



# Litigating Settlements

The Impact of Palestine's Accession  
to the Rome Statute on the Settlement Enterprise

Diakonia International Humanitarian Law Resource Centre  
December 2015

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Cover photo: The Israeli settlement Ma'ale Adumim, seven kilometers (4.3 miles) from east Jerusalem.  
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## I. Introduction

Palestine's 2 January 2015 accession to the Rome Statute of the International Criminal Court (ICC), and preceding declaration lodged under Article 12(3) of the Rome Statute, has created a new opening to hasten the achievement of justice and accountability for violations of international law in the occupied Palestinian territory (oPt).

In this brief, the Diakonia International Humanitarian Law Resource Center (IHLRC) revisits Israel's ongoing oPt settlement enterprise in light of Palestine's accession to the Rome Statute,<sup>1</sup> with the aim of clarifying a number of key legal issues.

**First**, the brief examines Israel's settlements under international humanitarian law (IHL), including the obligations of third States not to aid or assist such acts and not to recognize the facts they establish, including their underlying legislative and administrative regime. **Second**, it examines Palestine's accession to the Rome Statute and Article 12(3) declaration. This assesses the potential shift from the Office of the Prosecutor's (OTP) current preliminary examination of the situation into a full-fledged investigation. **Third**, it examines the definition of the crime that settlements may amount to under the Rome Statute, and within the context of possible investigations and prosecutions.<sup>2</sup> **Fourth**, it summarizes the UN Human Rights Council report about the impact of settlements on Palestinian human rights and assesses the report's relation to the ICC. **Fifth**, it examines the Government of Israel's (GoI) position, including political and legal justifications for these acts. **Sixth**, and finally, it examines how the Israeli Supreme Court has treated the settlements and settlement-related issues.

The brief concludes with specific recommendations, including those aimed at encouraging third States to support this exceptional opportunity to pursue investigations and prosecutions of individuals responsible for the establishment, continued maintenance and expansion of Israel's oPt settlement enterprise. It also recommends actions States can take to put an end to the whole of the settlement enterprise.

## II. Settlements & IHL

### A. Fourth Geneva Convention

Despite the clear prohibition of settlements under IHL, Israel has continued large-scale expansion of its settlement enterprise throughout the oPt. Defying the universal international view, Israel has consistently refused to recognize that the oPt constitutes occupied territory and, thus, that IHL fully applies to the territory and its Palestinian population as a matter of law.

The Fourth Geneva Convention specifies that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".<sup>3</sup> As noted in the Commentaries to the Convention, this specific prohibition was adopted to "prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories".<sup>4</sup>

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<sup>1</sup> The Diakonia IHLRC has previously issued a number of materials on settlements and IHL. See, e.g., Diakonia IHLRC, *The Unsettling Business of Settlement Business* (May 2015), <https://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/briefs/the-unsettling-business-of-settlement-business.pdf>; Diakonia IHLRC, *Fact Sheet: 6. International Law and Israeli Settlements in the Occupied Palestinian Territory* (2014), <https://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/fact-sheets/international-law-and-israeli-settlements-in-the-occupied-palestinian-territory.pdf>. For more, see <https://www.diakonia.se/en/IHL/Publications/>.

<sup>2</sup> The Rome Statute defines the crime as "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies". For easy reference to the reader, it will be referred to directly as "settlements".

<sup>3</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, para 6, Aug. 12, 1949, 75 U.N.T.S 287 [hereinafter *Fourth Geneva Convention*].

<sup>4</sup> Commentary to the Fourth Geneva Convention art. 49, 283, para 6, <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407>.

This prohibition was intended to combat the adverse effects of occupation on the protected population in an occupied territory, including social transformative measures likely to have adverse economic impact and effectuate permanent changes to the demographic character of the occupied territory.

### **B. Additional Protocol I**

Article 85(4)(a) of Additional Protocol I (API) provides that “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention”,<sup>5</sup> classifying these acts as grave breaches, “when committed willfully and in violation of the Conventions or the Protocol”<sup>6</sup> and a war crime.<sup>7</sup>

As explained in the API commentary, the element added under API was to treat population transfer violations as grave breaches because of their possible effects on the occupied population.<sup>8</sup> API classifies grave breaches as war crimes, an important categorization that relates to international criminal law investigations and prosecutions.<sup>9</sup>

### **C. Customary IHL**

The International Committee of the Red Cross (ICRC) Study on Customary IHL (ICRC Study) notes the customary status of the prohibition, in that “States may not deport or transfer parts of their own civilian population into a territory they occupy”.<sup>10</sup> The ICRC Study notes this prohibition’s inclusion in several military manuals, as well as in the domestic legislation of a vast number of States.<sup>11</sup> The study further notes that the practice has been condemned by the UN Security Council and other UN bodies.<sup>12</sup>

While Israel is not party to API, this does not alter the customary status of the rule and its clear prohibition under the Fourth Geneva Convention – to which Israel is bound – and must be respected by the Occupying Power. Customary international law is referred to as a “general practice accepted as law”.<sup>13</sup> The fact that Israel has not acceded to API does not diminish its obligation of this fundamental IHL principle.

### **D. Obligations of Third States, including Penal Sanctions**

While the prohibition on settlements is expressly codified in international law, this has not been sufficient to bring about a cessation of Israeli settlement activity – let alone to undo the enterprise in its entirety.

More noteworthy is that the settlement enterprise clearly links to numerous other unlawful acts by the Occupying Power, including territorial annexation, denial of the Palestinian right to exercise self-determination and permanent sovereignty over natural resources, as well as a litany of systematic related IHL and IHRL violations. Under IHL, most concerning are the interconnected and unlawful policies of forcible transfer of protected persons<sup>14</sup> and extensive destruction and appropriation of property not justified by military necessity<sup>15</sup> – both grave breaches of the Fourth Geneva Convention.

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 85(4)(a), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

<sup>6</sup> *Id.*, art. 85(4).

<sup>7</sup> *Id.*, art. 85(5).

<sup>8</sup> Commentary to Additional Protocol I art. 85(4)(a), 1000, para 3504, <https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/7bbcfc2d471a1eaac12563cd00437805>.

<sup>9</sup> Additional Protocol I art. 85(5).

<sup>10</sup> ICRC, Study on Customary IHL, Rule 130: Transfer of Own Civilian Population into Occupied Territory, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule130#Fn\\_2\\_7](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule130#Fn_2_7) [hereinafter ICRC Study].

<sup>11</sup> ICRC Study, Practice Relating to Rule 130: Transfer of Own Civilian Population into Occupied Territory, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule130](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule130).

<sup>12</sup> *Id.* See, e.g., UN Security Council resolutions confirming the establishment of settlements as contrary to IHL: Security Council Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979); Security Council Res. 452, U.N. Doc. S/RES/452 (July 20, 1979); Security Council Res. 465, U.N. Doc. S/RES/465 (Mar. 1, 1980); Security Council Res. 476, U.N. Doc. S/RES/476 (June 30, 1980).

<sup>13</sup> Statute of the International Court of Justice art. 38(1)(b), Oct. 24, 1945.

<sup>14</sup> Fourth Geneva Convention art. 147.

<sup>15</sup> *Id.*

Here, it is instructive to identify the third State obligations under IHL specifically, as well as international law generally.

With respect to IHL, States are obligated to *respect* and *ensure respect* for IHL, in accordance with Common Article 1 of the four Geneva Conventions.<sup>16</sup> This concerns not only the obligation to refrain from encouraging violations of IHL, but also to exert influence to prevent, bring an end to and reverse the effects of IHL violations to the degree possible.<sup>17</sup> The ICRC Study identifies the obligation to ensure respect for IHL as an *erga omnes* obligation, or an obligation owed by a State towards the international community as a whole.<sup>18</sup>

Thus, States should assume responsibility by taking steps – individually or collectively – to impede violations, the most important of which include the grave breaches identified above.<sup>19</sup> This, in turn, means that the Parties to the Geneva Conventions should take a proactive approach towards ensuring the universal application of its principles.<sup>20</sup> This can, for example, include a variety of punitive or restrictive measures such as limiting exports to and imports from a State committing violations that recognize, aid or assist wrongful acts, including reviewing and terminating arms trade with authorities likely to commit wrongful acts.<sup>21</sup> Nevertheless, in practice, the full extent of the measures required to comply with Common Article 1 and the third State duty of non-recognition remains somewhat uncertain owing to inconsistent State practice and under-enforcement of these obligations in the context of inter-State relations.

In relation to general international law, the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides guidance on the role of third States. Serious breaches of peremptory norms of international law<sup>22</sup> (also referred to as *jus cogens*) create a specific set of obligations for third States. States have a collective obligation to “cooperate to bring to an end through lawful means” serious breaches of *jus cogens*.<sup>23</sup> States must also ensure that they comply with the obligations of non-recognition and non-aid or assistance in connection with such serious breaches.<sup>24</sup> The oPt settlement enterprise may also contribute to violations of *jus cogens*, such as denial of the right to self-determination and the prohibition of annexation.<sup>25</sup>

<sup>16</sup> See also Additional Protocol I art. 1.1, 86 & 89. Article 86 of API stipulates that “High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so”. Further, it stipulates that “[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter”.

<sup>17</sup> ICRC Study, Rule 144: Ensuring Respect for International Humanitarian Law *Erga Omnes*, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule144](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144). See also International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries arts. 34–35 (2001) [hereinafter ARSIWA], [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>18</sup> On *erga omnes*, see *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5). On the *erga omnes* character of the right to self-determination in particular, see *East Timor (Port. V. Austl.)*, 1995 I.C.J. 90, para. 29 (June 30); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 155–160 (July 9) [hereinafter *Wall Advisory Opinion*].

<sup>19</sup> ICRC, *Improving Compliance with International Humanitarian Law*, International Humanitarian Law Research Initiative (June 25–27 2004), at 2–3, [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>20</sup> Commentary to the Fourth Geneva Convention art. 49, 28, 16, <https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/0cfe221042c46f8ec12563cd0042a115>.

<sup>21</sup> See Umesh Palwankar, *Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law*, 34 INT’L REV. RED CROSS 9 (1994). Palwankar’s stocktaking exercise looks at different types of measures used including diplomatic pressure, coercive measures, retortion, unarmed reprisals, and others in conjunction with international organizations. See also Knut Dormann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations*, INT’L REV. RED CROSS (2015); Diakonia IHLRC, *Accountability for violations of International Humanitarian Law: An introduction to the legal consequences stemming from violations of international humanitarian law* (Oct. 2013), <https://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/briefs/acountability-for-violations-of-international-law.pdf>. See also, *Arms Trade Treaty preamble & art. 7(1)(i)*, U.N. Doc. A/CONF.217/2013/L.3 (Mar. 27, 2013), adopted by G.A. Res. 67/234 B, U.N. Doc. A/RES/67/234 B (June 11, 2013).

<sup>22</sup> See Commentaries to the ARSIWA arts. 40, 112.

<sup>23</sup> ARSIWA art. 41(1).

<sup>24</sup> *Id.*, art. 41(2). While there is not yet a definitive list of all *jus cogens* norms, this list would include the right to self-determination, as well as the prohibitions against aggression, apartheid and racial discrimination. See Commentaries to the ARSIWA, 112 n641. The ILC is now working on the topic of *jus cogens*. See International Law Commission, *Report on the work of the sixty-sixth session*, Annex: *Jus Cogens*, Special Rapporteur Dire Tladi, U.N. Doc. A/69/10, 274 (2014).

<sup>25</sup> See THE LAW OF INTERNATIONAL RESPONSIBILITY 450 (James Crawford, Alain Pellet, Simon Olleson eds., 2010).

In the *Wall* advisory opinion, the International Court of Justice (ICJ) explained that “[i]t is also for all States...to see to it that any impediment...to the exercise by the Palestinian people of its right to self-determination is brought to an end”.<sup>26</sup> Third States may invoke the responsibility of another State when the obligation breached is owed to the international community as a whole.<sup>27</sup>

The ICJ, for example, upheld the status of customary IHL rules as peremptory norms of international law (or *jus cogens*).<sup>28</sup> In the *Nuclear Weapons* advisory opinion, the ICJ stated that fundamental rules of IHL are to be observed by all States “because they constitute intransgressible principles of international customary law” (emphasis added).<sup>29</sup> As per the ICJ, these IHL rules are obligations owed by States towards the international community as a whole. Further, the ILC has explained that “[i]n the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as ‘intransgressible’ in character, it would also seem justified to treat these as peremptory”.<sup>30</sup>

With regard to European Union (EU) member States in particular, *the EU Guidelines on Promoting Compliance with International Humanitarian Law*<sup>31</sup> provide guidance on measures to be taken in accordance with their obligations (either collectively as the EU or as individual States) under Article 21 of the Treaty of the EU (Lisbon Treaty) concerning respect for human rights and international law.<sup>32</sup> These measures include, but are not limited to, sanctions, prosecutions of individuals, and the imposition of arms trade limits.<sup>33</sup> With respect to prosecutions, these EU guidelines stipulate that where serious IHL violations take place, “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>34</sup>

Grave breaches of IHL are identified in the Geneva Conventions, including in Article 147 of the Fourth Geneva Convention as well as in API Article 85. The commission of grave breaches creates an obligation on States to investigate and prosecute individuals “alleged to have committed, or to have ordered to be committed” such acts. This obligation exists regardless of the nationality of the alleged perpetrator and includes the obligation to adopt universal jurisdiction within domestic legislation.<sup>35</sup> Under API, the grave breaches identified in both the Conventions and the Protocol are regarded as war crimes.<sup>36</sup>

Grave breaches and other serious violations of IHL also are defined as war crimes in the statutes of ad hoc international criminal tribunals, including those in the former Yugoslavia and Rwanda, as well as the Rome Statute of the ICC.<sup>37</sup> Further, the Fourth Geneva Convention stipulates that each High Contracting Party “shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches”.<sup>38</sup>

Thus, the responsibility for third States to enact penal sanctions against individuals should go beyond the grave breaches, and also punish acts prohibited by the Convention that are not specifically categorized as such.<sup>39</sup>

<sup>26</sup> Wall Advisory Opinion, para. 159.

<sup>27</sup> ARSIWA art. 48.

<sup>28</sup> Vincent Chetail, The contribution of the International Court of Justice to international humanitarian law, 85 INT’L REV. RED CROSS 235 (2003), [https://www.icrc.org/eng/assets/files/other/irrc\\_850\\_chetail.pdf](https://www.icrc.org/eng/assets/files/other/irrc_850_chetail.pdf).

<sup>29</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 79 (July 8). The ICJ further added that “these [IHL] rules incorporate obligations which are essentially of an erga omnes character”; see Wall Advisory Opinion, para. 157.

<sup>30</sup> See Commentaries to the ARSIWA, 113.

<sup>31</sup> Updated European Union Guidelines on the promotion of compliance with international humanitarian law (IHL) 2009 O.J. (C 303) 12 [hereinafter EU Guidelines].

<sup>32</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

<sup>33</sup> EU Guidelines, 16.

<sup>34</sup> Id., 13–14.

<sup>35</sup> Fourth Geneva Convention art. 146.

<sup>36</sup> Additional Protocol I art. 85(5).

<sup>37</sup> See, generally, Marco D. Oberg, The absorption of grave breaches into war crimes law, 91 INT’L REV. RED CROSS 163 (2009), <https://www.icrc.org/eng/assets/files/other/irrc-873-divac-oberg.pdf>.

<sup>38</sup> Fourth Geneva Convention art. 146.

<sup>39</sup> Commentary to the Fourth Geneva Convention art. 146, 593–594, <https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/83d26231d75c3884c12563cd0042eeb5>.

Due to the influence of political and foreign policy considerations in third State domestic judicial processes involving Israel officials and acts, third State obligations to investigate and prosecute individuals involved in crimes relating to the settlement enterprise have faced significant barriers. Nevertheless, the definition of the establishment, expansion and maintenance of settlements and other related acts as war crimes may provide additional opportunities to ensure State and individual criminal accountability and trigger restrictive measures by third States in the context of their relations with Israel public and private entities. Similarly, the ICC's ability to exercise jurisdiction over crimes committed in the oPt past the preliminary examination phase would benefit from the support of all States.

### III. Palestine's Accession & 12(3) Declaration

#### A. Palestine's Accession to the Rome Statute & 12(3) Declaration

Palestine acceded to the Rome Statute of the ICC on 2 January 2015, becoming the 123rd State Party on 1 April 2015.<sup>40</sup> On 1 January 2015, the ICC Registrar received a declaration lodged under article 12(3) of the Rome Statute<sup>41</sup> by the Government of Palestine stating its acceptance of the ICC's jurisdiction since 13 June 2014.<sup>42</sup> It also bears noting that Palestine acceded to the four Geneva Conventions and API in April 2014.<sup>43</sup>

#### B. On the Preliminary Examination

Following the ICC's receipt of Palestine's Article 12(3) declaration, the OTP opened a preliminary examination<sup>44</sup> into the situation in Palestine on 16 January 2015,<sup>45</sup> in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor.<sup>46</sup>

A preliminary examination is meant to examine the available information to determine whether there is a "reasonable basis to proceed" to an investigation. Specifically, under Article 53(1) of the Rome Statute, the Prosecutor engages in an initial assessment and must consider issues of jurisdiction, admissibility and the interests of justice.<sup>47</sup> Jurisdiction relates to the *prime facie* applicability of temporal, material and either territorial or personal jurisdiction.<sup>48</sup> Admissibility concerns the assessment of complementarity and gravity.<sup>49</sup>

<sup>40</sup> ICC, The State of Palestine accedes to the Rome Statute, ICC-ASP-20150107-PR1082 (Jan. 7, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1082\\_2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.aspx); ICC, ICC welcomes Palestine as a new State Party, ICC-CPI-20150401-PR1103 (Apr. 1, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx). See also <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>.

<sup>41</sup> Rome Statute of the International Criminal Court art. 12(3), 2187 U.N.T.S. 90 (July 17, 1998) [hereinafter Rome Statute].

<sup>42</sup> ICC, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, ICC-CPI-20150105-PR1080 (Jan. 5, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx). See also [http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf).

<sup>43</sup> See [https://www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/140410-GENEVE\\_e.pdf](https://www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/140410-GENEVE_e.pdf).

<sup>44</sup> On preliminary examinations, see Rome Statute arts. 15 & 53. See also ICC, Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13\_Eng (2013), Rule 44 [hereinafter Rules]; ICC, Regulations of the Office of the Prosecutor regulations 25, 27 & 29, ICC-BD/05-01/09 (Apr. 23, 2009) [hereinafter Regulations], <http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf>.

<sup>45</sup> ICC, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, ICC-OTP-20150116-PR1083, 16 January 2015, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx).

<sup>46</sup> Regulation 25(1)(c) allows for the initiation of a preliminary examination on the basis of a declaration lodged under Article 12(3) of the Rome Statute. Thus, the preliminary examination was not opened on the basis of information sent in conjunction with Palestine's accession to the Rome Statute.

<sup>47</sup> See Rome Statute arts. 53(1)(a-c).

<sup>48</sup> Temporal jurisdiction concerns the time in which the ICC can exercise its jurisdiction. Generally, this concerns jurisdiction after the entry into force of the Rome Statute. More specifically, this concerns the date of accession/ratification or the date requested by a State via a 12(3) declaration (which can only go as far back as the Rome Statute's entry into force). Material jurisdiction refers to those categories of crime included in the Rome Statute, namely genocide, war crimes and crimes against humanity. Personal or territorial jurisdiction involves the commission of a crime in the territory of a State party to the Rome Statute or a national. This can also be applicable by way of a 12(3) declaration.

<sup>49</sup> The Rome Statute recognizes that States have the first responsibility to prosecute international crimes and that the ICC's jurisdiction should be complementary to national criminal jurisdictions. This means that the ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out genuine and credible investigations and, where warranted, prosecutions. A case may be inadmissible if it is not of sufficient gravity to justify further action by the Court.

The interests of justice inquiry takes into account the gravity of the crime alleged to have been committed and victims' rights and interests.<sup>50</sup> As such, each of the forgoing factors must be assessed and satisfied to warrant the OTP proceeding from the current preliminary examination phase to possible future investigation or prosecution regarding Israel's settlements and other alleged crimes.

There is no specific timeframe for the OTP to reach a decision on concluding a preliminary examination and some have continued for years.<sup>51</sup> According to the OTP, the Prosecutor will make a decision on whether to decline, continue to collect information or initiate an investigation based on the particular facts and circumstances of each situation.<sup>52</sup>

### C. Initiating an Investigation

The next step concerns how the ICC may move from a preliminary examination to a "situation under investigation".<sup>53</sup>

The Prosecutor may exercise powers proprio motu to move from a preliminary examination into an investigation pursuant to Articles 13(c) and 15(3) of the Rome Statute.<sup>54</sup> Should the Prosecutor determine that there is a reasonable basis to proceed, it must then request Pre-Trial Chamber authorization.<sup>55</sup> This can be a broad investigation that looks at numerous crimes alleged to have been committed.<sup>56</sup>

The Pre-Trial Chamber may also refuse this request, although the Prosecutor may submit a subsequent request based on new facts or evidence.<sup>57</sup> On the other hand, the Prosecutor may decide not to proceed to an investigation, with the possibility of revisiting the preliminary examination in light of new facts or evidence.<sup>58</sup>

Should Palestine (or any other State Party) submit a referral under Article 14 of a "situation", no authorization from the Pre-Trial Chamber would be required, and an investigation can be initiated.<sup>59</sup> Palestine has stated that it submitted information relating to the summer 2014 Gaza conflict, settlements and treatment of Palestinian prisoners in Israeli prisons, although this was not a referral under Article 14.<sup>60</sup>

A Palestinian (or other State) referral to the OTP can be rejected based on the OTP's internal assessment of the referred situation<sup>61</sup> but such a rejection can be challenged by the referring State.<sup>62</sup> Furthermore, a State referral does not limit the type of cases or scope of evidence that the OTP may decide to consider and evaluate.<sup>63</sup>

<sup>50</sup> Gravity requires an assessment based on the scale, nature, and manner of commission of the crimes, and their impact and its effects on the overall purposes of the Court. The interests of victims includes the victims' interest in seeing justice done, but also includes other essential interests such as their protection, as indicated by the Rome Statute.

<sup>51</sup> Afghanistan and Colombia are clear examples, with the examinations becoming public in 2007 and 2005, respectively.

<sup>52</sup> ICC-OTP, Policy Paper on Preliminary Examinations (Nov. 2013), at para. 14 [hereinafter Policy Paper PE], [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20202013.pdf). The policy paper outlines in great detail, the policy of the OTP, as regards to the factors explained above, along with the conduct of the preliminary examination and the policy objectives. These objectives include transparency, ending impunity and prevention.

<sup>53</sup> See Valentina Azarova, *Palestine's Day in Court? The Unexpected Effects of ICC Action, AL-SHABAKA* (Apr. 1, 2015) [hereinafter Azarova], <https://al-shabaka.org/briefs/palestines-day-in-court-the-unexpected-effects-of-icc-action/>.

<sup>54</sup> See Rome Statute art. 18.

<sup>55</sup> *Id.*, art. 15(3-4). Rules, 48-50. Regulations, 29.

<sup>56</sup> See, generally, Rules 48-50; Regulations, 33. See also Azarova.

<sup>57</sup> Rome Statute art. 15(5).

<sup>58</sup> *Id.*, art. 15(6).

<sup>59</sup> *Id.*, arts. 14, 18 & 53. Rules, 52. Regulations, 29. See, generally, Rules, 107-110. See also the OTP's strategy of inviting referrals, rather than exercising its proprio motu powers in: Policy Paper PE, para. 98; ICC-OTP, Report on the activities performed during the first three years (June 2003 - June 2006), Ref- RP20060906-OTP, [http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP\\_3yearreport20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf). There is no statutory requirement to do so, and the OTP will proceed in the event that the State declines the offer.

<sup>60</sup> Thomas Escritt, *Palestinian Authority Submits First Documents on Alleged Israeli War Crimes to ICC, HA'ARETZ* (June 25, 2015), <http://www.haaretz.com/news/diplomacy-defense/1.663045>.

<sup>61</sup> Rome Statute art. 53(2)(a-c).

<sup>62</sup> *Id.*, art. 53(3)(a).

<sup>63</sup> See Prosecutor v. Mbarushimana, *Decision on the Defence Challenge to the Jurisdiction of the Court*, ICC-01/04-01/10-451 (Oct. 26, 2011), para. 27. See also Azarova.

Should the Prosecutor decide not to proceed, the Pre-Trial Chamber may review this decision on its own initiative, if the OTP decision was based solely on gravity or the interests of justice.<sup>64</sup> Additionally, the Prosecutor may revisit the decision not to proceed based on new facts or information.<sup>65</sup>

An early January 2015 Israeli newspaper story reported that senior Palestinian officials had stated that they would withdraw their efforts to have the ICC press claims against alleged Israeli wrongdoers, if Israel ceases settlement activity.<sup>66</sup> There is no legal basis for the ICC to cease a preliminary examination or investigation at the behest of the party that referred a situation.<sup>67</sup>

Furthermore, the ICC is an independent judicial organ that does not follow political bargaining instructions. The only plausible mechanism to secure ICC deferral based on a political decision would be for the UN Security Council to act under Chapter VII of the UN Charter and under Article 16 of the Rome Statute, which would result in the temporary suspension of the preliminary examination or investigation process for a (renewable) one year period.<sup>68</sup> It is beyond the scope of this brief to ascertain the probability of Palestine withdrawing either its accession or Article 12(3) declaration, or the possibility of the UNSC deferring the work of the Court for a period of one year in accordance with Article 16 of the Rome Statute.

#### **D. ICC Preliminary Examinations & the Prosecution Strategy (Effects on Attribution of Crimes)**

The OTP report on preliminary examinations explains that “activities will be conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council or acts on the basis of information of crimes obtained pursuant to Article 15”.<sup>69</sup>

The report also explains that the Rome Statute does not provide any timelines for concluding a preliminary examination.<sup>70</sup> The OTP identifies the four procedural phases as follows:<sup>71</sup>

- Phase 1: an initial assessment of information received under article 15;
- Phase 2: formal commencement of a preliminary examination, assessing whether preconditions for jurisdiction are satisfied and if a reasonable basis exists to believe that the alleged crimes fall within the Court’s subject-matter jurisdiction;
- Phase 3: assesses admissibility of potential cases under complementarity and gravity analysis; and
- Phase 4: examination of the interests of justice.

The OTP’s prosecution strategy (most recently referred to as the Strategic Plan)<sup>72</sup> also will impact its approach to settlements and related issues. The OTP has listed a set of strategic objectives in this regard, which include conducting preliminary examinations, investigations and prosecutions in line with international standards, as well as enhancing complementarity and cooperation, among others.<sup>73</sup> Several, but not all, of these issues are highlighted in this section.

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<sup>64</sup> Rome Statute art. 53(3)(b). Regulations, 31. Should the Prosecutor decline on gravity, the Pre-Trial Chamber may request reconsideration; should the Prosecutor decline on the interests of justice, the Chamber may allow the OTP to go forward with the investigation; see Rome Statute art. 53(3)(a-b).

<sup>65</sup> Rome Statute art. 53(4).

<sup>66</sup> Avi Issacharoff, PA says it’ll drop war crimes suit if settlements frozen, HA’ARETZ (Jan. 18, 2015), <http://www.timesofisrael.com/pa-says-itll-drop-war-crimes-suit-if-settlements-frozen/>.

<sup>67</sup> Kevin Jon Heller, Unfortunately, the ICC Doesn’t Work the Way Palestine Wants it To, OPINIO JURIS (Jan. 18, 2015), <http://opiniojuris.org/2015/01/18/palestine-really-no-idea-icc-works/>.

<sup>68</sup> It is not clear as to whether this can take effect on a preliminary examination or an investigation, but leading commentaries have leaned towards the interpretation that it may only apply to the latter. See Case Matrix Network, ICC Commentary art. 16, <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/#c1995>.

<sup>69</sup> Policy Paper PE.

<sup>70</sup> Id., para. 10.

<sup>71</sup> Id., para. 77-84.

<sup>72</sup> ICC-OTP, Strategic Plan June 2012-2015 (Oct. 11, 2013), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf) [hereinafter Strategic Plan 2015]. The 2016-2018 Strategic Plan has been released since and can be found at: [https://www.icc-cpi.int/iccdocs/otp/070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf).

<sup>73</sup> ICC, POLICIES AND STRATEGIES, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/documents.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/documents.aspx).

In the realm of policy, the OTP explains that it aims to “expand and diversify its collection of evidence so as to meet the higher evidentiary threshold”.<sup>74</sup> Due to the expected limitations on the OTP’s investigative measures and possibilities, as well as the possibility that required cooperation may not be forthcoming from Israel, the OTP may have to focus on mid- and high-level perpetrators, with a long-term aim of eventually prosecuting the highest-level responsible actors. This withholding of cooperation from Israel constraint likely will impact the Court’s ability to establish the entirety of the decision-making process for the execution of crimes at issue in accordance the provisions on individual criminal responsibility and command responsibility.<sup>75</sup>

Resources also play a significant role, given the current OPT workload.<sup>76</sup> With respect to the Court’s ability to meets its strategic goal to “conduct impartial, independent, high-quality, efficient and secure preliminary examinations” relevant areas for consideration will especially include resources, effective cooperation, and the political dynamics of the situation.<sup>77</sup> The OTP also will want to ensure that it presents quality submissions to the Trial Chamber,<sup>78</sup> which suggests that the preliminary examination may take time.

The OTP strategy also emphasizes enhanced focus on complementarity and cooperation.<sup>79</sup> With respect to settlements, complementarity analysis will need to examine how the Israeli judicial system has, or has not, handled this crime.<sup>80</sup> On cooperation, the Court will need to consider what level of on-site operations may be needed to conduct its work on the ground, if any, although this determination may be more relevant at the investigation stage.

Obviously, whatever strategic approach the Court follows, it will be necessary to ensure an efficient and effective preliminary examination (and possibly investigation) that grasps the overall context and range of alleged serious crimes in the oPt. Nevertheless, the issue of settlements may fall within the OTP strategic objective to conduct more focused investigations.<sup>81</sup> Submissions to the Court with respect to settlements may not require the same level of OTP resources (access, field presence and other identified challenges) as, for example, investigations of alleged crimes committed during the 2014 Gaza hostilities. This is why settlements may be a primary path for ICC involvement.

## IV. Settlements Under the Rome Statute, & within the Context of ICC Investigations and Prosecutions

The Rome Statute refers to the establishment of settlements under “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”.<sup>82</sup> Specifically, this section of the Rome Statute refers to “[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”.<sup>83</sup>

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<sup>74</sup> Strategic Plan 2015, 6.

<sup>75</sup> Rome Statute arts. 25, 28. It should be noted that the recent OTP report on preliminary examinations explains that “On 9 July 2015, the Government of Israel announced that it had decided to open a dialogue with the Office over the preliminary examination” although this seems to be for the purposes of affirming Israel’s position that the ICC cannot exercise jurisdiction over the oPt; see ICC-OTP, Report on Preliminary Examination Activities (2015) (Nov. 12, 2015), at 17, <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>; Barak Ravid, Exclusive: Israel Decides to Open Dialogue With ICC Over Gaza Preliminary Examination, HA’ARETZ (July 9, 2015), <http://www.haaretz.com/israel-news/.premium-1.665172>.

<sup>76</sup> Strategic Plan 2015, 6. Currently, there are 9 situations under investigation and 8 preliminary examinations.

<sup>77</sup> Id., 18.

<sup>78</sup> Id., 19.

<sup>79</sup> Id., 28–29.

<sup>80</sup> On the national proceedings, the assessment on national investigations, see Rome Statute arts. 17(1)(a–c), (2) & (3).

<sup>81</sup> Strategic Plan 2015, 5.

<sup>82</sup> Rome Statute art. 8(2)(b).

<sup>83</sup> Id., art. 8(2)(b)(viii).

The Court applies the Rome Statute, as well as the Court's accompanying Elements of Crimes and Rules of Procedure and Evidence, and "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".<sup>84</sup>

In terms of actual judicial practice, litigation regarding settlements remains limited, although some jurisprudence and practice exists to guide future cases. Some examples referred to in the ICRC Study<sup>85</sup> include: the prohibition as included in the military manuals of several States, legislation in several States, statements of certain States, UN Security Council condemnations regarding the 1990s Yugoslavia conflict, UN General Assembly and UN Human Rights Commission resolutions, UN Special Rapporteur on the Human Rights Dimensions of Population Transfer,<sup>86</sup> International Conference of the Red Cross (1981) and case law of the International Military Tribunal at Nuremburg. It also cites the condemnation of Israel's settlement activity in UNSC resolution 446 (1979).<sup>87</sup>

### **A. Contextual Elements**

With respect to war crimes generally, the Court has jurisdiction especially "when committed as part of a plan or policy or as part of a large-scale commission of such crimes"<sup>88</sup> and the Statute is interpreted within the IHL framework.<sup>89</sup> For each alleged war crime (including settlements) a nexus to armed conflict must exist under the ICC's Elements of Crimes (ICC Elements); the last two requisite elements for each war crime under the Statute are:

- "[t]he conduct took place in the context of and was associated with an international armed conflict"; and
- "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict".<sup>90</sup>

As the ICC Elements make clear, an alleged perpetrator need not have undertaken a legal evaluation regarding the existence of the armed conflict or of its character (international or non-international). The armed conflict need not have been causal to the commission of the crime, but must have played a substantial part.<sup>91</sup> With respect to Israel's oPt settlements, the lack of active hostilities between the parties in the occupied West Bank, including East Jerusalem, does not negate the existence of an international armed conflict because this territory where the alleged crimes are committed is under belligerent occupation (this occupied status itself is viewed as international armed conflict under IHL), thus satisfying the required nexus element.

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<sup>84</sup> *Id.*, art. 21(1)(b). It is worth noting that there is no international jurisprudence on settlements as war crimes.

<sup>85</sup> ICRC Study, Rule 130: Transfer of Own Civilian Population into Occupied Territory, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule130#Fn\\_2\\_7](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule130#Fn_2_7).

<sup>86</sup> U.N. Commission on Human Rights, Human rights and population transfer, Final report of the Special Rapporteur, Mr. Al-Khasawneh, U.N. Doc. E/CN.4/Sub.2/1997/23 (June 27, 1997), para. 60; "[p]opulation transfers engage both state responsibility and the criminal liability of individuals".

<sup>87</sup> The resolution: affirmed the applicability of the Fourth Geneva Convention to the oPt; stated that the settlements "have no legal validity"; deplored Israel's failure to abide by previous UN Security Council resolutions; and called on Israel "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories".

<sup>88</sup> Rome Statute art. 8(1).

<sup>89</sup> ICC, Elements of Crimes, ICC-PIDS-LT-03-002/11\_Eng, 13 (2011), at 13 [hereinafter ICC Elements], <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>90</sup> The ICC Elements further elaborate on this by providing the following: a) There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international; b) In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; c) There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".

<sup>91</sup> See *Prosecution v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06 (Jan. 29, 2007), para. 287. The ICC has adopted the ICTY's approach in this regard; see *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Appeal Judgment (Oct. 2, 1995), para. 70; *Prosecutor v. Radoslav Braanin*, Case. No. IT-99-36-T, Trial Judgment (Sep. 1, 2004), para. 123.

The Fourth Geneva Convention clearly applies to all cases of partial or total military occupation,<sup>92</sup> regardless of whether the territory occupied belongs to a High Contracting Party.<sup>93</sup>

Additionally, the mental and material elements of the crime must be satisfied. For the mental element, this requires proving intention or knowledge, and for the material element, actual commission of the crime (the act of transfer) must be shown.<sup>94</sup>

### B. Mental Element (*Mens Rea*)

Article 30 of the Rome Statute explains the requisite mental elements:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - a. In relation to conduct, that person means to engage in the conduct;
  - b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

Thus, the OTP will need to establish both intent and knowledge. The findings of the UN fact-finding mission on settlements, various Israeli government-commissioned reports and numerous statements by government officials are likely to be of significant value in establishing the requisite Article 30 mental element (*mens rea*) for a finding of individual international criminal responsibility, including among key, high-level actors under Article 25 of the Rome Statute.

### C. Material Element (*Actus Reus*)

The mental element also must be coupled with the prohibited act (*actus reus*) of the alleged crime of population transfer in question. Under the ICC Elements of Crimes, the prohibited act is that the perpetrator "[t]ransferred, directly or indirectly, parts of its own population into the territory it occupies".<sup>95</sup> This directly parallels the IHL population transfer prohibition contained in Article 49 para. 6 of the Fourth Geneva Convention.

The ICC Elements further elaborates on the term "transferred" by explaining that "[t]he term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law".<sup>96</sup> Here is where the IHL framework – Fourth Geneva Convention Article 49, API Article 85 and the parallel customary international law prohibition on population transfer – come into play.

The construction of settlements and supporting infrastructure in the oPt clearly would serve as a material act eliciting the direct or indirect transfer of Israeli nationals into the oPt. Other forms of conduct, including expansion of settlements, building housing units and supporting infrastructure (transportation, financial services, etc...), governmental and quasi-governmental subsidy schemes and other incentives may also satisfy and further substantiate the *actus reus* requirement.

<sup>92</sup> Fourth Geneva Convention art. 2. Article 2 further explains that while one Power may not be party to the Convention, parties to the conflict shall remain bound by it in their mutual relations. Art. 43 of the Hague Regulations of 1907 provides that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" and that "[t]he occupation extends only to the territory where such authority has been established and can be exercised".

<sup>93</sup> ANTONIO CASSESE, INTERNATIONAL LAW 420 (2nd ed., 2005). See also HCJ 769/02, PCATI et al v. Government of Israel et al., para.18 [Dec. 11, 2005], [http://elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.htm](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm). The notion that the Fourth Geneva Convention does not apply for this reason has never been accepted by any State (besides Israel) or international organization.

<sup>94</sup> Elements, 1, para. 2. Rome Statute art. 30.

<sup>95</sup> Elements, 22.

<sup>96</sup> Id., 22 fn44.

#### **D. On ‘Continuous Crimes’**

One question that arises relates to the nature of ‘continuous crimes’, or crimes that are committed within a continuous or ongoing temporal scope. The settlement enterprise was already quite mature and the transfer of the majority of the current settler population in to the oPt already had taken place before the Government of Palestine lodged its Article 12(3) declaration.<sup>97</sup> The key *actus reus* element therefore may revolve around the governmental policy and incentive schemes that result in the direct and/or indirect transfer of population (and not solely the actual building of a new settlement, for example).

Furthermore, the ICC may consider the possibility that certain actors involved in the settlement enterprise may be investigated and prosecuted, with the government implicated for aiding and abetting the crime in accordance with Article 25 of the Rome Statute.

As BADIL notes, the continuous crime aspect of the settlement enterprise raises questions about the scope of ICC temporal jurisdiction (*ratione temporis*). Here, prior cases of other international criminal tribunals, in which evidence of events clarified the context of certain crimes, may prove relevant.<sup>98</sup>

Commentary to the Rome Statute explains that “[t]he Rome Statute is silent in regard to violations which are committed prior to the entry into force of the Statute and continued afterwards...references in future cases to acts pre-dating the entry into force of the Statute may be useful in establishing the historical context but they may not be (sic) form the basis of a charge”.<sup>99</sup>

Schabas argues that the matter will be up to the Court to determine.<sup>100</sup> He notes, for example, the discussion on the continuous crimes of ‘enforced disappearance’ and ‘forcible transfer’. With respect to enforced disappearance, for example, the ICC Elements explains that the Court would only exercise jurisdiction if the crime commenced after the entry into force of the Statute,<sup>101</sup> despite that it has been argued that the ‘attack’ does not necessarily refer only to the initial act but also to the further incarceration of the victim.<sup>102</sup>

This restrictive interpretation as applied by the Court in the enforced disappearance context, however, should not be applied by the Court for various other continuous crimes, including settlements and forcible transfer. This is because the Court can be expected to focus on the actual transfer of persons under Article 8(2)(b)(viii) of the Rome Statute, rather than the settlement enterprise in its entirety – mindful of both the direct and indirect nature of the crime, and the violation’s interpretation under IHL (based on the Fourth Geneva Convention, API and customary IHL).

Nevertheless, there are certainly instances that have occurred since June 2014 (referring to the temporal mandate provided by the 12(3) declaration), including the expansion of settlements on land seized under various justifications.<sup>103</sup> These recent facts suggest that the OTP may seek to frame the overall settlements issue as a ‘composite crime’.

This composite crime approach also could include extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly<sup>104</sup> and

<sup>97</sup> See Rome Statute arts. 11 & 24.

<sup>98</sup> WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 418–419 (2010) [hereinafter Schabas].

<sup>99</sup> See Case Matrix Network, ICC Commentary art. 11, <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/#c1976>.

<sup>100</sup> Schabas, 419.

<sup>101</sup> *Id.* Elements, 11 n24.

<sup>102</sup> See Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT’L L. 653, 670 (2004).

<sup>103</sup> See, more recently, Barak Ravid, *Netanyahu Approves 454 New Housing Units Beyond Green Line*, HA’ARETZ (Nov. 17, 2015), <http://www.haaretz.com/israel-news/.premium-1.686522>; Tovah Lazaroff, *CBS: Housing finishes in West Bank settlements up by 219% in 2015’s first quarter*, JERUSALEM POST (Oct. 6, 2015), <http://www.jpost.com/Israel-News/Settler-construction-up-sharply-in-first-quarter-405556>.

<sup>104</sup> Rome Statute art. 8(2)(a)(iv).

deportation or transfer of all or parts of the population of the occupied territory within or outside the territory.<sup>105</sup> It also is possible for the Prosecutor to investigate other crimes linked to the war crime of settlements. This may include, for example, the crimes against humanity of forcible transfer<sup>106</sup> and apartheid.<sup>107</sup> Yet this would cause certain delays in investigations, and may run counter to the envisioned implementation of the prosecutorial strategy.<sup>108</sup>

## V. UN Human Rights Council on the Impact of Settlements

The UN Human Rights Council mandated a fact-finding mission (FFM)<sup>109</sup> “to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem”.<sup>110</sup> The FFM’s most striking observation was that the settlement enterprise amounted to a “creeping annexation that...undermines the right of the Palestinian people to self-determination”.<sup>111</sup>

The FFM came to several more serious conclusions.<sup>112</sup> It explained that Israel has had full control over the settlements and sustains them through infrastructure and security measures.<sup>113</sup> This resulted in a system of segregation supported and facilitated by strict military law and law enforcement control.<sup>114</sup> The FFM also outlined the settlement enterprises’ contribution to the Occupying Power’s systematic and widespread human rights and IHL violations and especially the effects on women, children, Bedouin and other vulnerable groups.<sup>115</sup> It further noted that Israel continues to allow settlers to commit violence with impunity.<sup>116</sup>

The FFM concluded that “Israel is committing serious breaches of its obligations under the right to self-determination and certain obligations under international humanitarian law” and noted that Palestinian accession to the Rome Statute may lead to justice and accountability for violations of human rights and IHL.<sup>117</sup>

The FFM made a series of important recommendations.<sup>118</sup> It stated that Israel must withdraw all settlers and ensure the right to a remedy for Palestinian victims and sustained damages.<sup>119</sup> It also called for an end to human rights violations by Israel, and for ensuring accountability for IHRL and IHL violations, including settler violence.<sup>120</sup>

Most importantly, the FFM called on States “to comply with their obligations under international law and to assume their responsibilities in their relations with a State breaching peremptory norms of international law, and specifically not to recognize an unlawful situation resulting from Israel’s violations”.

<sup>105</sup> *Id.*, art. 8(2)(b)(viii).

<sup>106</sup> *Id.*, art. 8(2)(b)(viii) & 7(1)(d).

<sup>107</sup> *Id.*, art. 7(1)(j).

<sup>108</sup> Azarova.

<sup>109</sup> H.R.C. Res. 19/17, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, U.N. Doc. A/HRC/RES/19/17 (Apr. 10, 2012). In 1979, the UN Security Council also established a commission to investigate settlements; see Report of the Security Council Commission Established under Resolution 446 (1979), U.N. Doc. S/13450 (July 12, 1979).

<sup>110</sup> H.R.C. Res. 22/63, Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, U.N. Doc. A/HRC/RES/22/63 (Feb. 7, 2013) [hereinafter FFM Settlements], <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlements.pdf>.

<sup>111</sup> *Id.* 20, para. 101. See also Al-Haq, UN Report: Concrete measures needed to stop Israel’s creeping annexation of the OPT (Feb. 1, 2013), <http://www.alhaq.org/advocacy/targets/united-nations/670-un-report-concrete-measures-needed-to-stop-israels-creeping-annexation-of-the-opt>.

<sup>112</sup> *Id.*, 20–21.

<sup>113</sup> *Id.*, 20, para. 100.

<sup>114</sup> *Id.*, 20, para. 103. The FFM found that “The legal regime of segregation operating in the OPT has enabled the establishment and the consolidation of the settlements through the creation of the privileged legal space for settlements and settlers”; *id.*, 11, para. 49.

<sup>115</sup> *Id.*, 21, para. 105–111.

<sup>116</sup> *Id.*, 21, para. 107.

<sup>117</sup> *Id.*, 20–21, para. 104.

<sup>118</sup> *Id.*, 21–22.

<sup>119</sup> *Id.*, 21–22, para. 112.

<sup>120</sup> *Id.*, 21–22, para. 113–114.

It also referred to the need for third States to take appropriate measures against private companies operating in or supporting the settlement project (including termination of business activities).<sup>121</sup>

Sound analysis of the settlement enterprise requires a detailed inspection of the role of successive Israeli governments that have either led or directly participated in the creation and expansion of settlements. This prominently includes consistent legal and policy support from these successive governments.<sup>122</sup>

The FFM noted hidden provisions in the government budget, quasi-governmental organizations funded by the government, and the World Zionist Organization's respective roles in providing funds over and above direct governmental subsidy and incentive schemes designed to encourage Jewish migration to oPt settlements.<sup>123</sup>

The FFM also looked at several spatial master plans that, while never officially approved, were in fact largely implemented by successive Israeli governments over time and underpinned settlement expansion.<sup>124</sup> Furthermore, the FFM revealed that many of the so-called 'illegal outposts' (which are 'illegal' settlements under Israeli law) created by settlers were established with the knowledge, and frequently the tacit support or non-interference, of relevant Gol authorities, including government officials at the highest levels.<sup>125</sup>

Consistent with the ICC's strategy, these latter categories of information from the FFM, suggesting an organized, hierarchical and Gol backed settlement effort should play an essential role in the Court's assessment of individual criminal responsibility and co-perpetratorship<sup>126</sup> of the alleged crimes in question, as well as the Court's measure of the gravity of the violating acts.<sup>127</sup>

The settlement enterprise, as such, will require detailed factual research and delineation for the Court to grasp the full gravity of the alleged criminal acts in question, an assertion consistent with the findings of the 2005 Sasson report.<sup>128</sup> That report highlighted the roles of the Israeli Ministry of Defense, Ministry of Housing and World Zionist Organization in publicly (before 1992) and privately (up to 2005) supporting settlement expansion through the vehicle of so-called "unauthorized outposts".<sup>129</sup>

The Sasson report also referenced important revelations disclosed through the Levy Report<sup>130</sup> (see below), produced by an Israeli government appointed panel and which called for retroactive authorization of outposts, given the "knowledge, encouragement and tacit agreement" of high-level officials.<sup>131</sup>

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<sup>121</sup> *Id.*, 22, para. 116–117.

<sup>122</sup> *Id.*, 6, para. 20.

<sup>123</sup> *Id.*, 6, para. 21.

<sup>124</sup> *Id.*, 6–7, para. 23.

<sup>125</sup> *Id.*, 7, para. 26.

<sup>126</sup> See Rome Statute arts. 25(3)(a) & 25(3)(d). See also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges (Public Redacted Version), ICC–01/04–01/07 (Sep. 30, 2008), para. 456–572; Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Defence Response to Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, ICC–01/09–01/11 (July 24, 2012), para. 4.

<sup>127</sup> This is not to remove the possibility that individual criminal responsibility may be attributed to settlers themselves for crimes falling within the jurisdiction of the Court.

<sup>128</sup> The Sasson Report was commissioned by the Israeli government to investigate settlements and outposts that were illegal under Israeli law. Under international law, there is no qualitative difference – all settlements and so-called outposts are illegal. See Israeli Ministry of Foreign Affairs, Summary of the Opinion Concerning Unauthorized Outposts–Talya Sason, Adv. (Mar. 10, 2005), <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/summary%20of%20opinion%20concerning%20unauthorized%20outposts%20-%20talya%20sason%20adv.aspx>.

<sup>129</sup> FFM Settlements, 7, para. 26.

<sup>130</sup> The Levy Report was commissioned by the Israeli government to investigate in a similar fashion to the Sasson Report.

<sup>131</sup> FFM Settlements., 9, para. 36.

Although the ICC's jurisdiction is confined to individual criminal responsibility, the FFM is an essential starting point in analyzing the overall context, including the evolving legal and policy positions that have facilitated settlement creation and expansion.<sup>132</sup>

The context provided by the FFM also links to a wide range of other alleged crimes that fall within the jurisdiction of the Court (e.g., forcible transfer and extensive destruction of property, among others) and that, as explained above, may be form part of a composite crime approach by the ICC Prosecutor.

## VI. Israel's Position, Based on the Findings of the Levy Committee

The findings of the Levy Committee, headed by former Israeli Supreme Court Judge Edmund Levy, to investigate the legal status of the 'outposts' in the West Bank, directly relate to a potential future settlement focused ICC prosecution and other potential mechanisms seeking justice and accountability for criminal acts committed in the oPt.<sup>133</sup> Under IHL analysis, there is no distinction between what Israel characterizes as 'authorized' and 'unauthorized' settlements. They are all illegal population transfers under IHL. By attributing responsibility on the part of the so-called 'outposts', the report details the responsibility of these officials and other actors with regards to the settlements that are 'legal' under Israeli law. As such, they clearly acknowledge and policy and practice of the State and its officials in the settlements considered 'legal' under Israeli law.

As noted by the FFM, the Levy Committee report (Levy Report) documents that settlements built without formal Gol authorization nevertheless were established with the knowledge, encouragement and tacit agreement of government ministers, including the Prime Minister, public authorities, the Israeli military government in the oPt (Israel Civil Administration) and the regional settlement councils, which are quasi-governmental entities.<sup>134</sup>

The Levy Report conclusions, in summary, were that occupation law is inapplicable to the oPt and, moreover, even it were, Article 49 of the Fourth Geneva Convention relating to deportations, transfers and evacuations, is not, and never was intended to be, applicable to circumstances such as exist in the oPt. The Levy Report further concluded that a "legal right" to settle and establish settlements exists.<sup>135</sup>

Despite not having formally adopted the report, the Israeli government policy and actions have continued to effectively align with the Levy Report conclusions and to carry out its recommendations, including by formalizing the status of outpost settlements considered illegal even under Israeli law.<sup>136</sup>

As such, the ICC will need to analyze and compare the facts relating to current settlement expansion with stated Gol policy and a wide range of relevant historical documents related to Israel's settlement project, including the Levy Report prominently among them. Perhaps more

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<sup>132</sup> The 2005 Commission of Inquiry on Darfur is a telling example. In its report, the commission – after finding that there were reasonable grounds to believe that war crimes and crimes against humanity had been committed in the context of the Sudanese government's counterinsurgency campaign in Darfur – recommended that the UN Security Council refer the situation to the ICC. This recommendation was later endorsed by the UN Security Council in resolution 1593 (2005). The report of the commission then played an extremely relevant role as a source of information during the ICC preliminary examination and investigation into the situation. Both the ICC Prosecutor and Pre-Trial Chamber extensively referred to it in their requests for and decisions issuing warrants of arrest; see Prosecutor v. Bashir (Prosecutor Application) ICC-02/05-157-AnxA (July 14, 2008), paras. 52, 68, 79, 88.

<sup>133</sup> See Yesh Din, Unprecedented: A Legal Analysis of the Report of the Committee to Examine the Status of Building in Judea and Samaria [the West Bank] ("The Levy Committee") – International and Administrative Aspects (Jan 2014), [http://www.yesh-din.org/userfiles/file/Reports-English/Yesh%20Din%20-%20Chasar%20Takdim%20English%20-%20Web%20%20\(1\).pdf](http://www.yesh-din.org/userfiles/file/Reports-English/Yesh%20Din%20-%20Chasar%20Takdim%20English%20-%20Web%20%20(1).pdf).

<sup>134</sup> FFM Settlements, 36.

<sup>135</sup> See The Commission to Examine the Status of Building in Judea and Samaria, Conclusions and Recommendations (Translation from the original and authoritative Hebrew text), <https://unispal.un.org/DPA/DPR/unispal.nsf/d80185e9f0c69a7b85256cbf005afeac/d9d07dcf58e781c585257a3a005956a6?OpenDocument>.

<sup>136</sup> Chaim Levinson, State to Hinder Removal of Settlers from Private Land, HA'ARETZ (May 27, 2014), <http://www.haaretz.com/news/israel/.premium-1.595479>. Tovah Lazaroff, Report on legal status of unauthorized West Bank Jewish building says Israel is not an occupying power in the territories, JERUSALEM POST (Sep. 7, 2012), <http://www.jpost.com/Diplomacy-and-Politics/PM-to-decide-on-Levy-report-with-settlement-ctee>. Yossi, Gurvitz, When a Legal Committee Tries to Make a Case for Theft, YESH DIN BLOG (May 19, 2014), <http://blog.yesh-din.org/en/?p=793>.

importantly, the Levy Report, like the Sasson Report, not only acknowledges the procedures related to such ‘outposts’, but also upholds the ‘legality’ of settlements under Israeli law, thereby affirming the inherent and direct conflict between Israeli domestic law and actual practice and Israel’s IHL obligations.

## VII. Settlements in the Israeli Supreme Court & Possible Effects on Complementarity

No case considered by the Israeli judicial system thus far has reversed or otherwise meaningfully restrained Israel’s settlement policy or acts taken under its auspices. To the contrary, Israel’s courts have avoided or failed in addressing the legality of the overall settlement policy. As explained by a former Israeli diplomat<sup>137</sup> and affirmed repeatedly by the Israeli Ministry of Foreign Affairs,<sup>138</sup> the Gol official position is that the status of the oPt is ‘disputed’ and hence subject to final status negotiations – a position that has been accepted by the Israeli Supreme Court. In 1967, however, Theodore Meron, then–Legal Advisor to the Israeli Ministry of Foreign Affairs provided a legal opinion that clearly stated that the settlements directly contravened the Fourth Geneva Convention.<sup>139</sup>

In dealing with the interpretation of war crimes in line with IHL, the ICC would view any argument contesting the occupied status of the oPt as having no basis. The ICC Prosecutor, consistent with international community consensus already has recognized the status of the oPt as occupied,<sup>140</sup> a finding that has not been challenged by the Pre-Trial Chamber.<sup>141</sup>

The Israeli Supreme Court has rejected challenges to the entirety of the settlement policy on various legal grounds – mainly that it is non-justiciable (in that it was a political, rather than legal, matter) and up to negotiations between Israel and the Palestinians.<sup>142</sup> Kretzmer has written about the Israeli Supreme Court’s treatment of issues relating to Israel’s settlements. He notes, for example, how the Court concluded that for settlements aimed at enhancing the defense of the State, military needs would justify the appropriation of land.<sup>143</sup> Political appropriation, on the other hand, rather than for asserted security reasons, Kretzmer explains, would be unlawful under Israeli law.<sup>144</sup>

The Israeli Supreme Court has ruled that it does not have competence to address Article 49 of the Fourth Geneva Convention since, in its view, it does not enjoy customary status.<sup>145</sup> The Israeli Supreme Court has refused to rule on the use of public land for settlements on the grounds of lack of standing.<sup>146</sup> It also has allowed for settlements to remain so long as Israel

<sup>137</sup> Alan Baker, International humanitarian law, ICRC and Israel’s status in the Territories, 94 INT’L REV. RED CROSS 1511, 1518 (2012).

<sup>138</sup> See, e.g. Israeli Ministry of Foreign Affairs, Israel, the Conflict and Peace: Answers to frequently asked questions (Dec. 30, 2009), [http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/FAQ\\_Peace\\_process\\_with\\_Palestinians\\_Dec\\_2009.aspx#Settlements1](http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements1).

<sup>139</sup> See SOAS, 1967 Theodore Meron opinion, <https://www.soas.ac.uk/lawpeacemideast/resources/>. Yitzhak Zamir, then Attorney-General, in response to the proposed legalization of one settlement project, explained that “even full annexation of Judea, Samaria and the Gaza Strip – any legal step of this sort raises serious problems, not only in the political arena, but also on the legal front, and it may be contrary to legal principles, international law and the Camp David Accords”; see Prime Minister’s Office, Israel’s State Archives, The “Elon Moreh” High Court Decision of 22 October 1979 and the Israeli Government’s Reaction, [http://www.archives.gov.il/ArchiveGov\\_Eng/Publications/ElectronicPirsum/ElonMoreh/](http://www.archives.gov.il/ArchiveGov_Eng/Publications/ElectronicPirsum/ElonMoreh/).

<sup>140</sup> ICC–OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia, para. 16 (Nov. 6, 2014), [http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article\\_53\(1\)-Report-06Nov2014Eng.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf).

<sup>141</sup> ICC PTC–1, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC–01/13, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation (July 16, 2015), <http://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf>.

<sup>142</sup> David Kretzmer, The law of belligerent occupation in the Supreme Court of Israel, 94 INT’L REV. RED CROSS 207, 214 & n37 (2012) [hereinafter Kretzmer]. See HCJ 4481/91, Bargil et al., v. Government of Israel et al., 47(4) PD, p. 210 [1993]; HCJ 3125/98, I’ad v. IDF Commander in Judea and Samaria, 58(1) PD, p. 913 [1998].

<sup>143</sup> Kretzmer, 213. See HCJ 606/78, Ayyub v. Minister of Defence, 33(2) PD, p. 120 [1978]; HCJ 258/79, Amira et al., v. Minister of Defence et al., 34(1) PD, p. 90 [1979].

<sup>144</sup> Kretzmer, 213. See HCJ 390/79, Dweikat et al., v. Government of Israel et al., 34(1) PD, p. 1 [1979].

<sup>145</sup> Kretzmer, 214. See Ayyub v. Minister of Defence, 33(2) PD, p. 121 [1978]; Dweikat et al., v. Government of Israel et al., 34(1) PD, p. 14–15 [1979].

<sup>146</sup> Kretzmer, 214 & n36. See HCJ 277/84, Ayreiv v. Appeals Committee et al., 40(2) PD, p. 57 [1986]; HCJ 910/86, Ressler v. Minister of Defence, 42(2) PD, p. 441 [1986]; HCJ 3125/98, I’ad v. IDF Commander in Judea and Samaria, 58(1) PD, p. 913 [1998]. Lack of standing, or locus standi, refers to a party’s ability to demonstrate sufficient connection to and harm from the law or action challenged for the purposes of participation in a court.

retained control over that area, and opined that only a political decision to withdraw would justify removal of settlements, further evidence of the politicization of the Israeli judiciary.<sup>147</sup> The Court also has rejected arguments that protection of settlers is not a legitimate security interest.<sup>148</sup> As Kretzmer argues with regard to the Israeli Supreme Court's declining to rule on the use of public land in the oPt for settlements, the Supreme Court "has somewhat compromised its position".<sup>149</sup>

Obviously, the Israeli Supreme Court's non-justiciability and other rulings regarding the settlements are likely to significantly weaken any potential challenge to the admissibility of a case at the ICC. For a case to be considered inadmissible, the Court would have to determine that it is being investigated or prosecuted by a State that has jurisdiction over it.<sup>150</sup>

In this case, the highest Israeli court has stated its unwillingness to do so directly, while the Palestinians are unable due to their inability to exercise jurisdiction over the allegedly responsible Israeli perpetrators. Israel would need to provide evidence that the case has been investigated and to show that it either has decided to prosecute alleged perpetrators or provide a sound evidentiary or legal basis for why it has not done so.<sup>151</sup> In order to determine unwillingness, the Court would need to establish one or more of the following:

- proceedings that were or currently being undertaken were for the purpose of shielding perpetrators;
- there has been an unjustified delay, inconsistent with an intent to bring the person concerned to justice; and/or
- proceedings were not conducted impartially and independently.<sup>152</sup>

The Prosecutor may also defer to a State's investigation for a short period of time, unless the Pre-Trial Chamber decides to authorize an investigation.<sup>153</sup> In the event that the Pre-Trial Chamber does so, the State may appeal.<sup>154</sup>

Article 19 of Rome Statute further outlines the procedures for challenging admissibility to a case, whether by a person or State, during the process.<sup>155</sup> Additionally, ICC prosecutorial investigation or action should not rule out the possibility of litigating crimes associated with the settlement enterprise in domestic courts, which would be consistent with upholding third State obligations under IHL.

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<sup>147</sup> Kretzmer, 214. See HCJ 606/78, *Ayyub v. Minister of Defence*, 33(2) PD, p. 113 [1978]; HCJ 4400/92, *Kiryat Arba Local Council v. Government of Israel*, 48(5) PD, p. 587 [1992]; HCJ 4400/92.

<sup>148</sup> Kretzmer, 224 fn83. See HCJ 4363/02, *Zinbakh v. IDF Commander in Gaza*, Judgment [May 28, 2002]; HCJ 4219/02, *Gusin v. IDF Commander in Gaza*, 56(4) PD, p. 408 [2002], p. 611.

<sup>149</sup> Kretzmer, 214. In an article in *Ha'aretz*, Kretzmer explains that accepting the Levy Report would also mean that the Israeli government would have to argue that the oPt is subject to the law of occupation meaning that: a) it would have to acknowledge a system that contains apartheid aspects; and b) political rights (presumably equal) would have to extend to all Palestinians in the West Bank, definitely ending a two-State solution; see David Kretzmer, *Bombshell for the Settlement Enterprise in Levy Report*, HA'ARETZ (July 10, 2012), <http://www.haaretz.com/opinion/bombshell-for-the-settlement-enterprise-in-levy-report-1.450170>.

<sup>150</sup> Rome Statute art. 17(1)(a).

<sup>151</sup> *Id.*, art. 17(1)(b).

<sup>152</sup> *Id.*, arts. 17(2)(a-c).

<sup>153</sup> *Id.*, arts. 18(2-3).

<sup>154</sup> *Id.*, art. 18(4).

<sup>155</sup> *Id.*, art. 19. This also brings in issues related to the cooperation of a State with the Court, outlined primarily in Article 87 of the Rome Statute. The Court may go as far as to make a finding of non-cooperation, referring the matter to the Assembly of States Parties; see Rome Statute art. 87(7).

## VIII. Conclusion, with Recommendations

This brief has addressed a range of issues relevant to the currently ongoing ICC preliminary examination on Palestine, focusing specifically on settlements. The OTP is likely to assess the issues in detail as the preliminary examination proceeds. At the current stage, this analysis will center on jurisdictional, admissibility and the interests of justice. There is no doubt that the situation in Palestine, as covered by the 12(3) declaration, is a large task for the OTP. Nevertheless, focus on the settlement issue in particular would support the Prosecutorial Strategy and provide a ripe opportunity for the Court to be the first judicial institution to deal with this serious IHL violation.

Recommendations for third State actions related to the issue of Israel's oPt settlements:

**First**, at a minimum, all States should continue to condemn Israel's settlements and ongoing settlement activity. States also should explicitly refer to the legal basis for the prohibition against settlements, and demand a full withdrawal of all settlers and compensation for damages incurred by the protected Palestinian population. Proper venues for this may include the following:

- All Middle East debates at the UN Security Council;
- Speeches at the annual debates of the UN General Assembly;
- All official meetings involving both Israeli and Palestinian officials (additionally, representatives must consistently refuse to recognize Israel's sovereignty over East Jerusalem by refusing to meet Israeli counterparts there); and
- EU Foreign Affairs Council conclusions.

**Second**, the EU and its member states should continue moving forward in their 'differentiation policy' which implies non-recognition of settlements and non-applicability to settlements of any advancement in EU-Israeli relations. While labeling guidelines are welcomed, the EU should continue on this path and adopt more significant measures, such as the complete ban on settlement products, that may halt the spiral of impunity which is behind continuous settlement expansion. More effective measures should come from the EU in accordance with its non-recognition policy of violations of international law and given its principled approach adopted vis-à-vis Crimea.

**Third**, all States should continue to support the work of the ICC and ensure that it continues to have the capacity and resources to investigate and prosecute crimes in the oPt. Requests to weaken the ICC, as have been reported in the media, should be countered on the basis that to weaken the ICC would inhibit its efforts to end impunity. States must support the ICC's independence and its ability to find justice for victims.

**Fourth**, all States should continue to actively support Palestine's efforts to seek justice and accountability for crimes falling within the ICC's jurisdiction. No effort should be made to discourage Palestine's active engagement with the ICC.

**Fifth**, the Assembly of States Parties must fully support the Court's principles, especially its independence, throughout the course of the judicial process. In particular, the Assembly of States Parties must be prepared to deflect political pressure that may be exerted on the Court should the Prosecutor find a reasonable basis to proceed.

**Sixth**, States should enact domestic legislation criminalizing offenses related to settlements (especially population transfer into the occupied territories, forcible transfer and destruction and appropriation of property not justified without military necessity) and investigate and prosecute such offenses when committed by their nationals and others over whom they are able to exercise jurisdiction. States should monitor their nationals who reside in Israeli settlements and enact legislation criminalizing residence in settlements as acts constituting the IHL violation of population transfer.

**Seventh**, all States should act on the recommendations of the UN FFM on settlements, including its call for States to comply with international law obligations and to take positive measures against any State that breaches peremptory norms of international law. Specifically, this should include that States should not recognize the unlawful situation resulting from Israel's recurring violations and peremptory norm breaches.

**Eighth**, all States should enact legislation and exert best efforts to prohibit and prevent the engagement of private companies subject to their jurisdiction, from operating, servicing, investing in or otherwise undertaking business activities in or related to the settlements.

**Ninth**, States should adopt and implement national legislation banning the granting of entry visas for individuals residing in Israeli settlements. Some national laws already explicitly require authorities to deny entry visas to individuals who have committed or have been involved in international crimes, violations of the laws of war or serious human rights abuses. Third State nationals residing in settlements should face legal consequences under national legal systems, and thus settlers should face travel restrictions and the prospect of criminal prosecution in third States.

**Tenth**, States should ensure, through appropriate legislative and administrative measures, that State authorities and entities, as well as private enterprises and individuals subject to their jurisdiction, do not support Israel's settlement activity, whether financially or otherwise, and including settler groups or individual settlers.

**Eleventh**, the EU should follow-up the Council's Political and Security Committee November 2012 recommendation to consider the imposition of visa bans and travel restrictions on violent Israeli settlers.<sup>156</sup>

**Finally**, foreign companies involved in and profiting from the Israeli settlement enterprise and other IHL violations in the oPt should withdraw from such engagements and fully comply, and face public pressure to fully comply, with the principles enshrined in the UN Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Corporations. Moreover, States in which these companies are domiciled should ensure the proper implementation of domestic law on corporate governance and regulation to bring about the cessation of business activities in or that support settlements and other Israeli IHL and IHRL violations.

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<sup>156</sup> See Andrew Rettman, EU countries consider sanctions on Israeli settlers, EUOBSERVER (Nov. 26, 2012), <https://euobserver.com/foreign/118317>.

## See other Diakonia IHL Resource Center briefs:

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Jerusalem light rail IHL analysis

The maritime blockade of the Gaza Strip

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- 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.

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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.



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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.

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