



# Removing Peace by Force

Diakonia International Humanitarian Law Resource Centre  
December 2015

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A Legal Analysis of Recent Israeli Policies of Forcible Transfer in the occupied Palestinian territory from the Perspective of International Humanitarian Law, Criminal Accountability and Third State Responsibility

Legal Brief – Diakonia International Humanitarian Law Resource Centre



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December 2015

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Cover photo: The village Um al-‘Kheir, in the Southern Hebron Hills, with the Carmel settlement in the background.  
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## SUSIYA

Susiya is a Palestinian community located in the Hebron governorate in the south of the occupied West Bank. The community currently hosts 55 nuclear families that have been living in this location for decades, on land that they claim to privately own. The homes of half of these families and all the community's public structures are located in Area C, where Israel maintains full military control, as well as control over planning and zoning.

The Israeli settlement of Susiya was established in its proximity in 1983 in contravention of international law. It has grown to a population of nearly 1,000 settlers, some of whom live in an unauthorized outpost erected in 2002 in the Palestinian community's former public centre.

In 1986, when the population of Susiya amounted to around 250 Palestinian families, the Israeli authorities declared the main residential area of Susiya an archaeological site. This designation provided the grounds for the eviction of all of Susiya's Palestinian residents. After the conclusion of the Oslo Agreements and the classification of the land as Area C, most of those who were relocated were forcibly displaced again in the context of two waves of demolitions, in 2001 and in 2011, on the grounds that the residents lacked building permits. At the same time, the Israeli authorities had allocated over 1,500 dunums of land for the development of the settlement of Susiya (defined as its "municipal boundaries"), an area that is over five times larger than its current built-up area.

All of the 114 structures located in Area C have now been served with demolition orders, including 34 residential tents and shacks, 26 animal shelters, 19 water cisterns, 19 latrines, two clinics, a school and a kindergarten. Construction of approximately half of these structures has been funded by humanitarian agencies. Furthermore, systematic episodes of settler violence and intimidation prevent or limit access for Susiya Palestinian inhabitants to over 2,000 dunums of land, which constitutes about two-thirds of the community's farming and grazing area. It was estimated in 2014 that some 800 olive trees and saplings owned by Palestinian residents of Susiya were vandalized and damaged, allegedly by Israeli settlers.

In May 2015, a decision by the Israeli Supreme Court refused to freeze the pending demolitions orders, clearing any remaining obstacles for the eviction of a large part of the community. Due to strong diplomatic pressure and international presence at the site, these demolition orders were not carried out. The community is still waiting for a hearing to be scheduled for the Court to rule on an appeal against the Israeli Civil Administration (ICA) decision to reject the community-proposed master building plan.

Today, Susiya residents in Area C remain at imminent risk of forced displacement. Plans for relocation of the community to a nearby site continue to be advocated by the Israeli authorities. These measures should be viewed in the context of the severe restrictions to basic services, livelihoods, access to resources and movement and access restrictions that the community faces, as well as ongoing threats and intimidation from nearby settlers. In addition, Palestinian residents are paying the price for an inadequate and discriminatory planning regime.

Planning schemes submitted to the Israeli Civil Administration by Palestinian residents (which would allow the issuance of building permits on land that they own) have been rejected repeatedly. In sharp contrast, the nearby Susiya settlement has been granted a generous master plan that allows for the development of housing and infrastructure.<sup>1</sup>

<sup>1</sup> For more information see OCHA oPt, 'Susiya: A Community at Imminent Risk of Forced Displacement' (8 June 2015) [http://www.ochaopt.org/documents/ocha\\_opt\\_susiya\\_factsheet\\_may\\_2015\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_susiya_factsheet_may_2015_english.pdf).

## THE E-1 PLAN

E-1 stands for 'East 1' according to Israeli master planning and represents an area of 12 square kilometres located in between the eastern outskirts of Jerusalem and the illegal Israeli settlement of Ma'ale Adumim. E-1 is the target of a longstanding Israeli plan to set up residential units and infrastructure in the area to create a contiguous Israeli presence connecting Jerusalem to Ma'ale Adumim. If implemented, these plans risk undermining continued Palestinian presence in the area, further disconnecting East Jerusalem from the rest of the West Bank and further disrupting the territorial contiguity of the occupied Palestinian territory.<sup>2</sup> Concurrently, in September 2014, the Israeli authorities publicly submitted a plan to forcibly relocate thousands of Palestinian Bedouins from the periphery of Jerusalem (including the E-1 area) and the Central West Bank to three different locations in the West Bank.<sup>3</sup>

## ABU NWAR

Abu Nwar, located on the outskirts of Jerusalem in the boundary area between the E-1 area and the municipal area of the Israeli settlement of Ma'ale Adumim, is one of 46 Palestinian Bedouin communities (comprising around 7,000 people, 70 per cent of whom are Palestinian refugees) slated for forcible transfer to three proposed relocation sites in the West Bank. In particular, on 28 April 2015, residents of Abu Nwar were informed by the ICA that some families would be required to move to the Al Jabal area outside of East Jerusalem.<sup>4</sup> For the rest of the community, the Israeli plan foresees its forcible relocation to the Nueima area near Jericho.

The community has firmly objected to such plans, reiterating its intention to remain on the land. While Israel has endeavoured to justify its 'relocation' plans by citing the need to provide the community with access to basic services, it should be emphasized that Abu Nwar has currently developed primary education facilities and running water infrastructure. Moreover, nothing apart from planning and other administrative obstacles created by Israel would prevent the provision of all of the basic services that the community requires for desires.

Israel's plans for Abu Nwar fall within the context of the above-described E-1 plan (see Box 2) and the Israeli 'relocation' plan for 46 Palestinian communities submitted in September 2014. According to UN OCHA and UNRWA, "the forced urbanization of Bedouin communities in the three relocation sites would destroy their culture and livelihoods".<sup>5</sup> Former UN Humanitarian Coordinator for the Occupied Palestinian Territory James Rawley also warned against "the strategic implications of these plans, given that many of the communities are located in areas slated for further Israeli settlement, including the E1 plan, which has long been viewed as an obstacle to the realization of a two-state solution".<sup>6</sup>

<sup>2</sup> See Peace Now, 'What is E-1?' (May 2015) <http://peacenow.org.il/eng/content/what-e-1>; B'Tselem, 'The E1 plan and its implications for human rights in the West Bank' (November 2013) [http://www.btselem.org/settlements/20121202\\_e1\\_human\\_rights\\_ramifications](http://www.btselem.org/settlements/20121202_e1_human_rights_ramifications).

<sup>3</sup> The relocation sites were identified in Al Jabal area (close to the East Jerusalem neighborhood of 'Eizariya), Nueima area (north of Jericho) and a site in the northern part of the Jordan Valley. OCHA oPt, 'Bedouin Communities at Risk of Forcible Transfer' (September 2014) [http://www.ochaopt.org/documents/ocha\\_opt\\_communities\\_jerusalem\\_factsheet\\_september\\_2014\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_communities_jerusalem_factsheet_september_2014_english.pdf); Haaretz, 'Israel Government Plans to Forcibly Relocate 12,500 Bedouin' (16 September 2014) <http://www.haaretz.com/israel-news/.premium-1.615986>.

<sup>4</sup> 'UN Officials: Israel must halt plans to transfer Palestinian Bedouins' Joint Press Release (Jerusalem, 20 May 2015) [http://www.ochaopt.org/documents/hc\\_unrwa\\_press\\_release\\_bedouin\\_abu\\_nwar\\_20may\\_english.pdf](http://www.ochaopt.org/documents/hc_unrwa_press_release_bedouin_abu_nwar_20may_english.pdf).

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

## AL-HADIDIYA

On 30 November 2015, Israeli Civil Administration personnel and soldiers confiscated ten tents in the Al-Hadidiyah community (Tubas Governorate), located in Area C in the northern Jordan Valley in close proximity to the Israeli settlement of Ro'i. In apparent contravention of IHL, this area has been declared a closed military zone by the Israeli authorities to conduct military training activity in the past (a designation which could only serve to authorize the Israeli army to temporarily displace Palestinian inhabitants to conduct *necessary* military activities, as opposed to training). Furthermore, the community faces continuous threats from the nearby settlement, while its access to basic needs such as water and electricity remains limited by ICA restrictions, notwithstanding its close proximity to a major water pumping facility (known as 'Beka'ot 2').

The tents confiscated on 30 November had been provided by aid organizations, following an earlier wave of demolitions on 26 November 2015 during which tents housing two families and seven structures used for storage also had been destroyed. On 28 November 2015, before the confiscation, ICA personnel together with military officials removed two tents erected by one of the families affected by the demolition two days earlier. These measures were enforced notwithstanding a pending order to freeze any demolition until 31 December that had been announced by the ICA supervisory committee on 23 November 2015. The affected families had already lost their homes during demolitions in 2011, and had been provided with new ones by humanitarian organizations. Furthermore, on 25 November 2015, military personnel arrived with a bulldozer and destroyed a section (one kilometer long) of the dirt road leading to the community.

The dirt road, which allows the affected community to access essential services including education and health services, was under renovation with the support of aid organizations. After a section of the road was bulldozed, many children in Al-Hadidiyah could not attend school in the nearby village of Tammun during the last week of November.<sup>7</sup>

<sup>7</sup> B'Tselem, 'Authorities continue to harass al-Hadidiyah community' (1 December 2015) [http://www.btselem.org/jordan\\_valley/20151201\\_demolition\\_and\\_confiscation\\_in\\_al\\_hadidiya](http://www.btselem.org/jordan_valley/20151201_demolition_and_confiscation_in_al_hadidiya); OCHA oPt, 'Displacement and Insecurity in Area C of the West Bank' Special Focus (August 2011); B'Tselem, 'Dispossession and Exploitation: Israel's Policy in the Jordan Valley and Northern Dead Sea' (May 2011) [http://www.btselem.org/sites/default/files/201105\\_dispossession\\_and\\_exploitation\\_eng.pdf](http://www.btselem.org/sites/default/files/201105_dispossession_and_exploitation_eng.pdf).

## I. Introduction

Susiya, Abu Nwar and Al-Hadidiya are three of the most recent case studies that illustrate the Israeli authorities' pattern of forcibly transferring Palestinian communities. Combined with the continuous expansion of settlements and their supporting services and infrastructure, these measures "reflect a systematic policy of Israel to set the stage for an overall dispossession of Palestinians and the establishment of permanent control over territories occupied since 1967."<sup>8</sup> These policies currently appear to be specifically directed at Area C and the E-1 zone, where the Occupying Power's actions also suggest intent to exercise permanent sovereignty in contravention of obligations under international humanitarian law (IHL), as well as the UN Charter and Security Council Resolutions.<sup>9</sup>

This brief will analyze Israeli policies of forcible transfer in the West Bank, including East Jerusalem, from the point of view of IHL, international human rights law (IHRL) and international criminal law (ICL). It also will identify the possible long-term implications of these policies, particularly with regard to the future status of the occupied Palestinian territory (oPt) and the viability of a contiguous State of Palestine in line with the international community's commitments. In this regard, the brief will refer to Third States' obligations vis-à-vis these illegal practices to inspire policy-makers to take concrete action to avert irreversible changes to the demographic status of the West Bank.

## II. Forcible Transfer under IHL and ICL

Article 49 of the Fourth Geneva Convention (4GC), to which Israel is a party, prohibits individual or mass forcible transfers of protected persons under belligerent occupation, regardless of motive.<sup>10</sup> Unlawful transfer and the transfer of the occupied population within the occupied territory are listed among the grave breaches under Article 147 of the 4GC and Article 85(4) of Additional Protocol I to the Geneva Conventions (API). The grave breaches paradigm entails not only the Occupying Power's obligation to refrain from carrying out such actions but also implicates individual criminal responsibility for the commission of war crimes.<sup>11</sup>

In addition, deportation and forcible transfer, as offences entailing the commission of war crimes and crimes against humanity, have been included in the statutes of a number of international criminal tribunals, including the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the International Criminal Court (ICC).<sup>12</sup>

In conclusion, forcible transfer of protected persons in armed conflicts not only violates IHL, but also may amount to a war crime and a crime against humanity under international criminal law.

<sup>8</sup> UNGA, 'Human rights situation in Palestine and other occupied Arab territories' (10 January 2011) A/HRC/16/72.

<sup>9</sup> Article 47 of the Fourth Geneva Convention clearly states that "[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory". Article 2 of the Charter of the United Nations (1945), requires that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." UN Security Council Resolution 242 (1967) emphasizes "the inadmissibility of the acquisition of territory by war" and calls for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict."

<sup>10</sup> In addition, the prohibition against forcible transfer under customary international law has been reiterated by the ICRC. See ICRC, 'Customary IHL', Rule 129.

<sup>11</sup> See Article 146 of the Fourth Geneva Convention, according to which "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention".

<sup>12</sup> Deportation and forcible transfer both refer to the forcible displacement of civilians. The former entails displacement outside the boundaries of a State or an occupied territory while the latter relates to transfer within such a territory. See Rome Statute of the International Criminal Court (adopted 18 July 1998, entered into force 1 July 2002), Articles 7(1)(d) and 8(2)(a)(vii); Statute of the International Criminal Tribunal for the Former Yugoslavia (Adopted 25 May 1993 with UN Security Council Resolution 827) Articles 2(g) and 5(d); Statute of the Special Court for Sierra Leone (Adopted 14 August 2000 with UN Security Council Resolution 1315) Article 2d.

### III. Could Israeli policies in the West Bank amount to forcible transfer?

In order to assess whether or not Israeli policies targeting Palestinian communities in the West Bank may amount to forcible transfer according to Article 49(1) of the 4GC and consequently lead to a grave breach according to Article 147 of the 4GC and 85(4) of the API, there are three criteria which need to be met: firstly, that the alleged victims were protected persons pursuant to the 4GC; secondly, through an act or omission, civilians were forcibly removed from their residence, or from areas where they were lawfully present, to a place outside of that area, and; thirdly, the removal was not conducted on grounds permitted under IHL, namely, as a temporary evacuation performed on the basis of the security of the population or for reasons of imperative military necessity.

As non-Israeli citizens living under military occupation, Palestinians in the West Bank (including East Jerusalem) fall within the category of protected persons under the Geneva Conventions. Hence, determining the illegality of Israel's displacement policies rests on establishing the 'forcibility' of the transfer and the non-applicability of those specific conditions under which transfer is permitted by the Geneva Conventions.

The following analysis examines whether these two conditions are fulfilled.

#### A. Forcible character of the act and the question of 'genuine consent'

Transfers that are motivated by an individual's own genuine wish to leave are lawful and fall outside of the scope of the prohibition under IHL. All transfers which are not motivated by an individual's own genuine choice are deemed to be forcible and thus unlawful, unless they meet certain conditions as outlined below. Case law has reinforced the notion that "the term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against a person or persons, or by taking advantage of a coercive environment".<sup>13</sup> In other words, although the transfer may not result from the direct use of physical force, Article 49 prohibits 'transfer' that is directly or indirectly forced, of individuals or groups from the protected population. In this regard, indirect transfer or deportation are performed in this case "by creating the physical conditions that oblige the protected persons to leave the location where they are against their will".<sup>14</sup>

The essential requirement is that the displacement in question be involuntary. That is to say that the "relevant persons had no real choice."<sup>15</sup> With regard to the protected persons' consent, case law has emphasized that "in assessing whether the displacement of a person was voluntary or not, [the Court] should look [...] to all the circumstances surrounding the person's displacement, to ascertain that person's genuine intention."<sup>16</sup> This includes "threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will".<sup>17</sup>

<sup>13</sup> Report of the Preparatory Commission for the International Criminal Court, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) 7 (fn 5). International Criminal Court Elements of Crimes, Article 6(e); See also ICTY, Judgement, Kristić, (IC-98-33-T) Trial Chamber (2 August 2001) § 529; ICTY, Judgement, Naletilić and Martinović (IT-98-34) Trial Chamber (31 March 2003) § 519 according to which "forcible transfer is the movement of individuals under duress from where they reside to a place that is not of their choosing."

<sup>14</sup> Eyal Benvenisti, 'Expert Opinion: On the Prohibition of Forcible Transfer in Susya Village' (30 June 2012) <http://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opinions/the-prohibition-of-forcible-transfer-in-susya-village.-prof.-eyal-benvenisti.pdf> accessed 30 July 2015.

<sup>15</sup> ICTY, Judgement, Krnojelac, (IT-97-25-T) Trial Chamber (15 March 2002) § 475; ICTY, Judgement, Krnojelac, (IT-97-25-A) and Appeal Judgement (17 September 2003) § 233.

<sup>16</sup> ICTY, Judgement, Simić et al., (IT-95-9-T) Trial Chamber (17 October 2003) § 126.

<sup>17</sup> Ibid.

Also, it is important to note that any apparent consensual declaration by protected civilians does not necessarily remove the ‘forcibility’ element, as consent may have been “rendered valueless by the situation.”<sup>18</sup> This again raises the question of a coercive environment. In this regard, as determined by the ICTY in *Blagojević and Jokić*, “even in cases where those displaced may have wished – and in fact may have even requested – to be removed, this does not necessarily mean that they had or exercised a genuine choice. Finders and triers of fact consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims’ vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful”.<sup>19</sup>

In assessing the proposed transfer of Palestinian communities, such as in the cases of Susiya, Abu Nwar and Al-Hadidiya, a clear indication of the general wish to stay can be identified in the statements of representatives of the communities affirming their desire to remain where they are.

In addition, other factors indicate the forcible nature of Israeli policies, in particular the lack of any genuine dialogue between the Civil Administration and the affected communities, the absence of any assessment of the impact of previous transfers on these communities, as well as the continuous and ongoing expansion of the surrounding illegal settlements of Susiya, Ma’ale Adumim and Ro’i, to which the Israeli authorities affords services and infrastructure that are consistently denied to Palestinian communities. While there may be individual cases in which individuals have expressed a desire to leave due to poor living conditions, this does not appear to reflect ‘genuine consent’.

In these instances, it is reasonable to argue that the expressed desire to leave has originated from the coercive environment in which the residents live. This environment is a result of continued threats and harassment against these communities by the Civil Administration and Israeli settlers, coupled with the failure of the Occupying Power to provide for their basic needs (by preventing, in particular, access to water, electricity, education, and health services), in flagrant disregard of Israel’s obligations under Article 55 of the 4GC and Article 69 of Additional Protocol I, as well as under IHRL.<sup>20</sup>

## **B. The question of ‘distance’ and ‘lawful presence’ of protected persons**

In assessing measures targeting specific individuals within a community, as opposed the community as a whole, international criminal jurisprudence offers relevant analysis concerning what distance of physical movement is required to satisfy the claim of forcible transfer. In particular, the ICTY in the *Simić et al.* case held that the location to which the victims are forcibly displaced is sufficiently distant if the victims are prevented from effectively exercising their right to stay in their home and community, and their right not to be deprived of their property.<sup>21</sup> Hence, the preservation of their presence within the community and the continuous enjoyment of basic human rights and services (including their right to property and freedom of movement) are crucial elements for assessing whether or not the displacement of Palestinian individuals or groups amounts to forcible transfer.

<sup>18</sup> ICTY, *Naletilic and Martinovic* (n 13) § 519 (fn 1357).

<sup>19</sup> ICTY, *Judgement, Blagojević and Jokić*, (IT-02-60) Trial Chamber (17 January 2005) § 596.

<sup>20</sup> In this regard, the ICTY in *Krajišnik* held that measures including “dismissals from employment, house searches, and the cutting off of water, electricity, and telephone services” all contributed to the intentional creation of an environment in which it was “practically impossible [for Muslims and Croats] to remain”. ICTY, *Judgement, Krajišnik*, (IT-00-39-T) Trial Chamber (27 September 2006) § 729. With regard to the applicability of IHRL, both the UN Human Rights Committee and the International Court of Justice have determined that Israel is bound to respect the obligations stemming from the international human rights treaties and conventions it has ratified, including extraterritorially in the oPt. See Human Rights Committee, ‘Concluding observations, Israel’ (3 September 2010) UN Doc. CCPR/C/ISR/CO/3, § 5; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Rep 2004, paragraph 120 (hereafter: *Advisory Opinion on the Wall*) § 106–113.

<sup>21</sup> ICTY, *Simić* (n 16) § 130.

With regard to ‘lawful presence’, the Israeli authorities often have claimed that, especially in cases where Bedouin communities were targeted, individuals could not provide written evidence of ownership rights over land and houses. This argument should be dismissed on the basis that, as stated by the ICTY in *Popović*, “clearly the protection is intended to encompass, for example, internally displaced persons who have established temporary homes after being uprooted from their original community. [In particular] the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and *not to impose a requirement for “residency” to be demonstrated as a legal standard*” (emphasis added).<sup>22</sup>

### **C. Inapplicability of the exceptions to the cases at hand**

Under IHL, the only ‘exception’ to the illegality of forcible transfer applies to temporary evacuations of protected persons. Such evacuation can only be ordered in two cases, defined in great detail under Article 49, namely, when the safety of the population or imperative military reasons so demand.

According to the Commentary on Article 49, these conditions apply only “if [...] an area is in danger as a result of military operations or is liable to be subjected to intense bombing”.<sup>23</sup> This wording clearly refers to situations where the level of armed force reaches a level of intensity that triggers the paradigm of conduct of hostilities, such as during the 2014 Gaza War. This paradigm is not applicable to the current situation in the West Bank. In particular, the relatively low level of armed force used in ongoing and largely sporadic incidents between Palestinians and the Israeli army or settlers, the low level of organization of Palestinian groups and demonstrations and the rudimentary weapons employed from the Palestinian side all indicate that the requirements for applying the conduct of hostilities paradigm under IHL are not met. However, even if one were to conclude that the conduct of hostilities paradigm applies to the current situation in the West Bank, two elements should be highlighted. Firstly, every argument put forward by Israel in terms of military necessity must be carefully evaluated in terms of necessity and proportionality.

In this regard, the ICRC Commentary states very clearly that “evacuation is only permitted in such cases . . . *when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate*”.<sup>24</sup> As an example, the declaration of certain areas by Israeli forces as ‘closed military zones’ to conduct military drills (such as in the Al-Hadidiyah area) cannot be justified in terms of ‘overriding and imperative military necessity’ if a direct link between that area, current military operations, and intense hostilities is absent. Secondly, even if removal could be justified under an imperative military necessity rationale, this does not justify forcible transfer, it simply allows for a temporary evacuation of civilians, who must be allowed to return immediately upon the cessation of the exceptional circumstances that led to the removal.

In addition, no lawful justification for the implementation of these measures appears to exist from the point of view of the enforcement of Israel’s obligations as Occupying Power. In view of the administrative demolition orders pending against the communities, and their lack of access to electricity and water networks, serious questions arise as to whether actions and planning by Israeli forces are consistent with Israel’s responsibility as Occupying Power to ensure public order and the safety of protected civilians in the oPt.

While Article 43 of the Hague Regulations authorizes the Occupying Power to take all measures to restore and ensure, as far as possible, public order and safety, no evidence suggests that the proposed displacement or relocation plans represent a good faith application of this provision for the following reasons, namely: i) in many cases the communities have not been consulted nor have their needs and wishes been taken into account by the ICA; (ii) the

<sup>22</sup> ICTY, Judgment, Popović et al., (IT-05-88-T) Trial Chamber (10 June 2010) § 900.

<sup>23</sup> Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 49, ICRC Commentary, para 2.

<sup>24</sup> Ibid.

communities reside in areas that, in most of the cases, are slated for further illegal Israeli settlement; (iii) the deplorable conditions in which the communities presently exist result from the discriminatory policies of the Occupying Power, including policies favoring the interests of Israeli settlers over those of the protected civilian population; (iv) the transfer is a continuation of a longstanding pattern of dispossession of these communities; and (v) such measures implement a planning and zoning regime that does not provide for any Palestinian ownership or representation, thereby flagrantly violating Israel's obligations under IHL and IHRL, as recently underlined by the UN Secretary General.<sup>25</sup>

On this basis, Israeli policies targeting Palestinian communities in Area C, where they are implemented, breach the prohibition against forcible transfer as established under Article 49 of the 4GC and the prohibition against forced eviction, under international human rights law.<sup>26</sup> Furthermore, if the criminal intent of particular individuals is proven, these policies also may amount to the grave breach of forcible transfer, thus entailing the commission of a war crime. As mentioned above, forcible transfer has been criminalized also according to the Statute of the ICC both as a war crime (under Article 8(2)(a)(vii) and Article 8(2)(b)(viii)) and as a crime against humanity (Article 7(1)(d)).

#### IV. Forcible Transfer of Palestinian Communities as a Crime against Humanity

As mentioned, the ICC Statute also categorizes forcible transfer as a crime against humanity. In order to qualify Israeli policies of transferring Palestinian communities in the West Bank as a crime against humanity, it must be demonstrated that Israel's relevant policies constitute part of a 'widespread or systematic attack directed against any civilian population'.<sup>27</sup> In particular, the 'attack directed against a civilian population' is understood under the ICC Elements of Crimes to mean a course of conduct involving the multiple commission of acts referred to in Article 7 of the Statute (which includes forcible transfer) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>28</sup> According to international criminal law, 'widespread' connotes the large-scale nature of the attacks and the number of victims. 'Systematic' requires a high degree of organization that follows a regular pattern.<sup>29</sup> These requirements have been echoed by the International Criminal Court in the *Omar Al Bashir* case.<sup>30</sup>

The following analysis demonstrates that the forcible transfer of Palestinian communities in the West Bank is an attack directed against a civilian population that is systematic, large in scale and appears to involve the commission of multiple crimes as a matter of State policy.

<sup>25</sup> UN Secretary General, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan' A/HRC/25/38 (12 February 2014) para 14.

<sup>26</sup> Human Rights Committee, 'General Comment 7: The right to adequate housing (art. 11.1 of the Covenant): forced evictions', (20 May 1997) para 3, according to which "the term 'forced evictions' as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".

<sup>27</sup> Rome Statute of the International Criminal Court (adopted 18 July 1998, entered into force 1 July 2002), Article 7(1)(d).

<sup>28</sup> ICC Elements of Crimes (n 13), Article 7(3).

<sup>29</sup> Report of the Independent Fact-Finding Committee on Gaza, presented to the League of Arab States (30 April 2009) para. 515.

<sup>30</sup> ICC, Prosecutor v. Bashir (ICC-02/05-01/09-29) Pre-Trial Chamber (11 August 2009) § 81. In particular, according to the ICC Pre-Trial Chamber, "although the terms 'widespread' and 'systematic' are not specifically defined in the Statute, the Chamber has previously held that this language excludes random or isolated acts of violence, and the term 'widespread' refers to the large scale nature of the attack, as well as to the number of victims, while the term 'systematic' pertains to the organized nature of the acts of violence and to the improbability of random occurrence".

The large number of affected people substantiates the large scale of forcible transfer that has taken place to date. It has been estimated that between January 2008 and July 2014, more than 5,000 Palestinians were displaced as a result of house demolitions and evictions in the West Bank, including East Jerusalem. Moreover, from 2009 to 2012, Palestinians reportedly submitted 1,640 applications for building permits, of which only 37 (or 2.3 per cent) were approved.<sup>31</sup> These acts should not be viewed as isolated events, as they result from repeated and similar actions by Israeli forces and their combined effects have far-reaching implications. As previously mentioned, in September 2014 the Israeli authorities presented plans to forcibly relocate 46 Palestinian communities from the outskirts of Jerusalem and the Central West Bank to three different locations in the West Bank.<sup>32</sup>

According to UNRWA Commissioner General Pierre Krahenbuhl, “[i]f such a plan were implemented this would [...] give rise to concerns that it amounts to a ‘forcible transfer’ in contravention of the Fourth Geneva Convention. [...] It might also make way for further Israeli illegal settlement expansion, further compromising the viability of a two-state solution”.<sup>33</sup>

Given the geographic necessity and strategic importance of the E-1 and wider Jerusalem periphery areas for linking Palestinian East Jerusalem with, as well as for connecting the north and south of, the West Bank, it appears evident that plans to remove Palestinian presence from these areas form part of a policy aimed at irreversibly altering Palestinian geographical presence in, and the overall demographic status of, the oPt. Furthermore, by isolating Palestinian East Jerusalem neighbourhoods and ensuring a contiguous Israeli settler population belt from Jerusalem to Ma’ale Adumim, these policies threaten the territorial contiguity of the West Bank, thereby placing the possibility of reaching a ‘two-state solution’ at further risk and fundamentally undermining the right of the Palestinian people to self-determination.<sup>34</sup>

Secondly, the large in scale character of these policies also is evidence by the wide geographic areas impacted by forcible transfer during the past decades. They include, but are not limited to, the E-1 area between Jerusalem and Jericho, a multitude of Jordan Valley villages, as well as areas surrounding the cities of Bethlehem and Hebron, including the South Hebron Hills zone (targeting Massafer Yatta and Susiya, in particular).<sup>35</sup> Geographically, these are significant areas of the oPt, and the far-reaching implications of these measures (in terms of the impact on the territorial contiguity of the West Bank and the future viability of the State of Palestine) support their ‘large-scale’ character.

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<sup>31</sup> Report of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Makarim Wibisono, A/HRC/28/78 (22 January 2015) para. 67.

<sup>32</sup> Supra, n. 3. OCHA oPt, ‘Bedouin Communities at Risk of Forcible Transfer’ (September 2014) [http://www.ochaopt.org/documents/ocha\\_opt\\_communities\\_jerusalem\\_factsheet\\_september\\_2014\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_communities_jerusalem_factsheet_september_2014_english.pdf); Haaretz, ‘Israel Government Plans to Forcibly Relocate 12,500 Bedouin’ (16 September 2014) <http://www.haaretz.com/israel-news/.premium-1.615986>.

<sup>33</sup> ‘UNRWA urges donor community to take firm stand against mass forcible transfer of Palestinian Bedouins’ (21 September 2014) <http://www.unrwa.org/newsroom/press-releases/unrwa-urges-donor-community-take-firm-stand-against-mass-forcible-transfer>.

<sup>34</sup> ‘UN Officials: ‘Israel must halt plans to transfer Palestinian Bedouins’ Joint Press Release (Jerusalem, 20 May 2015) [http://www.ochaopt.org/documents/hc\\_unrwa\\_press\\_release\\_bedouin\\_abu\\_nwar\\_20may\\_english.pdf](http://www.ochaopt.org/documents/hc_unrwa_press_release_bedouin_abu_nwar_20may_english.pdf) accessed 30 July 2015; Human Rights Council, Report of the United Nations High Commissioner for Human Rights, A/HRC/28/43 (12 January 2014) para. 11.

<sup>35</sup> Diakonia IHLRC, ‘The Forced Transfer of Bedouin Communities in the oPt’ Legal Brief (November 2011) [http://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/briefs/diakonia\\_forced\\_transfer\\_of\\_bedouin\\_communities\\_legal\\_brief-2.pdf](http://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/briefs/diakonia_forced_transfer_of_bedouin_communities_legal_brief-2.pdf) accessed 30 July 2015; Human Rights Council, A/HRC/28/43, para. 11, 12; OCHA oPt, ‘Demolitions and Forced Displacement in the Occupied West Bank’ (January 2012) <http://www.ochaopt.org/results.aspx?id=4770955>; OCHA oPt, ‘The Bir Nabala / Tel al’ Adassa Case Study’ (September 2013) <http://www.ochaopt.org/results.aspx?id=4771256>; OCHA oPt, ‘Case Study: Life in a ‘Firing Zone’, the Massafer Yatta Communities’ (May 2013) <http://unispal.un.org/unispal.nsf/fd807e46661e3689852570d00069e918/363291904ee21a2685257b740065f1d0?OpenDocument>; B’Tselem ‘Authorities continue to harass al-Hadidiyah community’ (1 December 2015) [http://www.btselem.org/jordan\\_valley/20151201\\_demolition\\_and\\_confiscation\\_in\\_al\\_hadidiya](http://www.btselem.org/jordan_valley/20151201_demolition_and_confiscation_in_al_hadidiya); OCHA oPt, ‘Displacement and Insecurity in Area C of the West Bank’ Special Focus (August 2011); OCHA oPt, ‘Protection of Civilians Weekly Report’ (19 December 2012 – 1 January 2013).

That these measures, combined together, have fundamentally altered the demographic status of the West Bank constitutes an indicative factors strongly suggesting their ‘organized’ character. Moreover, the well-established linkage between the forcible displacement of Palestinian communities and the expansion of illegal Israeli settlements, further suggests State policy. This is especially evident where the design and enforcement of settlement facilitating master plans and supporting military orders appear to originate from and to be organized and implemented from the highest levels of the Government of Israel.

In this regard, the creation by Israel of a planning and zoning regime in Area C that provides for no Palestinian representation is the primary driving factor in the rejection of the vast majority of Palestinian permit applications and the creation of vast areas that are off-limits for Palestinian construction.<sup>36</sup> This leads directly to the designation of Palestinian communities in Area C as ‘illegal’ according to Israeli law, thus ‘authorizing’ State-sponsored forcible transfer.

Therefore, reasonable grounds exist to conclude that the forcible transfer of Palestinian communities in the West Bank is both ‘widespread’ and ‘systematic’ and results in the commission of multiple violations against Palestinian civilians ‘pursuant to or in furtherance of a state or organizational policy to commit such an attack’. If criminal intent and constitutive elements of the crime are proven with regard to each such case, the criteria for the International Criminal Court’s determination that crimes against humanity have been committed may be satisfied.

It should be further emphasized that the expansion of settlements has continued unabated, while Israeli authorities deny the overwhelming majority of Palestinian planning and permit applications and maintain 70 per cent of Area C off-limits for Palestinian construction.<sup>37</sup> This reality may support the argument that forcible transfers are conducted on discriminatory grounds and lead to severe deprivation of the fundamental rights of Palestinian communities, by reason of a collective group identity, which are core elements of the criminal offence of persecution, another enumerated crime against humanity.<sup>38</sup> In this regard, ICTY jurisprudence has highlighted how measures of forcible transfer, particularly targeting a national, racial or religious group, may amount to the crime against humanity of persecution.<sup>39</sup>

## V. Forcible Transfer and Third States’ Obligations

Given the far-reaching implications of policies of forcible transfer for the viability of the ‘two-state solution’ and on the ability of the Palestinian people to exercise their right to self-determination, it is important to examine Third States’ legal obligations with regard to situations entailing the commission of forcible transfer, and the concrete means by which these violations should be treated.

### A. Common Article 1 of the Geneva Conventions

Firstly, all States that are High Contracting Parties to the Geneva Conventions (virtually all States comprising the international community) are obliged, under Common Article 1 (CA1) of the Geneva Conventions, “to respect” and “to ensure respect” for the provisions of the Conventions.<sup>40</sup> This obligation has been interpreted to extend beyond the basic obligation for

<sup>36</sup> See Military Order Concerning Towns, Villages and Buildings Planning Law (Judea & Samaria) No. 418 (1971). The order authorizes the removal of Palestinian representation from the planning process by way of annulment of the pre-existing Local Planning Committees. Instead, this responsibility was transferred to the Israeli Civil Administration’s Local Planning and Licensing Sub-Committee.

<sup>37</sup> Diakonia IHLRC, ‘Planning to Fail: The Planning Regime in Area C of the West Bank: An International Law Perspective (September 2013) 17. In particular, “in recent years Israeli authorities have rejected 94 per cent of Palestinian permit applications, and less than one percent of Area C, much of it built-up already, has been assigned for Palestinian development by the Military Commander. Seventy percent of Area C is off-limits to Palestinian construction, as it is allocated either to Israeli settlements or closed military areas; while another 29 percent is heavily restricted to Palestinians”. See also AIDA ‘Failing to Make the Grade’ (2013) 3; OCHA oPt, ‘Humanitarian Factsheet on Area C of the West Bank’ (January 2013).

<sup>38</sup> Rome Statute of the International Criminal Court (n 25), Article 7(2)(g).

<sup>39</sup> ICTY, Judgement, Kvočka et al., (IT-98-30/1-T), Trial Chamber (2 November 2001) §186.

<sup>40</sup> Common Article 1 of the Geneva Conventions clearly expresses that “the High Contracting Parties undertake to respect and to ensure respect for the present Conventions in all circumstances”.

States to refrain from illegal conduct during situations of armed conflict:

Common Article 1 is now generally interpreted as enunciating a responsibility on third States not involved in an armed conflict to ensure respect for international humanitarian law by the parties to an armed conflict by means of positive action. Third States have a responsibility, therefore, to take appropriate steps – unilaterally or collectively – against parties to a conflict who are violating international humanitarian law, in particular to intervene with states or armed groups over which they might have some influence to stop the violations.<sup>41</sup>

CA1 not only demands that States directly involved in armed conflict provide genuine legal protection of the rights of persons impacted by hostilities, but creates an obligation on all States Party to the Geneva Conventions to take necessary measures (or “do everything in their power”) to ensure legal protection where parties to an armed conflict do not comply with IHL.<sup>42</sup>

Although the text of CA1 refers broadly to “ensure respect,” thus leaving much room for interpreting precisely what “take necessary measures” should mean in concrete terms, State practice over the decades since the 4GC of 1949 entered into force lends further useful guidance. An important example of “necessary measures” is the obligation to cease providing military assistance to States implicated in IHL violations and grave breaches. Stated differently, for Third States to meet their treaty obligations to ensure respect for IHL, they may need to take lawful actions that include: diplomatic measures; halting their trade in arms with the State or armed group violating IHL; joining an international arms embargo; and imposing economic sanctions against the offending State or armed group.<sup>43</sup>

While taking such steps may be considered inherently political in nature, taking lawful measures to ensure respect for IHL by a party implicated in ongoing and serious IHL violations should, in fact, be viewed as a legal obligation for third States. In other words, the legal obligation to respect and ensure respect for IHL should transcend a false dichotomy between politics and international law. In this regard, the ratification of international law instruments should be regarded as a political and legal act intended to ensure that political decision- and policy-making is based on international law.

### **B. Article 41 of the Draft Articles on State Responsibility**

The International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides a specific set of obligations for Third States when peremptory norms of international law (also known as *jus cogens*) are breached. *Jus cogens* norms sit at the top of the hierarchy of the rules of international law, and thus may not be derogated from at any time or by any actor because they protect an overarching interest of the international community as a whole.

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<sup>41</sup> ICRC, ‘Improving Compliance with International Humanitarian Law’ (2004), 2 [https://www.icrc.org/eng/assets/files/other/improving\\_compliance\\_with\\_international\\_humanitarian\\_law.pdf](https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf)

<sup>42</sup> The ICRC Commentary on the Geneva Conventions notes that “the Contracting Parties do not undertake merely to respect the Convention, but also to ‘ensure respect’ for it. The wording may seem redundant. When a State contracts an engagement, the engagement extends to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders [...] The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally”. Commentary – Article 1. Part I: General Provisions, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, (12 August 1949).

<sup>43</sup> Diakonia IHLRC, ‘Accountability for violations of International Humanitarian Law: An introduction to the legal consequences stemming from violations of international humanitarian law’ (October 2013).

No comprehensive list of *jus cogens* norms exists, but international jurisprudence and legal literature have included in this category the right to self-determination, the prohibition against the acquisition of territory by the use of force and the prohibition against the commission of genocide, war crimes and crimes against humanity (including forcible transfer).<sup>44</sup> Article 41 of ARSIWA determines that if a serious breach of *jus cogens* norms is committed, all States Party have the specific obligations not to recognize as legal any effect of this violation, not to aid or assist in the commission of the violation and to positively cooperate to bring an end to the violation.<sup>45</sup>

These principles were reaffirmed by the International Court of Justice (ICJ) in its *Wall Advisory Opinion*, wherein the Court stated that “given the character and the importance of the rights and obligations involved [...], it is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end”.<sup>46</sup>

The Court further determined that “all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction”.<sup>47</sup> Indeed, the same reasoning can be applied to the case of forcible transfer of Palestinian communities given that both the prohibition against forcible transfer as a war crime and crime against humanity and the right to self-determination are *jus cogens* norms. In addition, one should not underestimate the long-term implications of policies of forcible transfer driven by the Occupying Power’s intent to exercise permanent sovereignty over a territory placed under military occupation, policies which undermine the protected populations rights to self-determination and promote acquisition of territory by the use of force.

### C. EU Guidelines on Promoting Compliance with IHL

A further set of obligations apply to European Union (EU) Member States, given the adoption of the *EU Guidelines on Promoting Compliance with International Humanitarian Law* (The Guidelines).<sup>48</sup> In line with the primary objectives of respect for human rights and international law inspiring the EU’s external policy according to Article 21 of the Treaty of Lisbon,<sup>49</sup> the Guidelines explain that, if a State or non-State-actor is involved in IHL violations, the EU shall react with measures from among an array of actions at its disposal, including:

<sup>44</sup> An important indicator of inclusion of basic principles of IHL (such as the prohibition against the commission of grave breaches) within the framework of *jus cogens* norms is provided by the ICJ in its Advisory Opinion on ‘The Legality of the Threat or Use of Nuclear Weapons’. In the Opinion, while not entirely clarifying the status of *jus cogens* in connection with international humanitarian law, the Court determined that “[the] fundamental rules [of IHL] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”. See Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, § 79. As duly pointed out by Professor Condorelli, “it is unlikely that the Court merely meant [...] that those principles must not be transgressed. That, indeed, is true of any rule of law that imposes any obligation at all!”; L. Condorelli, “Nuclear weapons: A weighty matter for the International Court of Justice”, *International Review of the Red Cross* (IRRC), No. 319, 1997, 14; V. Chetail, “The contribution of the International Court of Justice to international humanitarian law” IRRC, No. 85, 2003, 251. In the same vein, the International Law Commission has observed that “some of [the rules of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*”. See Report of the International Law Commission on the Work of its Thirty-Second Session, 35 UN GAOR Supp. (no. 10), 98 UN Doc A/35/10 (1980). On the inclusion of the prohibition against grave breaches among *jus cogens* norms, see the decision of the ICTY in the Kuperskic case where it held that “most norms of international humanitarian law, in particular those prohibiting war crimes [...] are also peremptory norms of international law or *jus cogens*”. ICTY, Judgement, Kuperskic et al., (ICTY-95-16-T), Trial Chamber (14 January 2000) § 520. For a similar opinion, see Al-Haq, ‘Feasting on the Occupation: Illegality of Settlement Produce and Responsibility of EU Member States under International Law’, Position Paper (Al-Haq 2013) 25–26.

<sup>45</sup> Draft Article on Responsibility of States for Internationally Wrongful Acts with commentaries, International Law Commission, United Nations, 2001, Article 41.

<sup>46</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Reports 2004, § 159.

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

<sup>48</sup> European Union Guidelines on the promotion of compliance with international humanitarian law (IHL) (2009/C 303/06).

- Political dialogue with non-EU States, both in the event of conflict and in time of peace;
- General public statements by which the EU takes a stand in favor of compliance with IHL;
- Demarches and public statements through which the EU condemns situations or particular acts;
- Restrictive measures and sanctions, in accordance with international law, which may be applied to States or individuals involved in a conflict;
- Cooperation with international bodies;
- Crisis-management operations that may include missions to collect information useful for the International Criminal Court (ICC) or for investigations into the alleged commission of war crimes;
- Prosecution of individuals responsible for violating IHL;
- Training and education of populations, military personnel and law enforcement officials; and
- Control of arms sales, in accordance with EU Council Common Position 2008/944/CFSP which provides that export licenses should be subject to compliance with human rights by countries importing arms.

The Guidelines also affirm that “certain serious violations of international humanitarian law are defined as war crimes. [...] States must, in accordance with their national law, ensure that alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the International Criminal Court”.<sup>50</sup>

#### **D. Universal Jurisdiction for Investigating and Prosecuting Grave Breaches**

Given that the forcible transfer of protected persons constitutes a grave breach of the Geneva Conventions and their Additional Protocols entailing the commission of a war crime, it is important to highlight third States’ responsibilities in relation to accountability measures. Article 146 of 4GC clearly states that each State Party to the Convention:

“*shall* be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and *shall* bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case” (emphasis added).<sup>51</sup>

The principle of universal jurisdiction as established in this provision gives any State the power to investigate and prosecute grave breaches such as forcible transfer, regardless of any direct jurisdictional link (e.g. territorial or personal jurisdiction) with the commission of the offence. Indeed, Article 146 not only confers this right to third States but, in fact, imposes a clear obligation on each State to act (reflected in the imperative wording “shall”).

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<sup>49</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007).

<sup>50</sup> European Union Guidelines (n 48), paras 13–14.

<sup>51</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, (12 August 1949) Article 146.

### E. Forcible Transfer and the Current ICC Preliminary Examination

The State of Palestine acceded to the ICC Statute on 7 January 2015. This confers jurisdiction to the ICC, subject to the exhaustion of national remedies, for serious crimes committed in the territory of Palestine, including forcible transfer. By ratifying the ICC Statute, all States Parties (which include all EU Member States) have committed to the pledge made in the Statute's preamble "to put an end to impunity for the perpetrators of international crimes and thus to contribute to the prevention of such crimes, and their duty to exercise its criminal jurisdiction over those responsible for such crimes".<sup>52</sup> Furthermore, according to Article 86 of the Statute, all States Parties shall cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction. This means that States Parties are obliged not to create political or technical obstacles to the ICC's process of exercising jurisdiction in the oPt context. On the contrary, when needed, States Parties are obliged to take positive measures to support the Court in the exercise of such jurisdiction.

In addition, ICL and ICC jurisdiction look not only at the responsibility of the so-called "direct perpetrator," but also of those "aiding and abetting" or "otherwise facilitating" the perpetration of serious crimes.<sup>53</sup> In this regard, States should pay particular attention to the conduct of private entities (including corporations and private security companies) domiciled in their territories and involved in businesses related to Israel's oPt occupation. Due to the fact that individual representatives of these private entities may be found culpable of aiding and abetting crimes such as forcible transfer and extensive destruction and appropriation of property, States are obliged to take appropriate measures to redress the unlawful activities of their corporate nationals and their individual representatives, including through genuine investigations and prosecutions.

## VI. Conclusions and Recommendations: Concrete Measures for Third States to Comply with Their Obligations

The forcible transfer of Palestinian communities in the West Bank is a widespread and systematic policy seriously infringing upon Palestinians' basic human rights and violating IHL norms governing protected populations under military occupation. The situation has reached a level where the long-term implications, particularly in Area C, including the E-1 zone, seriously jeopardize any plausible prospects for creating a viable and contiguous Palestinian state, and the prospects for a durable and just solution to the Israeli-Palestinian conflict.

It is thus imperative for the diplomatic community to respond, in order to comply with the specific and binding third State legal obligations to protect the rights of the occupied population, but also in light of the detrimental impact that such widespread and systematic policies have on stated Third State diplomatic and development agendas. The lack of effective action by the international community undermines not only its credibility in ensuring respect for international law in situations of crisis, but also the effectiveness of donor State aid and state-building interventions.

Urgent and concrete measures, based on international law, should not be further postponed.

In light of the above obligations as well as examples related to other contexts, **third States** should consider taking recourse through the following steps:

- Refusing to engage in development aid activities that entail passive or active involvement in unlawful acts and policies. The Occupying Power's planning and zoning regime is based on serious discriminatory practices and entrenches continuous Palestinian forcible transfer, while excluding Palestinians from any meaningful participation in planning and zoning. In

<sup>52</sup> Rome Statute of the International Criminal Court (n 27).

<sup>53</sup> *Ibid*, Article 25.

- particular, States should not rely upon any alleged consent to Israel's 'relocation' (forcible transfer) plans, given that the coercive environment in which such alleged consent has been obtained invalidates it;
- Imposing an embargo on the export to Israel of products that can provide technological, material or logistical assistance to its forcible transfer and settlement practices and policies;
  - Adopting restrictive measures to compel respect for IHL in the oPt. These can include diplomatic measures, restrictions on military technology and scientific cooperation, restrictions on exports/imports, bans on investments, and the freezing of capital. These measures can be adopted within international and regional cooperation frameworks and mechanisms at the:
    - UN level: through a Chapter VII UN Security Council resolution, given that continuous forcible transfer of Palestinian communities seriously undermines the territorial viability of the West Bank, and thus amounts to a threat to the peace and security of the region, and
    - EU level: through a decision by the European Council taken under Article 215(5) of the Treaty on the Functioning of the European Union (TFEU), based on the previous examples of Crimea, Burma, Libya and Iran;<sup>54</sup>
  - In particular, after the publication of the 2013 'Guidelines on the eligibility of Israeli entities working within Israeli settlements in Palestine for funding by the EU' and of the 2015 'EU's Notice on the Indication of Origin of settlement products', the EU and its Member States should continue to develop and implement the 'differentiation policy', namely ensuring that illegal Israeli settlements in no way benefit from any advancement in EU-Israel bilateral relations. On the contrary, the perseveration of policies such as settlement expansion and forcible transfer of Palestinian communities shall prohibit any further step in the advancement of the integration policy between the EU and Israel. At the same time, the EU should create the conditions for rendering the advancement of policies that seriously compromise the viability of the two-state solution economically unsustainable. Therefore a ban on the import of settlement products in the EU internal market should be adopted, based on firm international law grounds, particularly on their contribution to the maintenance of a situation that entails serious breaches of peremptory norms of international law (*jus cogens*), including the grave breaches of forcible transfer and extensive destruction and appropriation of property;
  - Immediately urging a freeze in new Israeli settlement construction (including those expansions related to natural growth) and setting the concrete basis without further delay for negotiating an internationally-supervised, time-bound plan for their progressive removal from the West Bank;
  - In recalling Israel's poor record of cooperation with UN investigative bodies (including special rapporteurs and international commissions of inquiry), urging and pressuring the Israeli Government to accept, cooperate and grant access to UN-mandated investigations dealing with alleged IHL and IHRL violations committed by both sides of the conflict.
  - Exercising criminal jurisdiction over individuals responsible for forcible transfer according to customary international law and State Party obligations under Article 146 of the 4GC; particular emphasis should be placed on:
    - Investigation/prosecution of individuals with dual-nationality, and
    - Investigation/prosecution of individuals who represent private corporations registered in the territory of third States for involvement in business related to forcible transfer and settlement expansion;
  - Providing the ICC with full cooperation in its preliminary examination of the situation in Palestine (e.g., through crisis-management operations, which may include cooperative

<sup>54</sup> See in particular, European Union 'Restrictive measures (sanctions) in force' (Regulations based on Article 215 TFEU and Decisions adopted in the framework of the Common Foreign and Security Policy) (Updated 19 March 2015) [http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf).

missions to collect pertinent information) and obstructing the creation of political or technical obstacles to the Court's impartial pledge to end impunity and ensure accountability for the commission of international crimes, including forcible transfer, in the oPt;

- Publishing and enforcing instructions to companies involved in business related to Israeli policies of forcible transfer, including house demolitions. Also ensure that the development of National Action Plans adequately reflects the legal rights and responsibilities applicable to occupied territories, and adopt domestic legislation to that effect; and
- Investigating the business activities of companies registered in third State domiciles that appear to profit from Israel's violations of IHL and requiring that such businesses transparently demonstrate that their engagement does not contribute to illegal Israeli conduct. In this regard, States should appropriately regulate the activities of business entities domiciled in their jurisdiction in accordance with States' own obligations and take appropriate measures to ensure that these businesses respect human rights and IHL obligations throughout their operations.

## See other Diakonia IHL Resource Center briefs:

Accountability for violations of International Humanitarian Law: An introduction to the legal consequences stemming from violations of international humanitarian law

International Crimes and Accountability: A beginner's introduction to the duty to investigate, prosecute and punish

The forced transfer of Bedouin communities in the oPt

Israel's Administrative Destruction of Cisterns in Area C of the West Bank

The Gaza Strip: Status under international humanitarian law

Jerusalem light rail IHL analysis

The maritime blockade of the Gaza Strip

## Diakonia's IHL Resource centre seeks to increase awareness of IHL among:

- The international community present in the oPt – international NGOs, international agencies such as United Nations and European Union bodies, international media and diplomatic missions as well as decision makers visiting the area;
- Israeli and Palestinian civil society, media, lawyers and the general public in Israel and Palestine;
- EU and UN bodies based in Brussels and Geneva;
- International corporate actors active in the oPt.
- Where possible, the disseminated IHL information and work with partner organisations also includes a gender perspective.

### **How we work**

The IHL Resource Centre consists of four interlinked components:

- Legal research and briefings to civil society and the international community;
- Education and information, including through the creation of an IHL Helpdesk and work with local partners;
- Monitoring of and reporting on IHL violations;
- Advocacy from Diakonia's Head Office in Stockholm.



#### What is Diakonia?

Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

#### *Diakonia International Humanitarian Law Resource Centre*

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in–depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website 'An Easy Guide to International Humanitarian Law in the occupied Palestinian territory' at: [www.diakonia.se/en/IHL/](http://www.diakonia.se/en/IHL/) or contact us to set up a general or specialised legal briefing by our legal advisors.

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