sections.

---

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf) (last visited 18 May 2014).

<sup>12</sup> See Yesh Din, *A Semblance of Law: Law Enforcement upon Israeli Civilians in the West Bank*, June 2006, p. 30 (quoting the Karp report), available at: <http://www.yesh-din.org/userfiles/file/Reports-English/SemblanceofLawfullreportEng.pdf> (last visited 18 May 2014).

<sup>13</sup> *Ibid*, p. 91: 7 out of 71 completed investigations resulted in an indictment; Yesh Din, *Law Enforcement on Israeli Civilians on the West Bank*, Data Sheet, July 2013, pp. 2-5 available at: <http://www.yesh-din.org/userfiles/file/datasheets/DataSheet%20July%202013%20-%20Law%20Enforcement%20-%20Eng.pdf> (last visited 18 May 2014); 70 out of 825 completed investigations resulted in an indictment.

<sup>14</sup> Yesh Din, *A Semblance of Law*, *supra*, note 12, p. 130: 43 indictments in 299 files regarding complaints filed by Palestinians.

<sup>15</sup> *Ibid*, p.19.

<sup>16</sup> Yesh Din, *Law Enforcement on Israeli Civilians on the West bank*, *supra*, note 13, pp. 2-5.

<sup>17</sup> Yesh Din, *Police investigation of Vandalization of Palestinian Trees in the West Bank*, Data Sheet, October 2013, available at: [http://www.yesh-din.org/userfiles/file/datasheets/data%20sheet%20oct2013/Yesh%20Din%20-%20Netunim%2010\\_13%20English.pdf](http://www.yesh-din.org/userfiles/file/datasheets/data%20sheet%20oct2013/Yesh%20Din%20-%20Netunim%2010_13%20English.pdf) (last visited 18 May 2014).

<sup>18</sup> Yesh Din, *Mock Enforcement*, May 2015.



### 3. The Duty to Investigate Settler Violence: Sources of Law

It is submitted that the duty to investigate settler violence, which constitutes a possible violation of humanitarian law and/or human rights law, is well-established under international law. The following sections will discuss key *alternative* sources of international law from which a duty to investigate settler violence can be inferred. The applicable source depends on the context, namely whether the violent behaviour amounts to a violation of specific rights and protections embodied in international humanitarian law or human rights law. It is important to note that the same set of facts may constitute a number of violations at the same time, and raise a duty to investigate under a number of sources of law.

International humanitarian law and human rights law regulate Israel's actions in occupied Palestine. As an occupying power, Israel is bound by the 1907 Hague Regulations concerning the Laws and Customs of War on Land ('Hague Regulations') and by the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Fourth Geneva Convention').<sup>19</sup> Israel must also comply with various obligations contained in the human rights treaties which it has signed and ratified, and with those obligations which are considered customary international law. This has been confirmed by the International Court of Justice and by human rights treaty bodies.<sup>20</sup>

#### 3.1 International Humanitarian Law

##### 3.1.1 Hague Regulations

The Hague Regulations embody rules of customary international law. As such, they are also binding on states which are not formally parties to the Hague Regulations, like Israel.<sup>21</sup> The International Court of Justice has endorsed the applicability of the Hague Regulations in the West Bank, and found that they constitute customary international law.<sup>22</sup> This has also been recognised by Israel's Supreme Court.<sup>23</sup>

According to Article 43 of the Hague Regulations, Israel, as the occupying power, carries the obligation to maintain public order in the occupied territory.<sup>24</sup> Legal experts emphasise that the responsibilities of the occupying power do not only entail minimum measures to prevent a breakdown in public order and civil life but also require more extensive measures to fulfil a variety of aspects of civil life, including the economic, social and cultural needs of the population.<sup>25</sup>

Dealing with settler violence is a policing task. It concerns primarily the occupant's duty to enforce law and order in the occupied territory and to suppress any criminal activity. In order to maintain law and order and fulfil the civil life needs of the Palestinian population, Israel is obliged to take certain positive actions.<sup>26</sup> This involves an obligation to prevent and halt settler violence, as well as to provide redress to its victims. In addition to investigating these incidents promptly and effectively, Israel's positive obligations may be met, for example, by developing programmes to address physical and mental health

---

<sup>19</sup> For the full text of the Hague Regulations and the Fourth Geneva Convention, see <http://www.icrc.org/ihl> (last visited 22 May 2014).

<sup>20</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, 9 July 2004, ICJ Reports 2004, paras 107-113; Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel*, CCPR/C/ISR/CO/4, November 2014, para 5.

<sup>21</sup> ICRC, *Introduction to Geneva Convention IV*, available at: <http://www.icrc.org/ihl.nsf/INTRO/195> (last visited 19 May 2014).

<sup>22</sup> ICJ, *supra*, note 20, paras 89, 124.

<sup>23</sup> For example, HCJ 606/78 *Ayyub v. Minister of Defence (Beth-El case)*, judgment of 15 March 1979).

<sup>24</sup> See also Article 64 of the Fourth Geneva Convention which is seen as a tool for interpreting Article 43 of the Hague Regulations and vice versa; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Challenge of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, 2009, p. 9; ICRC, *Occupation and Other Forms of Foreign Occupation*, Geneva, March 2012, pp. 56-58.

<sup>25</sup> ICRC, *Occupation*, *supra*, note 24, pp. 57, 59; Yutaka Arai-Takahashi, *supra*, note 24, pp. 96-97; David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel', *International Review of the Red Cross*, Vol. 94, 2012, pp. 218-219.

<sup>26</sup> Yutaka Arai-Takahashi, *supra*, note 24, pp. 129-135, 264-265 quoting Condorelli and Dinstein.

issues resulting from settler violence,<sup>27</sup> and if necessary, adopting legislation to protect the local population and to accommodate its needs.<sup>28</sup>

Importantly, investigating suspected crimes falls under what is considered the ‘law enforcement model’ under which the armed forces are operating in occupied territory, regardless of the nature of the security force tasked with this law enforcement role – whether it is the Israeli police or the military. The law enforcement model requires the authorities to adopt a policing approach to their actions, including to investigate crimes committed by, or against, persons within the state’s effective control. While the occupying power is usually represented in the occupied territory as a military command structure, it should be noted that criminal activity by Israeli citizens in the West Bank, including settler violence, may be investigated by the Israeli civilian police.<sup>29</sup> While Israel may allocate various governmental powers to various state organs, it remains responsible for any violation of international law committed by these organs.

Israel’s responsibility, under the Hague Regulations, to ensure public order and civil life in the occupied territory, covers also the investigation of suspected criminal activity by private individuals (not state-agents). Normally, the conduct of a private person or group of persons not acting on behalf of the state is not considered as an act of the state under international law.<sup>30</sup> Nonetheless, the state will still be responsible for its organs’ failure to investigate such wrongdoing by private persons (settlers).

The responsibility of the occupying power to ensure law and order in the occupied territory, in accordance with Article 43 of the Hague Regulations, is generally viewed as also being governed by human rights norms, regardless of whether they are considered to be complimentary standards or an integral part of international humanitarian law itself.<sup>31</sup> Relevant norms of human rights law governing the investigation and prosecution of settler violence will therefore be discussed in Section 3.2.

### 3.1.2 Fourth Geneva Convention

There is almost a universal consensus that the Fourth Geneva Convention is applicable in the West Bank. The Israeli government argues, under its so-called ‘missing reversioner’ theory, that the Convention does not apply *de iure* in occupied Palestine given that the territory was taken from Jordan which has not been recognised as the legitimate sovereign of the West Bank.<sup>32</sup> This position of non-applicability has been firmly rebutted by the International Court of Justice, the UN General Assembly and Security Council, the International Committee of the Red Cross and even by Israel’s own Supreme Court. All have determined that Israel’s actions in the West Bank, as well as the protections granted to the Palestinian population there, are subject to the law of occupation, including as embodied in the Fourth Geneva Convention.<sup>33</sup>

---

<sup>27</sup> UN HRC, *Report of the Independent International Fact-finding Mission (2013)*, *supra*, note 11, p. 13.

<sup>28</sup> Yutaka Arai-Takahashi, *supra*, note 24, pp. 100-101 citing Leurquin stating that in some circumstances, such as prolonged occupation, the occupant may even be obliged to enact legislation.

<sup>29</sup> UN HRC, *Report of the Independent International Fact-finding Mission (2013)*, *supra*, note 11, p. 13; Yesh Din, *A Semblance of Law*, *supra*, note 12, p. 132 (official IDF response to Yesh Din report).

<sup>30</sup> Unless, and to the extent, the state acknowledges the wrongful conduct and adopts it as its own, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2011), art 11.

<sup>31</sup> ICRC, *Occupation*, *supra*, note 24, p. 120; David Kretzmer, *Rethinking the Application of IHL in Non-international Armed Conflicts*, *Draft of paper for Minerva/ICRC Conference on Complementing IHL: Exploring the Need for Additional Norms to Govern Contemporary Conflict Situations*, Jerusalem, 1-3 June 2008, p. 14, available at: [http://law.huji.ac.il/upload/Kretzmer\\_rethinking\\_application\\_of\\_IHL.pdf](http://law.huji.ac.il/upload/Kretzmer_rethinking_application_of_IHL.pdf) (last visited 19 May 2014); David Kretzmer, ‘The law of Belligerent Occupation’, *supra*, note 25, p. 232; Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, *European Journal of International Law*, Vol. 16, no. 4, 2005, p. 665.

<sup>32</sup> Yutaka Arai-Takahashi, *supra*, note 24, p. 47: according to this controversial theory developed by Yehuda Blum, the absence of a ‘reversioner’ that acted as a legitimate sovereign (prior to occupation) to which the territory is to revert, would preclude obligations under the Geneva Conventions.

<sup>33</sup> ICJ, *Wall* advisory opinion, *supra*, note 20, paras 90-101. According to the International Court of Justice only part of the Fourth Geneva Convention may be currently relevant to the West Bank – given the protracted occupation of its territory, ICJ, *Ibid*, para 125: “Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3 [i.e. Articles 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77 and 143 GCIV], remain applicable in that occupied territory.” The ‘one year’ time limit laid down by Article 6 of the Fourth Geneva Convention had been, however, widely viewed by humanitarian law experts as having fallen into desuetude, see ICRC, *Occupation*, *supra*, note 24, p. 77; Vaïos Koutroulis, ‘The Application of International Humanitarian Law and International Human Rights in Situation of Prolonged Occupation: Only a Matter of Time?’,

## **General Protection**

According to Article 27 of the Fourth Geneva Convention, Israel must ensure that protected persons – Palestinians and all other persons who find themselves in the hands of an occupying power they are not nationals of<sup>34</sup> – are treated humanely, that their honour, family rights, religious convictions, manners and customs are respected, and that they are safeguarded against all acts of violence or threats of violence.<sup>35</sup> According to the ICRC Commentary this Article also requires Israel, the occupying power, to take all the precautions and measures in its power to prevent such acts and to assist victims in need. The Commentary further underlines the constitutional significance of these minimum core guarantees and designates them as absolute rights that cannot be abrogated – they are “valid in all circumstances and at all times”.<sup>36</sup> Thus, the duty to protect the local population living under occupation from acts of violence requires the occupying state to conduct an effective investigation of these acts when they occur. There is a clear link between investigation and protection. An effective investigation (and prosecution when appropriate) of instances of violence is very likely to identify the suspects and thus cease the abuse, as well as deterring others from committing, or threatening to commit, similar violent acts.

The Fourth Geneva Convention further determines that the occupying power is responsible for the treatment accorded to protected persons by its agents.<sup>37</sup> As already pointed out, when protected persons are mistreated by private individuals (not state-agents), the state is not automatically responsible for their private actions. However, it is responsible in the event it has failed to demonstrate due diligence in preventing acts contrary to the Convention and in identifying, arresting and prosecuting the persons involved.<sup>38</sup>

## **Grave Breaches**

Grave breaches constitute a category of violations of the Geneva Conventions considered so serious that states have agreed to enact domestic penal legislation in relation to these acts, search for suspects in the commission of these acts, and prosecute them or hand them over to another state for trial.<sup>39</sup> Allegations of grave breaches therefore trigger a responsibility to investigate the incident, and prosecute the suspects when appropriate.

Some forms of settler violence against Palestinians may amount to grave breaches under the Fourth Geneva Convention. The grave breaches category refers to behaviour against protected persons which constitutes, *inter alia*, murder, torture, inhuman treatment, including wilfully causing great suffering or serious injury to body or health, and the wilful extensive destruction of property, not justified by military necessity.<sup>40</sup>

Practitioners should assess whether settler violence could be considered a grave breach. For example, depending on the factual circumstances, a very serious physical assault may fall under torture, and in other cases settler violence may amount to inhumane treatment. An ICRC study points out that the

---

*International Review of the Red Cross*, Vol. 94, 2012, pp. 173-175. Koutoulis reiterates that Article 3(b) of the First Additional Protocol abolished this limit and calls for the application of all IHL rules until the end of the occupation. Israel has not ratified API but participated in the 1974-77 Diplomatic Conference where negotiators adopted Article 3 by consensus. For the Israeli Supreme Court's approach, see for example HCJ 2690/09 *Yesh Din v. Military Commander of the West Bank* (judgment of 23 October 2010) paras 6-7.

<sup>34</sup> Fourth Geneva Convention, art 4.

<sup>35</sup> See also UN SG, *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan: Report by the Secretary-General*, A/67/375, 18 September 2012, para 30, available at: <http://unispal.un.org/UNISPAL.NSF/0/A38CC9891ED4C23785257AAF005052A3> (last visited 18 May 2014).

<sup>36</sup> ICRC, *Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, Geneva, 1958, comment on Article 27 of the Fourth Geneva Convention.

<sup>37</sup> Fourth Geneva Convention, art 29.

<sup>38</sup> ICRC, *Commentary*, *supra*, note 36, p. 213 (Article 29).

<sup>39</sup> Fourth Geneva Convention, art 146.

<sup>40</sup> *Ibid*, art 147.



meaning of 'inhumane treatment' develops over time under the influence of changes in society.<sup>41</sup> The International Criminal Court (ICC) Statute considers grave breaches, including inhumane treatment, as war crimes within the jurisdiction of the court, as well as other acts of similar behaviour or gravity such as "committing outrages upon personal dignity".<sup>42</sup> The Elements of Crimes that were adopted by the ICC State Members in order to assist the Court in the interpretation of the crimes enumerated in the Statute defines 'inhumane treatment' as inflicting severe physical or mental pain or suffering upon one or more protected persons. Elements of the war crime of committing outrages upon personal dignity include, *inter alia*, forms of treatment that are severely humiliating, degrading or which otherwise violates the dignity of one or more protected persons.<sup>43</sup>

As for other – non-grave – breaches of the Geneva Conventions, states shall take measures necessary to suppress them. However, the exact response and nature of the sanction adopted in domestic law have been left open to the concerned state to decide for itself.<sup>44</sup> It has been submitted that the obligation to suppress violations of international humanitarian law – other than grave breaches – also entails a duty to investigate and prosecute in appropriate circumstances.<sup>45</sup>

## 3.2 International Human Rights Law

Israel is a party to six of the nine core international human rights treaties. It ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) on 3 January 1979, and the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) on 3 October 1991.<sup>46</sup>

Numerous international bodies, including the International Court of Justice and the treaty bodies that monitor implementation of these treaties, have determined that Israel's respective obligations under those treaties exist both inside Israel's territory and in relation to persons under its effective control, including in occupied Palestine.<sup>47</sup> Whilst the Israeli government does not accept this position, Israel's judiciary takes a more ambiguous view. The Israeli Supreme Court has refrained from ruling on the formal applicability of human rights treaties in the West Bank, but in many judgments relating to the occupied Palestinian territory delivered in recent years it has relied on provisions of these treaties. In most cases it has justified this position by stating that the norms cited are also part of the law of occupation or of Israeli law that binds the authorities.<sup>48</sup>

Various forms of settler violence constitute possible infringements of human rights law. Palestinians are exposed to settler violence that takes the form of, for example, physical attacks thus violating their right to life and physical integrity (article 6 of the ICCPR); attacks against homes and agricultural lands, as

<sup>41</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Study on Customary International Humanitarian Law*, Vol. I (Rules), Cambridge University Press, 2005, pp. 306-308.

<sup>42</sup> ICC Statute, art 8.

<sup>43</sup> ICC, *Elements of Crimes*, 2011, pp. 14, 27 available at: <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> (last visited 23 May 2014).

<sup>44</sup> Fourth Geneva Convention, art 146; Marko Divac Oberg, 'The Absorption of Grave Breaches in War Crimes Law', *International Review of the Red Cross*, Vol. 91, March 2009, pp. 63-66.

<sup>45</sup> Michael Schmitt, 'Investigating Violations of International Law in Armed Conflict', *Harvard National Security Journal*, Vol. 2, 2011, pp. 37-39, 55-56; Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts', *Yearbook of International Humanitarian Law*, Vol. 14, 2011, pp. 41-47.

<sup>46</sup> UN OHCHR, *Status of Ratifications of UN Human Rights Treaties* available at: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited 19 May 2014).

<sup>47</sup> ICJ, *Wall* advisory opinion, *supra*, note 20, paras 107-113; Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel*, CCPR/C/ISR/CO/4, November 2014, para 5; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel*, CERD/C/ISR/CO/14-16, March 2012, para 10; UN HRC, *Human Rights Situation in Palestine and other Occupied Arab Territories: The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly due to the Recent Israeli Military Attacks Against the Occupied Gaza Strip*, A/HRC/12/37, 10 August 2009, para 5 available at: <http://unispal.un.org/UNISPAL.NSF/0/71266F7CD47BBDEA.85257615004D8635> (last visited 19 May 2014); see also Human Rights Watch, *Forget About him, He is not Here*, 2012, p. 94, available at: <http://www.hrw.org/reports/2012/02/05/forget-about-him-he-s-not-here-0> (last visited 19 May 2014).

<sup>48</sup> Kretzmer, 'The Law of Belligerent Occupation', *supra*, note 25, p. 211.

well as the burning and destruction of olive trees and farmlands thus violating their right to adequate standard of living including adequate food and housing (article 11 of the ICESCR), intimidation and harassment, including of children on their way to schools, thus violating their rights to privacy and dignity and to education (article 13 of the ICESCR and articles 10 and 17 of the ICCPR).

As the occupying power, Israel carries the obligation to protect Palestinians subject to its jurisdiction from violations of their human rights by third parties (e.g. settlers). Under human rights law, Israel must provide an effective remedy to persons whose rights have been violated by state-agents, as well as by private individuals.<sup>49</sup>

The legal grounds which establish a duty to investigate human rights violations are further elaborated below.

### 3.2.1 Investigation: An Essential Element of Effective Remedy and Combat Against Impunity

Investigating the incident giving rise to a violation of a human right is normally required in order to obtain a remedy for the harm caused. It is also a procedural obligation which serves as a means of securing human rights. When no action is taken by the authorities, for example, when settler violence is not properly investigated and prosecuted, this may lead to a climate of impunity, thus encouraging further instances of violence.

The European Court of Human Rights has linked the investigation duty with the general duty of High Contracting Parties to secure the Convention rights to all persons within their jurisdiction,<sup>50</sup> and to provide an effective remedy in case these rights were breached.<sup>51</sup> In numerous cases, the Court opined that an investigation is absolutely necessary in order to combat impunity in cases of serious human rights violations, such as violations of the right to life, the prohibition on torture, inhuman or degrading treatment or punishment, slavery and forced labour, the right to liberty and security, as well as serious violations of the right to privacy and family life and the freedom of expression.<sup>52</sup>

The Inter-American Court of Human Rights has also imposed a positive obligation on states to investigate (and prosecute) human rights violations under the general obligation to respect the rights

---

<sup>49</sup> Human Rights Committee, *General Comment No.31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add 13, 26 May 2004, para 8.

<sup>50</sup> European Convention on Human Rights, art 1.

<sup>51</sup> Robin White and Clare Overy (Jacobs), *The European Convention of Human Rights*, 5th edition, Oxford University Press, 2010, p. 176; Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, 2004, pps. 213 -220; Fernando Basch, "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and its Dangers", *American University International Law Review*, Vol. 23, 2007, p. 223. Some of these commentators have observed that the Strasbourg Court has not been entirely consistent in spelling out the source of the obligation to conduct an effective investigation by alternatively placing it under the effective remedy guarantee (Article 13 of the ECHR) and/or fair trial guarantees (Article 6 of the ECHR) and/or an (implied) procedural limb of other substantive convention articles relevant to the facts of the case. It is not completely clear under what circumstances the Court is willing to examine whether there has been an effective investigation. What appears to be decisive is the question whether the lack of an effective investigation undermined the possibility of the complainant to obtain a domestic remedy, for example, compensation.

<sup>52</sup> Council of Europe, *Eradicating Impunity for Serious Human Rights Violations*, Guidelines adopted by the Committee of Ministers (and reference texts), 30 March 2011, p. 10, available <https://wcd.coe.int/ViewDoc.jsp?id=1769177> and [http://www.coe.int/t/dghl/standardsetting/hrpolicy/dh-i/Guidelines\\_Impunity\\_Reference-texts\\_EN\\_final.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/dh-i/Guidelines_Impunity_Reference-texts_EN_final.pdf) (last visited on 18 May 2014); See also, for example, ECtHR, *McCann & others v. UK*, Judgment, Application No. 18984/91, Judgment, 27 September 1995, paras 161-162; Mowbray, *The Development of Positive Obligations*, *supra*, note 51, pp. 29, 61; Alastair Mowbray, 'Duties of Investigation under the European Convention on Human Rights', *ICLQ International and Comparative Law Quarterly*, Volume 51, April 2002, p. 437; Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right the Life or an Onerous Burden on a State?', *European Journal of International Law*, Vol. 21, 2010, p. 705. See also CCPR, *General Comment No. 6: Article 6 (Right to life)*, HRI/GEN/1/Rev.9 (Vol. I), paras 3-4; CCPR, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, HRI/GEN/1/Rev.9 (Vol. I), para 14. Both comments available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fGEN%2f1%2fRev.9%20\(Vol.%20I\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fGEN%2f1%2fRev.9%20(Vol.%20I)&Lang=en) (last visited 15 May 2014).

and freedoms embodied in the American Convention on Human Rights, and under the right to judicial protection and “effective recourse” in the event these rights are violated.<sup>53</sup>

The Human Rights Committee, responsible for monitoring the implementation of the ICCPR by its State Parties, views the investigation of human rights violations as an essential element of the right to an effective remedy following human rights violations. In its General Comment 31, the Committee points out that a failure by a State Party to ensure respect for rights embodied in the Covenant and an effective remedy to any person whose rights were violated – including a failure to investigate allegations of such violations or to bring to justice those responsible – could in and of itself give rise to a separate breach of the Covenant. In this case the concerned State Party will be held liable for “permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress harm caused by such acts by private person or entities”.<sup>54</sup>

Similarly, the duty to investigate has been elaborated in soft law and considered part of the general obligation to ensure respect for specific human rights and to provide an effective remedy in case those rights were violated. Key instruments adopted by the UN General Assembly firmly place an investigative obligation in the context of a right to an effective remedy and of the fight to end impunity. Prominent examples are the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law.<sup>55</sup> These principles articulate clear obligations on states to investigate and prosecute gross violations of humanitarian and human rights law. They consider investigations as part of the process of redress. For example, an investigation is required in order to pay compensation, to secure cessation of an ongoing violation and to prevent future violations.

### 3.2.2 A Duty to Investigate under Specific Conventions

It should be noted that a duty to investigate may also arise under international instruments that protect specific human rights such as the Convention on the Elimination of all Forms of Racial Discrimination. It is arguable that on many occasions settler violence constitutes racial discrimination given that it is often motivated by a racial or discriminatory reason, and directed against a certain ethnic group – the Palestinian population. It is also based on the dissemination of ideological ideas based on racial superiority or hatred, and can be seen as incitement to racial discrimination – these acts are prohibited by the Convention.<sup>56</sup>

The Committee on the Elimination of Racial Discrimination considers that a duty to investigate racial discrimination is implied within the Convention which imposes a positive obligation on State Parties to protect from, and eradicate, racial discrimination and to provide an effective remedy in case of a violation.<sup>57</sup> It was also argued that an investigative duty is implied in the Convention on the Elimination of All Forms of Discrimination against Women and within the overarching due diligence obligation of States Parties to prevent, protect and redress violence against women.<sup>58</sup>

---

<sup>53</sup> American Convention on Human Rights, arts 1, 25.

<sup>54</sup> Human Rights Committee, *supra*, note 49, paras 8, 15.

<sup>55</sup> UN Commission on Human Rights, *Impunity Report of the Independent Expert to Update the Set of Principles to Combat Impunity (Addendum Updated set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity)*, E/CN.4/2005/102/Add.1, 8 February 2005, principles 1 and 19 available at: [http://www.impunitywatch.org/docs/UN\\_Updated\\_Principles\\_to\\_Combat\\_Impunity.pdf](http://www.impunitywatch.org/docs/UN_Updated_Principles_to_Combat_Impunity.pdf) (last visited 22 May 2014); UN GA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Annex to Resolution A/RES/60/147, adopted on 16 December 2005, principle 3(b)-(c).

<sup>56</sup> Convention on the Elimination of all Forms of Racial Discrimination, art 4.

<sup>57</sup> *Ibid*, arts 2,4, 6; CERD, *Mohammed Hasan Gelle v. Denmark*, Communication No. 34/2004, CERD/C/68/D/34/2004, 6 March 2006, para 73 available at: <http://www1.umn.edu/humanrts/country/decisions/34-2004.html> (last visited 22 May 2014).

<sup>58</sup> CEDAW, *General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations*, CEDAW/C/GC/30, 18 October 2013, para 17(a); CEDAW, *General Recommendation No 19: Violence Against Women*, 1992, paras 9, 24(a) available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (last visited 19 May 2014); UN HRC, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, A/HRC/23/49, 14 May 2013, para 14 available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A\\_HRC\\_23\\_49\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A_HRC_23_49_English.pdf) (last visited 18 May 2014); UN HRC, *15 Years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (1994–2009): A Critical Review*, A/HRC/11/6/Add.5,



A failure to investigate settler violence – while similar cases where the victims are Israelis, whether the offender is Israeli or Palestinian, are investigated properly on a regular basis – may constitute a separate violation by Israel of these Conventions, as well as of the principles of equal treatment and equal protection of the law.<sup>59</sup> Further, the UN Human Rights Council has confirmed Israel's obligation under international human rights law to protect Palestinians from violence by private individuals, and to investigate and punish acts of violence through the application of criminal law, without discrimination.<sup>60</sup> A Fact-Finding Mission appointed by the Council observed in its 2009 report that "insofar as the acquiescence of the security forces [in incidents of violence] only occurs in respect of violence against Palestinians by settlers, and not vice-versa, there is a strong argument that the behaviour of the security forces is in breach of the obligations of Israel to not discriminate on the basis of national origin under the International Covenant on Civil and Political Rights (article 26)".<sup>61</sup>

Interestingly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly enshrines a duty to investigate. It requires that a "State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".<sup>62</sup> The Istanbul Protocol, a manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, further elaborates some essential principles of this investigative duty.<sup>63</sup> It should be noted that the Convention applies only when torture or other cruel, inhuman or degrading treatment were carried out following the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>64</sup> A UN Fact-Finding Commission has concluded in this context that in some instances of settler violence, "evidence of the acquiescence of the security forces in this violence could amount to a violation of the relevant obligations relating to cruel, inhuman or degrading treatment".<sup>65</sup>

### 3.3 The Protection Against Private Violence: An Obligation of Due Diligence

As noted, as part of the positive obligation to protect those within its territory or subject to its jurisdiction, a state must prevent human rights violations, and investigate, punish and ensure redress when the violations were committed by third parties, including by private individuals.<sup>66</sup> However, the obligation imposed on states to protect against abuses by private persons or non-state actors is not absolute. A state cannot be expected to exercise the same degree of control over private persons as it does over its own agents. State Parties to human rights treaties are required to take *reasonable steps* or to exercise *due diligence* in preventing, deterring, investigating, and punishing violations by private individuals and entities.

The Inter-American Court of Human Rights has played a pioneering role in developing these positive obligations, including the duty to restore the right violated and to provide compensation.<sup>67</sup> In its seminal

---

27 May 2009, para 66 available at: <http://unispal.un.org/UNISPAL.NSF/0/AFFCA1CF0A7FF108852575EF00654A8E> (last visited 18 May 2014).

<sup>59</sup> Convention on the Elimination of all Forms of Racial Discrimination, art 5; ICCPR, art 26.

<sup>60</sup> UN HRC, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 2009, para 1413.

<sup>61</sup> *Ibid*, para 1416.

<sup>62</sup> CAT, art 12.

<sup>63</sup> OHCHR, *The Istanbul Protocol - Manual (2004) and Principles (1999) on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf> (last visited 22 May 2014).

<sup>64</sup> CAT, arts 1, 16.

<sup>65</sup> UN HRC, *Report of the United Nations Fact-Finding Mission*, *supra*, note 60, para 1415.

<sup>66</sup> Human Rights Committee, *supra*, note 49, para 8; OHCHR, *International Legal Protection of Human Rights in Armed Conflict*, 2011, p. 17 available at: [http://www.ohchr.org/Documents/Publications/HR\\_in\\_armed\\_conflict.pdf](http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf) (last visited 22 May 2014); Olivier De Schutter, *International Human Rights Law*, Cambridge University Press, 2010, pp. 365, 384; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, USA Kindle Edition, 2013, p. 42, para 1.110; Robyn Emerton (ed), *International Women's Rights Cases*, Cavendish Publishing, 2007, p. xvi; Andrew Clapham, 'The Human Rights Obligations of non-State Actors in Conflict Situations', *International Review of the Red Cross*, Vol. 88, September 2006.

<sup>67</sup> Amy Dwyer, 'The Inter-American Court of Human Rights: Towards Establishing an Effective Regional Contentious Jurisdiction', *Boston College International and Comparative Law Review*, Vol. 13, January 1990, p. 127; Brooke Stedman,

*Velásquez Rodríguez* case (1988) the Court ruled that an "illegal act which violates human rights and which is initially not directly imputable to a state – for example, because it is the act of a private person or because the person responsible has not been identified – can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention".<sup>68</sup> In order to ensure the full exercise of human rights, the concerned state bears "a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".<sup>69</sup> Due diligence requires that when enforcement authorities know that an individual is at risk of harm, they are expected to review that risk and determine whether they have additional obligations related to that risk. These obligations include a prompt investigation and, in appropriate cases, arresting the alleged perpetrator if there is "probable cause of a violation".<sup>70</sup>

In 1990 the Human Rights Committee published its views in the *Delgado Paez* case, interpreting the right to liberty and security (article 9 of the ICCPR) to mean that States Parties have an obligation to take reasonable and appropriate measures to protect individuals from threats to the life of persons under their jurisdiction, including threats from private actors.<sup>71</sup> The Committee confirmed this approach in 2004 when commenting that "there may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".<sup>72</sup>

Similarly, the Committee Against Torture made it clear that states bear international responsibility and its officials should be considered as authors, complicit or otherwise personally responsible under the Convention for consenting to or acquiescing in impermissible acts "where states know or have reasonable grounds to believe that acts of torture or ill- treatment are being committed by non-state officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-state officials or private actors".<sup>73</sup>

The European Court of Human Rights has also affirmed the Contracting Parties' obligation to prevent and investigate human rights violations by private individuals. The Court developed a clear obligation of due diligence in the case of *Osman v. UK* (1998) in which it held that states have a duty to provide individuals with suitable measures of protection against immediate threats from private persons. An effective investigation of such threats is considered a preventative measure against further harm.<sup>74</sup> The central question in the *Osman* case was whether the police could have prevented one set of crimes (murders), given that they occurred in the midst of ongoing police investigations into another set of crimes (graffiti, stalking, threats) committed by the same perpetrator. The Court had to assess whether the efficiency and quality of police actions, including the investigation of crimes that occurred previously, impacted on the protection that the victims received. The Court clarified that the state's failure does not have to amount to gross negligence or wilful disregard to protect life. It is sufficient to establish that the state "knew or ought to have known the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a private individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".<sup>75</sup>

---

'The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens', *Utrecht Journal of International and European Law*, 29 (77), 2013, p. 8.

<sup>68</sup> Inter-American Court of Human Rights (IACtHR), *Velazquez Rodríguez v. Honduras*, Judgment, 29 July 1988, paras 172.

<sup>69</sup> *Ibid*, paras 167, 172, 174.

<sup>70</sup> IACHR, *Jessica Lenahan (Gonzales) v. USA*, Case 12.626, Report no. 80/11, 21 July 2011, paras 125, 141, 147, 160.

<sup>71</sup> Human Rights Committee, *William Eduardo Delgado Paez v. Colombia*, Communication 195/1985, 12 July 1990, CCPR/C/39/D/195/1985 (1990), paras 5.5-5.6.

<sup>72</sup> Human Rights Committee, *supra*, note 49, para 8.

<sup>73</sup> CAT, *General Comment No.2 Implementation of Article 2 by State Parties*, CAT/C/GC/2/CRP.1/Rev.4, 25 November 2007, para 18, available at: [http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf) (last visited 18 May 2014).

<sup>74</sup> ECtHR, *Akkoc v. Turkey*, Judgment, Application No 22947/93 and 22948/93, 10 October 2000, paras 81-82; ECtHR, *Kaya v. Turkey*, Judgment, Application No 158/1996/777/978, 19 February 1998.

<sup>75</sup> ECtHR, *Osman v. UK*, Judgment, Application No 87/1997/871/1083, 28 October 1998, para 116.

The European Court further ruled, however, that these protection obligations should not unduly burden the authorities. States should have some flexibility in making operational choices in terms of priorities and resources. In addition, protection obligations are also to be balanced with the due process rights of offenders.<sup>76</sup> It should be noted that other human rights bodies have chosen, in comparison to the European Court of Human Rights, to emphasise victim rights. For example, the Committee on the Elimination of Violence Against Women expressed the view that this balance should tilt in favour of victims, stating that while an arrest warrant may be invasive *vis-à-vis* the alleged perpetrator, the "rights of the perpetrator cannot supersede women's human rights to life and to physical and mental integrity".<sup>77</sup>



Olive tree cut down by settlers, Burin village (PU-AMI, 2015).

---

<sup>76</sup> *Ibid*, paras 115-116.

<sup>77</sup> CEDAW, *A.T. v. Hungary*, Communication 2/2003, CEDAW/C/36/D/2/2003, 26 January 2005, para 9.3 available at: <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf> (last visited 19 May 2014); CEDAW, *Yildirim v. Austria*, Communication 6/2005, CEDAW/C/39/D/6/2005, 1 October 2007, para 12.1.5, available at: <http://www.bka.gv.at/DocView.axd?CobId=29081> (last visited 19 May 2014).



## 4. International Standards Relevant to Investigation and Prosecution of Settler Violence in the West Bank

Based on the above-mentioned treaty provisions, key requirements for the investigation and prosecution of human rights violations have been set out in the jurisprudence of regional human rights bodies. The standards developed corroborate or elaborate the scope of the state's international obligations. This jurisprudence will be examined in this part of the Guide, together with international instruments that are non-legally binding (soft law) but do expand on the content of these obligations and on what is considered good practice with respect to their implementation.

### 4.1 International Standards of Investigation

A review of international human rights law points towards firmly-established minimum requirements, or standards, that must be complied with when conducting investigations into alleged human rights violations. States have a general obligation to investigate human rights violations promptly, at their own initiative (*ex officio*), thoroughly, through independent and impartial bodies and while allowing a certain degree of participation from victims and their families, and of the general public. At the same time, the European Court of Human Rights cautions that the nature and degree of scrutiny in relation to investigations depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria that the state must adhere to.<sup>78</sup>

The following guidelines adopted by the Council of Europe summarise relevant jurisprudence of the European Court on the issue of investigations:

#### Adequate

The investigation must be capable of leading to the identification and punishment of those responsible. This does not create an obligation on states to ensure that the investigation leads to a particular result, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.<sup>79</sup>

This requirement pertains to the purpose of an investigation and the steps taken in pursuing that aim. The investigating authorities must demonstrate that they genuinely and seriously sought to determine the nature and circumstances of the alleged acts, and to establish the identity of any person who might have been involved.<sup>80</sup> The duty to investigate is a means obligation, not a results obligation. An investigation does not need to necessarily lead to prosecution or punishment. Nevertheless, regional human rights bodies have repeatedly ruled that an investigation is not a formality. Duty-bearers should take reasonable steps available to them to secure evidence and use all available means to conduct a serious and effective investigation aimed at uncovering the facts.<sup>81</sup>

The duty to investigate allegations of human rights violations is a procedural obligation. It is examined separately from the substantive right that has been allegedly breached. Hence, an inadequate investigation of complaints regarding human rights violations can result in an independent breach of a

<sup>78</sup> ECtHR, *Velikova v. Bulgaria*, Judgment, Application no 41488/98, 18 May 2000, para 80.

<sup>79</sup> Council of Europe, *supra*, note 52, p. 12; ECtHR, *Ramsahai and others v. the Netherlands*, Judgment, Application No 52391/99, 15 May 2007, para 324.

<sup>80</sup> CAT, *Hajrizi Dzemil et al. v. Yugoslavia*, Communication No. 161/2000, 21 November 2002, CAT/C/29/D/161/2000 (2002), para 9.4 available at: <http://www1.umn.edu/humanrts/cat/decisions/161-2000.html> (last visited 15 May 2014).

<sup>81</sup> Council of Europe, *supra*, note 52, p. 12; ECtHR, *Shanaghan v. UK*, Application No 37715/97, Judgment, 4 May 2001; ECtHR, *Brecknell v. UK*, Judgment, Application no 32457/04, 27 November 2007, para 66; IACtHR, *González v. Mexico (Cotton Fields case)*, 16 November 2009, para 289; IACtHR, *Myrle Mack-Chang v. Guatemala*, 2003, para 4; IACtHR, *Velazquez Rodríguez v. Honduras*, *supra*, note 68, para 177.

protected right even when the allegation itself was not substantiated.<sup>82</sup> Further, deficiencies in the investigation can be found even when the offender was successfully prosecuted.<sup>83</sup>

## Ex officio

Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, they must commence an investigation at their own initiative. The fact that the victim wishes not to lodge an official complaint, later withdraws such a complaint or decides to discontinue the proceedings, does not absolve the authorities from their obligation to carry out an effective investigation when there are reasons to believe that a serious violation has occurred.<sup>84</sup>

Under international law, the duty to investigate arises as soon as enforcement authorities are aware of the alleged violation. Submitting a complaint is only one of a number of different vehicles to bring a crime to the attention of law enforcers. State action is thus not dependent on the formal lodgement of a complaint by the victim.

In some cases, police may make the receipt of a complaint dependent on the submission of additional documentation which is costly and hard to obtain. However, when the police have been made aware of the violation, they should continue investigating. The absence or withdrawal of a complaint should have no bearing on the actions of law enforcers who are obliged to investigate if the case pertains to a serious human rights violation.

In this regard, the UN Committee on the Elimination of Racial Discrimination recommends that states should take the necessary steps to ensure that the police have ‘an adequate and accessible presence’ in the neighbourhoods, regions, collective facilities, camps or centres where the persons who are discriminated against and other vulnerable groups exposed to exclusion are present, so that complaints from such persons can be expeditiously received.<sup>85</sup> International police standards require that the police services are accessible to the public ‘where and when needed’.<sup>86</sup>

The UN Committee Against Torture has re-affirmed that the authorities have the obligation to proceed to an investigation *ex officio*, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed, and whatever the origin of the suspicion.<sup>87</sup> The Committee furthermore clarified that the right to have a complaint of torture or ill-treatment promptly and impartially examined<sup>88</sup> “does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence”. The Committee deems that it is “enough for the victim simply to bring the facts to the attention of an authority of the state for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated”.<sup>89</sup>

---

<sup>82</sup> CERD, *Dragan Durmic v. Serbia and Montenegro*, Communication No. 29/2003, CERD/C/68/D/29/2003, 8 March 2006, para 9.6 available at: [http://www.bayefsky.com/pdf/serbia\\_t5\\_cerd\\_29\\_2003.pdf](http://www.bayefsky.com/pdf/serbia_t5_cerd_29_2003.pdf) (last visited 19 May 2014).

<sup>83</sup> CEDAW, *Yildirim*, *supra*, note 77, para 12.1.6; CEDAW, *Goecke v. Austria*, Communication 5/2005, CEDAW/C/39/d/5/2005, 6 August 2007, para 12.1.6, available at: [http://www.bayefsky.com/pdf/austria\\_cedaw\\_t5\\_5\\_2005.pdf](http://www.bayefsky.com/pdf/austria_cedaw_t5_5_2005.pdf) (last visited 22 May 2014).

<sup>84</sup> Council of Europe, *supra*, note 52, pp. 47- 48; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment, Applications No 57947/00, 57948/00 and 57949/00, 24 February 2005, para 64; ECtHR, *Kelly v. UK*, Judgment, Application 30055/96, 4 May 2001, para. 94; ECtHR, *İlhan v. Turkey*, Judgment, Application 22277/93, 27 June 2000, para 63; ECtHR, *Ergi v. Turkey*, Application no 66/1997/850/1057, 28 July 1998, para 82.

<sup>85</sup> CERD, *General Recommendation No. 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, para 10, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f60%2f18\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f60%2f18(SUPP)&Lang=en) (last visited on 19 May 2014).

<sup>86</sup> Organization for Security and Cooperation in Europe (OSCE), *International Police Standards, Guidebook on Democratic Policing*, Senior Police Advisor to the OSCE Secretary General, 2008, paras 95-96, available at: <http://www.osce.org/spmu/23804?download=true> (last visited on 19 May 2014).

<sup>87</sup> CAT, art 12.

<sup>88</sup> CAT, art 13.

<sup>89</sup> CAT, *Dhaou Belgacem Thabti v. Tunisia*, Communication No. 187/2001, CAT/C/31/D/187/2001, 14 November 2003, paras 4, 10.6, available at: <http://www1.umn.edu/humanrts/cat/decisions/tunisia187-2001.html> (last visited 23 May 2014); CAT, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, 14 May 1998, CAT/C/20/D/59/1996, paras 8.2, 8.6, available at: <http://www1.umn.edu/humanrts/cat/decisions/59-1996.html> (last visited 15 May 2014).

In this context, the Human Rights Committee has repeatedly noted that in torture and ill-treatment cases the burden of proof cannot rest alone on the victim, given that the victim and the state do not always have equal access to evidence.<sup>90</sup> This vulnerability or ‘inequality in arms’ factor would also apply to settler violence in the West Bank. For example, Israeli police have better access to witnesses from the Israeli military who may have been present during, or shortly after, the alleged ill-treatment by settlers.

The requirement on a law enforcement agency to investigate violations at its own initiative extends to the development of a comprehensive investigation strategy. The state is required also to explore underlying motives of a violation and to pursue all lines of inquiry, including those that may reveal systematic patterns of a violation. When there is an indication of a racist motivation behind an act of violence, the onus is on the state to fully investigate these motives, instead of waiting for victims to pursue them, for example, through civil proceedings where they carry the burden of proof.<sup>91</sup> Investigating with due diligence means taking into account also what happened in similar criminal offences and identifying whether or not there is some type of connection between these crimes. This should be carried out *ex officio*, without the victims or their next of kin being responsible for taking the lead.<sup>92</sup> In the context of settler violence, Israeli police are required to examine whether incidents of settler violence have the same pattern, perpetrators, racial (anti-Arab) motivation and may be part of a more general planned strategy.

## Prompt

The investigation must be commenced with sufficient promptness in order to obtain the best possible amount and quality of evidence available. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities may generally be regarded as essential in maintaining public confidence in the observance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.<sup>93</sup>

The entire investigation must be conducted with reasonable expeditiousness. Complaints have to be recorded immediately so that the investigation can be pursued without delay.<sup>94</sup> Even when an investigation is launched immediately after a violation occurred, it will fall short of this standard if it subsequently comes to an unexplained or unjustified standstill for lengthy periods of time.<sup>95</sup> A backlog of cases and understaffing cannot be invoked as an excuse for tardiness or protracted investigations. States are expected to increase or re-direct investigative resources to ensure that prompt inquiries are undertaken.<sup>96</sup> The Istanbul Protocol requires that investigators of torture and ill-treatment allegations have at their disposal “all the necessary budgetary and technical resources for an effective investigation”.<sup>97</sup>

<sup>90</sup> Human Rights Committee, *Katsaris v. Greece*, Communication No. 1558/2007, CCPR/C/105/D/1558/2007, 30 August 2012, para. 10.4; *Olmedo v. Paraguay*, Communication 1828/2008, CCCR/C/104/D/1828/2, 26 April 2012, para 7.5; *Bleier v. Uruguay*, Communication No. 30/1978, 29 March 1982, para 13.30.

<sup>91</sup> CERD, *Dawas and Shava v. Denmark*. Communication 46/2009, CERD/C/80/D/46/2009, 2 April 2012, para 7.5, available at: [http://www2.ohchr.org/english/bodies/cerd/docs/jurisprudence/CERD-C-80-D-46-2009\\_en.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/jurisprudence/CERD-C-80-D-46-2009_en.pdf) (last visited 23 May 2014); Council of Europe, *supra*, note 52, pp. 42-43.

<sup>92</sup> IACtHR, *González v. Mexico*, *supra*, note 81, paras 366-370; IACtHR, *Rochela Massacre v. Colombia*, 11 May 2007, paras 156-158, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_163\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_163_ing.pdf) (last visited 19 May 2014).

<sup>93</sup> Council of Europe, *supra*, note 52, p. 12; ECtHR, *Skorokhodov v. Ukraine*, Judgment, Application no. 56697/09, 14 November 2013, paras 30-37; ECtHR, *Isayeva*, *supra*, note 84, paras 65-68.

<sup>94</sup> CERD, *General Recommendation No. 31*, *supra*, note 85, para 11.

<sup>95</sup> Human Rights Committee, *Krasovskaya v. Belarus*, Communication No. 1820/2008, CCPR/C/104/D/1820/2008, 6 June 2012, para 8.3, available at: <http://www.ccrpcentre.org/wp-content/uploads/2012/07/G1243285.pdf> (last visited 23 May 2014); *Olmedo*, *supra*, note 90, para 7.5; *Katsaris*, *supra*, note 90, paras 6.5, 10.7; *Amirov v. Russian Federation*, Communication No. 1447/2006, CCPR/C/95/D/1447/2006, 22 April 2009, para 11.4, available at: [http://www.ccrpcentre.org/wp-content/uploads/2012/10/1447-2006-Russian-Federation\\_en.pdf](http://www.ccrpcentre.org/wp-content/uploads/2012/10/1447-2006-Russian-Federation_en.pdf) (last visited 20 May 2014); *Umetaliev et al. v. Kyrgyzstan*, Communication No. 1275/2004, CCPR/C/94/D/1275/2004, 20 November 2008, para 9.6, available at: [http://www.ccrpcentre.org/individual-communications/decisions-search/?tax\\_type=relevant\\_articles&tax=Article%202.3%20b&p2p\\_country\\_to\\_decision%5b%5d=284](http://www.ccrpcentre.org/individual-communications/decisions-search/?tax_type=relevant_articles&tax=Article%202.3%20b&p2p_country_to_decision%5b%5d=284) (last visited 20 May 2014); CERD, *Dragan Durmic*, *supra*, note 82, para 9.6; IACtHR, *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, paras 225-228; ECtHR, *Muta v. Ukraine*, Judgment, Application No. 37246/06, 31 July 2012, paras 69-72; ECtHR, *Velikova*, *supra*, note 78, para 82.

<sup>96</sup> Mowbray, *The Development of Positive Obligations*, *supra*, note 51, p. 38; ECtHR, *Kaya*, *supra*, note 74, paras 106-107.

<sup>97</sup> Istanbul Protocol, *supra*, note 63, principle 3 (a).



The UN Committee Against Torture has emphasised that the promptness of investigations is a crucial factor in halting torture or ill-treatment and preserving evidence thereof.<sup>98</sup> Delay can prejudice the whole investigation. For example, negligence in the timely gathering of evidence at the crime scene cannot be corrected by an evidence gathering process which takes place months or even years after the facts.<sup>99</sup> Police investigators therefore often talk about the ‘golden hour’ following an offence during which evidence is still fresh, forensic samples have not been contaminated, witnesses are still in the area and, often, so is the suspect.<sup>100</sup>

It is worth noting that essential requirements for an adequate investigation continue to apply when a case is re-opened, or has to be re-investigated from the start, due to new elements or a judicial or administrative order. In relation to promptness, while there may be less urgency in securing evidence, for instance at the scene of a crime, when the investigation is reopened and aims to complement the original investigation, overall reasonable expeditiousness remains a requirement.<sup>101</sup>

## Thorough

Using all available means, the investigation should be comprehensive in scope and address all of the relevant background circumstances, including any racist or other discriminatory motivation or any systematic failures that led to the violation. This requires taking all reasonable steps to secure relevant evidence such as identifying and interviewing the alleged victims, suspects and eyewitnesses; examining the scene of the alleged violation for material evidence; and gathering forensic and medical evidence by competent specialists. The evidence should be assessed in a thorough, consistent and objective manner.<sup>102</sup>

Investigations of human rights violations must be genuine, display good faith and persistence by the investigators.<sup>103</sup> The quantity of investigative measures alone – for example the number of investigative reports and number of witnesses questioned – does not make an investigation thorough. The investigative acts must be designed to be effective, and may include the use of experts for this purpose.<sup>104</sup> For example, medical examinations of victims of ill-treatment may have to be carried out by independent medical professionals with particular competence in the area.<sup>105</sup> The Committee Against Torture emphasised that although forensic medical reports are important as evidence of torture or ill-treatment, they are an insufficient source of information and need to be supplemented by other sources of information, such as witnesses.<sup>106</sup>

The Israeli human rights organization Yesh Din examined a sample of Israeli police investigations into settler violence. The analysis indicates that these investigations typically fall short of the thorough standard. For example, in one third of the files examined, there was no trace of any investigative action taken before the file was closed. In addition, police only rarely visited the crime scene to collect evidence. This omission seems to be crucial taking into account that many settler attacks involve damage to property, and that the perpetrators are often alleged to be settlers living in the vicinity. In

<sup>98</sup> CAT, *Blanco*, *supra*, note 89, para 8.2.

<sup>99</sup> IACtHR, *Mapiripán Massacre*, *supra*, note 95, para 228.

<sup>100</sup> United Nations Office of Drug and Crime (UNODC), *Policing Crime Investigation, Criminal Justice Assessment Toolkit* (3), 2006, p. 10, available at: [http://www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/3\\_Crime\\_Investigation.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Crime_Investigation.pdf).

<sup>101</sup> ECtHR, *Brecknell*, *supra*, note 80, para 100.

<sup>102</sup> Council of Europe, *supra*, note 52, p. 12; see also, ECtHR, *Assenov v. Bulgaria*, Application No. 90/1997/874/1086, 28 October 1998, para 91; IACtHR, *Villagrán Morales v. Guatemala* (the ‘Street Children case’), 19 November 1999, para 66; ECtHR, *M.C. v. Bulgaria*, Judgment, Application no. 39272/98, 4 December 2003, paras 80-82.

<sup>103</sup> Human Rights Committee, *Umetaliev*, *supra*, note 95, para 9.5; *Katsaris*, *supra*, note 90, para 10.4; *Bleier*, *supra*, note 90, para 13.30; CERD, *Dragan Durmic*, *supra*, note 82, para 9.3.

<sup>104</sup> ECtHR, *Angelova v. Bulgaria*, Application No. 38361/94, 13 June 2002, para 77.

<sup>105</sup> ECtHR, *Aydın v. Turkey*, Judgment, Application No. 57/1996/676/866, 25 September 1997, para 107.

<sup>106</sup> CAT, *Gallastegi Sudope v. Spain*, Communication 453/2011, 28 June 2012, CAT/C/48/D/453/2011, para 7.3 available at: [http://www.ohchr.org/Documents/HRBodies/CAT/Jurisprudence/CAT-C-48-D-453-2011\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/CAT/Jurisprudence/CAT-C-48-D-453-2011_en.pdf) (last visited 15 May 2014); CAT, *Kostadin Nikolov Keremedchiev v. Bulgaria*, Communication No. 257/2004, 21 November 2008, CAT/C/41/D/257/2004, para 9.4 available at: <http://www1.umn.edu/humanrts/cat/decisions/257-2004.html> (last visited 15 May 2014); CAT, *Blanco*, *supra*, note 89, para 8.8.

many of the investigations examined, the Israeli police did not question key witnesses such as soldiers who witnessed the alleged crime.<sup>107</sup>

## Impartial and Independent

Persons responsible for carrying out the investigation must be impartial and independent from those implicated in the events. Institutional and functional independence is required. This means that direct colleagues or officials that are part of the same structure or force as the alleged perpetrators cannot investigate their peers.<sup>108</sup>

Investigative requirements are interrelated and at times overlap. A lack of thoroughness, displayed, for example, by failing to summon key witnesses or otherwise limiting the scope of the investigation, can indicate a bias.<sup>109</sup> Credible and detailed allegations of bias in the investigation of crimes should create additional impetus on the concerned state to demonstrate the fairness and adequacy of its investigations.

The Human Rights Committee has interpreted discriminatory comments by the investigators towards a victim or his relatives as a clear indication of a lack of impartiality.<sup>110</sup> A 2009 report of a UN Fact-Finding Mission found that Israel's failure to investigate Palestinians' allegations of assault by settlers indicated a bias in favour of settlers in the course of police investigations, thus suggesting an unequal protection of the law.<sup>111</sup>

## Victim Participation and Public Scrutiny

There should be a sufficient element of victim participation and public scrutiny of the investigation or its results to secure accountability, to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appearance of collusion in, or tolerance of, unlawful acts. Public scrutiny should not endanger the aims of the investigation and the fundamental rights of the parties.<sup>112</sup>

A challenge to victims involvement in the investigation process is created when the investigation is held in a language which is foreign to the victim. For example, given that the majority of settler violence complaints are recorded by the Police in Hebrew, it is difficult for Palestinian victims to verify the accuracy and completeness of the police record of their injuries and losses. When a complaint is submitted, it is important that complainants are able to make sure their statement is recorded accurately, and to complete any omissions. It is therefore required that complaints and statements of victims that present a detailed account of their case be written in the language of the victims, or at least be translated accurately. International policing standards also require that written information – in simple terms and in the language of the relevant community – be provided to inform victims about their rights, as well as to explain the criminal justice system and available resources.<sup>113</sup>

<sup>107</sup> For example, Yesh Din, *A Semblance of Law*, *supra*, note 12, pp. 97-101.

<sup>108</sup> Council of Europe, *supra*, note 52, pp. 52-53; ECtHR, *Ramsahai*, *supra*, note 79, paras 335-340; ECtHR, *Jordan v. United Kingdom*, Judgment, Application 24746/94, 4 May 2001, para 55.

<sup>109</sup> Human Rights Committee, *Kostadin Nikolov Keremedchiev v. Bulgaria*, Communication No. 257/2004, CAT/C/41/D/257/2004, 21 November 2008, para 9.4, available at: <http://www1.umn.edu/humanrts/cat/decisions/257-2004.html> (last visited 19 May 2014); CAT, *Nikolić v. Serbia and Montenegro*, Communication No. 174/2000, CAT/C/35/D/174/2000, 24 November 2005, para 6.5, available at: <http://www1.umn.edu/humanrts/cat/decisions/174-2000.html> (last visited 19 May 2014); CERD, *Mohammed Hasan*, *supra*, note 57, para 7.4; ECtHR, *Kaya*, *supra*, note 74, paras 57-58.

<sup>110</sup> Human Rights Committee, *Katsaris*, *supra*, note 90, paras 2.7, 10.7.

<sup>111</sup> UN HRC, *Report of the United Nations Fact-Finding Mission*, *supra*, note 60, para 1417.

<sup>112</sup> Council of Europe, *supra*, note 52, p. 12; ECtHR, *Skorokhodov*, *supra*, note 93, paras 30-37; *Isayeva*, *supra*, note 84, paras 65-68; see also UN Principles on the Effective Prevention and investigation of Extra-legal, Arbitrary and Summary Executions, 1989 (Manual 1991), principles 9-17, available at: <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf> (last visited 22 May 2014).

<sup>113</sup> IACP, *Response to Victims of Crime, Concepts and Issues Paper*, August 2010, p. 3, available at: <http://www.theiacp.org/Portals/0/documents/pdfs/Model%20Policy%20Information%20Packet%20April%202014.pdf>.

The importance of keeping victims' families informed of the progress of criminal investigations has been emphasised, primarily in relation to disappearances.<sup>114</sup> In some of these cases, the lack of official information provided by the authorities can constitute a separate violation of ill-treatment of the relatives of the victim.<sup>115</sup> The provision of information to victims and their families is equally necessary in the course of the investigation of other human rights violations.<sup>116</sup> The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims be informed "of the disposition of their cases, especially where serious crimes are involved and where they have requested such information".<sup>117</sup> The Council of Europe similarly recommends that a victim should be able to obtain information on the outcome of the police investigation.<sup>118</sup> This is essential in reassuring the victim that his or her problems and needs are being given due consideration by the competent authorities. A failure to inform the victim about the result of the police investigation may undermine his or her confidence in the criminal enforcement system and its ability to deal effectively with crime and the effects of crime.<sup>119</sup>

Further, the Committee Against Torture requires that states should inform victims and their families of the status and results of investigations, in particular where lack of information may impede their access to 'private' prosecution initiated by the victims or their families under domestic law. When prosecutors fail to inform victims of the results of a criminal investigation, especially when it has been decided to discontinue an investigation, such omissions may also prevent victims from initiating civil proceedings prior to the expiry of the relevant statutes of limitations.<sup>120</sup>

The Inter-American Commission of Human Rights has elevated the right to access information in respect to existing investigations beyond an individual right of reparation for relatives of the victims, describing it as a collective right to the truth which ensures that society has access to information essential for the workings of democratic systems.<sup>121</sup>

There may be limits to the access that victims and their relatives have to the investigation. The Inter-American Court ruled that any limits posed on such access ought to be regulated under domestic

<sup>114</sup> Human Rights Committee, *Mihoubi v. Algeria*, Communication no 1874/2009, CCPR/C/109/D/1874/2009, 7 January 2014, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/109/D/1874/2009&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/109/D/1874/2009&Lang=en) (last visited 23 May 2014); *Abushaala v. Libya*, Communication no 1913/2009, CCPR/C/107/D/1913/2009, 21 June 2013, available at: [http://www.ccprcentre.org/doc/2013/06/1913-2009-Abushaala-v-Libya\\_en.pdf](http://www.ccprcentre.org/doc/2013/06/1913-2009-Abushaala-v-Libya_en.pdf) (last visited 23 May 2014); IACtHR, *Castillo-Páez v. Peru*, 3 November 1997, para 90; IACtHR, *Vélazquez Rodríguez, supra*, note 68, para 18.

<sup>115</sup> Human Rights Committee, *Quiteros v. Uruguay*, Communication No. 107/1981, CCPR/C/OP/2, 21 July 1983, para 14, available at: <http://www1.umn.edu/humanrts/undocs/newscans/107-1981.html> (last visited 19 May 2014); ECtHR, *Kurt v. Turkey*, Judgment, Application No. 15/1997/799/1002, 25 May 1998, paras 130-134; IACtHR, *Villagrán Morales, supra*, note 102, paras 176-177; IACtHR, *González, supra*, note 81, paras 419-424.

<sup>116</sup> CERD, *General Recommendation No. 31, supra*, note 85, para 17.

<sup>117</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, available at: <http://www.un.org/documents/ga/res/40/a40r034.htm> (last visited 21 May 2014); Guide for Practitioners regarding the Implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/CONF.144/20 (Annex), 7 June 1990, annex, available at: [http://www.asc41.com/UN\\_congress/8th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/023%20ACONF.144.20%20United%20Nations%20Norms%20and%20Guidelines%20in%20Crime%20Prevention%20and%20Criminal%20Justice.pdf](http://www.asc41.com/UN_congress/8th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/023%20ACONF.144.20%20United%20Nations%20Norms%20and%20Guidelines%20in%20Crime%20Prevention%20and%20Criminal%20Justice.pdf) (last visited 21 May 2014); UNODC, *Handbook on Justice for Victims on the Use and Application of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1999, available at: <http://www.uncjin.org/Standards/9857854.pdf> (last visited 21 May 2014); UNODC, *Guide for Policy Makers on the Implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1999, available at: <http://www.uncjin.org/Standards/policy.pdf> (last visited 21 May 2014).

<sup>118</sup> Council of Europe, Committee of Ministers, *Position of the Victim in the Framework of Criminal Law and Procedure*, Recommendation No. R (85) II, Part IA, para 3, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=605227&SecMode=1&DocId=686736&Usage=2> (last visited 21 May 2014).

<sup>119</sup> Al Sahel, *Legal Coverage Assessment of the West Bank including Area C and East Jerusalem*, 2013, pp. 41-42: A household survey conducted in the West Bank found that 80% of those who experience settler violence reported that no action was taken by Israeli police or army, and 15 percent said that the police visited them once to take statement but no further action was taken. Among those who reported the settler attacks to the police, about two thirds indicated that the police did not follow up the complaint and no legal action was taken, while an additional 20 percent reported that they simply are not aware of what type of action was taken by the police after they submitted their complaint.

<sup>120</sup> CAT, *Hajrizi Dzemil, supra*, note 80, para 9.5; *Besim Osmani v. Republic of Serbia*, Communication No. 261/2005, 25 May 2009, CAT/C/42/D/261/2005, para 10.7, available at: <http://www1.umn.edu/humanrts/cat/decisions/261-2005.html> (last visited 15 May 2014); *Saadia Ali v. Tunisia*, Communication No. 291/2006, 26 November 2008, CAT/C/41/D/291/2006, para 15.7, available at: <http://www1.umn.edu/humanrts/cat/decisions/291-2006.html> (last visited on 15 May 2014); *Danilo Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, CAT/C/35/D/172/2000, para 7.3, available at: <http://www1.umn.edu/humanrts/cat/decisions/172-2000.html> (last visited 23 May 2014).

<sup>121</sup> IACHR, *Jessica Lenahan (Gonzales), supra*, note 70, para 193.

legislation, justified in the particular case and proportional to the aim of the limitation which is provided by the policing or prosecuting authority.<sup>122</sup> The European Court of Human Rights formulated similar limits when ruling that the victim or his/her next-of-kin must be involved in the investigation procedure “to the extent necessary to safeguard his or her legitimate interests”. Investigators are only required to give access to information yielded by the investigation ‘to a degree sufficient for victims to participate effectively in proceedings’.<sup>123</sup>

## 4.2 Investigative Standards under International Humanitarian Law

There seems to be a consensus that humanitarian law treaties do not explicitly formulate investigative standards. This, however, does not mean that investigations into violations of international humanitarian law should not follow any standard.<sup>124</sup> Some investigative requirements are considered to be implied in humanitarian law. For example, according to the ICRC Commentary, article 146 of the Fourth Geneva Convention includes a requirement to “spontaneously take necessary police action to arrest and prosecute with all speed” persons who have committed grave breaches of the Geneva Conventions.<sup>125</sup>

It is said that certain investigative measures which are deemed appropriate in peacetime, such as conducting autopsies or involving family members, would generally be ill-suited to the realities of conducting an investigation in the midst of combat or its immediate aftermath. However, regional human rights courts have confirmed that the duty to conduct an effective investigation continues to apply in situations of armed conflict or difficult security conditions.<sup>126</sup>

The UN Committee of Independent Experts in international humanitarian and human rights law, when assessing investigations conducted by Israel in 2010 following the “Cast-Lead” Gaza conflict, expressed the belief that “the gap between expansive investigation standards under international human rights law and the less defined standards for investigation under international humanitarian law is not so significant, and several criteria under human rights law can be met even within the context of an armed conflict”.<sup>127</sup> The Turkel Commission which also examined state obligations in relation to the issue of investigations emphasised that “from the moment a duty to carry out an effective investigation arises, there is no fundamental difference, nor should there be, between the principles for conducting an effective investigation in a situation of an armed conflict and the principles for conducting an effective investigation in a situation of law enforcement”.<sup>128</sup>

Given that this Guide focuses on the investigation of settler violence incidents, mostly in periods of ‘occupation without ongoing hostilities’,<sup>129</sup> and which are not battlefield incidents, the investigative standards set in international human rights law will apply. Settler violence is criminal activity which is outside the context of actual combat, therefore the ‘ordinary’ standards – which are those that have been developed in human rights law instruments and courts – are relevant and applicable.

---

<sup>122</sup> IACtHR, *González*, *supra*, note 81, para 381.

<sup>123</sup> ECtHR, *Ramsahai*, *supra*, note 79, paras 347-349.

<sup>124</sup> Yesh Din, *The Duty to Investigate - Compatibility of Israel's Duties under International Law with the Examination and Investigation of Complaints regarding Violations of the Law of Armed Conflict*, position paper submitted to the Turkel Commission, March 2011, para 30, available at: <http://www.yesh-din.org/infoitem.asp?infocaid=130> (last visited 23 May 2014).

<sup>125</sup> ICRC, *Commentary*, *supra*, note 36, p. 593 (Article 146).

<sup>126</sup> IACtHR, *Mapiripán Massacre*, *supra*, note 95, para 238; ECtHR, *Kaya*, *supra*, note 74, para 79; ECtHR, *Isayeva*, *supra*, note 84, paras 97-98.

<sup>127</sup> UN HRC, *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess Any Domestic, Legal or Other Proceedings Undertaken by Both the Government of Israel and the Palestinian Side* (‘Tomuschat report’), A/HRC/15/50, September 2010, p.10.

<sup>128</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010 (‘The Turkel Commission’), *Second Report- Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, p. 15, available at: <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf> (last visited 22 May 2014).

<sup>129</sup> Schmitt, *supra*, note 45, p. 5, footnote 101.



## 4.3 International Standards of Prosecution

### 4.3.1 Duty to Prosecute

The duty to prosecute arises when violations of international human rights law or humanitarian law constitute a crime under international law or national law, and there is sufficient evidence to justify prosecution. In comparison, the duty to investigate seems broader, requiring that all alleged human rights violations will be investigated, regardless whether they are considered crimes under international or domestic law. At this stage evidence still needs to be found in order to substantiate the allegations.<sup>130</sup> The duty to investigate these violations in good faith may occasionally entail a duty to prosecute in a certain case. Both obligations stem from the state's undertaking to provide an effective remedy where a protected right is violated.

The ICCPR does not contain an independent right to see another person prosecuted. It is possible that a state's decision not to prosecute is justified following an adequate investigation.<sup>131</sup> The European Court of Human Rights indeed has ruled that the European Convention's effective remedy guarantee does not entail a right to have third parties prosecuted, or an absolute obligation for all prosecutions to result in conviction, or indeed a particular sentence. This clearly depends on the specific circumstances of each case, and on the quality of the evidence gathered in the course of the investigation. Even when the findings of the investigation justify prosecution, there is no obligation to mete out a certain sentence beyond state's general duty to ensure that the criminal process is fair and capable of implementing criminal penalties when appropriate.<sup>132</sup> Further, a variety of remedies may be available to victims other than criminal proceedings, i.e. civil, administrative or disciplinary remedies, depending on the gravity of the wrongdoing and on the evidence that the investigators were able to collect.

That said, human rights bodies and courts emphasised the importance of prosecution in certain circumstances and the danger of avoiding a criminal trial when the evidence so demands. In this context, the Committee on the Elimination of Racial Discrimination highlights the importance of prosecuting racist acts, including minor offences committed with racist motives, because they undermine social cohesion and affect society as a whole.<sup>133</sup> This may be particularly relevant to settler violence given its often discriminatory and racial motives. Further, the Inter-American Commission of Human Rights noted that when there is a 'general pattern of negligence and lack of effective action by the state in prosecuting and convicting aggressors', it creates a 'climate that is conducive to domestic violence, since society sees no evidence of willingness by the state, as the representative of the society, to take effective action to sanction such acts'.<sup>134</sup> This reasoning equally applies to settler violence, where Palestinians see little evidence of Israeli authorities' willingness to sanction settlers.<sup>135</sup>

Civil society organisations regularly assist Palestinians to review the investigation file of their case. Such organisations may challenge the closure of a settler violence investigation with no prosecution, for instance, when such prosecution is appropriate based on the analysis of the investigation file and the quality of evidence found.<sup>136</sup>

---

<sup>130</sup> Human Rights Committee, *supra*, note 49, para 18; *UN Remedy and Reparation Principles*, *supra*, note 90, principles 3(b), 4.

<sup>131</sup> Joseph and Castan, *supra*, note 66, p. 302 para 9.186; Human Rights Committee, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, CCPR/C/55/D/563/1993, 25 October 1995, paras 8.2, 10, available at: <http://www1.umn.edu/humanrts/undocs/session55/vws56355.htm> (last visited 19 May 2014); *Gilberto François Croes v. The Netherlands*, Communication No. 164/1984, CCPR/C/34/D/164/1984, 7 November 1988, para 10, available at: <http://www1.umn.edu/humanrts/undocs/session34/164-1984.html> (last visited 19 May 2014).

<sup>132</sup> ECtHR, *Brecknell*, *supra*, note 80, para 66; ECtHR, *Öneryıldız v. Turkey*, Judgment, Application No. 48939/99, 30 November 2004, paras. 101-108; Basch, *supra*, note 51, p. 224.

<sup>133</sup> CERD, *General Recommendation No. 31*, *supra*, note 85, para 15.

<sup>134</sup> IACHR, *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, 16 April 2001, para 56.

<sup>135</sup> Yesh Din, *Law Enforcement on Israeli Civilians*, *supra*, note 2; *Yesh Din*, *supra*, note 18, pp. 40, 62 (in Hebrew).

<sup>136</sup> See, for example, Yesh Din, *Law Enforcement on Israeli Civilians*, *supra*, note 2.

### 4.3.2 Duty to Punish

Holding human rights violators accountable may imply some level of punishment but human rights mechanisms are usually cautious in commenting on the exact nature or level of punishment required under international law. The Human Rights Committee has commented on leniency of sentences for torture crimes in some countries and has ruled out amnesties for perpetrators of torture and forced disappearances.<sup>137</sup>

The Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, while stressing the need for criminal punishment, did not order the state of Honduras to carry out the criminal proceedings needed to achieve that goal. Instead, it limited itself to an order to pay fair compensation to the victims' next of kin.

In subsequent cases the Court departed from this approach by not only ordering states to pay monetary compensations to victims of breaches of the American Convention, but also requiring states to carry out criminal judicial proceedings to punish persons responsible for the relevant crimes. It opined that the right to a fair trial also covers victims' rights in the prosecution process, which includes a right to have the offender punished 'where appropriate'. In the *Bulacio* case (2003), the Court clarified that the duty to punish applies to all human rights violations, not only gross violations.<sup>138</sup> Some critics claim the Court went too far in this case by directing Argentina to undertake specific criminal prosecutions even if such action may violate its domestic law (statute of limitation had expired). This victims' entitlement to retribution through the punishment of their offenders also begs the question whether the Inter-American Court has transformed the investigation and prosecution duties into an obligation of result, rather than means.

The European Court of Human Rights has been less authoritative in this respect, limiting the judicial remedy to compensation to victims, rather than directing prosecutorial action. It was highlighted that thus far the Court did not order states 'to take any measure in criminal proceedings already open, to reopen criminal cases already extinguished or to initiate proceedings never initiated.'<sup>139</sup>

### 4.3.3 Essential Requirements for Prosecution

The Council of Europe Guidelines affirm that the essential requirements for an effective investigation established through the jurisprudence of the European Court of Human Rights apply also at the prosecution stage.<sup>140</sup>

The information imparted by the prosecuting authorities must be relevant and adequate. The entire process of administration of justice should not be subject to unwarranted delays. When a timely police investigation provides clear and decisive evidence, the other actors in the judicial process (prosecutors and magistrates) should handle the case with equal expeditiousness.<sup>141</sup> Prosecutors should consider the views and concerns of victims and inform them of their rights.<sup>142</sup> It is crucial that victims believe 'that their case has been fully and carefully considered, and that they have confidence in the decision that is made to prosecute or not'. Victims dissatisfied with a decision not to prosecute ought to have a right of review or a right to institute private proceedings.<sup>143</sup>

---

<sup>137</sup> Human Rights Committee, *General Comment No.20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 15; *Celis Laureano v. Peru*, Communication no 540/1993, CCPR/C/56/D/540/1993, 25 March 1996, para 10, available at: [http://www.bayefsky.com/pdf/107\\_peru023.pdf](http://www.bayefsky.com/pdf/107_peru023.pdf) (last visited 19 May 2014); *Concluding Observations regarding Spain*, CCPR/C/79/Add.61, 3 April 1996, para 10, available at: <http://www.refworld.org/docid/3ae6b0270.html> (last visited 19 May 2014).

<sup>138</sup> See IACtHR, *Bulacio v. Argentina*, 18 September 2003, paras 110, 114, 162(4); IACtHR, *Blake v. Guatemala*, Judgment, 24 January 1998, paras 96-97; Basch, *supra*, note 51, pp. 204, 207, 210, 220.

<sup>139</sup> Juliet Chevalier-Watts, *supra*, note 52, p. 720; Basch, *supra*, note 51, p. 223.

<sup>140</sup> Council of Europe, *supra*, note 52, p. 14.

<sup>141</sup> IACHR, *Maria da Penha*, *supra*, note 134, paras 38-40.

<sup>142</sup> UN, *Guidelines on the Role of Prosecutors*, 1990, para 13(d) available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx> (last visited 21 May 2014).

<sup>143</sup> Guide for Practitioners regarding the Implementation of the UN Declaration of Basic Principles of Justice for Victims, *supra*, note 117, paras 52, 54; Council of Europe, *Position of the Victim in the Framework of Criminal Law and Procedure*, *supra*, note 118, Part I B, paras 5-7.

Where domestic law provides for it, victims may have a right to instigate private prosecution. UN principles discussing the promotion of human rights and actions to combat impunity state that ‘although the decision to prosecute lies primarily within the competence of the state, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in states whose law of criminal procedure recognizes these procedures.’<sup>144</sup> It should be noted that the availability of this option does not absolve states from pursuing investigations and prosecutions *ex officio*. The European Court of Human Rights ruled that the victim of an assault by private actors was not ‘required to concurrently pursue the matter by way of a private prosecution’ when the authorities ‘who were empowered to open and conduct a criminal investigation’ did not make a ‘genuine attempt to take a prompt and thorough examination of the matter, establish the facts and, if necessary, bring those responsible to account.’<sup>145</sup>



A henhouse set on fire by settlers, Madama village (PU-AMI, 2014).

---

<sup>144</sup> UN, *Updated Set of Principles to Combat for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, principle 19.

<sup>145</sup> ECtHR, *Skorokhodov*, *supra*, note 93, para 36.



## 5. International Standards of Policing

The following section deals with international standards for policing. Some techniques of crime investigation and the processing of a crime scene will also be highlighted in this section. Whilst certain minimum human rights standards exist for investigations (and also apply at the prosecution stage), the situation for policing standards is far more discretionary. Still, some guidance regarding strategic approaches for law enforcement, which may be relevant to the policing of settler violence in the West Bank, can be found in documents adopted by bodies such as the UN Office on Drugs and Crime, the UN Police, the Organization for Security and Cooperation in Europe and the International Association of Chiefs of Police (IACP).<sup>146</sup> These bodies have developed standards in order to train police personnel, and those standards largely reflect duties and principles governing policing under international human rights law. They also tend to capture best practices in policing such as community policing, crime prevention, intelligence-led policing and problem-oriented policing. For example, the European Crime Prevention Network keeps track of useful country practices in crime prevention. The IACP has developed an extensive range of model policies and training keys on various issues relevant to policing and investigations.<sup>147</sup>

Recommendations made by these bodies regarding the function of police and the proper way to carry out investigations may help Israel to fulfil its obligations under international law towards the Palestinian population. While these recommendations are more general in nature, and less concern a remedy for an individual victim, they contribute to the effectiveness of future investigations and to the prevention of humanitarian and human rights violations.

### 5.1 Service-Oriented Policing Focused on Proactive Crime Prevention

Progress towards better policing is made when there is a shift ‘from a control-oriented approach to a more service-oriented approach’, and where the primary concern of law enforcement is proactive crime prevention.<sup>148</sup> Proactive policing seeks to target prominent and emerging crime threats rather than only to respond to crimes after they have already been committed and reported.<sup>149</sup> Crime prevention is defined as the anticipation, recognition, and appraisal of a crime risk and the initiation of some action to remove or reduce it.<sup>150</sup>

Crime analysis provides quality information in order to support the proactive management of crime prevention, investigative and suppression strategies. The systematic examination and processing of crime-related data and information is directed at identifying existing and emergent crime activity patterns and trend correlations.<sup>151</sup> Crime analysis is used in major case management, an innovative approach to solving crimes and dealing with complex incidents or series of incidents. Specialized training and investigation techniques are combined with an operations management software system. The software manages the vast amounts of information involved in investigations. While originally developed to manage serious/serial crimes, it can be successfully used in any investigation involving masses of data and complex details. It is most helpful to identify common links in crimes committed in different locations that might be committed by the same person or group.<sup>152</sup>

---

<sup>146</sup> OSCE, *International Police Standards*, *supra*, note 86; UNODC, *Policing Crime Investigation*, *supra*, note 100; OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 15, 2003, available at: <http://www.ohchr.org/Documents/Publications/training9chapter15en.pdf> (last visited on 19 May 2014) and *Human Rights and Law Enforcement: Human Rights Training for Police*, 2002, available at: <http://www.ohchr.org/Documents/Publications/training5Add2en.pdf>.

<sup>147</sup> International Association of Chiefs of Police (IACP) publications available at: <http://www.theiacp.org/Training-Keys-Publications> (last visited on 21 May 2014).

<sup>148</sup> OSCE, *International Police Standards*, *supra*, note 86, para 2.

<sup>149</sup> UNODC, *Policing Crime Investigation*, *supra*, note 100, p. 10.

<sup>150</sup> Virginia Crime Prevention Association, *Crime Prevention Standards: A Guide for Virginia Law Enforcement Agencies*, 1997, p. 3, available at: <http://www.theiacp.org/portals/0/pdfs/Crime%20Prevention%20Standards%20-%20VA.pdf> (last visited 21 May 2014).

<sup>151</sup> IACP, *Crime Analysis Concepts and Issue Paper*, April 2008, p. 1; All IACP training keys, concept papers and model policies are available at: <http://www.theiacp.org/Portals/0/documents/pdfs/Model%20Policy%20Information%20Packet%20April%202014.pdf> (last visited 21 May 2014).

<sup>152</sup> Ontario Ministry of Safety and Correctional Services - Canada, *Major Crimes Management*, available at: [http://www.mcscs.jus.gov.on.ca/english/police\\_serv/MajorCaseManagement/mcm.html](http://www.mcscs.jus.gov.on.ca/english/police_serv/MajorCaseManagement/mcm.html).



When incidents of settler violence seem to follow a pattern of systematic harassment and to involve the same group of perpetrators, Israeli police could consider the use of the above techniques and approaches in order to predict spikes in settler violence and to pin-point hotspots where these crimes frequently occur. The detection of crime patterns (crimes with similar traits distinguishing them from other crimes) and crime series (crimes that are the product of the same decision-maker) would allow a better forecast of settler violence and a better allocation of resources to protect Palestinians from such violence.

The European Crime Prevention Network has collected a number of good practices of crime prevention implemented in European countries. Most pertain to safety in public spaces, housing estates and urban planning. As mentioned earlier, settler violence may take the form of vandalization of houses and olive trees. From a comparative perspective, crime prevention practice employed in Portugal in response to olive tree theft may be a good example relevant to the West Bank.<sup>153</sup> The Portuguese programme succeeded in 2008 in ending olive thefts thanks to an integrated programme of increased patrolling, data-gathering and public-private partnerships. The patrol teams initially used all-terrain vehicles but gradually adapted to make more efficient use of motorbikes and horses. The collection, collation and analysis of data proved instrumental in predicting and responding to hotspots.<sup>154</sup> Clearly the nature and motivation behind such crimes, in addition to the political context, are different from settler violence attacks on olive trees in the West Bank. Nevertheless, the example demonstrates that effective policing methods can be employed to combat such crimes when the will exists.

Other approaches of modern policing, such as problem-oriented and intelligence-led policing, are also useful in dealing with violent crimes. In the context of policing in the West Bank, Israeli police already makes use of covert policing techniques, using Israeli settlers as informants to gather information on alleged crimes by Palestinians. The principle of equal protection of the law requires that any resources allocated to crime analysis, data management systems and intelligence ought to be used equally, i.e. not only when preventing and investigating violence by Palestinians but also when preventing and investigating settler violence. The diligence and sophistication of investigative techniques which are used by Israeli authorities to investigate crimes allegedly perpetrated by Palestinians, makes the high failure for crimes of settler violence particularly absurd.

## 5.2 Unbiased Policing

Some discretion is intrinsic in police work. Police officers must have the necessary discretion to apply the law based on individual circumstances and conditions that they, by training and experience, perceive to be in the best interests of the individual and the community. However, discretion cannot be unchecked, and cannot permit the police to treat someone in a differential manner based on their economic, social, or political status and affiliation.<sup>155</sup> The police must be responsive to the community as a whole and strive to deliver their services promptly in an equal and unbiased manner. Discriminatory policing has the effect of criminalizing entire communities and denying them justice. In this respect, public information that serves to initiate police investigations must be evaluated and acted upon in an objective manner. When reaching out to specific parts of the community, and particularly when dealing with conflicts between communities, it is important for the police not to convey the impression that they will treat different groups differently, for instance, treating some more favourably.<sup>156</sup>

In the context of the West Bank, actions by Israeli police, as the representative of the occupying power, are often bound to be perceived as biased in favour of Israeli citizens. It is thus up to the Israeli police to exercise rigorous objectivity in their investigation of settler violence. The principle of equal treatment requires the police to invest the same effort, will and diligence in investigating alleged crimes by settlers as they tend to do when investigating alleged crimes by Palestinians.

---

<sup>153</sup> European Crime Prevention Network, *Good Practices*, available at: <http://www.eucpn.org/goodpractice/index.asp> (last visited 23 May 2014); *Comparative Table of Good Practices on Community Wardens*, 2013, available at: <http://www.eucpn.org/goodpractice/showdoc.asp?docid=299> (all last visited 21 May 2014).

<sup>154</sup> Portugal's Programme 'Safe Olive', available at: <http://www.eucpn.org/goodpractice/showdoc.asp?docid=288> (last visited 21 May 2014).

<sup>155</sup> IACP, *Unbiased Policing - Concepts and Issue Paper*, June 2006, p.2.

<sup>156</sup> OSCE, *International Police Standards*, *supra*, note 86, paras 3, 16, 40, 43, 110.

### 5.3 Crime Investigation Techniques

The overview of investigation standards in international human rights law contained in Section 4 of this Guide included a requirement of thoroughness; the police must take all reasonable steps to secure relevant evidence. The development of policing standards also suggests some useful techniques of a thorough criminal investigation.

First responders to a crime should prioritize their responsibilities and actions at the scene in a manner similar to medical triage, surveying the overall situation in a deliberate but expeditious manner, and then prioritizing their actions based on criticality. One source uses the acronym PRELIMINARY to identify duties that fall within the responsibility of the preliminary investigation:<sup>157</sup>

P	Proceed to the scene promptly and safely
R	Render assistance to the injured
E	Effect the arrest of the individual
L	Locate and identify witnesses
I	Interview the complainant and the witnesses
M	Maintain the crime scene and protect the evidence
I	Interrogate the suspects
N	Note the crime scene and protect the evidence
A	Arrange for collection of evidence
R	Report the incident fully and accurately
Y	Yield the responsibility to the follow-up investigator

Responding officers must take all measures reasonably possible not to disturb potential sources of evidence, such as footprints or tire marks, or the cross-contamination of potential sources of DNA evidence.<sup>158</sup> Once the scene has been controlled, a crime scene perimeter should be established and protected from unauthorized persons. Documenting the crime scene through sketches, photography, videotaping, and note taking is required.<sup>159</sup> Another important task of the preliminary investigation is for officers to locate witnesses to the incident at the scene or in the surrounding area. Generally, a preliminary investigation should be completed by the end of the shift in which the incident occurs.<sup>160</sup>

The quality of the preliminary investigation is crucial as its initial report will often form the basis upon which decisions are made to proceed with a follow-up investigation. This investigation begins when the special skills of a detective or criminal investigator are required. It typically includes, *inter alia*, developing an investigative plan; examining and processing all existing evidence; discussing the case with other specialists; interviewing the victim and witnesses; conducting a records search; reviewing laboratory analysis reports on all evidence submitted; conducting required surveillance and interrogating suspects. Physical evidence must be collected and preserved by trained officers. Any object that can be used to connect a victim to a suspect or a suspect to a crime scene is relevant physical evidence. Evidence found at a crime scene that may be suitable for DNA analysis can be a powerful investigative tool for linking suspects to crimes, eliminating suspects, and identifying victims.<sup>161</sup> Further investigative tasks may include checking venues where stolen property may be sold, seeking information from witnesses who frequent the area, and searching places or premises aimed at discovering additional physical evidence. The follow-up investigation may also involve returning to the scene. Occasionally, an investigator may come upon a piece of evidence not found during the initial search. Additionally, re-evaluation and better familiarization with the scene can provide the investigator with a new sense of direction.<sup>162</sup>

Follow-up investigations will take place concurrently with, or immediately following, the preliminary investigation when a crime is serious or complex or may link to another crime, as well as when patrol officers do not have the necessary expertise in crime scene processing or the necessary equipment for

<sup>157</sup> IACP, *Criminal Investigations - Concepts and Issue Paper*, August 2005, p.2.

<sup>158</sup> IACP, *Crime Scene Processing - Concepts and Issue Paper*, June 2003, p.1.

<sup>159</sup> *Ibid*, pps. 2-4.

<sup>160</sup> IACP, *Criminal Investigations*, *supra*, note 157, p. 2.

<sup>161</sup> IACP, *Crime Scene Processing*, *supra*, note 158, p. 7.

<sup>162</sup> IACP, *Criminal Investigations*, *supra*, note 157, p. 4.

evidence collection and related tasks.<sup>163</sup> When settler violence incidents seem to be part of a crime series or to follow a specific pattern, they may require investigators with specialized skills.

As mentioned earlier, the review by civil society organisations of investigation files in cases of settler violence reveals that investigations often are not carried out properly in line with these policing standards and guidance.<sup>164</sup>



Settlers vandalizing a fence in a Palestinian private land near Tel Rumeida, Hebron (YAS, 2014).

---

<sup>163</sup> *Ibid*, p. 4.

<sup>164</sup> Yesh Din, *Law Enforcement on Israeli Civilians*, *supra*, note 2; B'tselem, *Means of Expulsion*, *supra*, note 2.

## 6. Conclusion

Crimes of settler violence continue to have a devastating impact on Palestinian communities throughout the West Bank. Not only are they traumatic and costly in and of themselves for individuals and families, but the regularity of such crimes, combined with the high investigative failure by Israeli authorities, undermines confidence in the rule of law for Palestinian communities. One way to counter such impunity is to hold the relevant duty-bearer, namely Israel, to international standards for the effective investigation and prosecution of such crimes. References to international standards and jurisprudence remind the duty-bearers that international law is applicable in the occupied West Bank, as well as provide a useful checklist of the standards that are necessary for an adequate investigation.

This Guide aims to equip practitioners and interested parties with sufficient information about the legal basis of the obligation imposed on Israel to investigate and prosecute crimes of settler violence, as well as the different types of crimes that must be investigated, including those that constitute grave breaches of the Fourth Geneva Convention, those which constitute human rights violations and those which must be investigated as part of the general law and order responsibility of Israel as the occupying power.

Whilst states are not necessarily responsible for the acts of private individuals, they must prevent human rights violations and investigate, punish and ensure an effective remedy for such violations. The key obligation is that of due diligence. Within this overarching obligation, investigations must be adequate, prompt, thorough, impartial and independent, ensure victim participation and public scrutiny and be conducted ex officio, namely as part of the independent obligation of the state to investigate crimes at its own initiative. Prosecutions must be based on relevant and adequate information, victims must be informed of the process, and the administration of justice in such cases should not be subject to unwarranted delay. Different policing techniques are used around the world to combat different types of crimes. However, international best practice highlights the importance of community policing methods focused on proactive crime prevention, unbiased policing and the usage of a range of crime investigation techniques designed to protect and capture the evidence in a comprehensive manner.

Considering the investigative, information gathering and law enforcement resources at the disposal of Israeli authorities in the West Bank, there seems little reason why they could not meet international standards in relation to the resolution of crimes of settler violence.



Graffiti by settlers on a shop door, Hebron (Paul Jeffrey, 2003).



## **Annex 1: Checklist of Investigation Standards**

*Note:* While the summary description of investigation standards is drawn from Council of Europe Guidelines, these essential requirements for investigations reflect case law of UN treaty bodies and regional human rights courts on both sides of the Atlantic (European and Inter-American Courts of Human Rights).

### **Adequate**

The investigation must be capable of leading to the identification and punishment of those responsible. This does not create an obligation on states to ensure that the investigation leads to a particular result, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.

### **Ex officio**

Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation at their own initiative. The fact that the victim wishes not to lodge an official complaint, later withdraws such a complaint or decides to discontinue the proceedings does not absolve the authorities from their obligation to carry out an effective investigation, if there are reasons to believe that a serious violation has occurred.

### **Prompt**

The investigation must be commenced with sufficient promptness in order to obtain the best possible amount and quality of evidence available. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities may generally be regarded as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

### **Thorough**

The investigation should be comprehensive in scope and address all of the relevant background circumstances, including any racist or other discriminatory motivation. It should be capable of identifying any systematic failures that led to the violation. This requires the taking of all reasonable steps to secure relevant evidence such as identifying and interviewing the alleged victims, suspects and eyewitnesses; examination of the scene of the alleged violation for material evidence; and the gathering of forensic and medical evidence by competent specialists. The evidence should be assessed in a thorough, consistent and objective manner.

### **Impartial and independent**

Persons responsible for carrying out the investigation must be impartial and independent from those implicated in the events. Institutional and functional independence is required. This means that direct colleagues or officials that are part of the same structure or force as the alleged perpetrators cannot investigate their peers.

### **Public scrutiny**

There should be a sufficient element of public scrutiny of the investigation or its results to secure accountability, to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts. Public scrutiny should not endanger the aims of the investigation and the fundamental rights of the parties.

## **Annex 2: Excerpts of Key Sources of Law Clarifying the Obligations of States in relation to Investigation and Prosecution of IHL and Human Rights Violations, including by Private Individuals**

### **Treaty Law**

The Hague Regulations, 1907

#### *Article 43*

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

#### *Article 46*

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,  
12 August 1949

#### *Article 4*

Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

#### *Article 27*

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. [...]

#### *Article 64*

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

#### *Article 146*

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. [...]

#### *Article 147*

Grave breaches to which the preceding Article relates shall be those involving any of the following acts,

if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

## Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

### *Article 12*

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

## **Soft Law Principles and Other Guidance**

UN Human Rights Committee General Comment No.31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

UN Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences (May 2013)

14. International human rights law requires a state to take measures – such as by legislation and administrative practices – to control, regulate, investigate and prosecute actions by non-state actors that violate the human rights of those within the territory of that state. These actions by non-state actors do not have to be attributed to the state, rather this responsibility is part of the state's obligation to exercise due diligence to protect the rights of all persons in a state's territory.<sup>165</sup>

UN Committee on the Elimination of Discrimination Against Women– General Recommendation No. 19 on Violence Against Women (1992)

9. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

---

<sup>165</sup> UN Doc. [A/HRC/23/49](#), *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (Due Diligence Report)*, 14 May 2013, para 14.

UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)

*II. Scope of the obligation [to respect, ensure respect for and implement international human rights law and international humanitarian law]*

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.

*III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law*

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (2005)

*Principle 19: Duties of States with regard to the administration of justice*

States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.

Istanbul Protocol - Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2000)

*Principle 2*

States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other



experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.

CERD, General Recommendation No. 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (2005)

*B. Reporting of incidents to the authorities competent for receiving complaints*

10. States parties should take the necessary steps to ensure that the police services have an adequate and accessible presence in the neighbourhoods, regions, collective facilities, camps or centres where the persons belonging to the groups referred to in the last paragraph of the preamble reside, so that complaints from such persons can be expeditiously received.

11. The competent services should be instructed to receive the victims of acts of racism in police stations in a satisfactory manner, so that complaints are recorded immediately, investigations are pursued without delay and in an effective, independent and impartial manner, and files relating to racist or xenophobic incidents are retained and incorporated into databases.

12. Any refusal by a police official to accept a complaint involving an act of racism should lead to disciplinary or penal sanctions, and those sanctions should be increased if corruption is involved.

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
- (c) Providing proper assistance to victims throughout the legal process;
- (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
- (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

## **Jurisprudence**

IACtHR, *Velazquez Rodríguez v. Honduras* (1988)

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an

infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State ( for example, because it is the act of a private person or because the person responsible has not been identified ) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

IACtHR, *Bulacio v. Argentina* (2003)

*The Court decides that:*

4. the State must continue and complete the investigation of all the facts of this case and punish those responsible for them; that the next of kin of the victim must have full access and be able to act, at all stages and levels of said investigations, pursuant to domestic legislation and the provisions of the American Convention on Human Rights; and that the results of the investigations must be publicly disseminated, under the terms set forth in paragraphs 110 to 121 of the instant Judgment.

ECtHR, *Osman v. UK* (1998)

*2. As to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman*

1. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

2. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the

authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

[...]

## II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

3. The applicants contended that the failure of the police firstly to bring an end to the campaign of harassment, vandalism and victimisation which Paget-Lewis waged against their property and family and secondly, and in particular, to avert the wounding of the second applicant constituted a breach of Article 8 of the Convention, which stipulates:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

4. The applicants maintained that they could not have been expected to obtain a civil injunction to prevent Paget-Lewis from intimidating their family and attacking their home and property since any such request would have been futile. They pleaded in this respect that they would have been unable to provide a court with any proof that Paget-Lewis was responsible for the acts of vandalism given that the police had never taken any steps to investigate the incidents which they had reported.

At the hearing the applicants informed the Court that their main complaint under Article 8 concerned the failure of the police to secure the second applicant's personal safety, an issue which the Commission had not addressed. In the applicants' submission, even if it were to be accepted that the police could not have foreseen that Paget-Lewis would have carried out a near-fatal attack on the life of Ahmet Osman, the risk of some harm being caused to him was nevertheless foreseeable. In their view that was in itself sufficient to engage the responsibility of the authorities under Article 8.

5. The Commission found that the applicants' complaints concerning the failure of the authorities to protect their home and property against the attacks allegedly perpetrated by Paget-Lewis did not give

rise to a breach of Article 8 since in its view it would have been open to the applicants to seek an injunction against Paget-Lewis.

As to the complaint that the police failed to protect the second applicant's physical integrity, the Delegate of the Commission informed the Court at the hearing that the Commission had in fact addressed this grievance. For the reasons which led it to conclude that there had been no violation of Article 2, it found that the complaint under Article 8 could not be sustained either.

6. The Government agreed with the Commission on both points.

7. The Court recalls that it has not found it established that the police knew or ought to have known at the time that Paget-Lewis represented a real and immediate risk to the life of Ahmet Osman and that their response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty under Article 2 of the Convention to safeguard the right to life. In the Court's view, that conclusion equally supports a finding that there has been no breach of any positive obligation implied by Article 8 of the Convention to safeguard the second applicant's physical integrity.

8. As to the applicants' contention that the police failed to investigate the attacks on their home with a view to ending the campaign of harassment against the Osman family, the Court reiterates that the police had taken the view that there was no evidence to implicate Paget-Lewis and for that reason charges could not be laid against him. It is to be noted in this respect that Paget-Lewis was questioned by PC Adams sometime in November 1987, but he denied all responsibility. Detective Sergeant Boardman also confirmed in his report that there was no evidence on which to mount a prosecution case against Paget-Lewis (see paragraph 45 above). In the light of new developments in the case, an attempt was in fact made to arrest and question Paget-Lewis on 17 December 1987 on suspicion of criminal damage including with respect to the acts of vandalism directed at the applicants' home and property (see paragraph 49 above). However, that attempt failed.

9. The Court concludes accordingly that the facts of the case do not disclose the breach by the authorities of any positive obligation under Article 8 of the Convention.

ECTHR, *Skorokhodov v. Ukraine* (2013)

## 2. The Court's assessment

10. The Court notes at the outset that the violent treatment to which the applicant was subjected on 28 November 2005 reached the threshold of severity necessary to fall within the scope of Article 3 of the Convention (see, *a contrario*, *Tonchev v. Bulgaria*, no. 18527/02, § 38-40, 19 November 2009).

11. Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. On the other hand, it goes without saying that the State's general duty under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that, if it is, criminal proceedings should necessarily lead to a particular sanction. In order that a State may be held responsible it must in the view of the Court be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, fails to provide practical and effective protection of the rights guaranteed by Article 3 (see *Beganović v. Croatia*, no. 46423/06, §§ 70 and 71, 25 June 2009, with further references).

12. In particular, the Court's case-law has been consistent on the point that Article 3 of the Convention requires that the authorities conduct an effective official investigation into alleged ill-treatment even if such treatment has been inflicted by private individuals (see *Denis Vasilyev v. Russia*, no. 32704/04, § 99, 17 December 2009 and *Biser Kostov v. Bulgaria*, no. 32662/06, § 77, 10 January 2012).

13. The minimum standards of effectiveness laid down by the Court's case-law include the



requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see *Muta v. Ukraine*, no. 37246/06, § 61, 31 July 2012).

14. In the present case the authorities were informed of the incident on the same day. A few days later the applicant lodged a formal complaint seeking the public prosecution of R. and L. It is to be noted that for more than half a year the applicant's allegations of ill-treatment were examined exclusively in "pre-investigation" enquiries. However, the Court has held in various contexts that this investigative procedure does not comply with the principles of an effective remedy because the enquiring officer can take only a limited number of procedural steps within that procedure at a point where victims have no formal status, thus excluding their effective participation in the procedure (see *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, §§ 310-312, 1 July 2010; *Golovan v. Ukraine*, no. 41716/06, § 75, 5 July 2012; and *Savitsky v. Ukraine*, no. 38773/05, § 105, 26 July 2012). There is no reason to depart from those findings in the present case. It is remarkable that during the period of "pre-investigation" enquiries the police took several decisions refusing the opening of a criminal investigation. However, the supervising authorities found that those decisions had been unsubstantiated and each time remitted the case for a new round of enquiries (see paragraphs 11 and 12 above). The repetition of such remittal orders within one set of proceedings discloses a serious deficiency by itself (see, for example, *Spinov v. Ukraine*, no. 34331/03, § 56, 27 November 2008).

15. As regards the pre-trial investigation which was opened on 14 June 2006, it does not appear that the investigator took all the necessary steps in order to investigate the case thoroughly before terminating the proceedings on 12 June 2007. In particular, the prosecutor's decision of 28 September 2007 suggested that a substantial number of investigatory measures had not been taken and the case had not been examined comprehensively (see paragraph 17 above). The investigation was therefore reopened and more than six and a half years after the incident it was still pending.

16. It follows therefore that the authorities, who were empowered to open and conduct a criminal investigation, did not make a genuine attempt to take a prompt and thorough examination of the matter, establish the facts and, if necessary, bring those responsible to account. As regards the Government's reference to Article 27 of the Code of Criminal Procedure of 1960, the Court considers that in the present case, where there were grounds for the authorities to carry out an investigation into the possible crime of torture, as provided by Article 127 of the Criminal Code of 2001, the applicant was not required to concurrently pursue the matter by way of a private prosecution of R. and L. capable of leading to criminal responsibility for a less serious crime.

17. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities failed to carry out an effective investigation into the applicant's allegations of ill-treatment. There has therefore been a violation of Article 3 of the Convention under its procedural limb.

CERD, *Dawas and Shava v. Denmark* (2012)

7.4 The Committee is of the view that in circumstances as serious as those in this case, where the petitioners were subjected, in their own house, to a violent assault by 35 offenders, some of them armed, enough elements warranted a thorough investigation by public authorities into the possible racist nature of the attack against the family. Instead, this possibility was set aside at the level of the criminal investigation, thereby preventing the issue from even being adjudicated at the criminal trial. The Committee considers that the onus was on the State party to initiate an effective criminal investigation, instead of giving the petitioners the burden of proof in civil proceedings. The Committee recalls its jurisprudence, according to which when threats of violence are made, and especially when they are made in public and by a group, it is incumbent upon the State party to investigate with due diligence and expedition. This obligation is a fortiori applicable in the circumstances of the present case, where 35 individuals actually participated in an assault on the family.



