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**Settler States and Self-Determination: Colonialism's Role in Asymmetric Warfare and Amplifying the Inadequacies of International Humanitarian Law for Liberation Movements**

**A Case Study of Occupied Palestine**

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### **Abstract**

This paper examines the colonial roots of international humanitarian law (IHL), the impact of settler colonialism on asymmetric warfare, and its role in exposing and exacerbating the inadequacies of IHL. Using the Israeli occupation of Palestine and the ongoing Gaza war as a case study, the research explores how settler colonial practices and ideologies shape the dynamics of asymmetric conflicts, challenging traditional IHL frameworks. The study analyzes the historical development of IHL, its colonial roots, and its limitations in addressing prolonged occupations and resistance movements.

By examining the roots of Israeli settler colonialism in Palestine and the recent International Court of Justice advisory opinion on the illegality of Israeli occupation, the paper highlights the tensions between the right to self-determination and the realities of colonial dominion. It argues that the legacy of settler colonialism contributes to the dehumanization of occupied populations and fuels a cycle of violence and impunity.

The research concludes by proposing potential reforms to IHL, including expanding the scope of civilian harm assessment, reconsidering combatant status in non-international armed conflicts, and adopting a human rights-based approach. These findings contribute to ongoing debates about the effectiveness of IHL in modern, asymmetric conflicts and liberation movements and underscore the need for a more nuanced legal framework that accounts for the realities of settler colonial contexts.

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## **CHAPTER 1: INTRODUCTION, RESEARCH QUESTION, AND METHODOLOGY**

### ***Introduction***

In the landscape of contemporary global conflicts, the enduring impact of settler colonialism continues to shape power dynamics, territorial disputes, and struggles for self-determination. Settler colonialism, characterized by the permanent movement of a population into a territory with the intent of establishing political dominance, has left an indelible mark on regions across the globe. From North America to Australia, and notably at present in Palestine, the legacy of settler colonial practices persists, influencing not only socio-political realities but also the nature of armed conflicts and the application of international law.

The conflicts arising in settler colonial contexts often manifest as asymmetric warfare, where significant disparities exist between opposing forces in terms of military capability, resources, and international recognition. This asymmetry poses unique challenges to the principles and application of International Humanitarian Law (IHL), a body of rules designed to limit the effects of armed conflict and protect those who are not participating in hostilities. Developed primarily in the context of interstate wars, IHL faces considerable strain when applied to conflicts rooted in colonial histories and characterized by prolonged occupation and resistance movements.

The situation in Palestine stands as a prime example of these complex dynamics. Spanning over seven decades, this conflict embodies the tensions between settler colonial practices and indigenous rights, the challenges of asymmetric warfare, and the limitations of international law in addressing protracted occupations. The ongoing struggle in Palestine highlights critical questions about the right to self-determination, the legality of occupation, and the protection of civilian populations in situations of extended conflict.

As the international community grapples with these issues, the adequacy and effectiveness of IHL in settler colonial contexts come under scrutiny. The principles of distinction, proportionality, and precaution – cornerstones of IHL – face significant challenges in their application to asymmetric conflicts where the lines between combatants and civilians often blur, and where the very legitimacy of resistance is contested. Moreover, the state-centric nature of international law, including IHL, raises questions about its ability to address the needs and rights of non-state actors and populations under occupation.

Recent legal developments, including advisory opinions from the International Court of Justice, have brought renewed attention to these issues, particularly in the context of the Israeli occupation of Palestinian territories. These legal pronouncements underscore the tensions between established principles of international law and the realities on the ground in settler colonial situations. They also highlight the ongoing debate about the role of international law in addressing historical injustices and promoting peace in regions affected by colonial legacies.

As one delves into these complex issues, it becomes clear that the intersection of settler colonialism, asymmetric warfare, and IHL presents challenges for the international legal system. Understanding this intersection is crucial not only for addressing the specific challenges in situations like Palestine but also for developing more effective and just approaches to conflict resolution and civilian protection in similar contexts worldwide.

### ***Research Question and Significance***

This study seeks to address the following research question: How does the legacy of settler colonialism impact the application and effectiveness of IHL in asymmetric conflicts, particularly in the context of liberation movements? To explore this question, the paper examines the Israeli-Palestinian conflict as a case study, analyzing how settler colonial practices and ideologies shape the dynamics of asymmetric warfare and expose the limitations of current IHL frameworks.

The significance of this research lies in its potential to contribute to a more nuanced understanding of the challenges facing IHL in contemporary conflicts. As the global community continues to grapple with protracted occupations, struggles for self-determination, and the complexities of asymmetric warfare, it becomes increasingly crucial to critically examine the adequacy of existing legal frameworks. This study's focus on the intersection of settler colonialism and IHL addresses more unique niche, offering insights that could inform more effective approaches to conflict resolution and civilian protection in similar contexts worldwide.

Moreover, this research has important implications for ongoing debates about the evolution of international law in response to changing patterns of conflict. By highlighting the ways in which settler colonial legacies can exacerbate power imbalances and complicate the implementation of humanitarian protections, this study contributes to discussions about the need for more contextually sensitive legal frameworks. It challenges the assumption of universal

applicability in IHL in favor of a more nuanced approach that accounts for the historical and structural factors shaping modern conflicts.

The examination of the Palestinian case study offers particular relevance given its prominence in international discourse and its embodiment of key issues at the heart of many contemporary conflicts. By analyzing how settler colonial practices in this context interact with IHL principles, this research provides a concrete example of the broader challenges facing international law in addressing prolonged occupations and resistance movements. The findings from this study have the potential to inform policy discussions, legal interpretations, and humanitarian practices not only in the Israeli-Palestinian context but also in other situations where colonial legacies continue to influence conflict dynamics.

***Methodology:***

This study employs a qualitative, interdisciplinary approach to examine the impact of settler colonialism on asymmetric warfare and IHL. The research methodology combines critical legal analysis with historical and sociopolitical inquiry, situated within the theoretical framework of settler colonial studies. The research draws on a range of primary and secondary sources; primary sources include international legal documents such as the Geneva Conventions and their Additional Protocols, United Nations resolutions, and key International Court of Justice (ICJ) advisory opinions, with particular attention to the July 2024 ICJ advisory opinion on the illegality of Israeli occupation. Secondary sources encompass academic literature from the fields of international law, conflict studies, and settler colonial theory. This interdisciplinary approach allows for a comprehensive examination of the complex interplay between legal frameworks and socio-historical realities.

The primary methodological approach is a case study analysis of the Israeli occupation of Palestine and ongoing war in Gaza, used as a lens through which to explore broader issues of settler colonialism's influence on asymmetric warfare and the application of IHL. This case study is chosen for its protracted nature, the clear presence of settler colonial dynamics, and its significance in international legal discourse.

The analytical framework of the study is grounded in critical legal theory, particularly its application to international law and colonial contexts. This theoretical lens is used to interrogate the underlying assumptions and power dynamics embedded in IHL and its application in settler colonial situations. Throughout the study, a critical discourse analysis is applied to legal texts,

political statements, and academic literature to uncover how language and framing influence perceptions of legitimacy and rights in the context of occupation and resistance.

By employing this multi-faceted methodological approach, the study aims to provide a nuanced understanding of the complex relationships between settler colonialism, asymmetric warfare, and IHL, using the Palestinian case study as a focal point for broader theoretical and practical insights.

## CHAPTER 2: LITERATURE REVIEW

### *Literature Review*

International humanitarian law (IHL) emerged with the ambitious goal of providing universal protections to limit the brutality of war. However, its historical development is inextricably tied to the era of dominant European imperialism, resulting in the exclusion of colonized peoples and non-State actors from its early formulations. This foundational flaw of international law - the division of the world into "civilized" and "uncivilized" realms, with only the former deemed worthy of legal recognition - has left a troubled legacy that continues to shape the uneven application of IHL in contemporary conflicts.<sup>1</sup>

In particular, the strict distinction between combatants and civilians that forms the bedrock of IHL often fails to accommodate the realities of asymmetric conflicts and anti-colonial struggles, where the lines between these categories are blurred. National liberation movements that arose in the aftermath of World War II to resist colonial domination and foreign occupation frequently involved the mass mobilization of civilian populations. However, IHL frameworks grounded in clear combatant/civilian distinctions risk delegitimizing the participation of civilians in resistance and liberation movements as unlawful combatants, and stripped them of legal protections.

This particular issue highlights how Third World Approaches to International Law (TWAIL) provides a useful framework for examining and critiquing scholarship on IHL. TWAIL questions the supposedly universal norms of international law rooted in colonialism and Western hegemony to examine the viability of IHL applications in a non-Western or Eurocentric world. TWAIL approaches are particularly relevant to the case study of Palestine, as the central argument made by scholars, including Murphy et. al, is that international law has been manipulated and instrumentalized to serve neo-colonial interests in Palestine, enabling Israel's fragmentation, structural domination, and exploitation of the Palestinian people.<sup>2</sup> The application of TWAIL in the Palestinian case expands on Mégret's historical analysis of IHL and classification as a European imperialist project, particularly in the justification of European

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<sup>1</sup> Mégret, Frédéric. 2006. "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Law's 'Other.'" *International Law and its 'Others'*. Anne Orford, ed., Cambridge University Press.

<sup>2</sup> Murphy, Ray, Anita Ferrara, and Susan Power. 2023. "The Occupation of Palestine from a TWAIL Lens." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 52–68. Brill | Nijhoff. [https://doi.org/10.1163/9789004503939\\_005](https://doi.org/10.1163/9789004503939_005).



colonization through legal doctrines like terra nullius. This legacy has continued in Palestine, with the State of Israel evading its IHL Geneva Convention and customary international law obligations and denying Palestinian sovereignty through manipulated legal arguments.<sup>3</sup> This manipulation of international law is further exacerbated by regime and political bias. Murphy et al. note this in the case of Palestine and the Israeli High Court of Justice (HCJ), which has historically facilitated settlements in the Palestinian territories by manipulating military necessity arguments and other international legal principles.<sup>4</sup>

Wolfe, while not specifically focusing on Palestine, provides important context on settler colonialism, arguing that it is inherently eliminatory towards indigenous populations. He contends that settler colonial logic, while not always genocidal, aims to replace indigenous societies. Wolfe's work helps situate Israel's occupation within broader patterns of settler colonialism, offering a theoretical framework for understanding Israel's long-term intentions in the occupied territories.<sup>5</sup> Imseis's work offers a detailed examination of the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territories, challenging Israel's arguments for non-applicability. This work provides crucial legal context for understanding Israel's obligations as an occupying power and forms a foundation for arguments about the occupation's illegality.<sup>6</sup>

This research aims to incorporate these many facets of IHL and settler colonial research and knowledge, utilizing Palestine as a case study. It hopes to apply these foundational ideas and frameworks to the current state of affairs in Palestine with the ongoing war in Gaza, and to examine them in the context of the most recent ICJ advisory opinion on the illegality of Israeli occupation. By doing so, this study seeks to contribute new insights on the legal status of Israel's occupation of Palestinian territories and its implications for Palestinian self-determination and statehood, as well as wider implications for IHL and asymmetric conflicts and self-determination struggles.

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<sup>3</sup> Mégrez, Frédéric. 2006. "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Law's 'Other.'" *International Law and its 'Others'*. Anne Orford, ed., Cambridge University Press.

<sup>4</sup> Murphy, Ray, Anita Ferrara, and Susan Power. 2023. "The Occupation of Palestine from a TWAIL Lens." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 52–68. Brill | Nijhoff. [https://doi.org/10.1163/9789004503939\\_005](https://doi.org/10.1163/9789004503939_005).

<sup>5</sup> Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

<sup>6</sup> Imseis, Ardi. "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion." *American Journal of International Law* 99, no. 1 (January 2005): 102–18. <https://doi.org/10.2307/3246093>.

### **CHAPTER 3: INTERNATIONAL HUMANITARIAN LAW, COLONIALISM, AND ASYMMETRIC CONFLICT**

#### ***Colonial Beginnings of International Humanitarian Law***

The 1949 Geneva Conventions were created to establish universal humanitarian protections applicable to all parties in armed conflicts, regardless of nationality or power status. However, although the texts attempted to be universally applicable, they were inevitably initially shaped by the Western-dominated context of their drafting and fundamentally reflected a Western-centric colonial mindset and version of ‘universality’.<sup>7</sup> The original four Conventions were negotiated in the aftermath of World War II, embedding Western legal concepts and assumptions into the core of the protective laws of war as the negotiations were dominated by Western powers – particularly the United States, United Kingdom, and France – and participation from newly independent states in Africa and Asia was very limited, as most were still under colonial rule in 1949.<sup>8</sup>

Certain aspects of the Geneva Conventions' language and structure particularly reflected the dominance of Western powers during their formulation. References to "civilized peoples" in Article 3, for instance, echo colonial-era notions of civilization that historically justified European imperialism.<sup>9</sup> This terminology implicitly created a hierarchy of nations, reinforcing power imbalances in the international system and jeopardizing universal protections for non-Western places and peoples who were considered ‘uncivilized’ or ‘savage’, and therefore not deemed worthy of IHL safeguards. Similarly, the emphasis on state sovereignty and interstate relations reinforces a Westphalian international order that emerged from European geopolitical history and fails to account for states or regions whose sovereignty may go unrecognized or be infringed upon by more powerful Western states.<sup>10</sup> This state-centric approach did not adequately address the complexities of conflicts involving non-state actors or transnational entities, which became increasingly prevalent in the post-colonial era and still exist today. Perhaps unsurprisingly, the original four Conventions largely ignored forms of conflict common in the

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<sup>7</sup> Giovanni Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, vol. 1 (Oxford University Press, 2017): 36-37, <https://doi.org/10.1093/oso/9780199379774.003.0002>.

<sup>8</sup> Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, 39.

<sup>9</sup> ICRC, “The Geneva Conventions of 12 August 1949,” First Convention, Article 3.

<sup>10</sup> Eleanor Davey, “Decolonizing the Geneva Conventions: National Liberation and the Development of Humanitarian Law,” in *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics*, ed. A. Dirk Moses, Marco Duranti, and Roland Burke, 1st ed. (Cambridge University Press, 2020), 391-392, <https://doi.org/10.1017/9781108783170.019>.

colonial world, such as guerrilla warfare and anti-colonial struggles, as some colonial powers like Britain and France feared that more robust protections for ‘rebels’ would undermine their ability to suppress anti-colonial revolts.<sup>11</sup>

### ***Additional Protocol II and Non-International Armed Conflicts***

In particular, there was widespread concern about the inadequacy of the Conventions in addressing *non-international armed conflicts* (NIACs) as decolonization accelerated in subsequent decades and 80% of victims of armed-conflicts post-1945 were the result of these non-international conflicts.<sup>12</sup> Concerns over this inadequacy ultimately led to the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts where representatives of newly independent states and national liberation movements challenged prevailing interpretations of IHL.<sup>13</sup>

The Diplomatic Conference spanned four annual sessions over the course of four years and during this time, the first two Additional Protocols to the Geneva Conventions were discussed and drafted concurrently. The second Additional Protocol – known formally as the ‘Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of non-International Armed Conflicts’ (Protocol II) – was negotiated and agreed upon in 1977.<sup>14</sup> Protocol II was negotiated with the intention of addressing the particular violence and cruelty of NIACs and ensuring that these internal wars were held to the same fundamental principles and standards of armed conflict as international conflicts.

The drafting of Protocol II emerged from a recognition that the existing legal framework for NIACs was insufficient and aimed to further develop and supplement Common Article 3 of the original four Conventions. However, the process of developing Protocol II was fraught with debate and controversy, particularly about the protocol’s scope of application. Many developing countries and national liberation movements advocated for a broad application that would cover a wide range of internal disturbances and tensions.<sup>15</sup> However, other states – particularly those dealing with internal rebellions – pushed for a narrower scope to maintain their sovereignty in

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<sup>11</sup> Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, 55-58.

<sup>12</sup> ICRC. “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.” IHL Databases. <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977>.

<sup>13</sup> Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, 56-59.

<sup>14</sup> *Ibid.*

<sup>15</sup> Davey, “Decolonizing the Geneva Conventions,” 395-396.

addressing domestic unrest.<sup>16</sup> The final text reflects a compromise, with Article 1 specifying that Protocol II applies to conflicts between state armed forces and "dissident armed forces or other organized armed groups" that exercise territorial control, creating a higher threshold than Common Article 3 while limiting the scope for potential 'rebels'.<sup>17</sup>

Another major debate centered on the legal status of non-state armed groups. Liberation movements sought recognition as legitimate parties to conflicts based on their legally-endowed right to self-determination and freedom from occupation rule and/or apartheid, while many states resisted granting any legal status to rebel groups. In the end, the official text of Protocol II did not explicitly address the legal status of non-state actors, a deliberate omission made to gain wider acceptance among hesitant states. Developing countries and liberation movements also pushed for stronger protections for civilians and restrictions on state conduct, including proposed prohibitions on certain weapons and tactics, as well as more robust provisions on humanitarian access and assistance.<sup>18</sup> However, many of these proposals were watered down or removed in the final text due to opposition from other states concerned about limitations on their military operations. These tensions were exacerbated by the fact that the majority of the Conference's attention was focused on Additional Protocol I, which deals with international armed conflicts, while Additional Protocol II generally received comparatively less attention and was subject to a more rushed final adoption process.<sup>19</sup>

Nonetheless, post-colonial representatives and liberation movement representatives were still able to provide significant input. The Ghanaian representative, for instance, advocated for the legitimacy of mass civilian participation in liberation struggles and, as such, defended "methods of combat [that were] very different from traditional ones". Similarly, the representative of the Zimbabwe African National Union argued that the proposed norm requiring anti-colonial fighters to distinguish themselves from the civilian population was "totally unrealistic" given the nature of guerrilla warfare in non-Western states.<sup>20</sup> The integration of anti-

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<sup>16</sup> Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, 55-56.

<sup>17</sup> ICRC, "The Geneva Conventions of 12 August 1949, Additional Protocols and Their Commentaries," IHL Databases. Additional Protocol II, Article 1.

<sup>18</sup> Eleanor Davey, "Decolonizing the Geneva Conventions: National Liberation and the Development of Humanitarian Law," 375-96.

<sup>19</sup> *Ibid.*

<sup>20</sup> Nicola Perugini, "Decolonising the Civilian in Third World National Liberation Wars," *Millennium: Journal of International Studies*, February 12, 2024, 03058298231214163, <https://doi.org/10.1177/03058298231214163>. Page 28.

colonial violence into the realm of IHL during this conference and in other spaces represented a form of progress, expanding the scope of legal protections. Article 4 on fundamental guarantees and Article 5 on persons whose liberty has been restricted reflect concerns raised by these groups about human rights protections in internal conflicts. Additionally, Article 18 on relief societies and relief actions was influenced by arguments from developing countries about the importance of humanitarian assistance in internal conflicts.<sup>21</sup>

Even so, the liberation movement representatives who were invited to provide input and perspective for the drafting were not allowed to vote or have more formal participation in the decision-making around the protocols.<sup>22</sup> And, due to concerns that the entire Protocol II might be rejected at the last moments of the conference due to disagreements, a significantly shortened version was made and hastily adopted in the final days of the conference. This last-minute compromise resulted in a much more limited scope than initially proposed, with many detailed provisions being removed or simplified. This included the removal of provisions on the missing and dead, detailed rules on methods of combat, specific protections for medical personnel and units, rules on judicial guarantees, and provisions on NIAC combatant and prisoner-of-war status.<sup>23</sup> This rushed process and the resulting limitations of Additional Protocol II reflect the challenges in reaching an agreement on rules for non-international armed conflicts, where issues of state sovereignty and the status of non-state actors were particularly sensitive.

### ***Challenges of Applying IHL to Asymmetric Conflicts***

Despite the provisions made in Protocol II and the foundational principles of the Geneva Conventions for handling NIACs, there is still a great deal of tension between the principles of IHL and the realities of asymmetrical internal conflicts and resistance movements. These tensions are particularly pronounced in conflicts involving non-state actors seeking self-determination or resisting perceived oppression. The vast disparities in military capabilities, organizational structures, and strategic objectives between state and non-state actors create significant challenges in applying IHL principles such as distinction and proportionality.

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<sup>21</sup> ICRC, “The Geneva Conventions of 12 August 1949, Additional Protocols and Their Commentaries.” Additional Protocol II, Articles 4, 5, 18.

<sup>22</sup> Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, 44-46.

<sup>23</sup> ICRC, “The Geneva Conventions of 12 August 1949, Additional Protocols and Their Commentaries.” Additional Protocol II Commentary.

Moreover, the state-centric nature of IHL itself raises questions about its effectiveness and fairness in regulating these inherently unequal conflicts.

**1. The Principles of Distinction and Proportionality in NIACs - Inadequacy of Current Interpretations of Combatant Status:** The principle of distinction is a fundamental principle of IHL that requires parties to a conflict to distinguish between civilians and combatants, and between civilian objects and military objectives.<sup>24</sup> This is designed to ensure that civilians are as protected as possible from the damage and violence of war, while also extending some basic protections to combatants. Combatants in international armed conflicts are provided certain privileges, namely entitlement to prisoner-of-war (POW) protections in the event of enemy capture, and protection from criminal prosecution – with the exception of violations of IHL or war crimes.<sup>25</sup> States did *not* agree to extend these same privileges in NIACs to members of non-state armed groups, in order to dissuade insurgency and armed resistance. The principle of distinction still applies during NIACs just as in international armed conflicts, just without the same degree of protection for combatants. Members of non-state armed groups are generally not recognized as lawful combatants under IHL and consequently, if captured, they are typically charged under domestic law of the enemy state and are not entitled to POW status. The primary protection from IHL that is afforded to guerrilla fighters in NIACs is that they are treated humanely if they are no longer taking part in hostilities.<sup>26</sup>

The traditional definition of combatant status struggles to encompass the realities of modern asymmetric warfare, and the Geneva Conventions' focus on membership in identifiable and organized armed formations as the touchstone of combatant status is contentious in many of today's conflicts, particularly when applied to liberation movements.<sup>27</sup> For example, private military contractors, who play an increasingly significant role in modern conflicts, often fall into a legal limbo where they do not represent normal citizens but are also not part of a formal standing army. Similarly, members of guerrilla or resistance groups who engage in hostilities but do not meet the formal criteria for combatant status pose significant challenges to the application of IHL and fail to fall neatly under either the civilian or combatant category.

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<sup>24</sup> ICRC, "The Geneva Conventions of 12 August 1949, Additional Protocols and Their Commentaries."

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

In self-determination struggles, civilians quickly become both victims and perpetrators of conflict and violence due to a lack of a formal, centralized military, or oftentimes even the lack of a state altogether. This is even further complicated when non-state actors engaging in an NIAC for self-determination constitute a military wing of a larger political or social organization of which there are civilian members not directly engaging in hostilities. This is certainly true of Hamas in Gaza, which has a wide range of members under different political and organizational branches of the organization who have no direct, active role in hostilities with Israel. This has also been seen with groups like the Kurdish People's Defense Units (YPG) in Syria<sup>28</sup> which serves as the militia wing of the larger political, non-military Kurdish Democratic Union Party, or with Hezbollah in Lebanon which has a political wing that actively participates in Lebanese politics as well as engaging in social services and media production that is separate from its military segment. The common conflation of all subsets of these organizations as one large rebel militia group – often with the label of 'terrorist' also attached – creates a great deal of confusion about who and what constitute legitimate targets, depriving many civilians of their protections.

Perhaps the most contentious area in applying IHL's civilian-combatant distinction to asymmetric conflicts is the interpretation of "direct participation in hostilities." The concept of "direct participation in hostilities" is crucial in determining when civilians lose their protection from attack. However, in asymmetric conflicts, particularly those involving rebel organizations or child soldiers, the boundaries of this concept become blurred. The common narrow interpretation is inadequate for modern conflicts and is exacerbated by the temporal aspect of civilian protection. The current interpretation of "for such time" in relation to when civilians lose protection by participating in hostilities is a "'farmer by day, fighter by night' scenario".<sup>29</sup> This interpretation, while intended to protect civilians, may inadvertently incentivize the blurring of lines between combatants and civilians.

In asymmetric conflicts, the line between civilian and military *objects* also often becomes blurred, further complicating not only distinction but also proportionality assessments. Non-state

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<sup>28</sup> Ilana Rothkopf, "International Humanitarian Law and Non-State Practice in Armed Conflict: Combatant's Privilege and Kurdish Fighters in Syria," *Journal of Conflict and Security Law* 24, no. 2 (July 1, 2019): 271–96, <https://doi.org/10.1093/jcsl/krz008>.

<sup>29</sup> Alice Ribbenvik, "The Principle of Distinction in Modern Warfare," 2018, page 23. ICRC, "The Geneva Conventions of 12 August 1949, Additional Protocols and Their Commentaries."

actors may utilize civilian infrastructure for military purposes, either out of necessity or as a deliberate camouflage tactic. This creates challenges not only distinguishing between viable and protected military targets, but also complicates the process of determining the military value of potential targets and in calculating expected civilian harm. For example, a building used partly as a civilian residence and partly as a command center for a non-state group presents a difficult proportionality calculation. The military advantage of destroying the command center must be weighed against the harm to civilians and civilian property. In such cases, the principle of proportionality intersects with the aforementioned questions about direct participation in hostilities, particularly around which activities qualify as “direct participation” and when civilians lose or regain their immunity.<sup>30</sup>

Research conducted by the Center for Civilians in Conflict interviewed over 250 civilians in Bosnia, Libya, Gaza, and Somalia about involvement in NIACs in their respective territories, attempting to determine what understanding, if any, these civilians had of IHL definitions and principles.<sup>31</sup> These civilians reported conflict involvement in complex ways beyond traditional fighting, including the provision of logistical support, media coverage, and membership of affiliated institutions or organizations. Many of these civilians shared that they were unaware of whether or when they had crossed the line for the IHL threshold of “direct participation” and did not understand what actions would deprive them of their protected civilian status. Many civilians also shared that their participation in the conflict was forced, or that they had no choice but to participate to protect themselves and their families. This is due largely to the absence of a national army or government that can properly protect these individuals against large, developed enemy States with abundant resources and technology to maintain greater separation between their own civilian and combatant populations.

The study's emphasis on the various motivations for civilian involvement and the challenges in clearly distinguishing between civilians and combatants underscores the need for a more nuanced approach to civilian protection in these contexts. It suggests that blanket categorizations based on association or proximity to armed groups are often inadequate and frequently harmful. Instead, there is a need for more context-specific assessments that consider the involuntary nature of some civilian involvement and the power imbalances inherent in

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<sup>30</sup> *Ibid.*

<sup>31</sup> Center for Civilians in Conflict. “The People’s Perspectives: Civilian Involvement in Armed Conflict,” 2015.



asymmetric conflicts, and particularly decolonial struggles. This could help prevent the unjust targeting of civilians who are caught in the crossfire of self-determination struggles and ensure their continued protection under IHL.

**2. Proportionality in conflicts with technological disparities:** Advancements in military technology have massively widened the gap in asymmetric conflicts and further complicated the principle of proportionality.<sup>32</sup> State actors typically possess advanced weaponry, precision-guided munitions, and sophisticated intelligence capabilities while non-state actors may rely on improvised explosive devices (IEDs), small arms, and guerrilla tactics. This disparity complicates the assessment of expected military advantage and anticipated civilian harm due to fundamentally different operational realities faced by each side. State actors may argue that their precision capabilities allow for minimized civilian casualties, justifying strikes against high-value targets even in populated areas. However, this ignores the potential for intelligence failures and damage of targeting dual-use objects. Non-state actors, lacking precision weapons, may claim military necessity for tactics that put civilians at greater risk, such as operating from civilian-dense areas or using imprecise munitions. Their limited options for engaging against superior forces quickly blur the lines between military and civilian targets.

The assessment of anticipated military advantage also differs greatly between parties whose strategic goals are vastly different. State actors may be pursuing objectives such as counterterrorism campaigns or maintaining territorial control, while non-state actors may be – and often are – engaged in a struggle for self-determination or resistance against occupation. These differing perspectives can lead to vastly different valuations of what constitutes a significant military advantage and change the parameters by which decisions are made and actions are taken. For a technologically superior force, the destruction of a single enemy position may seem a minor gain, while for an outgunned non-state actor, it could represent a major victory. This highlights the key challenge of how to assess military advantage and civilian harm when the capabilities and tactics of the parties to the conflict are so disparate.

Another challenge in applying proportionality to asymmetric conflicts is the question of the timeframe for impact consideration. Should proportionality be assessed based on the immediate effects of an attack, or should longer-term consequences be considered? This becomes

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<sup>32</sup> *The principle of proportionality in IHL requires that the expected civilian harm from an attack must not be excessive in relation to the anticipated military advantage. (ICRC Geneva Conventions)*

particularly relevant in protracted conflicts where the cumulative effects of military operations on civilian populations can be severe and when weaker groups or states lack the resources and infrastructure to recover from attacks and damage. For instance, the destruction of civilian infrastructure of a weaker party might provide a short-term military advantage but lead to long-term humanitarian consequences. The question of how to factor these long-term effects into proportionality calculations remains contentious.

The inherent subjectivity in proportionality assessments becomes even more pronounced in asymmetric conflicts. The "reasonable military commander" standard often used in evaluating proportionality decisions may be insufficient when the parties to the conflict have radically different military doctrines, cultural contexts, available technologies, and strategic objectives.<sup>33</sup> Moreover, the power imbalances in asymmetric conflicts can make it difficult to hold parties accountable for potential violations of the proportionality principle, particularly when non-state actors may lack the legal expertise to effectively argue proportionality violations and powerful state actors might be shielded from accountability by their political and military influence.

**3. Exacerbating the State-Centric Nature of IHL:** IHL remains a very *state*-centric structure that confers significant privileges upon state actors, particularly in the context of asymmetric conflicts. This is rooted in the initial endeavor of IHL to regulate warfare between sovereign entities, even with the addition of Protocol II which accounted for NIACs. A fundamental issue arising from this state-centric approach is the binding nature of IHL on non-state armed groups without their consent or participation in the law-making process. The principle of legislative jurisdiction, which holds that non-state actors are bound by IHL simply by virtue of operating within the territory of a state party to the conventions, exemplifies this imposition of obligations.<sup>34</sup> This lack of ownership and perceived legitimacy can significantly undermine compliance with IHL by non-state actors.

Additionally, IHL rules are often primarily addressed to the stronger state party, as the weaker non-state actor may lack the organizational structures and capabilities necessary to fully implement IHL to the same degree. This disparity is exacerbated by the aforementioned reluctance of states to grant non-state actors any form of international legal personality or

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<sup>33</sup> Perugini, "Decolonising the Civilian in Third World National Liberation Wars."

<sup>34</sup> Morgan Kelley, "Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare," 2013.

legitimacy by including them in IHL processes. The preferential treatment of state actors is evident in the substantive provisions of IHL, where non-state actors are afforded comparatively fewer rights under IHL than states. Some states have attempted to carve out further exceptions to IHL protections for certain non-state actors they label as "terrorists," further diminishing the protections available to these groups when 'terrorism' is a highly politicized, non-legal term that is frequently unevenly applied to non-state actors for the same behaviors that states sometimes commit. The formation of customary IHL similarly privileges state practice, generally disregarding the practice of non-state actors.<sup>35</sup> This exclusion further entrenches the state-centric nature of IHL and potentially limits its relevance and effectiveness in contemporary conflicts, which are predominantly characterized by the involvement of non-state actors.

### ***Settler Colonialism as an Enabler of Asymmetric Warfare***

The state-centric nature of IHL, with its inherent biases favoring established state actors, creates a fertile ground for the perpetuation of settler colonial practices and ideologies. This intersection between IHL's structural limitations and the ongoing legacy of settler colonialism further complicates the pursuit of justice and self-determination for colonized peoples.

Settler colonialism is a form of colonization where foreign populations move into a territory with the intention of establishing permanent residence there and asserting sovereignty. It is an inherently eliminatory process as settlers are primarily motivated by the acquisition of territory, which often entails the removal of existing populations or infrastructure.<sup>36</sup> This drive for new territory and expanded sovereignty manifests in the prioritization of settler lives and needs over those of indigenous inhabitants. Settler colonial practices typically include displacement of native populations, land confiscation, segregation, and attempts at assimilation of indigenous peoples, if not extermination of indigenous peoples altogether. The ideology underpinning settler colonialism involves notions of "improvement" and the cultivation of supposedly "empty" or "waste" lands that are used to justify the displacement of 'incompetent' or 'uncivilized' indigenous peoples.<sup>37</sup> Importantly for the understanding of settler colonialism's intersection with IHL, settler colonialism is understood as an ongoing structure rather than a

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<sup>35</sup> Yousef M. Aljamal, " Hamas: A Terrorist Organization or Liberation Movement?," *Politics And Religion Journal* 8, no. 1 (June 1, 2014): 39–58, <https://doi.org/10.54561/prj0801039a>.

<sup>36</sup> Patrick Wolfe, "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (2006): 387-409, at 388.

<sup>37</sup> Patrick Wolfe, "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

single historical event, with its effects and practices continuing long after initial settlement and contributing to the ongoing subjugation of colonized peoples.

Given all these aspects of settler colonialism, colonial powers typically maintain overwhelming military superiority over subjugated or indigenous populations, sometimes permanently. This power imbalance forces resistance movements into asymmetric tactics out of necessity. While often condemned internationally, these tactics emerge from a context where conventional warfare is impossible for the weaker side. Settler colonial regimes also often implement systems of spatial control and surveillance that restrict the movement and organization of indigenous populations.<sup>38</sup> This spatial control limits indigenous peoples' ability to mount coordinated resistance or even pursue normal economic and social activities. Settler colonial powers additionally tend to criminalize indigenous resistance, labeling it as terrorism or insurgency.<sup>39</sup> This framing delegitimizes struggles for self-determination in the eyes of the international community and is used to justify harsh crackdowns and collective punishment of civilian populations.

There was a pervasive view historically among Western powers that indigenous populations were "savages". The laws of war that were developed in the 19<sup>th</sup> century thus explicitly excluded "non-civilized" peoples from their protections on the philosophical basis that indigenous "savages" were incapable of following the laws of war.<sup>40</sup> Because indigenous populations were deemed incapable of following the laws, they were also deemed ineligible for any protections under the law, creating a double standard that allowed brutal tactics to be used against colonized populations.<sup>41</sup> Excluding colonized peoples from the laws of war was part of forcing them to adopt Western norms of warfare in order to gain recognition, and this exclusion created a precedent for denying protections to non-state combatants as inherently unlawful that continues to be invoked today against non-state fighters.

The intersection of settler colonialism and IHL thus creates a complex and often unjust framework for addressing asymmetric conflicts between settler states and indigenous populations. The historical exclusion of colonized peoples from the protections of the laws of

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<sup>38</sup> Patrick Wolfe, "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

<sup>39</sup> Khaled A. Beydoun, "On Terrorists and Freedom Fighters," 136.

<sup>40</sup> Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Law's 'Other,'" 3-4.

<sup>41</sup> *Ibid*, 18-20.

war, combined with the ongoing structures of settler colonialism, perpetuates a system where indigenous resistance is delegitimized and brutally suppressed. The result is a legal regime that, while ostensibly neutral, often serves to reinforce the power imbalances inherent in settler colonial situations. This dynamic is particularly evident in protracted conflicts like the Israeli-Palestinian case, where the intersection of settler colonial practices and the limitations of IHL create significant obstacles to achieving justice and self-determination for the colonized population.

## CHAPTER 4: PALESTINE AS A CASE STUDY

### **Applying the Settler Colonial Framework in Palestine:**

Settler colonial studies most commonly examine the United States, Australia, and New Zealand, but the frameworks established for understanding the origins of Zionism, the foundation of Israel, and the roots of the ongoing occupation of Palestine in settler colonialism. The prioritization of elimination, territory acquisition, assimilation, and segregation in settler colonial ideology is massively significant in the case of Palestine.<sup>42</sup> Israel's ongoing occupation reflects these settler colonial practices and Israel's very foundation was facilitated through the displacement of Palestinians that has continued for decades. The very origins of Israel as a new state of refuge and safety for Jews fleeing the Holocaust deemed the land as 'more necessary' for the lives of Jews fleeing other persecution than the lives of Arabs and Palestinians already living within the territory. That foundational search for refuge morphed into a long-term desire for territorial and sovereignty expansion has manifested in the prioritization of some lives over others. It is also emblematic of the fear of being displaced that is so salient among nations that were built or empowered through the displacement or subjugation of other nations and peoples. This was seen in France and Britain's hesitations when contributing to the creation of the Geneva Conventions about legitimizing movements that challenged colonial occupation and control.

The founding father of Zionism wrote in his manifesto "if I wish to substitute a new building for an old one, I must demolish before I construct."<sup>43</sup> The influence of this eliminatory ideology can be seen today in Palestine as Benjamin Netanyahu has established his vision for the occupied Gaza Strip by 2035, transforming the territory into a capitalist utopian economic trade zone of modern skyscrapers and manicured greenery after the completion of the current extremely violent and lethal war.<sup>44</sup> This is emblematic of the settler colonial desire for 'improvement' and elimination, and echoes the ideology underpinning European settlement of North America, where Indigenous displacement was justified through notions of "improvement" and cultivation of supposedly "empty" or "waste" lands.

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<sup>42</sup> Patrick Wolfe, "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

<sup>43</sup> Patrick Wolfe, "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (2006): 388.

<sup>44</sup> Adam Tooze, "Gaza: "The Decade After" - The Surreal Geoeconomic Imaginary of Netanyahu's "Economic Peace." *Chartbook* 284. 23 May 2024.

Segregation is a crucial practice for the ‘improvement’ and assimilation goals of settler colonialism, and has certainly been employed in Palestine with the construction of a separation wall – in violation of international law – and restrictions on Palestinian freedom of movement. Palestinian civilians in both Palestinian territories and Israel have been subjected to educational systems that marginalize their history and culture and have been limited in their ability to exercise their culture, language, and religion.<sup>45</sup> These issues of segregation and assimilation also exemplify how the conceptualization of settler colonialism as an ongoing structure rather than a distinct historical event is particularly relevant to the Palestinian situation. As settler colonialism drags on, non-native inhabitants in colonial States become the beneficiaries of the historical and ongoing victimization of Native or Indigenous peoples. This framing of settler colonialism as a continuing process aligns closely with the Palestinian experience, where displacement, land appropriation, and struggles over sovereignty persist into the present day, prioritizing illegal Israeli settlers and disadvantaging native Palestinians.

Palestine also highlights some key unique features of settler colonialism that divert from the traditional iterations found in the U.S. or Australia, primarily regarding the urban nature of a great deal of Palestinian territory and the international order’s enabling of Israel’s settler colonial project. North American settler colonialism, for example, focused on the acquisition of rural, agricultural land that could be made productive by settlers. Zionist settlement, however, has taken interest in rural *and* urban areas. This urban colonization represents a distinct form of spatial transformation compared to the homestead-based settlement of North America, and also highlights the difficulty of urban war and conflict in places like Gaza where massive populations of civilians reside in war zones and are irresponsibly subjected to violence intended for combatants. And, regarding international enabling of settler colonialism, North American settler colonial projects received support through international mechanisms such as the Papal bulls of 1942. However, with time, the world has come to recognize the problematic foundations of the U.S. and other settler colonial states and the illegality of many of the practices utilized in the country’s founding. However, the case of Palestine was predicated on and enabled by a modern system of formalized international law and diplomacy formed in the wake of the first World War

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<sup>45</sup> Ray Murphy, Anita Ferrara, and Susan Power, “The Occupation of Palestine from a TWAIL Lens,” in *Prolonged Occupation and International Law*, ed. Nada Kiswanson and Susan Power (Brill | Nijhoff, 2023), 52–68, [https://doi.org/10.1163/9789004503939\\_005](https://doi.org/10.1163/9789004503939_005).

with the primary goal of achieving global peace and security. The establishment of Israel through UN partition and its ongoing military and diplomatic backing by Western powers represents a degree of international endorsement not present in earlier settler colonial cases. And, these actions took place through a system that came into existence after the initial settler colonial projects in North America and beyond, yet, seemingly no lessons were learned from the resistance to those earlier colonial instances. Unfortunately, in the quest for “global peace and security”, the peace and security of some people and states were considered more important than that of others.

The prioritization of settler lives and claims over indigenous ones, the drive for territorial acquisition and "improvement," the suppression of native resistance, and the use of legal and discursive tools to legitimate these actions are all hallmarks of settler colonialism that can be clearly observed in the Palestinian context. The impact of this settler colonial legacy is easily tangible in Palestine: it impacts the legal status of the Palestinian territories, the treatment and rights of Palestinian people, the Palestinian fight for self-determination, and Israel's impunity in mistreating Palestinian civilians.

### **Legal Status of Gaza**

The legal status of Gaza under IHL is a uniquely complex subject of significant debate, with profound implications for the relevant legal framework and the applicability of the settler colonial framework. Israel maintains that it ended its occupation of Gaza in 2005 when it withdrew its military forces and settlers from the territory and that the region is no longer under Israeli occupation.<sup>46</sup> This position is supported by some legal experts who argue that the traditional markers of occupation, particularly military presence, are no longer present in Gaza. However, a majority of international opinion, including the United Nations, European Union, and International Committee of the Red Cross (ICRC), considers Gaza to remain under Israeli occupation. This view is based on a broader interpretation of "effective control" that goes beyond physical military presence. Proponents argue that Israel maintains control over Gaza's borders, airspace, territorial waters, and key infrastructure, effectively exercising authority over the territory without consent and amounting to ongoing occupation.<sup>47</sup>

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<sup>46</sup> Clive Baldwin, “How Does International Humanitarian Law Apply in Israel and Gaza?,” *Human Rights Watch – The New Arab*, October 27, 2023.

<sup>47</sup> *Ibid.*



The determination of occupation status is crucial because it dictates the extent of Israel's legal obligations towards the population in Gaza. If Gaza is considered occupied territory, the full body of occupation law under the Fourth Geneva Convention and customary international law would apply. This would also impose heightened responsibilities on Israel as the occupying power, including ensuring the welfare of civilians, maintaining public order, and providing for basic needs such as food, water, and medical care.<sup>48</sup> And, even if Gaza is not considered occupied, the situation still constitutes an armed conflict, to which IHL applies. At a minimum, Common Article 3 of Additional Protocol II (to which Palestine is a party), and customary IHL govern the conduct of hostilities and protection of civilians.<sup>49</sup> These rules bind all parties to the conflict, including non-state armed groups like Hamas.

The legal debate about Gaza's occupation status also impacts the classification of the war as international or non-international. One can argue that it should be classified as an international armed conflict due to the ongoing occupation and Hamas's *de facto* role as the government of Gaza, while others view it as a non-international armed conflict between Israel and Hamas. This classification affects the specific treaty provisions that apply, though many fundamental protections are considered customary international law and apply in both types of conflicts. Naming it as an international armed conflict under the purview of all IHL amplifies the severity of Israel's violations of IHL throughout the war and the illegality of its ongoing occupation. However, naming the war as a non-international armed conflict contributes to the delegitimization of Palestinian resistance, and underscores the tensions of IHL and the realities of self-determination that this paper addresses.

The ongoing debate over Gaza's status underscores the challenges of applying traditional concepts of occupation and settler colonialism to modern conflicts. Technological advancements and remote forms of control have blurred the lines of what constitutes "effective control" in the 21st century, and this ambiguity can and should not be used to deny protections to civilian populations caught in conflict.<sup>50</sup> And regardless, the fundamental principle of humanity

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<sup>48</sup> Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion," *American Journal of International Law* 99, no. 1 (January 2005): 102–18, <https://doi.org/10.2307/3246093>.

<sup>49</sup> ICRC. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977."

<sup>50</sup> Tasnimul Hassan and Deeksha Tiwari, "Tenuous Accountability: Armed Groups, International Law and the Israel-Palestine Conflict," *NLIU CRIL Journal of International Law and Policy*, vol. 1 issue 1 (November 22, 2021).

underlying IHL demands that those with significant control over a population's welfare bear responsibility for ensuring their basic needs and rights are met; in this case, Israel constitutes that power with significant control.

As the situation in Gaza continues to evolve, the international community faces the challenge of interpreting and applying IHL in a way that provides meaningful protection to civilians, regardless of the technical classification of the conflict or territory. In either case, be it an international or non-international armed conflict, Israel has shown a disregard for IHL's principles and customary international law and an increasingly unabashed impunity for its violations.

### **Difficulties of Protection of Civilians and Civilian Objects in Gaza**

The protection of civilians and civilian objects is a cornerstone of IHL, and its application in the context of Gaza is particularly critical given the densely populated nature of the territory and the intense hostilities taking place there. The principle of distinction is fundamental and applies regardless of the classification of the conflict or the status of the territory. In the ongoing war in Gaza, there are serious concerns about potential violations of these principles by both Israeli forces and Palestinian armed groups. The intense bombardment of Gaza by Israeli forces has resulted in widespread destruction of civilian infrastructure and a high number of civilian casualties. Over 40,000 Palestinians have been killed since October 7, with 52% of these deaths being women and children.<sup>51</sup> The scale of civilian harm raises questions about compliance with the IHL principles of distinction, proportionality, and precaution in attack. Particular concern has been raised over attacks on specifically protected objects under IHL, such as hospitals, schools, and places of worship. The destruction of Al Ahli Arab Hospital in Gaza City, for instance, constitutes a potentially grave breach of IHL, regardless of which party was responsible.<sup>52</sup> IHL provides special protection to medical facilities, and any attack on such facilities must be justified by their use for military purposes that are harmful to the enemy, a claim that must be thoroughly investigated. Similarly, the attacks on humanitarian personnel and obstruction of humanitarian aid that have occurred in Gaza, facilitated by Israel, violate IHL principles.<sup>53</sup>

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<sup>51</sup> Iain Overton, "Gaza War: UN revises death toll for women and children." May 17, 2024.

<sup>52</sup> Human Rights Watch. "Gaza: Findings on October 17 al-Ahli Hospital Explosion." November 26, 2023.

<sup>53</sup> ICRC, "The Geneva Conventions of 12 August 1949, Additional Protocols and Their Commentaries."

The use of certain weapons in densely populated areas also raises IHL concerns. The use of white phosphorus by Israeli forces in Gaza, a substance that can cause severe burns, is particularly dangerous when used in urban environments, and constitutes a war crime as it specifically violates customary international law and Additional Protocol III's prohibitions on the use of incendiary weapons against civilians. On the Palestinian side, the indiscriminate rocket attacks by Hamas and other armed groups targeting Israeli civilian areas are clear violations of IHL as are any verifiable accusations of the use of civilian human shields.<sup>54</sup> The taking of hostages, as occurred in the October 7 attack, is also explicitly prohibited under IHL.

The principle of proportionality calculation is particularly challenging in Gaza due to its urban nature and the fact that military and civilian objects are often in close proximity. However, the extensive civilian casualties and destruction of civilian infrastructure in Gaza have showcased that Israel's attacks have not properly adhered to this principle as it has repeatedly launched attacks resulting in massive civilian casualties against potential military targets – often unverified – or ambiguous dual-use objects. IHL also requires parties to take all feasible precautions to minimize harm to civilians. This includes providing effective advance warning of attacks that may affect the civilian population, unless circumstances do not permit. While Israel has issued evacuation orders for parts of Gaza, the effectiveness and legality of these orders have been questioned, given the limited safe areas available within Gaza and the difficulties of large-scale movement in the besieged territory, particularly with little notice.<sup>55</sup>

The protection of civilians also extends to ensuring access to basic necessities for survival. The severe restrictions on water, food, electricity, and medical supplies in Gaza have created a dire humanitarian crisis that likely constitutes a violation of IHL. The deliberate deprivation of these essentials could amount to the war crimes of starvation or collective punishment, or, in some circumstances, even crimes against humanity.<sup>56</sup>

### **Settler Colonial Impact on View of Palestinians: Fueling Impunity**

The legacy of settler colonialism and ongoing occupation of Palestinian land has profoundly shaped Israeli perceptions of Palestinians and contributed to their dehumanization

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<sup>54</sup> Amnesty International. "Israel And Occupied Palestinian Territories 2023." <https://www.amnesty.org/en/location/middle-east-and-north-africa/middle-east/israel-and-the-occupied-palestinian-territory/report-israel-and-the-occupied-palestinian-territory/>.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

that enables ongoing violence and oppression. This dynamic, rooted in colonial ideology, has significant implications for the treatment of Palestinians and the apparent impunity with which Israel has been able to retaliate against them. Settler colonial ideology fundamentally relies on the notion of the indigenous population as inferior and less civilized than the settler population. In the case of Israel, this manifests in the portrayal of Palestinians as backwards, violent, and incapable of self-governance. Early Zionist thinkers often described Palestine as "a land without a people for a people without a land," effectively erasing the existence and legitimacy of the existing Palestinian population.<sup>57</sup> This narrative, though factually incorrect, has persisted in various forms, shaping Israeli public opinion and policy and facilitating an ongoing process that continues to influence how Palestinians are negatively perceived and treated.

The portrayal of Palestinians as subhuman or less than fully human has several dangerous consequences. Firstly, it makes it easier for Israeli society to accept and even justify violence against Palestinians. When a population is seen as less than human, their suffering becomes less morally problematic, and they become easier to villainize as an entire racial, religious, or social group based on the actions of only a few members. This dynamic is evident in the disproportionate use of force against Palestinian civilians in Gaza. The high civilian death toll in Israeli military operations is often justified through rhetoric that paints all Palestinians as potential terrorists or voluntary human shields, effectively denying them the status and protection of innocent civilians.<sup>58</sup>

Furthermore, the framing of the conflict as one between two equal sides, rather than as a case of ongoing violent settler colonialism, obscures the power dynamics at play. This "both sides" narrative, prevalent in international discourse, falsely equates the actions of an occupying power with those of an occupied people resisting that occupation. It ignores the fundamental asymmetry of the situation and the systemic nature of Palestinian oppression. This framing has emboldened Israel to use the language of self-defense to justify actions that would otherwise be considered war crimes.

The settler colonial framework also helps explain the seeming impunity with which Israel has been able to act against Palestinians. Settler colonial states often enjoy significant support from other powerful nations, particularly those with their own settler colonial histories. In Israel's

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<sup>57</sup> Wolfe, "Settler Colonialism and the Elimination of the Native," 388-389.

<sup>58</sup> Amnesty International. "Israel And Occupied Palestinian Territories 2023."

case, unwavering support from the United States has in part shielded it from meaningful international consequences for its actions against Palestinians. This support is not just diplomatic but also includes massive military aid, which directly enables Israel's military superiority over Palestinians and exacerbates the asymmetric nature of their engagement.

The international community's failure to hold Israel accountable for violations of international law and human rights abuses can be partially attributed to the pervasive influence of settler colonial ideologies globally. Many Western nations, themselves products of settler colonialism, are hesitant to strongly condemn practices that mirror their own historical (and in some cases ongoing) treatment of indigenous populations, despite the widespread international recognition of settler colonial practices as unlawful. This creates a form of collective impunity where settler colonial practices are normalized and shielded from serious repercussions.

The impunity Israel experiences is also reinforced by the weaponization of accusations of antisemitism against critics of Israeli policy. By conflating criticism of the state of Israel with antisemitism, defenders of Israeli actions create a chilling effect on discourse and activism around Palestinian rights. This tactic has been particularly effective in Western countries where the memory of the Holocaust rightly creates sensitivity around antisemitism. However, it has also been used to silence legitimate criticism of Israel's treatment of Palestinians, further enabling impunity in Israel's violence towards innocent Palestinian civilians.

The ongoing expansion of Israeli settlements in the West Bank, in violation of international law, is a clear example of this impunity in action. Despite consistent international condemnation, Israel continues to build and expand these settlements with little consequence. This not only further dispossesses Palestinians of land and resources but also creates an environment that makes a viable Palestinian state increasingly difficult to achieve. The lack of meaningful international action against this clear violation of the Fourth Geneva Convention demonstrates the extreme degree and extent of Israel's impunity.

It's important to note that this dehumanization and impunity don't go entirely unchallenged. In the last 11 months of the escalatory war in Gaza, more and more international powers and States have spoken out against Israel's actions, alongside ICJ advisory opinions in January and July of 2024 regarding the potential for genocide in Gaza and the illegality of Israeli occupation of Palestinian territories. Additionally, Palestinian resistance, in various forms, continues to assert Palestinian humanity and rights. Growing global movements like Boycott,

Divestment, and Sanctions (BDS) aim to create accountability where official channels have failed and utilize economic impacts to influence policy change. However, these efforts face significant obstacles due to the entrenched nature of settler colonial ideologies and power structures in both Israel's domestic dealings and international diplomatic relationships.

## **CHAPTER 5: ICJ ADVISORY OPINION JULY 2024**

The examination of settler colonial trends in Palestine illuminates the stark realities of ongoing dispossession, occupation, and the suppression of Palestinian self-determination. These patterns, deeply rooted in colonial practices, have persisted despite decades of international scrutiny and intermittent peace processes. However, the International Court of Justice's (ICJ) most recent July 2024 advisory opinion on the illegality of Israeli occupation marks a significant moment in the legal framing of the Palestinian situation. This landmark decision – the court's most substantial regarding Israeli occupation since 1967 – not only reinforces the observations made in this paper's analysis of settler colonialism in Palestine but also provides authoritative, albeit non-binding, legal substantiation of these trends. The ICJ's opinion serves as a mechanism for identifying concrete examples of the ongoing colonial nature of the occupation and explicitly affirming its illegality under international law.

### ***Essential Findings of the ICJ Opinion:***

The ICJ opinion came to many significant conclusions in its 83-page opinion about the illegality of Israel's presence and behavior in the Occupied Palestinian Territory, and many of these conclusions highlight important underlying structures that fuel illegal behavior:

- First and foremost, the Court found that Israel's continued presence in the Occupied Palestinian Territory – including Gaza – is unlawful and reiterated the Palestinian people's right to self-determination as a peremptory *jus cogens* norm.<sup>59</sup> To make this determination, the Court opted to reference the law on the use of force rather than IHL to emphasize the illegality of Israel's presence as IHL would apply regardless of the occupation's legality.<sup>60</sup>
- The Court determined that Israel's settlement policy, including the transfer of Israeli civilians into occupied territory, violates IHL, specifically Article 49 of the Fourth Geneva Convention.<sup>61</sup>

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<sup>59</sup> Prohibition on the acquisition of territory by force – customary international law – corollary to the prohibition of the use of force in Art 2(4) of the UN charter.

<sup>60</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." 19 July 2024. Page 5.

<sup>61</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 174-175.

- The Court found that Israel's exploitation of natural resources in the occupied territories violates the principle of permanent sovereignty over natural resources, impeding Palestinians' right to self-determination.<sup>62</sup>
- The Court concluded that Israel's discriminatory legislation and measures in the occupied territories, including restrictions on movement and property rights, amount to racial discrimination.<sup>63</sup>
- The Court determined that Israel's policies and practices of settlement expansion and annexation obstruct the Palestinian people's right to self-determination.<sup>64</sup>
- The Court found that Israel's prolonged occupation and policies have created irreversible 'facts on the ground', entrenching its control, speaking to how settler colonial practices can become entrenched over time, making it difficult to reverse violations of IHL and restore self-determination rights.<sup>65</sup>
- The Court stated that Israel cannot justify its policies based on security concerns, as these cannot override fundamental principles of international law like the prohibition on acquiring territory by force.<sup>66</sup>
- The Court emphasized that all states have an obligation not to recognize or assist in maintaining the unlawful situation created by Israel in the occupied territories. However, the opinion does not outline strong enforcement mechanisms, potentially reflecting Israel's impunity stemming from geopolitical support.<sup>67</sup>

All of these illegal behaviors clearly illustrate the harmful legacy and continued impact of settler colonial ideology and practices. They highlight how settler colonialism conflicts with IHL protections for occupied populations, how economic exploitation is intertwined with denying and

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<sup>62</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 124-133.

<sup>63</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 223-227.

<sup>64</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 230-243.

<sup>65</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Page 68.

<sup>66</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 253-254.

<sup>67</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 273-279.



suppressing self-determination, how systems of institutionalized discrimination are established, and how claims of security are used to override human rights claims.

### ***International Law and Settler Colonial Theory***

The ICJ's advisory opinion provides a clear illustration of how international law can be used to analyze settler colonial structures, while also revealing some of the ways legal frameworks can be manipulated to support such structures. The opinion recognizes practices that align with settler colonialism's emphasis on elimination that manifests in policies aimed at removing or marginalizing the indigenous population to make way for settler society. The Court notes that Israel has, in addition to over 2,000 square kilometers of territory expropriation and exploitation of natural resources such as water and minerals, used military power to force Palestinians out of Area C.<sup>68</sup> The opinion also highlights Israel's adoption of "related discriminatory legislation and measures" that create "an inhospitable environment" for Palestinians.<sup>69</sup> These align with settler colonial strategies of demographic engineering to alter the population balance in favor of settlers.

The ICJ opinion reveals how certain legal frameworks and interpretations can inadvertently perpetuate settler colonial structures. For instance, the Court notes that Israel has "to a large degree substituted its military law for the local law in force in the Occupied Palestinian Territory at the beginning of the occupation in 1967".<sup>70</sup> This imposition of the occupying power's legal system is a common feature of settler colonial regimes. The Court also points out how Israel uses the selective interpretation of laws to further its settlement agenda: "This includes considerable areas of land that would be characterized as private property but have been declared by Israel as State land — and thus intended for public use — in reliance on a selective interpretation of the law in force at the time of Israel's occupation".<sup>71</sup>

### ***Tension between the right to self-determination and prohibition on the use of force:***

The ICJ advisory opinion once again emphasizes the Palestinian people's right to self-determination as an *erga omnes* obligation, underscoring its importance and suggesting that all

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<sup>68</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 120-123.

<sup>69</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 163-166.

<sup>70</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraph 136.

<sup>71</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraph 120.

states have a legal interest in its realization.<sup>72</sup> However, it also reaffirms the prohibition on acquisition of territory by force.<sup>73</sup> This dichotomy creates critical questions about what forms of resistance are legally permissible for people seeking self-determination, especially in situations of prolonged occupation, from non-violent civil disobedience to armed struggle.

IHL does not explicitly address the right to resist occupation. While Common Article 1 of the Geneva Conventions obliges High Contracting Parties to ensure respect for the Conventions in all circumstances, it does not provide clear guidance on the legality of resistance movements.<sup>74</sup> The Additional Protocol I does extend the application of IHL to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," but this does not necessarily legitimize all forms of armed resistance.<sup>75</sup>

International law has grappled with this tension in other contexts, such as the struggles against apartheid in South Africa and colonial rule in various parts of the world. UN General Assembly Resolution 3314 (1974), which defines aggression, includes a provision stating that nothing in the definition "could in any way prejudice the right to self-determination, freedom and independence... particularly peoples under colonial and racist regimes or other forms of alien domination."<sup>76</sup> This suggests some recognition of the right to resist, but the legal boundaries of this right remain unclear.

In the Palestinian case, this tension underscores the urgent need for continuing legal scholarship and potentially developing new legal instruments that can provide clearer guidance on the permissible forms of resistance against prolonged occupation, while still maintaining the fundamental principles of international law and the protection of civilian lives.

### ***Distinction Between Civilians and Combatants:***

While the Court emphasizes Israel's obligations to protect Palestinian civilians, it does not explicitly address the legal status of Palestinians engaged in resistance activities against the

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<sup>72</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Page 6.

<sup>73</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 174-179.

<sup>74</sup> ICRC, "The Geneva Conventions of 12 August 1949," Common Article 1.

<sup>75</sup> ICRC, "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)", 8 June 1977. Article 1.4.

<sup>76</sup> UN General Assembly, "Definition of Aggression, United Nations General Assembly Resolution 3314," 1974. Article 7.

occupation. The ICJ's silence on this matter in its advisory opinion leaves a significant gap in understanding how international law should approach the status and rights of individuals involved in resistance against occupation.

This omission underscores the limitations of existing legal frameworks in addressing the nuanced realities of anti-colonial struggles and asymmetric conflicts. The rigid civilian/combatant dichotomy of the Geneva Conventions and Additional Protocols may not adequately capture the fluid nature of participation in resistance movements. In situations of prolonged occupation, where the line between civilian life and resistance can blur, strict adherence to traditional categories may fail to provide appropriate protections or accurately reflect the nature of the conflict.

Despite the Court's focus on civilian protection, the lack of discussion on resistance participants raises important questions about the application of international law in such contexts and risks perpetuating a one-sided narrative that fails to account for the complex dynamics of occupation and resistance. This approach may reinforce power imbalances by emphasizing the occupying power's responsibilities without fully acknowledging the legal rights and protections that can be afforded to those engaged in legitimate resistance activities.

The ICJ's treatment of this issue (or lack thereof) in the advisory opinion may have far-reaching implications for how international law conceptualizes and addresses similar conflicts worldwide. By not directly engaging with the legal status of resistance participants, the Court missed an opportunity to provide guidance on evolving interpretations of IHL that could better accommodate the realities of modern conflicts.

***Role of international bodies in addressing prolonged occupations:***

The ICJ emphasized the important role of international bodies, particularly the United Nations General Assembly and Security Council, in addressing Israel's prolonged occupation of Palestinian territory. Specifically, the Court stated that "it is for the General Assembly and the Security Council to consider what further action is required to put an end to the illegal presence of Israel, taking into account the present Advisory Opinion".<sup>77</sup> The Court called on the UN as a whole to "redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a

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<sup>77</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraph 281.

threat to international peace and security, to a speedy conclusion".<sup>78</sup> Furthermore, the Court opined that international organizations, including the UN, have an obligation not to recognize as legal the situation arising from Israel's unlawful presence in the Occupied Palestinian Territory.<sup>79</sup> The Court thus highlighted the responsibility of international bodies to take concrete steps to end prolonged occupation and refuse to legitimize it, in line with their mandates to uphold international law and maintain global peace and security.

The ICJ's advisory opinion underscores the need for international bodies to take more decisive action in addressing prolonged occupations, which often have roots in colonial legacies. This is particularly relevant to the broader discussion of colonialism's impact on IHL. The Court's emphasis on the illegality of annexation and the importance of self-determination reflects the post-colonial shift in international law away from accepting territorial acquisition by force. However, the persistence of Israel's occupation highlights the challenges in fully implementing these principles. International bodies should consider stronger enforcement mechanisms and sanctions to end prolonged occupations, as well as more robust support for self-determination movements. This case illustrates how IHL, while evolving to reject colonial practices, still struggles with effectively addressing situations that stem from colonial-era conflicts and power imbalances.

### ***ICJ Opinion Illuminates Israel's Impunity***

The opinion clearly documents many blatant violations of IHL committed by Israel in the Palestinian territories, highlighting Israel's ongoing impunity. Despite the Court's unequivocal findings that Israel's policies and actions violate fundamental principles of international law – including the Fourth Geneva Convention and customary international law – Israel has continued to pursue these policies with minimal international consequences, particularly in Gaza. The Court's observation about Israel's creation of "irreversible facts on the ground" points to a critical aspect of Israel's impunity: the normalization of IHL violations over time. As the occupation has become entrenched, the international community has seemingly become more desensitized to ongoing breaches of IHL, particularly in Gaza, where cycles of violence have become tragically routine.

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<sup>78</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraph 282.

<sup>79</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 273-283.

The Court's call for all states to refrain from recognizing or assisting in maintaining the unlawful situation created by Israel *theoretically* provides a basis for international action.<sup>80</sup> However, the lack of concrete enforcement mechanisms in the opinion, coupled with the political support Israel receives from key powerful allies like the United States, significantly undermines the practical impact of these legal findings. Colonial powers utilize alliances with other powerful, often colonial, states to enable oppression, and settler colonial regimes tend to enjoy significant diplomatic cover from powerful allies. The United States' consistent support for Israel in international forums is a prime example. This diplomatic shield protects settler states from meaningful international pressure or sanctions, further tilting the balance against indigenous self-determination efforts, and in the case of Gaza, substantially contributing to Israel's impunity.

The advisory nature of the ICJ's opinion, while carrying significant legal weight, does not provide a direct mechanism for enforcement. This limitation is particularly problematic in the context of Gaza, where urgent humanitarian needs often clash with Israel's security claims. The absence of a binding enforcement mechanism allows Israel to continue its policies with limited immediate legal consequences, further reinforcing its sense of impunity in violating IHL.

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<sup>80</sup> International Court of Justice. "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem." Paragraphs 273-283.

## **CHAPTER 6: EVOLVING IHL AND CONCLUSIONS**

The Palestinian case study provides valuable insights into areas where IHL and its enforcement mechanisms may need to evolve to better protect civilians in modern conflicts, and leads us toward several key areas for potential development.

### ***Expanding the Scope of Civilian Harm Assessment***

One promising avenue for improving IHL's effectiveness in NIACs and self-determination struggles is expanding the scope of civilian harm assessment. This approach would provide a more comprehensive understanding of the impact of armed conflicts on civilian populations, potentially leading to better protection mechanisms and more effective accountability processes.

Traditionally, civilian harm assessments have focused primarily on immediate casualties resulting from direct military actions. However, this narrow view fails to capture the full extent of civilian suffering in modern conflicts. A more holistic approach would consider long-term impacts on civilian infrastructure, livelihoods, and social structures. For instance, the destruction of hospitals, schools, and water treatment facilities can have lasting effects on public health, education, and quality of life long after hostilities have ceased. Similarly, damage to agricultural lands or economic centers can devastate local economies, leading to prolonged civilian hardship. Psychological harm and displacement are often overlooked aspects of civilian suffering that merit greater attention in IHL applications. The trauma experienced by civilians in conflict zones can have long-lasting mental health consequences, affecting individuals, families, and entire communities. Forced displacement, whether internal or across borders, disrupts social fabrics and can lead to a host of additional vulnerabilities. By incorporating these factors into civilian harm assessments, IHL could better reflect the true cost of armed conflicts on civilian populations.

Moreover, tactics such as blockades and restrictions on movement, often employed in self-determination struggles and NIACs, have profound effects on civilian well-being that are not adequately captured by current IHL frameworks (and may even amount to war crimes). These measures can impede access to food, medical care, and other essential services, leading to severe humanitarian crises. An expanded scope of civilian harm assessment would consider these indirect but devastating impacts on civilian populations.

Implementing this expanded approach would require developing new methodologies and indicators for assessing civilian harm. This could involve interdisciplinary collaboration between

legal experts, social scientists, public health professionals, and humanitarian workers. Long-term monitoring and data collection would be necessary to fully understand the protracted effects of armed conflicts on civilian populations. This enhanced understanding could inform more nuanced and effective protection strategies, influence military decision-making processes, and strengthen accountability mechanisms for IHL violations.

### ***Combatant Status under Additional Protocol II***

The lack of protection for combatants under Protocol II raises questions about whether a third category of “unlawful combatant” should be added to the existing categories of individuals in armed conflict of civilians and combatants. Under current IHL, non-state actors in NIACs are not recognized as lawful combatants, even if they adhere to the typical IHL requirements of having a chain of command, wearing a distinct emblem, etc. The creation of an “unlawful combatant” category, alongside combatant (with the implication that this type of combatant is now ‘lawful’) and civilian, could help generate greater recognition and protection for fighters who are members of recognizable resistance organizations with a verified claim to self-determination. The creation of this category and the extension of POW protections to ‘lawful’ combatants would also not negatively impact the protection of and distinction between civilians.

This approach could incentivize non-state armed groups to comply with IHL, as doing so could lead to recognition as 'lawful' combatants which could in turn, could improve the overall conduct of hostilities and enhance protection for all individuals affected by the conflict. However, implementing such a change would require careful definition of the criteria for 'lawful' combatant status in NIACs, including factors such as the legitimacy of the group's cause, its level of organization, and its adherence to IHL. There would almost certainly be pushback from the same States who have always had concerns about potentially legitimizing non-state armed groups or undermining state sovereignty.

Despite these challenges, the potential benefits of introducing an "unlawful combatant" status warrant serious consideration. As conflicts evolve, so too must the legal frameworks governing them. By providing a more nuanced approach to combatant status in NIACs, the tension between IHL protections in conflict and the importance of the realization of self-determination could be eased.

### *Adopting a Human Rights-Based Approach to IHL*

The limitations of IHL in addressing asymmetric conflicts and self-determination struggles, particularly within settler colonial contexts, may necessitate an exploration of alternative legal frameworks rather than improvements to the existing IHL framework. A human-rights law-oriented approach could potentially offer a more comprehensive and nuanced mechanism for addressing these complex situations. While IHL has traditionally focused on regulating the conduct of hostilities, a human rights framework could provide a more holistic understanding of conflict impacts and offer broader protections for all individuals involved.

A human rights framework would expand the scope of civilian protection to address individuals' right to life, health, education, and adequate standard of living, which would provide a stronger base for addressing the indirect and long-term effects of conflict on civilian populations and infrastructure. This aligns with the call for a more comprehensive civilian harm assessment, encompassing long-term impacts on infrastructure, livelihoods, and social structures that current IHL frameworks often fail to capture. A human rights framework also could help address the difficulties of combatant status in NIACs and self-determination struggles as one's rights and protections would be evaluated beyond their combat status alone, potentially better addressing some of the 'shades of gray' of involvement.

Human rights law involves a greater degree of state obligations relating to individual rights, which could be helpful in addressing situations of long-term occupation and control by reasserting specific obligations that a ruling party has to civilian populations under its control. This is also salient for the right to self-determination, more explicitly recognized and developed in human rights law than in IHL, and could provide a stronger legal basis for addressing the claims of peoples seeking self-determination in settler colonial contexts.

Human rights law should certainly not replace IHL altogether as the primary framework, but incorporating a human rights approach would generate more comprehensive approaches to civilian protection, provide a stronger basis for addressing the rights of all individuals involved in conflict, and open up additional accountability mechanisms. This pathway would certainly face challenges, particularly from states who resist the shift as an infringement on their sovereignty or an impediment to their military operations, as well as due to practical challenges of reconciling human rights law and the laws of war in conflict situations. However, a human



rights-oriented framework could potentially address some of the key limitations of IHL in dealing with asymmetric conflicts and self-determination struggles in settler colonial contexts.

### ***Improving Implementation of Existing IHL and Ensuring Accountability***

While much conversation centers around evolving IHL itself, there is a greater need to improve the implementation of existing laws and accountability for violations. This includes enhancing IHL education for military personnel, political leaders, and civilians, as well as developing better mechanisms for real-time monitoring and reporting of violations.

A critical aspect of implementation is the integration of IHL into military doctrine, rules of engagement, and operational planning. This integration ensures that IHL considerations are not an afterthought but an integral part of military decision-making processes. States should be encouraged to develop robust mechanisms for legal review of new weapons and methods of warfare, as required by Article 36 of Additional Protocol I to the Geneva Conventions.

The current system of international justice, including the International Criminal Court (ICC) and ad hoc tribunals, has made significant strides but faces limitations in terms of jurisdiction and enforcement. Strengthening these mechanisms is essential, but equal attention should be paid to enhancing national judicial systems' capacity to prosecute IHL violations. This can be achieved through legislative reforms, capacity-building programs for legal professionals, and international assistance in complex cases. In line with this, the need for thorough and impartial investigations into alleged violations cannot be overstated, yet current mechanisms often face political obstacles and practical challenges in conflict zones.

Ultimately, political will remains the cornerstone of effective IHL implementation and accountability. The international community must consistently prioritize respect for IHL in its diplomatic efforts and be willing to impose meaningful consequences for serious violations. The longer that powerful States, at best, ignore violations by their allies, at worst, or contribute financially or militarily to such violations, the longer IHL will go unenforced and ignored.

### ***Conclusions:***

This research has demonstrated that the legacy of settler colonialism not only shapes the dynamics of ongoing conflicts but also exposes critical limitations in IHL's ability to address the complexities of prolonged occupations and struggles for self-determination. Despite attempts at universality, the foundational assumptions and structures of IHL often fail to adequately account

for the realities of asymmetric conflicts, especially those rooted in settler colonial contexts. The Palestinian case study vividly illustrates how these limitations manifest in practice, with devastating consequences for civilian populations caught in the crossfire of protracted conflict.

The ongoing occupation of Palestinian territories and the recent escalation of violence in Gaza highlight the urgent need for a reevaluation of how international law approaches conflicts characterized by significant power imbalances and historical injustices. The July 2024 ICJ advisory opinion on the illegality of Israeli occupation serves as a critical juncture, affirming the unlawfulness of prolonged occupation and emphasizing the right to self-determination as a peremptory norm of international law. However, the opinion also underscores the limitations of current legal mechanisms in enforcing these principles, particularly in the face of geopolitical realities that often shield settler colonial states from meaningful accountability.

Moreover, the examination of IHL's application in Gaza demonstrates the challenges in implementing principles of distinction and proportionality in densely populated urban areas, especially when confronted with vast technological disparities between conflicting parties. The expanded scope of civilian harm, including long-term impacts on infrastructure, psychological trauma, and forced displacement, calls for a more comprehensive approach to assessing and mitigating the effects of armed conflict on civilian populations.

Looking forward, this research suggests several potential avenues for evolving IHL to better address the realities of modern, asymmetric conflicts:

1. Expanding the scope of civilian harm assessment to include long-term and indirect impacts of conflict.
2. Reconsidering combatant status in non-international armed conflicts to provide more nuanced protections for individuals involved in liberation movements.
3. Incorporating a human rights-based approach to complement and enhance IHL, potentially offering more comprehensive protections and clearer state obligations.
4. Strengthening implementation and accountability mechanisms to ensure adherence to IHL principles, regardless of the power dynamics at play.

However, these potential reforms must be considered alongside a critical examination of the underlying structures that perpetuate inequality and injustice in the international system. The persistence of settler colonial ideologies and practices, even in the face of clear legal prohibitions, suggests that legal reforms alone may be insufficient to address the root causes of

these conflicts. As the international community grapples with these issues, it is crucial to center the voices and experiences of those most affected by prolonged occupations and struggles for self-determination. Only through a comprehensive reevaluation of our legal frameworks, informed by a nuanced understanding of historical injustices and contemporary power dynamics, can we hope to develop more just and effective approaches to conflict resolution and civilian protection.

The case of Palestine serves not only as a stark reminder of the human cost of these legal and structural inadequacies, but also as a call to action for the international community. As we move forward, it is imperative that we continue to critically examine and evolve our legal frameworks, always striving towards a more just and equitable global order that truly upholds the principles of human dignity and self-determination for all peoples.

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