

Amicus Brief on the Direct or Indirect Transfer of Palestinians within the Occupied Territories

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Introduction

It has come to the attention of the present writer that upon the outbreak of the Second Intifada, Israel froze the procedure for updating addresses switched from the Gaza Strip to the West Bank in its copy of the registry. As a result of this, the Palestinians whose registered addresses remain in the Gaza Strip are said to be prevented from moving to the West Bank and exercising their right to choose where they live. It has also been reported that the Palestinian residents whose registered addresses are in the Gaza Strip who are present in the West Bank must hold a permit to be present in their homes and with their families. It has been suggested that among the issues that have arisen under these circumstances, one specific issue ought to be highlighted. For Palestinian women to travel to the Gaza Strip from the West Bank to be united with, or to follow, their spouses who reside in the Gaza Strip, a permit for passage from the West Bank to the Gaza Strip is issued without affording the possibility of allowing them to return to the West Bank (granting of a *de facto* one-way passage, which is aggravated by the requirement, imposed in most cases, to sign a written declaration never to return to the West Bank).

Those women who decide to leave the West Bank to join their spouses who are registered or resident in the Gaza Strip are not directly ordered by the Israeli occupation authorities to do so. Nevertheless, the social and legal conditions created by the occupation authorities are said to leave them with a hard choice. They would depart for the Gaza Strip to realize their rights to marriage and family life, but with the inability to return to the West Bank (the denial of their rights to free movement and to choose their own residence within the meaning of Article 12 of the International Covenant on Civil and

Political Rights (ICCPR)).¹ Or they would remain in the West Bank while being precluded from meaningfully exercising their rights to marriage and family life. This amicus brief will analyze whether this *indirect* form of displacement would raise not only State responsibility for a violation of both Article 49(1) of the Fourth Geneva Convention (GCIV) of 1949 and of the equivalent rule under customary international humanitarian law (IHL), but also individual criminal responsibility for the war crime of forcible transfer within the occupied territories, as contemplated under Article 8 of the Rome Statute of the International Criminal Court (ICC Statute). It should be understood that due to the time constraint, this brief will constitute only a summary of my legal views.

Legal Status of the Gaza Strip – Brief Examinations

The Israeli Supreme Court in the *Bassiouni* case held that since the withdrawal or disengagement of the Israeli Defense Forces *qua* occupying armed forces in 2005, the Gaza Strip ceases to be defined as an occupied territory under international humanitarian law.² Instead the Court has categorized it as a “hostile territory”, and that the Israeli responsibility for ensuring the rights of the civilian population in that territory can arise from the post-occupation duties that are supplemented by the standards of international human rights law.

In view of this judicial finding, it is necessary to examine whether the Israeli authorities are still bound by the relevant rules of the law of occupation in the Gaza Strip. On this matter, two approaches may be suggested. First, it can be submitted that an ultimate authority retained by the disengaging occupant and its ability to redeploy troops at a short notice (or even “within a reasonable time to make the authority of the occupying power felt”)³ are sufficient to continue labeling it as the occupying power under IHL.⁴ This suggests that the Gaza Strip can continue to be described as the occupied territory under international law. Second, it may be argued that the question whether or not the Gaza Strip is the occupied territory is simply irrelevant to identifying individual criminal responsibility for war crimes of deportation and forcible transfer examined in the immediate circumstances of the case. Indeed, the legal status (occupied territory or otherwise) of the territory to which displaced persons are destined does not feature in respect of the two relevant war crimes: “[u]nlawful deportation or transfer” of protected persons under the Geneva Conventions, which is a grave breach of these Conventions

¹ As an aside, note ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep 136 at 178, paras 133-134 (finding the construction of the security barrier to impede the freedom of movement under this provision).

² See *Israel, Petition for an Order Nisi and an Urgent Request for Injunction, Jaber al Bassiouni Ahmed et al v. The Prime Minister and Minister of Defense*, HCJ 9132/07, 28 October 2007 [*Gaza Fuel and Electricity* case]. This is different from a gradual transfer of powers to a local administration in the occupied territory, which can be contemplated within the framework of occupation laws: *ICRC’s Commentary to GCIV*, at 62-63.

³ ICTY, *Prosecutor v. Naletilić*, Case No. IT-98-34-T, Judgment of 31 March 2003, para. 217 (reflecting the position of the US *Field Manual 27-10* (1956), sec. 356). See also G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law And Practice of Belligerent Occupation* (1957) at 28-29.

⁴ See *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict*, 25 September 2009, UN Doc. A/HRC/12/48, para. 279 (“Goldstone Report”) (referring to the occupied status of Denmark during World War II, despite the local administration left in place); and *Israel, Tsemel v. Minister for Defense*, HCJ 102/82, 37(3) *Piskei Dinn* 365 at 373-374; as cited in: Y. Shany, “Faraway, so Close – the Legal Status of Gaza After Israel’s Disengagement”, (2005) 8 *YbkIHL* 369 at 376.

(Article 8(2)(a)(vii) ICC Statute); and “the deportation or transfer of ...parts of the population of the occupied territory...outside this territory”, which is premised on other serious violation of the laws and customs of war (Article 8(2)(b)(viii) ICC Statute). The same is true of the crime against humanity of “[d]eportation or forcible transfer of population” under Article 7(1)(d) ICC Statute.

Deportation or Forcible Transfer

As will be explored below, in the present circumstances of the case, the war crime of deportation and forcible transfer of civilians may be recognized in case civilian persons are found to be forcibly relocated from the West Bank, which is no doubt the occupied territory, to the Gaza Strip. There has been controversy over the merit of distinguishing the two nomenclatures, namely between deportation (cross-border or external displacement of forcible nature) and forcible transfer (internal displacement or displacement within national borders of forcible nature).⁵ Further, it is disputed whether the concepts of deportation and forcible transfer can encompass a forcible relocation beyond “some kind of demarcation line or barrier which, if crossed, effectively prevents or at least seriously inhibits the return of the forcibly displaced population to its accustomed areas of residence”.⁶ Nonetheless, these questions are immaterial to the present circumstances, irrespective of whether or not one endorses the train of thought that the Gaza Strip is a “hostile territory” and not an occupied territory. Clearly, the impugned displacement involves the Palestinians concerned traversing the *de facto* boundaries between Israel and the occupied Palestinian territories (which the West Bank is), which are relatively fixated and far from being “constantly changing frontlines” of the kind examined by the ICTY in the *Stakić* case.⁷

Deportation or Forcible Transfer of Persons as a War Crime

Deportation or unlawful displacement of civilians within occupied territories, while engaging State responsibility,⁸ may constitute an underlying offence of both war crimes and crimes against humanity (as well as even genocide). Existing rules of IHL provide a basis for individual criminal responsibility for forcible displacement of civilians within or outside occupied territories. Article 147 GCIV specifically categorizes “unlawful deportation or transfer” of protected persons as a grave breach of the GCIV.⁹ The States parties to the Geneva Conventions are obligated to penalize the violation of the prohibition under their national law and to search for and prosecute perpetrators present in their territories or to extradite them to another party willing to establish the

⁵ It may be contended that deportation denotes displacements that involve the crossing of an international border while forcible transfer relate only to relocations within a State. See, for instance, W.A. Schabas, *The UN International Criminal Tribunals – The former Yugoslavia, Rwanda and Sierra Leone*, (2006) at 203; and ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006. In contrast, see the jurisprudence of the ICTY which has jettisoned the cross-border element with respect to deportation: *Prosecutor v. Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 674; and *Prosecutor v. Stakić*, IT-97-24-A, dissenting opinion of Judge Shahabuddeen, paras 23-32.

⁶ *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, Partly Dissenting Opinion of Judge Shahabuddeen, para. 46.

⁷ *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, para. 303.

⁸ The state responsibility for forced displacement of civilians has been recently highlighted by the Eritrea Ethiopia Claims Commission. See, for instance, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27-32, 17 December 2004, paras 79-106, 44 ILM 601; and Partial Award, Civilians Claims, Ethiopia’ Claim 5, 17 December 2004, paras 128-131, 44 ILM 630.

⁹ GCIV, Article 147.

jurisdiction.¹⁰ Further, according to Article 85(4) API, “the deportation or transfer of all or parts of the population of the occupied territory within...this territory in violation of Article 49 of the Fourth Geneva Convention” is included in the expanded list of grave breaches of API and expressly designated as war crimes. Further, the International Committee of the Red Cross’ *Customary International Humanitarian Law Study* confirms the individual criminal responsibility for this grave breach of API.¹¹

Under the Rome Statute of the International Criminal Court, forcible transfer of civilians within the occupied territories can give rise to two forms of war crimes: (i) the grave breach form of war crimes under Article 8(2)(a)(vii) ICC Statute, which incorporates one of the grave breaches of the Fourth Geneva Convention stipulated under Article 147 GCIV;¹² and war crimes based on “[o]ther serious violations of the laws and customs of war applicable in international armed conflict” within the meaning of Article 8(2)(b)(viii) ICC Statute,¹³ which corresponds to Article 85(4)(a) API.

With respect to crimes against humanity, coercive displacement may be encompassed within the material scope of any of its three underlying acts: deportation or forcible transfer of population; persecution; and other inhumane acts. Indeed, if the contested measures are intended to result in the demographic changes in the occupied West Bank, this would be a clear violation of the conservationist premise underlying the laws of occupation, as embodied under Article 43 of the Hague Regulations annexed to the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907.¹⁴ Surely, this does not necessarily lead to an individual criminal responsibility for war crimes.¹⁵ Still, it might not be excluded that the implementation of the contested acts is either systematic or widespread in nature, and that their cumulative effects are sufficient to reach the threshold of “other inhumane acts”, the residual category of the crime against humanity. However, in the absence of first-hand information that clearly demonstrates systematic policy on the part of the Israeli occupying authorities with regard to the contested measures, or a widespread pattern of these measures, this question goes beyond the scope of discussions of this amicus brief, and the following discussions will focus only on issues of war crimes.

Differences between the Grave Breach Form and the War Crime Based on Serious Violations of Laws and Customs of War

¹⁰ GCIV, Article 146(1) and (2).

¹¹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (2005), Vol. I, at 578-9.

¹² Insofar as the war crime of deportation or transfer of all or parts of the population of the occupied territory within or outside the territory under Article 8(2)(b)(viii) is concerned, this formulation is considered a reproduction of the grave breach listed in Article 8(2)(a)(vii): K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, (2003), at 212.

¹³ Article 8(2)(b)(viii) concerning war crimes expressly contemplates the internal displacement, as can be seen from the wording (“within or outside this territory”).

¹⁴ The same conclusion can be reached even when such demographic changes are not intended but occurring as a result of gross negligence on the part of the occupation authorities.

¹⁵ Not all violations of IHL rules will amount to war crimes. *Contra*, J.J. Paust, “The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War”, (2003) 27 *Suffolk Transnational Law Review* 1, at 13.

It is generally understood that insofar as the acts constituting deportation or forcible transfer of persons are concerned, the material elements of the war crimes under Article 8(2)(a)(vii) and Article 8(2)(b)(viii) ICC Statute are identical.¹⁶ However, it is worth noting that this understanding may be qualified in two respects. First, there is difference in the personal scope of the victims of such forced removal. The grave breach form under Article 8(2)(a)(vii) must be directed against the persons protected by the Geneva Conventions 1949. This means that with respect to GCIV, the victims of deportation or unlawful transfer must fall within the scope of “protected persons” under Article 4 GCIV, namely those who have fallen “in the hands of” a party to the conflict, whether in occupied territories, in the territories of the adverse party to the conflict, or even in battlefields. The ICTY has construed the concept of protected persons under GCIV in a broader manner so as to be consistent with humanitarian object and purpose of the Convention.¹⁷ On the other hand, the war crime of coercive displacement under the heading “other serious violations of the laws and customs of war” (Article 8(2)(b)(viii)) deals with “the population” in the occupied territories (“peaceful civilians” and even civilians who have become unprivileged belligerents by taking a direct part in hostilities). It does not, however, cover civilians finding themselves in an active combat zone.¹⁸

Second, while this is only a semantic question, there might be difference in the number of victims of forced displacement contemplated in those two provisions. Article 8(2)(b)(viii) ICC Statute provides that “the deportation or transfer of all or parts of the population of the occupied territory within...this territory” may constitute a war crime. The reference to the wording “parts of the population” suggests that the coercive removal would be of collective nature.¹⁹ On the other hand, the Elements of Crimes for Article 8(2)(a)(vii) ICC Statute in its paragraph 1 (1) recognizes that displacing only one person may satisfy the material requirement.²⁰ Be that as it may, what is at least agreed upon is that there is no requirement of a minimum number of displaced persons.²¹

Turning to the Palestinian persons affected by the impugned measures, if one starts with the premise, as this amicus brief does, that the GCIV is *de jure* applicable to the West Bank,²² it is clear that they are the protected persons within the meaning of Article 4 GCIV and “parts of the population of the occupied territory” within the meaning of Article 85(4)(a) API.

¹⁶ See, for instance, *ICRC's Commentary to APs*, paras 3503 *et seq*; and G. Werle, *Principles of International Criminal Law*, (2005), at 327.

¹⁷ See, for instance, *Prosecutor v. Tadic*, IT-94-1-A, Judgment of 15 July 1999; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment of 24 March 2000, para. 151; and *Prosecutor v. Mucić, Delalic et al. ("Čelebići Camp" case)*, IT-96-21-A, Judgment 20 February 2001, para. 84.

¹⁸ For the same view, see P. Akhavan, “Reconciling Crimes Against Humanity with the Laws of War – Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence”, (2008) 6 JICJ 21 at 35-37 (criticizing the ICTY Trial Chamber in the *Gotovina* case for obliterating the requirement of the forced transfer of persons occurring in occupied territories).

¹⁹ Dörmann, *supra* n. 12 at 212.

²⁰ On that basis, Werle argues that the transfers of a single person is sufficient to meet the definition of the crime: Werle, *supra* n. 16 at 328.

²¹ *Prosecutor v. Momcilo Krajisnik*, IT-00-39-A, Judgment of 17 March 2009, para. 333.

²² See, for instance, H.C. 337/71, *The Christian Society for the Holy Places v. Ministry of Defense et al.* 26(1) Piskei Din 574, at 580 (1972); English excerpt in: (1972) 2 Israel YbkHR 354, at 356 (*per* Sussman J.) (recognizing the applicability of customary international humanitarian law, including many rules derived from GCIV, to the West Bank and the Gaza Strip).

“Unlawful Transfer” and “Forcible Transfer”

The development of the case-law by the ICTY suggests that “unlawful transfer” as a grave breach of the Geneva Conventions is understood as the forced displacement of persons from where they reside to a place that is not their own choosing.²³ This understanding is in harmony with the concept of “forcible transfer” embodied under Article 49(1) GCIV.

The focus on the coercive nature of relocation is crucial for diminishing the importance of examining the *lawfulness* of the place of residence from which persons are removed. It is true that the ICTY case-law has referred to “displacement from the area in which they are lawfully present”.²⁴ Even so, it has been stressed that among the main legal values safeguarded by forcible transfer stands out the right of the victims to stay in their home and community.²⁵ Further, with respect to *actus reus*, the judicial appraisal has focused almost exclusively on the involuntary nature of removal. Indeed, one of the leading legal experts of the International Committee of the Red Cross (and Red Crescent) (ICRC) once wrote that “Article 49 comes into play whenever people are forcibly moved from their *ordinary* residences”.²⁶ In view of the reduced importance of the lawfulness of the abodes from which persons are relocated, the war crime of forcible transfer seems to mark a contrast to the crime against humanity of “forcible transfer of population” laid down in Article 7 ICC Statute. The latter stipulates that this crime denotes displacement of persons “from the area in which they are *lawfully* present...”.²⁷

Involuntary Nature of Transfer

In order to assess the forcible nature of the transfer, one key criterion is that the contested movement is contrary to an individual’s own “genuine wish to leave”²⁸ or “a genuine choice to go”.²⁹ The coercive nature of the transfer is to be interpreted broadly so as to include many (if not all) involuntary forms of displacement. The Trial Chamber of the ICTY has held that the term “forcibly”, when used to refer to “forcible transfer”, should not be confined to physical coercion, but that the interpretation of this term can be guided by the general prohibition of physical and moral coercion stipulated under Article 31 GCIV.³⁰ By applying liberal interpretation, it has ruled that this term “includes threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.³¹

²³ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment of 31 March 2003, para. 519.

²⁴ See, for instance, *Prosecutor v. Simić et al.*, IT-95-9-T, Judgment of 17 October 2003, paras 129-131; and *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment of 27 September 2006, para. 723.

²⁵ *Prosecutor v. Simić et al.*, IT-95-9-T, Judgment of 17 October 2003, para. 130.

²⁶ J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (1995) at 144, emphasis added. See also Jack Goldsmith, US Department of Justice, *Memorandum for the Files, Re: Voluntary Departure from Occupied Territory*, 16 July 2004, at 2.

²⁷ ICC Statute, Article 7(2)(d), emphasis added. Indeed, the Preparatory Commission for the International Criminal Court specifically rejected the proposition by some delegates that this lawful residence should be part of the elements of this war crime under Article 8(2)(a)(vii) ICC Statute: Dörmann, *supra* n. 12, at 106.

²⁸ ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment of 31 March 2003, para. 519.

²⁹ ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgment of 2 August 2001, paras 528 *et seq.*

³⁰ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment of 31 March 2003, para. 519.

³¹ *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, para. 281, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment of 17 September 2003, paras 229 and 233; and *Prosecutor v. Krajišnik*, IT-00-39-T,

The survey of the ICTY case-law suggests that even where displaced persons have requested to be removed, this does not necessarily indicate the exercise of a genuine choice.³² Indeed, the evaluations of a genuine consent to (or genuine free will of) relocation depend on particular circumstances of the case. It is of the present writer's view that relevant criteria for assessing the vulnerability of the victims should include their gender, ethnicity, religion, age, disability etc.

Turning to the present circumstances, it cannot be assumed that the decision of the Palestinian women who are registered and resident in the West Bank (and whose whole families and lives are there) to move *forever* to the Gaza Strip is based on their "genuine choice to go". Indeed, there is no other alternative for them to join their spouses in the Gaza Strip and effectively to exercise their fundamental rights to marriage and family life.

Absence of Lawful Grounds for Displacement

The absence of valid legal grounds for displacement under international law is a key to rendering forcible transfer criminally punishable. While Article 8(2)(a)(vii) ICC Statute codifies the war crime of "*unlawful* deportation or transfer" as a grave breach of the Geneva Conventions,³³ the Elements of Crimes for this provision does not clarify the concept of unlawfulness.³⁴ Even so, under Article 7(2)(d) ICC Statutes, the crime against humanity of deportation or forcible population transfer is defined as "forced displacement of the persons ...*without grounds permitted under international law*".³⁵

The Allied military trials established in the aftermath of the Second World War furnish some crucial guidance on this issue. In the *A. Krupp* case, the US Military Tribunal at Nuremberg, which was set up to implement the Control Council Law No. 10 after World War II, confirmed the position taken by Judge Phillips in the *Milch* case.³⁶ According to this, the unlawfulness of deportation or transfer could be identified in three circumstances: (i) when this is undertaken "without a legal title"; (ii) when the purpose of the displacement is illegal"; (iii) "whenever generally recognized standards of decency and humanity are disregarded".³⁷ In the *Von Leeb and Others* case, the same US Military Tribunal clarified the meaning of an unlawful purpose by holding that "There is no

Judgment of 27 September 2006, paras. 724 and 730. See also *Prosecutor v. Krstić*, IT-98-33-T, Judgment of 2 August 2001, paras 528-530.

³² ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment of 17 September 2003, para. 229;.

³³ ICC Statute, Article 8(2)(a)(vii), emphasis added.

³⁴ The Elements of Crimes in relation to Article 8 (2) (a) (vii)-1 only highlights five elements:

1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³⁵ ICC Statute, Article 7(2)(d), emphasis added. For the case-law, see, for instance, ICTY, *Prosecutor v. Krajisnik*, Trial Judgment, para. 723.

³⁶ US Military Tribunal at Nuremberg, *Trial of Erhard Milch*, 20 December 1946-17 April 1947, (1948) 7 LRTWC 27 at 45-6 and 55-6; (1947) 14 AD 299, Case No. 129, at 302.

³⁷ US Military Tribunal at Nuremberg, *The Krupp Trial (Trial of A.F.A. Krupp von Bohlen und Halbach and Eleven Others)*, 17 November 1947-30 June 1948, (1949) 10 LRTWC 69, Case No. 58, at 144 *et seq*; and 15 AD 620 Case No. 214, at 626.

international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power”.³⁸ For the purpose of the present-day system of IHL, the requirement of unlawful purpose can be obliterated.³⁹ The reference to “the generally recognized standards of decency and humanity” is reminiscent of the Martens Clause. These standards can be deployed as a “dynamic and generative” vehicle⁴⁰ for systematically transplanting (rather than mechanically translating) appropriate standards of customary human rights law with a view to assessing the lawfulness of forcible transfer.

I submit that the unlawfulness of the forcible displacement within or outside occupied territories should be determined by reference to the requirements of conventional and customary international humanitarian law, and where appropriate, to those of conventional and customary human rights law.⁴¹ In case an occupying power invokes its national laws as a legal basis for displacement, such national laws must be consistent with the appropriate international rules applicable in occupied territories. It is one of the established principles of international law that States cannot invoke provisions of their domestic laws as justifications for their failure to perform obligations under international law.⁴²

Grounds for unlawfulness of deportation or forcible transfer (and the exceptions to the prohibition of such a measure) are laid down in Articles 45 and 49 GCIV. Under Article 45 GCIV,⁴³ unlawfulness of transfer of persons can be contemplated in two circumstances: (i) transferring aliens who are in the territory of a State party to an international conflict to a non-State party; and (ii) transferring a protected person to a country where she or he may have reason to fear persecution for her or his political opinions or religious beliefs (the earlier version of the principle of non-refoulement). Article 49(2) GCIV provides that evacuations can constitute the exceptions to the prohibition on forcibly displacing civilians within occupied territory. However, the

³⁸ US Military Tribunal at Nuremberg, *Trial of Wilhelm Von Leeb and Thirteen Others (The High Command Trial)*, 30 December 1947-28 October 1948, (1949) 12 LRTWC 1, Case No. 72, at 93; and 15 AD 376 at 394. See also *Trial of Carl Krauch and Twenty-Two Others (I.G. Farben Trial)*, Judgment of 29 July 1948, (1949) 10 LRTWC 1 at 4 *et seq*; and 15 AD 668 at 679.

³⁹ By comparison, note that the “purpose requirement”, which is included for the definition of torture in Article 1 of the UN Convention against Torture, is missing under Article 7 ICCPR and under the corresponding provisions of the regional human rights instruments (Article 3 of the European Convention on Human Rights; Article 5 of the American Convention on Human Rights; and Article 5 of the African Charter of Human and Peoples’ Rights).

⁴⁰ I. Scobbie, “The Approach to Customary International Law in the Study”, in: E. Wilmschurt and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (2007) 15, at 18 and 44.

⁴¹ Schabas refers to other provisions of the Geneva Conventions, and to “general norms of international customary law” as the basis for assessing “unlawfulness”: Legal Opinion on deportations, Expert Opinion by Professor William A. Schabas, 7 August 2002,

⁴² Vienna Convention on the Law of Treaties, Article 27. See also Permanent Court of International Justice, *Free Zones* case, Judgment of 7 June 1932, (1932) PCIJ, Ser. A/B, No. 46, at 167; *The Greco-Bulgarian “Communities”* case, Advisory Opinion of 31 July 1930, (1930), PCIJ, Ser. B, No. 17 at 32; and *The Polish Nationals in Danzig* case, Advisory Opinion of 4 February 1932 (1932), PCIJ, Ser. A/B, No. 44 at 24.

⁴³ Under this provision, the term “transfer” is employed to denote displacement of persons beyond national boundaries.

evacuations must be of temporary duration. They can be made only for the security of the civilian population in the occupied territories or for imperative military reasons. Evacuated persons must also be transferred back to their homes as soon as hostilities in the area have ceased.⁴⁴ While this provision sets out conditions for lawful evacuations, it is regarded as applicable *a fortiori* in all situations of unlawful displacement.⁴⁵

Turning to the material circumstances of the case at issue, there does not seem to be any security ground that would justify the occupying authorities creating *de facto* deportation or transfer of some Palestinian women from the West Bank to the Gaza Strip through granting a one-way passage. It is also very hard to rationalize such a measure for imperative military reasons.

In my opinion, the contested measure would infringe some salient rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR), to which Israel is a party: (i) the rights to private and family life under Article 17(1); (ii) the right to marriage under Article 23; and (iii) the right to free movement and freedom to choose one's own residence under Article 12(1). It is worth noting that while those rights do not feature as non-derogable rights under Article 4 ICCPR and even in the expanded catalogue of non-derogable rights contemplated by the Human Rights Committee's *General Comment No. 29* (2001),⁴⁶ their suspension in emergency circumstances of occupation or armed conflict cannot be recognized automatically. This provision makes clear that States Parties...*may* take measures derogating from their obligations....⁴⁷ Further, the lawfulness of derogation is contingent upon the occupying power meeting the three requirements: (i) notification of the derogation measures to the other States parties to the ICCPR; (ii) proportionality of the derogating measure to a legitimate aim of dealing with the exigencies; and (iii) non-discrimination of derogating measures on the basis of race, color, sex, language, religion or social origin.

With respect to the first requirement, it is not clear whether the Israeli Government has duly complied with this procedural requirement (even retroactively). In relation to the second requirement, the contested measures, even if pursuant to the legitimate aim of addressing Israel's paramount security concerns,⁴⁸ seem to be out of proportion, given that they unnecessarily obstruct meaningful exercise of the rights to marriage and family life of the Palestinians, the rights that are irrelevant to security considerations. As regards the third requirement, when derogating from the substantive rights described above, the Israeli occupation authorities must ensure that there is no arbitrary or unreasonable distinction between the Palestinian residents, who are affected by the contested measures

⁴⁴ GCIV, Article 49(2), third sentence.

⁴⁵ E.-C. Gillard, "The Role of International Humanitarian Law in the Protection of Internally Displaced Persons", (2005) 24 *Refugee Survey Quarterly* 37 at 41. For the sake of completeness, reference should also be made to Article 17 of Additional Protocol II (APII), which refers to the security of the civilians or imperative military reasons for determining the lawfulness of internal displacement. This provision is of special relevance in case an outbreak of hostilities in certain areas of the occupied territories are considered the initiation of a non-international armed conflict, with such areas, even temporarily, slipping out of the control of the occupying power.

⁴⁶ Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), 31 August 2001 (adopted on 24 July 2001), para. 6.

⁴⁷ ICCPR, Article 4(1), emphasis added.

⁴⁸ There is no doubt that very few democracies are faced with such intractable and existential security threat as Israel.

and already undergoing considerable economic and social hardships on one hand, and Jewish settlers who have moved, by their own volition or through the governmental “policy”, to the West Bank on the other.

It ought to be added that the overall impact of these measures may potentially jeopardize and fragment the social, cultural, economic and political unity of the Palestinians residing in the West Bank and Gaza Strip, whose lives are already overstrained in the prolonged occupation. These would be squarely at variance with the right of self-determination of the Palestinian people. In the light of these considerations, it seems that the “lawfulness” of the impugned measures may be gravely contested.

Indirect Forcible Displacement (Indirect Deportation or Indirect Forcible Transfer)

“Indirect” deportation or forcible transfer refers to displacements of civilians outside or within occupied territories, which are not ordered by a government, but which can result from governmental actions or policies that create social and economic conditions intolerable to such civilians. Such hostile social and economic conditions include fear of threat, harassment and attacks by other civilians.

Both the first paragraph of Article 49 and Article 147 GCIV are silent on the direct or indirect nature of the displacement. It is worth pointing out that the Ethiopia-Eritrea Claims Commission was confronted with some claims relating to indirect forcible displacement of civilians, even though it is highly disputable whether the contested displacement occurred within areas that could be considered occupied at the relevant time. With respect to the Eritrean claim that Ethiopia was liable for the massive flight of Eritrean civilians upon the offensive of the Ethiopian armed forces, the Commission rejected the claim on the ground of the lack of evidence. However, one may infer from its reasoning that the possibility of charging a State for indirect displacement occurring under coercive circumstances as such is not gainsaid.⁴⁹ In a separate case concerning Ethiopia’s claim that unlawful Eritrean Government’s actions and policies engendering social and economic conditions hostile to Ethiopian minority members resulted in their “indirect” expulsions, the Commission held that such displacements were economic and social dislocations caused by war and not imputable to Eritrea’s action or even omission.⁵⁰ There was, however, recognition that the root causes of their departure were not limited to economic difficulties, but that this included family separation, harassment, sporadic discrimination, and even attacks instigated by Eritrean civilians.⁵¹

As this case concerned the displacement during the conduct of hostilities, the broader scope of “indirect” expulsions that the Commission recognized as lawful need to be read in the light of the tumultuous circumstances of armed conflict.⁵² By comparison, with respect to deportation or forcible transfer undertaken in the context of less volatile situations of occupation, the threshold for identifying State liability for this should be deemed lower.

⁴⁹ Ethiopia Eritrea Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 and 26, paras 134-136.

⁵⁰ Partial Award, Civilians Claims, Ethiopia’s Claim 5, paras 9-95.

⁵¹ *Ibid.*, para. 93.

⁵² Further, the Ethiopia-Eritrea Commission was considered deliberately to set the higher threshold of identifying State liability within its scope of mandate.

Even if one comprehends, as this amicus brief does, that indirect forcible displacement of persons within or outside the occupied territories may constitute an infraction of Article 49(1) GCIV and raise the appropriate State responsibility, it is a separate question whether this act would also lead to the war crime for which individual criminal responsibility may arise. Under the second limb of Article 8(2)(b)(viii) ICC Statute, the enumerated act of transferring civilian persons within the occupied territory (the act regulated by Article 49(1) GCIV) does not explicitly refer to the case of indirect forcible removal.

In contrast, the first limb of Article 8(2)(b)(viii) ICC Statute expressly mentions the war crime of *indirect* transfer by the occupying power of part of its own civilian population into the occupied territory. There have been doctrinal debates over whether or not this war crime is recognized under customary international law.⁵³ The treaty-based rules of international humanitarian law (Article 49(6) GCIV and Article 85(4)(a) API) that furnish the basis for this war crime is silent on the case of *indirect* transfer. Admittedly, this question does not have direct bearings on the present litigation. However, the debates over the constitutive or declaratory nature of the first limb of Article 8(2)(b)(viii) ICC Statute may entail important implications upon the second limb of the same provision. If the drafters of the ICC Statute intended to recognize individual criminal responsibility for a violation of the prohibition of *indirect* deportation or transfer of persons within or outside the occupied territory under the second limb of that provision, then it would seem incoherent that they omitted the word “indirectly”.

Be that as it may, the jurisprudence of the ICTY, which has demonstrated liberal construction of the involuntary nature of displacement,⁵⁴ may help extend the material scope of deportation or forced transfer to cover what can be termed *indirect* forcible displacement. Special note should be taken of the *Krajišnik* case. There, the ICTY Appeals Chamber confirmed the Trial Chamber’s finding of the crime against humanity of forcible transfer in relation to the displacement that took place within the national borders of Bosnia Herzegovina. Many Muslims and Croats abandoned their homes in the Serb-controlled municipalities in Bosnia and Herzegovina due to the “severe living conditions” created by the Serb authorities through such measures as house searches, arrests, physical harassment, and cutting of electricity supplies.⁵⁵ The *mens rea* of the responsible Serbs in driving out the Muslims and Croats in their controlled areas seems clear. It is fair to assume that they intended (or at least were aware) that the relocation of the members of non-Serb ethnic groups would occur as a consequence and “in the ordinary course of events”.⁵⁶

In the present circumstances, the Israeli occupying authorities in the occupied Palestinian territories can be said to create a particularly difficult social context for many Palestinian

⁵³ See, for instance, D. Kretzmer, “The Advisory Opinion: the Light Treatment of International Humanitarian Law”, (2005) 99 AJIL 88 at 94.

⁵⁴ *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, para. 281, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment of 17 September 2003, paras 229 and 233; and *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment of 27 September 2006, paras. 724 and 730.

⁵⁵ *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment of 17 March 2009, para. 319; and *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment, 27 September 2006, paras 724 and 729. In that case, the Trial Chamber found not only forcible transfer but also deportation because some Muslims and Croats left the Serb-controlled municipalities in Bosnia and Herzegovina for the neighboring countries (Croatia and Macedonia).

⁵⁶ See ICC Statute, Article 30.

women who are married to men registered or resident in the Gaza Strip. Those women no doubt feel that they are left no choice but to leave the West Bank to follow or join their spouses in the Gaza Strip, with the risk of forfeiting their right to return to the West Bank. At least one can contend that Israeli officials and commanders responsible for the occupation authority should have been aware of the consequences of its action.⁵⁷ To that extent, it would seem reasonable to argue that such removal amounts to a war crime of deportation or forcible transfer of persons outside or within the occupied territory, as stipulated under the second limb of Article 8(2)(b)(viii) ICC Statute. In these lights, it is proposed that the Israeli occupation authority should stop the contested measures detrimental to family lives of those Palestinians.

Respectfully submitted,

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1 July 2010

⁵⁷ In this respect, see ICC Statute, Article 28(a).