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# SYMPOSIUM ON REVISITING ISRAEL'S SETTLEMENTS

# TAKING THE SETTLEMENTS TO THE ICC? SUBSTANTIVE ISSUES

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## *The State of the Debate*

Interest in the criminal aspects of the Israeli settlement project in the West Bank is hardly new; it informed the drafting of Additional Protocol I (AP I) and of the Statute of the International Criminal Court (ICC), and motivated Israel's rejection of both instruments. The 2009 Palestinian attempt to establish ICC jurisdiction prompted extensive scholarly debate on the preconditions for jurisdiction and on its territorial and temporal aspects, as well as on specific admissibility questions, primarily gravity.[1] (Complementarity is not an issue with regard to the establishment of West Bank settlements, since Israeli law and jurisprudence do not prohibit it, although they regulate some aspects related thereto).

Some of the debated matters were decided in practice when the ICC Office of the Prosecutor (OTP) announced in 2015 that it regarded Palestine as a state for the purposes of accession to the ICC Statute and acceptance of ICC jurisdiction. This decision does not formally close the debate, as the matter is ultimately for the Court to determine. Nonetheless, with the Prosecutor having undertaken a preliminary examination of the situation in Palestine, including the settlements, this contribution addresses some relevant substantive issues. It tenders some observations on the application of ICC Statute Article 8(2)(b)(viii) (specifically addressing the crime of transfer by the occupying power of part of its of civilian population to occupied territory) to the settlements, focusing on the systemic nature of the transfer of population, both as the normative essence of the crime and as a factual characteristic of Israeli policy.

## *The Criminalization of Transfer of the Occupying Power's Civilian Population into Occupied Territory*

Article 8(2)(b)(viii) is exceptional among crimes listed in the ICC Statute. On the perpetrator's side, transfer of population under Article 8(2)(b)(viii) is the only crime under the Statute other than aggression, which requires state involvement as a constitutive element: "The transfer, directly or indirectly, *by the Occupying Power*." The crime therefore requires unlawful conduct attributable to the state. Individuals would be indictable as principal perpetrators

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[1] *E.g.,* Yaël Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip*, 8 J. Int'l Crim. Just. 3 (2010); Eugene Kontorovich, *Israel/Palestine—The ICC's Uncharted Territory*, 11 J. Int'l Crim. Just. 979 (2013), Andreas Zimmermann, *Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article 12(3)*, 11 J. Int'l Crim. Just. 303 (2013); Michael G. Kearney, *On the Situation in Palestine and the War Crime of Transfer of Civilians into Occupied Territory*, 28 Crim. L.F. 1(2017); Eugene Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility at the ICC*, 47 Isr. L. Rev. 379 (2014); Ido Rosensweig, *The Palestinian Accession to the Rome Statute and the Question of the Settlements*, Opinio Juris (Jan. 22, 2015).

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only if they are public authorities (or if their conduct is otherwise attributable to the state).[2] This wording is an acknowledgement that notwithstanding the culpability of individuals, transfer of population requires an operational state apparatus. It differs from crimes against humanity (including torture) and genocide, where a plan or policy by the state or organization are a contextual requirement—in law for the former, in practice for the latter. In the case of settlements, the crime is not only "*caused* by the system,"[3] but is *carried out* by it.

Even more significantly, on the victim's side transfer is again the only crime other than aggression which protects not individuals' physical integrity but a collective interest, namely the demographic composition of the native population in the territory concerned.[4] Moreover, the criminalization is intended to protect persons from the *consequences* of the transfer, thereby imposing individual responsibility for an indirect result of the conduct. That consequence is only implied in the provision rather than defined in it. This has resulted in controversy over the values sought to be protected by the prohibition, and correspondingly, over the actual conduct that is prohibited.

In other words, transfer of the occupying power's civilian population into the occupied territory essentially concerns a relationship between political communities. This does not mean that it cannot be regulated under international criminal law, but the fiction that system criminality is the crime of individuals[5] is doubly difficult to maintain.

*The Status of the Crime Stipulated in Article 8(2)(b)(viii) and Why It Matters*

There is no doubt as to the applicability of the prohibition on transfer of population as a matter of state responsibility under the Fourth Geneva Convention (GC IV) Article 49(6), since Israel is party to the Convention. But Israel is party neither to AP I nor to the ICC Statute, which criminalize the conduct of individuals. The question therefore arises as to the substantive legal basis for prosecuting Israelis under Article 8(2)(b)(viii).

Reportedly, during the 1998 negotiations in Rome many states held the view that the criminal prohibition in Article 8(2)(b)(viii) was customary law.[6] However, the basis for this is not clear, given the arguable lack of state practice. A different view, held by Meron, Cassese,[7] and others, is that in 1998 the criminal prohibition on transfer of population was not customary. Zimmermann claims that it has since crystallized into one, pointing to domestic legislation and statutes of domestic and hybrid tribunals which have incorporated Article 8(2)(b)(viii).[8] These, too, are principally expressions of opinio juris. No one has ever been indicted for the crime under either domestic or international law. Moreover, state pronouncements relating specifically to Israeli settlements are much more reserved regarding the criminality of the conduct. For example, neither UN Security Council Resolution 2234 on the illegality of the settlements nor the explanations of votes accompanying it made any mention of the criminal

[2] International Committee of the Red Cross, Working Paper Submitted to ICC the Preparatory Commission (June 18, 1999).

[3] Bert A.V. Röling, *The Significance of the Laws of War, in* Current problems of International Law 133 (Antonio Cassese ed., 1975).

[4] International Committee of the Red Cross, Customary International Law Rules, Rule 130 (2005); Oscar Uhler et al., Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary 283 (1958) referring to "economic situation" and "separate existence as a race"; Commentary to AP I 1000, para. 3504 (Yvez Sandoz et al. eds., 1987).

[5] Mark A. Drumbl, *Accountability for System Criminality*, 8 Santa Clara J. Int'l L. 373 (2010).

[6] Herman von Hebel, *Article 8(2)(b)(viii)*, *in* The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence 158 (Roy S. Lee et al. eds., 2001).

[7] Theodor Meron, *Crimes under the Jurisdiction of the ICC*, *in* Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos 47 (Hermann von Hebel et al. eds., 1999). Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 Eur. J. Int'l L. 144, 151 (1999), reiterated in 2013 in Antonio Cassese & Paolo Gaeta, Cassese's International Criminal Law 80–81 (3d ed., 2013).

[8] Andreas Zimmermann, *Israel and the International Criminal Court - an Outsider's Perspective*, 36 Isr. Y.B. Hum. Rts. 231 (2006).

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character of the settlement activity.[9] In light of the above, and since in determining whether a customary norm exists which creates a criminal prohibition the principle of legality calls for a restrictive approach, the view that Article 8(2)(b)(viii) reflects customary international law is rather tenuous.

Even if customary international law had crystallized since 1998, Israel would have a strong case as a persistent objector. Its objection to the criminalization of transfer was a main reason for its nonaccession to either AP I or the ICC Statute. Even when it signed the Statute, implying a softening of its objection (notwithstanding the subsequent rescinding of the signature), its accompanying statement indicated that its objection to Article 8(2)(b)(viii) persisted.

That Article 8(2)(b)(viii) does not reflect customary law does not mean that it cannot be binding upon Israelis. The ICC Statute can impose substantive obligations on individuals as a matter of conventional law, through the territorial and personal jurisdiction of states parties.[10] The substantive prohibition in Article 8(2)(b)(viii) is therefore grounded in Palestine's acceptance of the ICC Statute. This has implications ratione temporis and ratione loci.

First, unless the domestic law of Palestine had prohibited it earlier, the prohibition on settlements only exists from the time that the Statute entered into force for Palestine, namely April 1, 2015. The Court's temporal jurisdiction, which Palestine has accepted retroactively from June 13, 2014, does not extend to Article 8(2)(b)(viii) because the latter did not constitute a crime in Palestine until the Statute came into force on April 1, 2015. This raises the question whether the continuing effect after April 1, 2015 of acts carried out pursuant to earlier decisions (for example military orders taking private property) would be regarded as the consequence of earlier conduct or as new conduct.

Second, the practical significance of Article 8(2)(b)(viii)'s applicability only to conduct (of Israelis) on the territory of Palestine cannot be overstated. Acts in the West Bank by the military, such as the issuing of military orders on property and movement, fall within the purview of the Article. But a great part of the settlements project is pursued, at least initially, in Israel. This is where relevant government and parliament (Knesset) decisions are adopted. Whether these activities may be regarded as taking place in the West Bank would depend on whether one adopts the effects doctrine for localizing the criminal act.[11]

### *What Constitutes "Transfer"?*

Another controversial issue is the meaning of "transfer"; and consequently, what particular activities by Israelis might fall within its scope. Israel maintains that GC IV Article 49(6) only prohibits forcible transfers, and consequently so does the crime. This view is hardly tenable in light of the wording and purpose of this provision, and has been rejected by the International Court of Justice.[12] Even Israel's own interpretation of the prohibition was not always so limited. When on September 14, 1967 Theodor Meron, then Legal Advisor of the Ministry of Foreign Affairs of Israel, wrote to the Prime Minister[13] of the absolute prohibition under GC IV Article 49(6), at issue was not any suggestion of forcible action, and indeed his memo made no mention of a condition of compulsion.

The addition of "indirectly" in Article 8(2)(b)(viii) is widely regarded as a response to the Arab group's pursuit, during the negotiations of both the Statute and the Elements of Crimes, of a very expansive definition of the prohibited conduct, so as to include organization, encouragement, inducement, help, facilitation, nonprevention, etc.

[9] UNSC, *Israel's Settlements Have No Legal Validity, Constitute Flagrant Violation of International Law*; Security Council Reaffirms, United Nations Meetings Coverage 7853d mtg., SC/12657 (Dec. 23, 2016).

[10] Marko Milanović, *Is the Rome Statute Binding on Individuals? (And Why We Should Care)*, 9 J. Int'l Crim. Just. 25 (2011).

[11] Michail Vagias, The Territorial Jurisdiction of the International Criminal Court (2014).

[12] *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. 136, para. 120 (July 9).

[13] Legal Adviser to the Ministry of Foreign Affairs, Letter to Mr Adi Yafeh, Political Secretary to the Prime Minister, on Settlement in the Administered Territories (Sept. 18, 1967).

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The precise scope of "indirectly" was left unspecified, and none of these modes of perpetration resolves the fundamental question of what is "transfer," which a person is barred from planning for, encouraging, facilitating, etc.

In my view, the term "transfer" cannot be understood as limited to the physical movement of persons across a demarcating line (forcibly or otherwise), because it is not the presence of civilians of the Occupying Power in the occupied territory as such that raises concern (indeed, there is no prohibition on entry of civilians into occupied territory). What makes the transfer objectionable is its detrimental impact on the interests of the local population. Such a change is only possible if there is a *continuous* presence of settlers. Meron's 1967 opinion cited above is again poignant. It states that the purpose of the prohibition is "to prevent *settlement* in occupied territory of citizens of the occupying State" (my emphasis). But how far does "settlement" extend?

This matter has received scant attention. Zimmermann holds that "transfer" as relocation and settlement must be distinguished from inducement to stay.[14] But I doubt that the two categories can be distinguished in practice. Certainly in the case of the Israeli settlements this is a formidable challenge, as the state's involvement in relocation, establishment, and stay in the West Bank is a full package. It consists of incentives across the board: free and subsidized land; financial benefits to individuals and local municipalities; quality road infrastructure allowing easy access to Israel's metropolitan area; military protection including restrictions on Palestinian access and movement; assimilation of the law in the settlements to that which applies in Israel; and even legal sanctions on individuals' refusal to conduct economic and cultural relations with the settlements. Most importantly, aside from specific incentives, the management of the settlements is fully integrated within state administration, making their location practically immaterial to individuals' decisions to live there. It is this integration which constitutes the strongest facilitating element in moving to a settlement.

International criminal law attaches criminal responsibility to all levels of perpetration. This means that every employee of the public sector (which constitutes a third of Israel's workforce) involved in establishing and perpetuating the settlements with intent and knowledge[15] is committing a crime. The question is whether a line should be drawn somewhere, and if so, how. One might take guidance from the definition of the crime of aggression, which is limited to "planning, preparation, initiation or execution."[16] However, this restriction to the initial stages is linked to the fact that the crime of aggression is expressly limited to persons "in a position effectively to exercise control over or to direct the political or military action of a State."[17] Article 8(2)(b)(viii) is not so limited, and indeed, if perpetuation of the settlements is indeed criminal, those most responsible are not only those in a position "to direct" political or military action.

One might argue that the preoccupation with demarcating the precise scope of the crime is unnecessary, since at any rate, only those most responsible would be sought by the ICC,[18] such as, perhaps, the prime minister, the military commander in the West Bank, or the heads of the Division of Settlement in the Jewish Agency (which operates under governmental authority). Indeed, the OTP might decide to limit its efforts in that way; the Court might later also exempt itself from delineating the crime and limit itself to determining the culpability of particular defendants before it. But it is not sound legal policy to avoid the hard task of defining a crime by enforcing it only in obvious cases. For one thing, the deterrent effect of the criminal prohibition is lost. Also, experience shows that there may be a gap between criminal tribunals' aspirations to try those at the highest echelons, and their actual

[14] Zimmermann, *supra* note 1, at 324.

[15] Rome Statute of the International Criminal Court art. 30, July 17, 1998, 2187 UNTS 90.

[16] Rome Statute of the International Criminal Court art. 8bis(1), July 17, 1998, 2187 UNTS 90.

[17] Rome Statute of the International Criminal Court arts. 8bis(1), 25(3bis), July 17, 1998, 2187 UNTS 90.

[18] ICC Office of the Prosecutor, OTP Strategic Plan, para. 21 (2013).

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ability to do so.[19] Most importantly, ICC prosecutorial policies only apply in the ICC. The statute itself is likely, indeed expected, to impact national judicial systems, which might not restrict themselves to trying persons only for the most serious cases. In conclusion, the actus reus of the prohibition has yet to be clearly ascertained.

*Mens rea*

The mens rea required for conviction under the ICC Statute is intent and knowledge.[20] Article 8(2)(b)(viii) therefore requires the prosecution to prove, inter alia, that defendants knew that their acts were transferring Israeli civilians into occupied territory. Insofar as concerns the architects of the settlement project and their legal advisors, this seems to pose no difficulty. But as one descends the hierarchy, where maintaining the settlements is integrated in day-to-day state administration, it is worth considering two possible defenses: mistake of fact and mistake of legal element.[21]

For almost fifty years Israel has been consistently obliterating the distinction between itself and the settlements (or the West Bank more generally). In maps and legally,[22] the boundaries of sovereign Israeli territory have been intentionally obfuscated. The construction of the Separation Barrier has only exacerbated public misconceptions. It is therefore not surprising that with respect to certain parts of the West Bank (such as the Jordan Valley, not to mention Jerusalem), many Israelis are not aware that these are occupied land.[23]

In addition, for almost fifty years the government has been propagating the view that the territory of the West Bank is not occupied because it had not been taken from a sovereign.[24] This view has been endorsed by lawyers at the highest level.[25] Thus, a person might know that transfer of civilian population to occupied territory is prohibited, but be factually mistaken about the West Bank being "occupied" because of a legal mistake as to the definition of "occupation."[26]

Each individual case would have to be considered on its merits, but it is worth noting that the systemic nature of the settlement project, namely its organization and its embedment in state apparatus, renders it to some extent transparent to those involved in it.

*Conclusion*

The application of Article 8(2)(b)(viii) to the Israeli settlements is less than self-evident. In part this may be because the original prohibition in GC IV was drafted following a different type of settlements activity from the one that Israel is engaged in. In another part this is because the conversion of state responsibility into individual responsibility has not received sufficient attention. As the need to interpret the Article approaches, the gaps and difficulties need careful consideration.

[19] Acknowledging this gap, the OTP would consider prosecuting level perpetrators when their conduct has been particularly grave and has acquired extensive notoriety. *Id.* at para. 22.

[20] Rome Statute of the International Criminal Court art. 30, July 17, 1998, 2187 UNTS 90.

[21] Kevin Jon Heller, *Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis*, 6 J. Int'l. Crim. Just. 419 (2008).

[22] Erasure of the Green Line, Akevot.

[23] Nir Yahav, "63.5% of the Jews are Mistaken: The Valley is under Israeli Sovereignty" Walla! (June 12, 2011) (In Hebrew).

[24] *See* Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL (forthcoming 2017) and Eyal Benvenisti, *The Missing Argument: The Article that Changed the Course of History?*, 111 AJIL Unbound 31 (2017).

[25] The 2012 Levy Commission Report on the Legal Status of Building in Judea and Samaria (June 21, 2012), co-authored by the former legal advisor of the MFA and a former supreme court judge.

[26] Miriam Bilig & Udi Lebel, *Public Opinion Poll regarding Settlement in Judea and Samaria* , Ariel University (Aug. 28, 2013).

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