



# Applying INTERNATIONAL CRIMINAL LAW TO ISRAEL'S Treatment of the Palestinian People

BADIL's Working Paper No. 12

BADIL Resource Center  
for Palestinian Residency and Refugee Rights  
October 2011



**Head Researcher:** Simone O'Broin

**Edit Team:** Badil Resource & Research Unit

Design and Layout: BADIL

Printing: al-Ayyam Printing, Press, Publishing, and Distribution Company

ISSN: 1728-1660

Published by



BADIL Resource Center for Palestinian Residency & Refugee Rights

P.O.Box 728

Bethlehem, Palestine

Tel: +972-2-277-7086

Fax: +972-2-274-7346

Email: [info@badil.org](mailto:info@badil.org)

Website: <http://www.badil.org>

©BADIL 2011

All rights reserved. BADIL encourages use of information contained in this working paper but requests that full citation to the source be made.

**Cover Photo:** Protesters block Israel consulate in L.A, San Francisco. USA. 16 January 2009  
(Source: [indymedia.ie](http://indymedia.ie))

### ***Credits & Notations***

Many thanks to all who have encouraged and supported BADIL throughout this research project and in particular to Elna Sondergaard who has set the foundation for this BADIL working paper and to Serene Assir, AUC student, for her research on Palestinian cases in Spain. We would also like to thank Adriana Zarraluqui for her contribution, particularly on the the section related to “forcible displacement”.

BADIL working papers research durable solutions for Palestinian refugees and IDPs as well as strategies of ending impunity for human rights abuses as part of a just and permanent solution to the Palestinian/Arab-Israeli conflict. Working papers do not necessarily reflect the views of BADIL.

# Table of Contents

Introduction .....	5
I. The International Criminal Law Framework .....	11
1. History of ICL .....	11
2. Characteristics of International Crimes .....	13
2.1. Individual Criminal Liability	
2.2. Universality	
2.3. Actus Reus and Mens Rea	
2.4. Statutory Limitations	
2.5. Immunity	
2.6. Remedies	
3. Temporal Considerations .....	18
4. Identification of Perpetrators .....	21
II. Three Categories of International Crimes .....	25
1. War Crimes .....	25
1.1. Elements of War Crimes	
1.2. Israeli Policies as War Crimes	
<i>Israel's policy of Population Transfer</i>	
<i>Israel's policy of Property Destruction and Confiscation</i>	
2. Crimes against Humanity .....	39
2.1. Elements of Crimes Against Humanity	
2.2. Israeli Policies as Crimes Against Humanity	
<i>Widespread or Systematic Attack</i>	
<i>Population Transfer as a Crime Against Humanity</i>	
<i>Persecution as a Crime Against Humanity</i>	
<i>Apartheid</i>	
3. Genocide .....	50
3.1. Elements of the Crime of Genocide	
<i>Mens Rea</i>	
<i>Israel's Policies</i>	
<i>Israeli military operation in Gaza, December 2008-January 2009</i>	

<b>III. Enforcement of International Criminal Law</b> .....	<b>58</b>
<b>1. International Obligations and Mechanisms</b> .....	<b>59</b>
1.1. Third party Obligations .....	<b>59</b>
<i>State Party Treaty Obligations</i>	
<i>Obligations of the European Union and its Member States</i>	
<i>UN Obligations</i>	
1.2. International judicial Mechanisms .....	<b>68</b>
<i>International Court of Justice (ICJ)</i>	
<i>International Criminal Court (ICC)</i>	
<i>International Criminal Tribunal for Israel (ICTI)</i>	
<b>2. National obligations and mechanisms</b> .....	<b>76</b>
2.1. National Investigation and Prosecution .....	<b>76</b>
<i>Lack of Remedies within the Israeli Legal System</i>	
<i>Norms of Jurisdiction</i>	
<i>Universal Jurisdiction</i>	
<i>National Practice of Universal Jurisdiction in relation to Israel</i>	
<b>IV. Conclusion</b> .....	<b>92</b>

# Introduction

*“International Criminal law has become a necessary instrument for the enforcement of IHL and IHRL. Criminal proceedings and sanctions have a deterrent function and offer a measure of justice for the victims of violations. The international community increasingly looks to criminal justice as an effective mechanism of accountability and justice in the face of abuses and impunity.”<sup>1</sup>*

This BADIL working paper will constitute the first of a new BADIL series looking into the subject of International Criminal Law.

BADIL Resource Center and others have documented that, since the establishment of the State of Israel in 1948, a systematic and institutionalized practice of displacement of Palestinians and confiscation of their land has constituted an essential component of Israeli state policy.<sup>2</sup> The process of moving Palestinians away from their homes and dispossessing them of their lands and livelihoods is still ongoing on both sides of the Green Line,<sup>3</sup> i.e., inside Israel and in the Occupied Palestinian Territory (hereinafter OPT)<sup>4</sup>, with certain communities

---

1 Report of the United Nations Fact-Finding Mission on the Gaza conflict, A/HRC/12/48 of 25 September 2009 (hereinafter Goldstone Report), at 286.

2 BADIL's documentation includes *Survey of Palestinian Refugees and Internally Displaced Persons, 2008-2009* (hereinafter BADIL Survey); BADIL, “Displaced by the Wall – Forced Displacement as a Result of the West Bank Wall and its Associated Regime”, 2006; BADIL, “Ruling Palestine – A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine”, 2005 and various issues of *al-Majdal*, including issue no. 43 (Winter-Spring 2010): *The Jewish National Fund*. All documents are available at [www.badil.org](http://www.badil.org). See also the research carried out by Professor Susan Akram and Ph.D candidate and Researcher, Terry Rempel, for example in “Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees”, 22 B.U. Int'l L. J. 1 (2004) (hereinafter Akram and Rempel).

3 The Green Line, or Armistice Line is the 1949 ceasefire line delineating the boundary between Israel and the West Bank, incl. East Jerusalem, and the Gaza Strip.

4 The West Bank, including East Jerusalem, and the Gaza Strip have been under belligerent Israeli occupation since 1967.

being at particular risk of displacement.<sup>5</sup> According to BADIL, the total number of displaced Palestinians amounted to at least 7.1 million at the end of 2009.<sup>6</sup> In terms of land-dispossession, Israel has now confiscated or restricted the use of 70% of the West Bank which includes Area C and the *de facto* annexed land in occupied East Jerusalem.<sup>7</sup> Additionally, in Gaza, Israel has established a buffer zone along the Green Line and restricted access for Palestinians to the area, which is estimated at 17 % of the total land mass of Gaza. An estimated 35 % of the cultivable land in Gaza is located in this restricted area.<sup>8</sup> Within Israel, 94%

---

5 BADIL Survey, *supra* note 2, at executive summary: "By 2009, Palestinian communities in the OPT at particular risk of forced displacement include communities in the path of the Wall, Palestinian Bedouin, Palestinians residing in the Jordan Valley, eastern Jerusalem, Hebron, southern Gaza and the Gaza Strip buffer zone. Among Palestinian citizens of Israel, the Bedouin in the Naqab (Negev) and Palestinian communities in the Galilee and the so-called "mixed cities" are particularly vulnerable to forced displacement." See also documentation from United Nations Office for the Coordination of Humanitarian Affairs – occupied Palestinian territory (OCHA) available at [www.ochaopt.org](http://www.ochaopt.org), for example the weekly reports concerning Protection of Civilians. In the report of 28 July – 10 August 2010, OCHA noted under the heading "Wave of Area C demolitions continues": "Since the beginning of 2010, Israeli authorities have demolished 242 Palestinian-owned structures in Area C, (more than half of which were demolished in July) displacing 282 people...According to official Israeli figures, there are more than 3,000 outstanding demolition orders throughout Area C. Currently, it is nearly impossible for Palestinians to obtain building permits to maintain, repair or construct homes, animal shelters or infrastructure necessary for sustaining shelter and livelihood in Area C". See also OCHA report "Sharp Increase in Demolitions and Displacement in the West Bank," July 2010. See also report by Amnesty "As Safe as Houses? Israel's Demolition of Palestinian Homes" (June 2010) noting that: "By denying permit applications to an expanding Palestinian population in both East Jerusalem and the West Bank, the Israeli authorities are putting Palestinians in an impossible position: whatever choice they make, they face homelessness. Denied permission to build by Israel, the occupying power, many feel they have no option but to construct homes and other structures without official permits, knowing that these buildings may soon be flattened, without redress, by Israeli bulldozers." Human Rights Watch has also documented the demolition of Bedouin homes (see article 1st August 2010 "Israel: Halt Demolitions of Bedouin Homes in Negev") and the demolition of homes in East Jerusalem (6 November 2009 "Israel: Stop East Jerusalem Home Demolitions.")

6 BADIL Survey, *supra* note 2, at executive summary. During the 1948 war, 85% of the Palestinian population was expelled from the area which became Israel. Over one-third of the population in the West Bank and the Gaza Strip was displaced during the 1967 War and hundreds of thousands over the last four decades (see BADIL Survey, at 10-19).

7 *ib.*, at 42. See also report by B'Tselem, "By Hook and by Crook: Israel's Settlement policy in the West Bank", July 2010, at 77: "More than 42 percent of West Bank land has been allocated to the establishment of over 200 settlements as well as the neighborhoods in the areas annexed to the Jerusalem municipal borders."

8 See August 2010 report by OCHA and WTO, "Between the Fence and a Hard Place – the Humanitarian Impact of Israeli Imposed Restrictions on Access to Land and Sea in the Gaza Strip": "Since late 2008, Palestinians have been totally or partially prevented from accessing land located up to 1,000-1,500 meters from the Green Line (depending on the specific area), and sea areas beyond 3 nautical miles from shore. Overall, the land restricted area is estimated at 17 percent of the total land mass of the Gaza Strip and 35 percent of its agricultural land". See also Al-Haq, *Shifting Paradigms, Israel's enforcement of the Buffer Zone in the Gaza Strip*, June 2011. See also Palestinian Central Bureau of Statistics, Press Release on the Occasion of Land Day, 30 March 2010, at 1.

of the land is now eligible only for Jewish people.<sup>9</sup> The Israeli domination over the Palestinian people continues unabated and the policy of displacement, illegal acquisition of land and denial of return, repatriation, restitution and compensation has intensified recently in various areas, for example in East Jerusalem and Area C of the West Bank.<sup>10</sup>

While arguing that the regime of occupation, apartheid and colonization induces the contemporary forced displacement in the OPT and inside Israel, BADIL has identified the main methods or “triggers” of displacement to include excessive and indiscriminate use of force; home demolitions and forced evictions; revocation of residency rights; closure and segregation; collective punishment; confiscation and discriminatory distribution of land; attacks and harassment by non-state actors; detention and torture; and settler implantation. Historians have linked Israel’s policies with the Zionist ideology<sup>11</sup>. This suggests, as stated by BADIL, that:

Palestinian displacement and dispossession are caused by a policy of forced population transfer which has been employed by the Zionist movement and the state of Israel with the aim to colonize Palestinian land and establish a Jewish demographic majority in it.<sup>12</sup>

BADIL’s observations support the assumption that Israel’s policies towards the Palestinian people can only be understood by comprehending the broader

---

9 See for example, Hussein Abu Hussein and Fiona McKay, *Access Denied – Palestinian land rights in Israel* (Zed Books, 2003) (hereinafter Hussein and McKay). The authors concluded: “Today some 94 per cent of all land in the state is regarded as “redeemed” and that is considered to be at the disposal of the Jewish people. This is known as ‘Israel Lands’. Only the remaining 6 per cent can still be bought and sold, with around half of this in Palestinian ownership. Some 13 per cent of Israel Lands is owned by the JNF, which excludes Palestinians from using its land. Although the remaining is not subject to the same restrictions, it is managed in many respects as if it were also still in the ownership of the Zionist movement. As we have sought to demonstrate all of the bodies that control the land regime – the JNF, the ILA, the planning bodies, government ministers and officials – have consistently been driven by the ideological goals of Zionism”.

10 See for example, Human Rights Watch, “Israel: New Peak in Arbitrary Razing of Palestinian Homes,” 19<sup>th</sup> August 2010, noting that: “Israeli authorities destroyed 141 Palestinian homes and other buildings in July 2010, the largest number in any month since at least 2005.”

11 See for example, Nur Masalha, *Expulsion of the Palestinians: The concept of Ttransfer in Zionist Political Thought 1882-1948*, (Institute for Palestine Studies 1992); Nur Masalha, *The Politics of denial – Israel and the Palestinian Refugee Problem* (Pluto Press, 1<sup>st</sup> ed. 2003); Pappé, I., *The Ethnic Cleansing of Palestine* (Oneworld 2006), (hereinafter Pappé); Walid Khalidi “Plan Dalet: Master plan for the Conquest of Palestine”, *Journal of Palestine Studies*, Vol. 18, No. 1: Special Issue: Palestine 1948 (Autumn 1988), at 4-33; Uri Davis, *Apartheid Israel, Possibilities for a Struggle Within*, (Zed Books, London, 2003).

12 BADIL Survey, *supra* note 2, at 2.

historical, ideological, political, legal<sup>13</sup> and economic<sup>14</sup> context. Therefore, from the perspective of international law, it is imperative to examine Israel's policies, not solely under International Humanitarian Law (IHL) and International Human Rights Law (IHRL), but also under International Criminal Law (ICL) in particular the legal prohibitions against colonialism and apartheid.<sup>15</sup>

Over the past decades there has been an increasing amount of attention directed towards ICL and how to ensure that perpetrators of international crimes will be held accountable and that victims will obtain justice. In the Palestinian case, this culminated in the 2009 *United Nations Fact Finding Mission on the Gaza Conflict Report*<sup>16</sup>, lead by Richard J. Goldstone, mandated to investigate crimes committed by Israelis and Palestinians during Israel's military offensive against the Gaza Strip in December 2008 and January 2009 (Operation Cast Lead). The investigators conducted extensive investigations in Gaza, which included hundreds of interviews with victims, and drafted a comprehensive report that, despite recent debate<sup>17</sup>, will remain a milestone in the struggle against impunity, due to its clear focus on the rights of the victims and its support for the application of ICL and universal jurisdiction.

The purpose of this paper is to apply ICL to Israel's policies towards the Palestinian people. Chapter I will firstly explore the history and development of ICL and consider the characteristics of international crimes. It will also

---

13 See, for example, Joseph Schechla, "Bosnia and Palestine, So Close, and Yet So Far", BADIL Al-Majdal, Issue No.35, Autumn 2007: "Israel's transfer of Palestinian population has been carried out on the basis of domestic laws, including "basic laws", since the state emerged in 1948. Motivating this process is a righteous ideology that bonds the incoming population and rationalizes the government and state agencies with a claim of superior rights conveyed only to the "nationals" at the expense of the indigenous Palestinian people, including over remaining Palestinian "citizens" of the state." See also Hussein and Mckay, supra note 9.

14 Israel's regime of oppression against the Palestinians has various economic aspects and results, for example, in a lack of access to natural resources that belong to the Palestinians, such as water, and the prevention of economic growth in many Palestinian communities. The Israeli policy of de-development has been described by Sara Roy in relation to Gaza, see for example *The Gaza Strip – the Political Economy of De-Development* (The Institute of Palestine Studies, 1995).

15 A group of legal scholars recently analyzed the nature of Israel's occupation of the OPT in light of the legal prohibition against colonialism and apartheid. Their report concluded that: "Both colonialism and apartheid are prohibited by international law. This Report has found strong evidence to indicate that Israel has violated, and continues to violate, both prohibitions in the occupied Palestinian territories". See "Report by the Human Sciences Research Council, Occupation, Colonialism, Apartheid? A re-assessment of Israel's practice in the Occupied Palestinian Territories under international law", May 2009 (hereinafter HSRC Report).

16 Human Rights in Palestine and other Occupied Arab Territories: Report of the UN Fact Finding Mission on the Gaza Conflict., 15 September 2009. A/HRC/12/48 (hereafter Goldstone Report).

17 See: *Washington Post*, "Reconsidering the Goldstone Report on Israel and war crimes." Richard Goldstone, 1<sup>st</sup> April 2011; *Newstatesman*, "Where now for the Goldstone report?" John Dugard, 6<sup>th</sup> April 2011; *Haaretz*, 'Netanyahu to UN: Retract Gaza war report in wake of Goldstone's comments', 2<sup>nd</sup> April 2011, Barak Ravid, *et al*.

briefly look at legal principles relating to the time frame for prosecution of Israel's crimes, with particular reference to the ethnic cleansing in 1948. Finally, it will look at the identification of potential perpetrators for criminal prosecution. Chapter II will focus on the criminal aspects of the widespread pattern of displacement, dispossession, persecution and apartheid towards the Palestinian people. It will analyse whether these actions constitute international crimes, namely war crimes, crimes against humanity or genocide.<sup>18</sup> Chapter III is split into two parts, exploring possibilities for the enforcement of ICL on an international and national level. The first part covers the obligations to enforce ICL on an international level, by third parties including individual states, the European Union (EU) and its member states and the United Nations (UN). It will also explore the possibilities of enforcement in international judicial forums – the International Court of Justice (ICJ), the International Criminal Court (ICC) and a potential International Criminal tribunal for Israel (ICTI). The second part focuses on prosecution on a national level, considering briefly the lack of remedies within the domestic Israeli legal system and moving on to look at initiatives in Europe and other countries to attempt prosecutions on the basis of universal jurisdiction. The influence of politics on the implementation of ICL will be considered throughout chapter III.

Rather than attempting to make a specific case against specific perpetrators, the aim of this paper is to set out the relevant legal framework for the application of international criminal law to some of Israel's policies towards the Palestinian people. This paper will thereby supplement other papers published by BADIL in the field of criminal justice, legal accountability and remedies<sup>19</sup> as well as work by

---

18 An examination of other international crimes falls outside the scope of this paper, including, for example, torture or the crime against aggression. In relation to the 1967 war, see John Quigley, "The United Nations Response to Israel's Seizure of the Gaza Strip and West Bank" (Pal. Y. Int'l L 12 (2002/2003), 145 and John Quigley, *Palestine and Israel – a Challenge to Justice*, (Duke University Press, 1990) at 213: "Leaders of the Jewish Agency bear this liability for waging a war of aggression and for expelling the Palestine Arabs in 1948. Government leaders of Israel are liable for the wars of 1956, 1967 and 1982." With regard to Israel's invasion of Lebanon in 1982, see Thomas W Mallison, "Aggression or Self-Defense in Lebanon in 1982", 77 Am. Soc'y Int'l L. Proc. 174 (1983) and Linda Malone, "Sharon vs Time: The Criminal Responsibility Under International Law for Civilian Massacres", Pal. Y. Int'l L, 3 (1986), 41. With regard to Operation Cast Lead, see Victor Kattan, "[Operation Cast Lead: Use of Force Discourse and Jus ad Bellum Controversies](#)", Pal. Y Int'l, 15 (2009) and George E. Bisharat et al., "Israel's Invasion of Gaza in International Law", 38 Denv. J. Int'l L. & Pol'y 41 2009 (hereinafter Bisharat).

19 See, for example, BADIL Working Paper No. 11, "Principles & Mechanisms to Hold Business Accountable for Human Rights Abuses" by Yasmine Gado (Dec 2009); al-Majdal, issue no. 35 (2007) *Accountability and the Peace-Making Process*; al-Majdal, issue no. 41 (2009) *Litigating Palestine*; and al-Majdal 43 (2010), *The Jewish National Fund – A Para-State Institution in the Service of Colonialism & Apartheid*. See also the forthcoming working paper concerning Apartheid.

lawyers and other organizations<sup>20</sup> with a view to combating the ongoing impunity of Israel and its officials.

As pertinently noted by John Dugard:

In 1948 both human rights law and international criminal law were undeveloped. The ethnic cleansing of Palestine was judged largely in political terms. Despite the fact that the Nuremberg trial had just concluded, little attempt was made to characterize the Nakba in terms of international criminal law, as a crime against humanity or genocide. In retrospect it seems that the international community found it hard to believe that the Jewish people who had just been subjected to crimes of genocide and crimes against humanity themselves could, through the instrumentality of the Zionist enterprise, engage in similar actions. But 62 years on, the situation has changed. There have been major developments in human rights law and international criminal law. And, above all, a UN Mission lead by a South African Jewish jurist has found that Israel has committed serious war crimes in the course of its 2008-9 assault on Gaza. The international community is therefore more inclined to judge the conduct of Israel in terms of international criminal law. In these circumstances it is necessary to go back to the Nakba and reassess it in terms of international criminal law. Scholars such as Ilan Pappé have laid bare the facts and it is now incumbent on lawyers to examine the facts from the perspective of international criminal law. Yes, it was a catastrophe. But was it more? Was it a genocidal campaign? Were crimes against humanity committed in the course of the ethnic cleansing that occurred? These are questions that should be addressed and answered.<sup>21</sup>

---

20 See, for example, the extensive work by the Palestinian Center for Human Rights (PCHR), described in its report: "The Principle and Practice of Universal Jurisdiction" (2010). See also "Human Rights Manual for Palestinian Lawyers – Identifying, Investigating and Prosecuting Human Rights Violations" (Bar Human Rights Committee of England and Wales) (2006) and the Report published by Diakonia following the conference: Palestine/Israel: Making Monitoring Work: (Re-) Enforcing International Law in Europe. Various international organizations have also examined violations under ICL, including Human Rights Watch, see for example the recent report concerning property destruction during Operation Cast Lead: "I lost Everything. Turning a Blind Eye" 14 April 2010. See also references in footnote 7. Finally, see Bisharat, *supra* note 18, and the debate among various legal scholars about international criminal accountability in the Palestine Yearbook of International Law Vol. XII 2002/2003 (hereinafter Palestine Yearbook).

21 Interview with John Dugard in BADIL's Haq Al Awda, Vol. 38, 2010, at 2.

# I. The International Criminal Law Framework

## 1. History of ICL

The ICL framework originates from the legal principles set out in the Nuremberg trials, following the second World War.<sup>22</sup> Further development of the principles ensued with the adoption of the 1948 Genocide Convention<sup>23</sup> and the four Geneva Conventions of 1949. However, these principles have lain dormant for decades and only re-emerged when the UN Security Council passed a resolution to establish the ad-hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), in 1993, and for Rwanda in 1994 (ICTR).<sup>24</sup> However, a substantial amount of jurisprudence emerged from these tribunals and this acceleration in the development of ICL culminated in the establishment of the permanent International Criminal Court (ICC) in July 2002.<sup>25</sup>

The trial of Adolf Eichmann, in Jerusalem in 1961,<sup>26</sup> illustrated the role domestic

---

22 Antonio Cassese, *International Criminal Law* (Oxford University Press, 2<sup>nd</sup> ed. 2008) (hereinafter Cassese), at 4

23 Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277, *entered into force* January 12, 1951 (hereinafter Genocide Convention).

24 Moreover, torture was established as a separate international crime by the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85, *entered into force* June 26, 1987 (hereinafter Torture Convention).

25 See Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002 (hereinafter Rome Statute). There are now 114 state parties to the Rome Statute, see ICC's website for further information: [www.icc-cpi.int](http://www.icc-cpi.int) (visited March 2011).

26 *The Attorney General v. Adolf Eichmann*, criminal case no. 40/61 in the District Court of Jerusalem: 11 Dec 1961, para.1 "Adolf Eichmann has been brought to trial in this Court on charges of unsurpassed gravity - charges of crimes against the Jewish People, crimes against humanity, and war crimes. The period of the crimes ascribed to him, and their historical background, is that of the Hitler regime in Germany and in Europe, and the counts of the indictment encompass the catastrophe which befell the Jewish People during that period - a story of bloodshed and suffering which will be remembered to the end of time."

courts can play in prosecuting serious crimes, ensuring justice for victims and raising awareness of the crimes. Eichmann was arrested by Mossad agents in Argentina and tried in Jerusalem by a panel of three judges, including presiding judge Moshe Landau. On the basis of various jurisdictional grounds, including universal jurisdiction, Eichmann was convicted of all 15 charges against him, including crimes against the Jewish people, defined as genocide. Specifically with regard to universal jurisdiction, the judges concluded that this jurisdictional principle, set out in the Nazis and Nazi Collaborators (Punishment) Law, was in accordance with international law:

The power of the State of Israel to enact the Law in question or Israel's "right to punish" is based, with respect to the offences in question, from the point of view of international law, on a dual foundation: The universal character of the crimes in question and their specific character as being designed to exterminate the Jewish People.

The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("delicta juris gentium"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.<sup>27</sup>

Therefore, at that time, Israel upheld the principle of universal jurisdiction as a customary norm of international law. This case led to a wide acceptance by states that universal jurisdiction could be used to prosecute genocide. It was more than three decades later before domestic judges began again to prosecute international crimes on the basis of universal jurisdiction, for example war crimes in Denmark<sup>28</sup> and torture in the Netherlands.<sup>29</sup> The high-

---

<sup>27</sup> *Ibid.* para. 11-12.

<sup>28</sup> Case against Bosnian Muslim Refik Saric, decided by the Danish Supreme Court in 1995 (U1995.838H) (following the decision by the Danish Eastern High Court 25 November 1994).

<sup>29</sup> Case against Sebastien Nzapali, decided by Rotterdam District Court on 7 April 2004 (AO 7287). For a domestic prosecution of crimes against humanity, see for example *R. v. Finta* [1994] 1. S.C.R. 701, judgement by the Supreme Court of Canada of 24 March 1994. Finta was a "legally trained captain in the Royal Hungarian Gendarmerie and was commander of an investigative unit at Szeged when 8,617 Jewish persons were detained in a brickyard, forcibly stripped of their valuables and deported under dreadful conditions to concentration camps". In 1947-48, Mr. Finta was tried and convicted, *in absentia*, by a Szeged court for "crimes against the people" relating to his role as a Gendarmerie captain during the spring of 1944 purge of Szeged's Jewish population. In 1951, Finta immigrated to Canada. In 1956 he became a Canadian citizen.

profile arrest of Augustus Pinochet in the UK in 1998 and the conviction of Nazi war criminal Anthony Sawoniuk in the UK in 1999 followed this. The enactment of a law allowing judges to exercise universal jurisdiction in Belgium in 1993 (amended in 1999)<sup>30</sup>, as well as the initiation of a case against the former Israeli Prime Minister, Ariel Sharon in 2002<sup>31</sup>, brought further attention to the role of domestic courts in investigating and prosecuting international crimes. Over the last decade, state parties to the Rome Statute (the statute of the ICC) have enacted legislation allowing their national courts to adjudicate crimes covered by this Statute on the basis of universal jurisdiction.<sup>32</sup> As a result, a number of criminal trials have been initiated and some have resulted in convictions.<sup>33</sup>

## 2. Characteristics of International Crimes

### 2.1. Individual Criminal Liability

International crimes relate to a serious breach by a state of an obligation (so-called *erga omnes* obligations) arising under a peremptory norm (*jus cogens* norms),

---

30 Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, March 23, 1999, which amended the 1993 Act to implement the Geneva Conventions and Additional Protocols. The 1999 Act contained a jurisdictional clause in Article 7: "Belgian courts are competent to take cognizance of offenses stipulated in the present law irrespective of the place where they have been committed". The 1993 law was repealed in August 2003. See UN Secretary General's report A/65/181, at 94: Accordingly, the Act of 16 June 1993 was repealed by the Act of 5 August 2003. However, the Act of 5 August 2003 left intact the substantive law of the 1993 and 1999 Acts. Moreover, the rules on the jurisdiction of Belgian courts were still broad, as a result of an adaptation of the general law of extraterritorial jurisdiction to the realities of modern international crime. At the same time, the Act of 5 August 2003 modified the procedure for applying to Belgian courts by providing that prosecutions, including investigations, could be undertaken only at the request of the federal prosecutor, who assesses the complaints made. The procedure of instituting civil indemnification proceedings was abandoned, with the exception of cases where an offence was perpetrated wholly or partly in Belgium or where the alleged perpetrator of an offence was Belgian or resided primarily in Belgium. When he received a complaint, the federal prosecutor referred it to the examining magistrate for investigation." See also Luc Reydam's, *Universal Jurisdiction – International and Municipal Legal Perspectives* (Oxford University Press, 2003), at 106.

31 Complaint lodged by Survivors Against Israeli Prime Minister Ariel Sharon, Director General of the Defence Ministry Amos Yaron and other Israelis and Lebanese Responsible for the Sabra and Shatila Massacre, 18 June 2001, published in the Palestine Yearbook of International Law, Vol. XII. 2002/2003, at 219-258.

32 See, A. Hays Butler, The Growing Support for Universal Jurisdiction in National Legislation, in Stephen Macedo (ed), *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, (Philadelphia: University of Pennsylvania Press, 2004) (hereinafter MACEDO). See also Bisharat, *supra* n. 18, at 110.

33 For an overview of case law, see Joseph Rikhof, "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity", *Criminal Law Forum*, Vol. 20, no. 1, March 2009; and UN Secretary-General A/65/181 .

Thus, only the most serious violations of human rights norms are criminalized under ICL, which is a body of international norms:

designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, terrorism) and to make those persons who engage in such conduct criminally liable. They consequently either authorize states, or impose upon them the obligation, to prosecute and punish such criminal conduct.<sup>34</sup>

Accordingly ICL criminalizes certain abhorrent wrongdoings by imposing *individual criminal liability* upon perpetrators of such crimes. This concept of individual criminal liability, which was developed in the Nuremberg principles, is a cornerstone of ICL. As stated by the International Military Tribunal:

The very essence of the Charter<sup>35</sup> [instituting the IMT] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.<sup>36</sup>

Today this fundamental principle of criminal liability for individuals is considered international customary law<sup>37</sup>, and was accepted as such by Israel in the Eichmann case. It is stipulated in the statutes of the various international tribunals and courts, for example, Article 25 of the Rome Statute which states:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

## **2.2. Universality**

Since an international crime involves the violation of firmly established international customary rules and values shared by the whole international community, states share a universal interest in repressing these crimes. This principle of universality reflects

---

34 Cassese, *supra* n. 22, at 4.

35 Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8<sup>th</sup> August 1945.

36 Cassese, *supra* n. 22 at 31 with reference to IMT judgement *ibid.* at 223.

37 See Edoardo Greppi, "The evolution of individual criminal responsibility under international law", *Int Review of the Red Cross*, No 835, at 531, 30 September 1999 (hereinafter Greppi): "The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large number of judgements, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law".

the common assumption that all states, governments and humanity generally agree that the commission of serious international crimes is unacceptable and, hence, perpetrators should not enjoy impunity. For this reason, immunity from prosecution is ruled out, unless the perpetrator enjoys personal immunity while serving as head of state, foreign minister or diplomatic agent (see further below).<sup>38</sup>

Legal scholars and judges would agree to include in the category of international crimes “the most serious crimes of concern to the international community as a whole”<sup>39</sup> and therefore the core crimes covered by the mandate of ICC, i.e., the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

### **2.3. Actus Reus and Mens Rea**

ICL is a distinct field of international law in which rules are created from the classic sources of international law.<sup>40</sup> Though a distinct field of international law in itself, ICL is closely linked to International Humanitarian Law (IHL), International Human Rights Law (IHRL) and domestic criminal law.<sup>41</sup> One aspect of ICL, similar to domestic criminal law, is that a violation must be proven to have, first, a specific objective element (*actus reus*), i.e., the commission of certain offenses (killing, forced displacement etc) or an omission contrary to a rule imposing a specific behavior,<sup>42</sup> and, secondly, a specific subjective element (*mens rea*), i.e., a certain mental state or intention of the principal perpetrators or others who have participated in the commission of the crime.

Under international customary law there is no “general definition of the various categories of mens rea such as intent, recklessness, or negligence”.<sup>43</sup> The existence

---

38 Cassese, *supra* n.22 at 12.

39 Rome Statute, *Supra* n. 25, Article 5.

40 Thus, ICL norms stem from the sources of international law, as explained in Article 38 of the ICJ Statute that is considered “the general statement of the sources of international law” (Ian Brownlie, *Principles of International Law*, (6<sup>th</sup> edition 2003), at 5: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” This means, for example, that the Rome Statute is not in itself a general source of ICL, but it regulates the jurisdiction of the ICC, imposes legal obligations upon state parties and some of its provisions might reflect international customary law or general principles of ICL.

41 For a discussion on how the subject of international accountability for human rights atrocities is situated in four interrelated bodies of law, see Steven R. Ratner, Jason Abrams and James Bischoff *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, 3<sup>rd</sup> ed. March 2009) at 10.

42 Cassese, *Supra* n. 22, at 53.

43 *Ib*, at 56.

of intent can be inferred from relevant facts and circumstances.<sup>44</sup> However, in the context of the jurisdiction of the International Criminal Court, the matter is explicitly dealt with by Article 30<sup>45</sup> which stipulates that a person shall be criminally responsible “only if the material elements are committed with intent and knowledge”. Article 30 specifies that 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.

The mental element required for specific crimes might be set out in treaty provisions, as in the case of genocide which requires a special intent (*dolus specialis*),<sup>46</sup> or established by customary law. Most international crimes (except genocide) require culpability at the level of intention (*dolus directus*), but under certain circumstances a lesser degree of culpability would be sufficient, for example in relation to superiors’ responsibility where recklessness (*dolus eventualis*) will suffice.<sup>47</sup>

## 2.4. Statutory Limitations

It is also relevant to mention that ICL permits prosecution of international crimes committed many years previously. Although such rules might be contained in some national legal systems, no statutory limitations are applicable as a matter of customary international law, at least with regard to war crimes, crimes against humanity and genocide.<sup>48</sup> Article 29 of the Rome Statute confirms this conclusion.<sup>49</sup>

---

44 International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), at general introduction.

45 As well as in important case law which developed certain definitions. These will be discussed later on in this paper.

46 Article 2 of the Genocide Convention.

47 Cassese, *supra* n. 22, at 66.

48 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73, 8 I.L.M. 68, *entered into force* Nov. 11, 1970. Although ratified by only 45 countries, it is considered an expression of customary law. See, *Ruth Kok, Statutory Limitations in International Criminal Law* (The Hague: TMC Asser Press, 2007) “In sum, while previous discussion in the period of 1964-1990 showed that, in a state practice oriented approach, the conclusion could not be drawn that a customary rule providing for the imprescriptibility of international crimes had emerged, it is clear that, on the basis of all the available evidence, at the beginning of the 21<sup>st</sup> century there is sufficient evidence of state practice and *opinio juris* to draw this conclusion”.

49 However, it should be emphasized that Article 11 of the Rome Statute states that ‘the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’.

## 2.5. Immunity

In line with domestic penal law, ICL recognizes various circumstances which may negate the responsibility of the accused. The most important in this context is the issue of immunity from prosecution. High-ranking officials accused of committing international crimes may argue that they cannot be prosecuted due to immunity rules – either because they belong to a certain category of state officials, or because they acted in their official capacity and that, hence, their sanctioning of these crimes should be considered an official act for which they cannot be prosecuted.

International customary law recognizes two categories of immunity: functional (or *ratione materiae*) and personal (or *ratione personae*). On the basis of the former “[n]o state agent is accountable to other states for acts undertaken in an official capacity and which therefore must be attributed to the state”<sup>50</sup>; thus this is “a substantive defence”.<sup>51</sup> The latter “is predicated on the need to avoid a foreign state either infringing sovereign prerogatives of states or interfering with the official functions of a state agent under the pretext of dealing with an exclusively private act”; thus this is ‘a procedural defence’<sup>52</sup> which ends when the person leaves his or her office.

Cassese would argue that functional immunity is excluded for perpetrators acting in an official capacity.<sup>53</sup> Practice by international tribunals and courts confirm this conclusion: these institutions did not even recognize personal immunity – as demonstrated by the ICC when initiating a case against the sitting Sudanese president Omar al-Bashir and by the Special Court for Sierra Leone when issuing an arrest warrant against Charles Taylor, former President of Liberia. As regards domestic criminal jurisdiction, state practice tends to reject functional immunity, as exemplified in the House of Lords’ decision in the Pinochet case<sup>54</sup>, Personal immunity has been accepted for certain *categories* of high-ranking individuals, including Heads of State, Heads of government and according to the ICJ, also Ministers of Foreign Affairs, as long as they are in office.<sup>55</sup> However, the group cannot be extended to other ministers as a matter of international customary law. State practice is not consistent, and

---

50 Cassese, *supra* n. 22, at 303.

51 *Id.*

52 *Id.*

53 *Id.*, at 12.

54 Judgement of 24 March 1999, *Regina v. Bartle over the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, Judgment of 24 March 1999, 38 ILM 581.

55 *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002 [2002] ICJ Rep 1.

some countries have extended immunity beyond the above-mentioned norms, in particular in relation to officials from powerful states, for example in the case in France against Rumsfeld for torture.<sup>56</sup>

## 2.6. Remedies

The issue of remedies for victims of international crimes is addressed in The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>57</sup> This stipulates, in accordance with international law, that remedies should include effective access to justice and the provision of adequate, effective and prompt reparation, which includes: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>58</sup> Thus, during the criminal trial or in a separate civil law suit, victims should be provided with the right to submit a claim concerning restitution and compensation for harm suffered as a consequence of the crimes.

Specifically the role of victims in criminal prosecution has been strengthened by the Rome Statute which provides for the establishment of a trust fund for the benefits of victims of crimes and permits the participation of victims at all stages of the proceedings.<sup>59</sup>

## 3. Temporal Considerations

The principle of legality imposes certain general limitations on international criminal cases, including the principle of specificity (*nullum crimen sine lege stricta* –no crime without law) and the fundamental principle of non-retroactivity (*nullum crimen sine proevia*) according to which:

---

56 See Katherine Gallagher, "Universal Jurisdiction in Practice Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture" J Int Criminal Justice (2009) 7 (5): 1087-1116.

57 General Assembly Resolution 60/147 of 16 December 2005. See also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. See also for example Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 6 of the Convention on the Elimination of Racial Discrimination; and Article 8 of the Torture Convention.

58 *Ib.*, at 18.

59 The issues of victims' rights and restitution claims of Palestinian refugees are further discussed in Alejandra Vicente, "Justice Against Perpetrators: The Role of Prosecution in Peacemaking and Reconciliation." in Terry Rempel (ed), *Rights in Principle, Rights in Practice: Revisiting the role of International Law in crafting durable solutions for Palestinian Refugees* (BADIL 2009) at 47.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.<sup>60</sup>

Thus, the determination of the time when certain wrongdoings became criminalized under ICL is crucial. This might raise specific issues in relation to crimes, which continued over a long period (so-called continuous crimes), such as an ongoing policy of population transfer or an apartheid regime. If the legal prohibition was enacted before the beginning of the crime, the answer is simple whereas the matter is more complicated if the crime began before the enactment of the criminal rule.<sup>61</sup>

The issue of timing is significant when addressing the displacement and dispossession of the Palestinian people in 1948, since much of the development of international law, particularly human rights law and ICL, has occurred subsequent to that time. According to the *inter-temporal doctrine*, which is a general principle of international law, the legality of acts must be assessed in the light of the applicable law at the time of their commission.<sup>62</sup> However, various important legal obligations had already been created in 1948 by virtue of treaty law, such as the 1907 Hague Convention (IV)<sup>63</sup> and its annex, Hague Regulations<sup>64</sup> which is customary law.<sup>65</sup> Following WWII, the Allied forces charged German officials with violations of this Convention, despite the fact that Germany had not ratified it. Though the Hague Regulations make no explicit reference to

---

60 Article 15(1) of the International Covenant on Civil and Political Rights (and Article 11(2) of the Universal Declaration of Human Rights). See also Article 15(2): Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. See also Article 22(1) of the Rome Statute. The European Court of Human Rights has recently interpreted this principle in relation to war crimes committed during the Second World War, see *Kononov v. Latvia*, decision 17 May 2010, application 36376/04.

61 See the discussion on continuous crime in relation to the ICC, William A. Schabas, *An Introduction to the International Criminal Court* (CUP, 3<sup>rd</sup> ed. 2007) at 70 (hereinafter SCHABAS). For an argument in favour of applying the law of the present to crimes committed in the past, see Monique Chemillier-Gendreau, "Israel's Violent Attacks on Palestinian Arabs in 1948-49: Qualifying Crimes in Light of International Law and Consequences", *Palestine Yearbook*, in *The Palestine Journal of International Law*, Vol. 12 (2002-2003), pp.117-144.

62 Rempel. *Supra* n.59, p.399. For a discussion of the issue of continuing violence in relation to the Palestinian refugees' right to return to their homes in Israel, see Gail J Boling, *The Question of "Timing" in Evaluating Israel's Duty Under International Law to Repatriate the 1948 Palestinian Refugees*, in *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Israel and the Palestinian Refugees (Eyal Benvenisti, Chaim Gans and Sari Hanafi (eds), Volume 189 (2007).

63 Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36, Stat. 2277.

64 Regulations Annexed to Hague Convention (IV) Concerning the Laws and Customs of War on Land, 18 October 1907.

65 The Geneva Conventions of 1906 and 1929 were also in place. The latter was ratified by Israel on 3<sup>rd</sup> Aug 1948. .

expulsion or transfer of inhabitants by the occupying force<sup>66</sup>, such a prohibition is implicit in Articles 42-56, which limit the exercise of military authority over occupied territory. Expropriation and destruction of private property, without military necessity is prohibited<sup>67</sup> as is pillage<sup>68</sup> and collective penalties.<sup>69</sup> The occupying power is also required to ensure public order and safety.<sup>70</sup> The acts committed by the Zionist militias during the mass expulsion of the 1948 Nakba violated these prohibitions although it remains controversial as to whether, and on which segment of historic Palestine, the Zionist militias would be considered “occupiers”. As stated by BADIL: “It is thus clear that even at the time of the 1948 war, acts which led to the massive displacement and dispossession of Palestinians were illegal under international law”,<sup>71</sup>

Moreover, the London Charter of the Nuremberg International Military Tribunal (the Charter)<sup>72</sup> and the IMT judgment had already introduced new crime categories (crimes against peace and crimes against humanity) and developed the concept of war crimes, as well as key legal principles<sup>73</sup> such as the principle of individual criminal responsibility. These legal principles were affirmed by the General Assembly in its resolution 95(1) 11 December 1946, *Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal*<sup>74</sup> and accepted by Israel in the Eichmann case. The Charter stipulates that deportation of the civilian population is both a war crime and a crime against humanity and that wanton destruction of towns and villages, not justified by military necessity, is a war crime. Plunder of public and private property is also listed as a war crime.<sup>75</sup>

---

66 Pictet is of the opinion that the reason for this omission is that mass transfers were considered to be in abeyance at the time of drafting in 1907. See Pictet, “The Geneva conventions of 12 August 1949, Commentary, IV Geneva Convention”, ICRC, 1958, p.279.

67 *Supra*, n.64, Art 46.

68 *Ib*, Art.28 and Art 47.

69 *Ib*, Art 50.

70 *Ib*, Art.43.

71 REMPEL, *supra* note 59, at 399.

72 Attached to the 1945 London Agreement between the four major Allies.

73 See Hans-Henrich Jescheck, “The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in ICC Statute”, *J Int'l Crim Just* 38 (2004).

74 The International Law Commission elaborated these principles in 1950 in its report “Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal.” The principles were considered customary law in the Eichmann case. For an argument against considering the Nuremberg principles customary law in 1946, see Cassese at [http://untreaty.un.org/cod/avl/ha/ga\\_95-1/ga\\_95-1.html](http://untreaty.un.org/cod/avl/ha/ga_95-1/ga_95-1.html): “It would seem more appropriate to hold that General Assembly resolution 95 (I) strongly contributed to giving the Nuremberg principles the customary law status they have today. Indeed, since 1946, the Nuremberg principles have been reaffirmed and developed in the statutes of the international criminal tribunals and in international and national case law. They are today widely considered to represent customary international law.”

75 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945, Art. 6 (b) and Art. 6 (c).

The acts which took place then in the context of the 1948, if proven as ethnic cleansing of Palestine were already illegal under customary international law.

It is also necessary to consider whether more recent human rights and other legal documents are applicable to the 1948 Palestinian refugees. The *continuing violations doctrine* indicates that the legality of an act may be assessed in light of new treaty law if the violation is continually perpetrated until the coming into effect of the new treaty.<sup>76</sup> This means that in case the original 1948 actions are proven to be illegal, and since Israel has continued to commit such acts, then it is appropriate to apply more recent human rights and ICL treaties to the initial 1948 actions. Israel's continuing pattern of displacement and dispossession of the Palestinian people has occurred within and from Israel after the initial 1948 events, from Gaza and the West Bank (including East Jerusalem) following its 1967 occupation and further as a result of the building of the separation wall in the occupied West Bank.<sup>77</sup>

#### 4. Identification of Perpetrators

International crimes are committed by individuals: either state officials or private individuals who are not acting to pursue personal interests but are rather somehow connected with a state policy or at any rate with "system criminality"<sup>78</sup> Their actions therefore either:

- a) are linked to an international or internal armed conflict, or absent of such a conflict,
- (b) have a political or ideological dimension, or is somehow linked or otherwise connected to ... the behavior of state authorities or organized non-state groups or entities.<sup>79</sup>

---

<sup>76</sup> See article 14 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in August 2001, approved by the General Assembly in resolution 56/83 of 12 Dec 2001, pp 59-62. See European Court of Human Rights, *Papamichalopoulos and Others v Greece*, 18/1992/363/437 (1993) and *Loizidou v Turkey*, 40/1993/435/514 (1996) – the court held that Turkey was liable for property confiscations which took place almost two decades before Turkey became subject to the jurisdiction of the European Court. The Human Rights Committee has also endorsed the doctrine. See for example *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981). The Inter-American Court system has also applied the *continuing violation* doctrine in a number of cases, where violations had begun before the State in question had ratified the American Convention on Human Rights and recognized the Inter-American Court jurisdiction, and where the violations had continued to occur after. See for example *Blake v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 36, at 1 (July 2, 1996), *Moiwana Village v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 124, at 1 (June 15, 2005), and *Serrano-Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 120, at 1 (Mar. 1, 2005). See also Lovelace.

<sup>77</sup> Rempel, *supra* n.59, at 400.

<sup>78</sup> Exemplified by the trial and conviction of the Dutch businessman Frans Van Anraat who sold raw material for the production of chemical weapons in Iraq during Saddam Hussein's regime.

<sup>79</sup> Cassese, *supra* n. 22, at 54.

The group of potential accused who have committed or attempted to commit an international crime (or in the case of genocide been involved in conspiracy and incitement) includes those who have participated in the commission of the crime in question by planning, ordering or committing it. In addition to the principal perpetrator and co-perpetrator, the potential accused would include those who have aided and abetted the commission of the crime.<sup>80</sup> ICL also imposes criminal liability, under certain circumstances, for failure to act, for example when criminal responsibility is established on the basis of the principle of command responsibility. (Rome Statute Art. 28), i.e., liability of superiors “for failure to prevent or punish crimes perpetrated by their subordinates.”<sup>81</sup>

Therefore, responsibility “extends liability to persons at all levels of the military or civilian hierarchy – from foot soldiers and militiamen to high-ranking commanders and politicians – who support the commission of a crime.”<sup>82</sup>

While previous and ongoing cases in Europe, New Zealand and South Africa have hitherto focused on the criminal liability of high-ranking officials, such as senior political and military leaders,<sup>83</sup> prosecution of soldiers in the lower ranks of the IDF and less senior political figures would also be possible if their participation in the planning or commission of the crime is proved and the requisite mens rea established.

Ilan Pappé has noted with regard to the perpetrators from 1948:

This book [*The Ethnic Cleansing of Palestine*] is written with the deep conviction that the ethnic cleansing of Palestine must become rooted in our memory and consciousness as a crime against humanity and that it should be excluded from the list of *alleged* crimes. The perpetrators are not obscure – they are a very specific group of people: the heroes of the Jewish war of independence, whose names will be quite familiar to most readers. The list begins

---

80 lb at 226.

81 Cassese, *supra* n. 22, at 236. See Article 25(3)(a) - (d) of the Rome Statute and Ratner, *supra* note 41, at 143 noting that the Rome Statute operates with four forms of responsibility for the commission of a crime: physical commission, co-perpetration, indirect perpetration and common-purpose liability.

82 Ratner, *supra* note 41, at 145. The mental element of aiding and abetting liability is different from that of the principal perpetrator, and it has been defined in Ratner as: “An accused aider and abettor need only be aware of the crime’s “essential elements”, and that his conduct assists the physical perpetrator to commit it”. Moreover: “Under the jurisprudence of the ad hoc tribunals, such assistance and encouragement must have a substantial effect on the perpetration of the crime, and the physical perpetrator must actually commit the crime.”

83 E.g: DoronAlmog; Ariel Sharon; Avraham Dichter; Moshe Ya'alon; Ami Ayalon; etc.

with the indisputable leader of the Zionist movement, David Ben-Gurion, in whose private home all early and later chapters in the ethnic cleansing story were discussed and finalized. He was aided by a small group of people I refer to in this book as the “Consultancy”, an ad-hoc cabal assembled solely for the purpose of plotting and designing the dispossession of the Palestinians. [ ] This caucus prepared the plans for the ethnic cleansing and supervised its execution until the job of uprooting half of Palestine’s native population had been completed. It included first and foremost the top-ranking officers of the future Jewish State’s army, such as the legendary Yigael Yadin and Moshe Dayan. They were joined by figures unknown outside Israel but well grounded, in the local ethos, such as Yigal Allon and Yitzhak Sadeh. [ ] Both the officers and the experts were assisted by regional commanders such as Koshe Kalman, who cleansed the Safad area, and Moshe Carmel, who uprooted most of the Galilee. Yitzhak Rabin operated both in Lydd and Ramla as well as in the Greater Jerusalem.<sup>84</sup>

In addition, criminal jurisdiction may be extended to non-state actors who have committed crimes which are clearly connected to state policy. As well as being crimes under domestic Israeli law, some of the violent actions taken by Israeli settlers<sup>85</sup> against Palestinians, for example in Hebron, might be criminalized under the forms of responsibility discussed above, especially in light of the brutality of some of their offenses and various statements made by settlers illustrating their hatred towards Palestinians. A connection of their illegal acts to state policy must be established. One factor to be explored might be their underlying Zionist and religious ideological motivation. The potential impunity and protection that Israeli settlers enjoy from the IDF<sup>86</sup> would suggest further that intentional killing of Palestinians<sup>87</sup> or eviction of Palestinians from their homes<sup>88</sup>, by settlers is so closely connected to the conflict and Israeli state policy that they may qualify, not solely as domestic crimes, but also as war crimes or

---

84 Ilan Pappé, *The Ethnic Cleansing of Palestine* (One World publications, 2006), at 5-6.

85 The section focuses on violent actions taken by settlers and not on the criminal aspects of the illegal settlements, including in relation to the settlers themselves.

86 See Goldstone report, *supra* note 1, at 1400-1411: “Yesh Din reports that over 90 per cent of investigations into settler violence are closed without an “indictment being filed”.

87 See OCHA Special Focus Report December 2008, Unprotected: Israeli settler violence against Palestinian civilians and their property. For statistics on settler violence, see B’Tselem at [www.btselem.org](http://www.btselem.org)

88 See for example article in *the Guardian*, 29 July 2002: “Israeli settlers evict Palestinian family from their home of 70 years”, available at [www.guardian.co.uk](http://www.guardian.co.uk), and see generally BADIL Survey, *supra* n. 2, at 22.

crimes against humanity.<sup>89</sup> This issue has not yet been tried in practice; therefore it cannot be concluded with any certainty. Though a very important potential group of perpetrators; this topic will not be discussed in more detail here.<sup>90</sup>

In addition, criminal responsibility may extend to corporate executives, both of Israeli and foreign companies, who have aided in the commission of crimes. This group could include, for example, private contractors, private security companies or foreign enterprises operating in the OPT or providing services to the Israeli authorities. Acts which incur international criminal responsibility may also entail the possibility of seeking remedies based on civil responsibility of some of the actors.<sup>91</sup>

---

89 For relevant case law in relation to war crimes committed by civilians, see Cassese, *supra* n. 22, at 83. See discussion concerning crimes against humanity committed by private individuals, *ib.*, at 116: "The case law seems to indicate that the crimes we are discussing [crimes against humanity] may be committed by individuals acting in their private capacity, provided they behave in unison, as it were, with a general state policy and find support for their misdeeds in such policy." See also the Draft Code of Offenses against Peace and Security of Mankind that referred to acts by private individuals "acting at the instigation or with the toleration of such authorities", and discussion by Schabas, "State Policy as an Element of International Crime", 98 *J. Crim L. & Criminology* 953 (2007-2008).

90 See Goldstone report, *supra* note 1, at 85-198. See OCHA, *Unprotected: Israeli settler violence against Palestinian civilians and their property* (December 2008).

91 In the context of corporate liability and the former regime in Iraq, see for example the case against Frank van Anraat, *Public Prosecutor v. Van Anraat*, the Hague District Court, 23 December 2005. See also Yasmine Gado, BADIL working paper 11, *Principles & Mechanisms to Hold Business Accountable for Human Rights Abuses Potential Avenues to Challenge Corporate Involvement in Israel's Oppression of the Palestinian People* at 37: "Thus, it is settled that corporate executives may face direct and secondary personal liability under international criminal law". For a discussion of criminal liability of legal entities, see the report by the International Commission of Jurists related to Corporate Complicity in International Crimes, September 2008; Wolfgang Kaleck and Miriam Saage-Maa, "Corporate Accountability for Human Rights Violations amounting to International Crimes", *J of Int Criminal Justice*, 8 (2010), 699-724; and report by FAFO: "Assessing the Liability of Business Entities for Grave Violations of International Law", available at [www.fafno.no](http://www.fafno.no).

## II. Three Categories of International Crimes

The purpose of this section is to discuss the elements of three international crimes – war crimes, crimes against humanity and genocide – that may overlap to some extent. Individual acts may be criminalized at various levels and these acts fall within one or several of the categories; for example an act of intentionally killing civilians during an armed conflict would constitute a serious war crime. If that act is part of a “widespread or systematic attack” against a population, it may also constitute a crime against humanity. Finally, if the perpetrator is carrying out the killing with the intent “to destroy” a group, the category of genocide might come into play. Similarly, the policy of population transfer might constitute a war crime or a crime against humanity depending on the specific factual circumstances.

### 1. War Crimes

*“We would shoot a fire storm at the neighborhoods... I would shoot so many bullets at night, but at houses, not at dead areas. I have no idea what I did with those bullets. It could be that I even killed people. I still don't know because they didn't tell me... And it's known there were casualties in those fire-storms.”<sup>92</sup>*

#### 1.1. Elements of War Crimes

The category of war crimes is well established within IHL. A precondition for qualifying facts as war crimes is the existence of either an international or an

---

<sup>92</sup> Testimony of an Israeli paratrooper stationed in Hebron from 2000 (Breaking the Silence, Occupation of the Territories, Breaking the Silence (2010), p. 100).

internal armed conflict. The Israeli-Palestinian conflict has been categorized as an international one.<sup>93</sup> During an international armed conflict, a war crime consists of a *serious* violation of any of the customary or treaty norms belonging to the body of IHL, which have been criminalized (actus reus) with an intent particular to the crime (mens rea).

The Geneva Conventions (GC) criminalized certain serious crimes as “grave breaches” which entail individual criminal responsibility.

Article 147 of the GCIV lists the following offenses as grave breaches when committed against protected persons or property:

- a) willful killing;
- b) torture or inhuman treatment, including biological experiments;
- c) willfully causing great suffering or serious injury to body or health;
- d) unlawful deportation or transfer or unlawful confinement of a protected person;
- e) compelling a protected person to serve in the forces of a hostile Power;
- f) willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention;
- g) taking of hostages and
- h) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>94</sup>

In relation to grave breaches, the obligation of states parties to search and prosecute war criminals will be triggered if the accused is present in their territory. Prosecution may then be possible on the basis of universal jurisdiction.<sup>95</sup> Additional Protocol I<sup>96</sup> has added some crimes to this list of “grave breaches” and war crimes including:

Article 85(3) of API:

- a) Making the civilian population or individual civilians the object of attack; and

---

93 A. Cassese, *International Law* (OUP 2<sup>nd</sup> ed. 2005), 420 and *Public Committee against Torture in Israel v. Government of Israel and Others* HCJ 769/02, para.21. See the Goldstone report, *supra* note 1, at 270-285, and Bisharat, *supra* n. 18.

94 See Geneva Convention relative to the Protection of Civilian Persons in Time of War, art.147, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950, as well as similar provisions in the other Geneva Conventions.

95 Article 146(2) of the IV Geneva Convention.

96 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 which entered into force 7 December 1979.

b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.

Article 85(4) of API:

- a) 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 Geneva Convention”;
- c) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

Although Israel has not signed this Protocol, much of it is accepted as customary international law. In particular, apart from apartheid,<sup>97</sup> the three crimes listed above are accepted and recognized as violations of customary international law<sup>98</sup> and as war crimes as a matter of customary international law.<sup>99</sup> As customary law they are therefore binding on Israel. Importantly, these three crimes are listed as grave breaches and war crimes in the Rome Statute of the International Criminal Court. They are also included in the Rome Statute’s definition of serious war crimes over which the ICC has jurisdiction “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Article 8). It is widely accepted that war crimes included in the Rome Statute are considered to be a violation of customary international law.<sup>100</sup>

Bearing in mind the focus of this paper, three breaches of the Geneva Convention IV of particular relevance are:

- Deportation and Forcible Transfer (Article 49(1) of the Fourth Geneva Convention (GCIV)), which may constitute a grave breach under art. 147

---

97 Apartheid is codified as a crime against humanity in the Rome Statute – Art.7.1(j).

98 See for example Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol.1 Rules (CUP 2009), Rule 1 (principle of distinction) pp. 3-5 and Rule 129 A and Rule 130 pp.457-468.

99 See *ibid*, Rule 156, pp. 572, 578-9: “Serious violations of international humanitarian law constitute war crimes”, which is interpreted to include 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.

100 See for example: Knut Dörtmann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, pp. 345. Available at: [http://www.mpil.de/shared/data/pdf/pdfmpunybd/doermann\\_7.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunybd/doermann_7.pdf)

- (d) of GCIV,<sup>101</sup> and a grave breach and a war crime under Additional Protocol I (article 85 (4)(a) (5)) and under the ICC Statute (Art. 8.2.(a) (vii)).
- Transfer of own civilian population by the occupying power into occupied territories- Settlement Implantation (Article 49(6) of GCIV), which may constitute a grave breach and a war crime under Additional Protocol I (article 85(4)(a) and (5).and the ICC Statute (Art.8(2)(b)(viii)
  - Destruction and confiscation of property (Art. 53 GCIV), which may constitute a grave breach under art. 147 of the GCIV and a grave breach and a war crime under the ICC Statute (art. 8.2.(iv))

## 1.2. Israeli Policies as War crimes

Various fact-finding missions and inquiry commissions have investigated specific offenses committed by Israeli officials and concluded that the allegations of war crimes were credible.<sup>102</sup> Various reports have also concluded that Israeli officials have committed a number of serious war crimes in the OPT during military operations.<sup>103</sup> NGOs and lawyers have also investigated various allegations of war crimes and in many cases concluded that Israel had violated the laws of war.<sup>104</sup> This section will consider whether evidence exists of the above-mentioned three breaches in relation to Israel's policies towards the Palestinian people and whether they may constitute a war crime. The first two shall be considered together under the umbrella term of *population transfer* as there is some overlap in their codification.

---

<sup>101</sup> When committed in an international conflict against protected Persons, and when the transfer or deportation are unlawful, therefore outside the scope of lawful evacuations allowed by paragraphs 2 and 3 of Art. 49, for imperative military reasons or for the security of the civilian population.

<sup>102</sup> See, for example, the Goldstone report, *supra* note 1; Arab League Fact-finding mission. Report of the High-level fact-finding mission to Beit Hanoun established under Council resolution S/3/1, September 2008 (A/HRC/9/26). See also conclusion by the Inquiry Commission established pursuant to Commission Resolution S-5/1 of 19 October 2000 concerning violation of human rights and humanitarian law in OPT during the first months of the second intifada, at 116-119.

<sup>103</sup> See various reports of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, e.g., report by former Special Rapporteur John Dugard of 21 January 2008, A/HRC/7/17: "It is highly arguable that Israel has violated the most fundamental rules of international humanitarian law, which constitute war crimes [ ] These crimes include direct attacks against civilians and civilian objects, and attacks which fail to distinguish between military targets and civilians and civilian objects [ ]; the excessive use of force arising from disproportionate attacks on civilians and civilian objects [ ] and the spread of terror among the civilian population", at 25. See also reports by the current Special Rapporteur, for example report of 7 June 2010, A/HRC/13/53/Rev. 1 in which Richard Falk discussed the implications of the Goldstone report.

<sup>104</sup> See Daniel Machover and Kate Maynard, "Prosecuting Alleged Israeli War Criminals in England and Wales", 20 Denning Law J, 95, (2004). War crimes allegations have also been discussed by other lawyers and scholars, see for example John Quigley, *Palestine and Israel – a Challenge to Justice*, (Duke University Press, 1990), at 214.

## *Israel's Policy of Population Transfer*

The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the former Commission on Human Rights has clearly defined “Population transfer” as:

the movement of people as a consequence of political and/or economic processes in which the State Government or State-authorized agencies participate. These processes have a number of intended or unintended results that affect the human rights of the transferred population, as well as the inhabitants of an area into which settlers are transferred.

(...). The State's role in population transfer may be active or passive, but nonetheless contributes to the systematic, coercive and deliberate nature of the movement of population into or out of an area. Thus, an element of official force, coercion or malign neglect is present in the State practice or policy. The State's role may involve financial subsidies, planning, public information, military action, recruitment of settlers, legislation or other judicial action, and even the administration of justice.<sup>105</sup>

In the context of occupation, the Sub-commission clarified that population transfer often occurs through settlers' implantation.<sup>106</sup> According to the latter and from a human rights perspective, population transfer can take two forms, forced removal of population and/or settler implantation.

The legal term “population transfer” covers various practices that might also be labeled “ethnic cleansing” in common language:

...that crime [i.e., population transfer] manifested itself once again in the Balkans and central Africa under a new euphemism: “ethnic cleansing”. The label became synonymous with the international law term “population transfer”, which itself may appear in some contexts as a euphemism for specific practices better described as mass expulsion, deportation, colonization, demographic manipulation, removals and even genocide. However, “population transfer”...

---

<sup>105</sup> Conclusions of the special rapporteurs, Awn al-Khasawneh and Ribot Hatano, *The Human Rights Dimensions of Population Transfer, including the implantation of settlers and settlements*, UN document E/CN.4/Sub.2/1993/17 of 6 July 1993 (hereinafter Khasawneh), at 14-15.

<sup>106</sup> Ibid, paras 35-37, pp 10-11.

[ ]...remains the omnibus term of international human rights and humanitarian law, further enshrined as a war crime and crime against humanity in the Rome Statute on the International Criminal Court.<sup>107</sup>

Thus, the essence of population transfer remains a systematic and discriminatory state policy whose purpose is an alternation of the demographic composition of an area by moving people into and/or out of the area. The policy can be implemented in various ways by the state - for example by military action or by using discriminatory legislation for the purposes of expulsion to another country or internal displacement. The state can also use financial subsidies to attract settlers.

It is clear that a policy of population transfer violates various international legal norms and human rights norms (e.g., the prohibition against discrimination), in addition to IHL norms when carried out during an armed conflict<sup>108</sup>, and as such it is considered illegal under international law.<sup>109</sup> The question then arises as to whether a policy of population transfer in its entirety, or aspects of it, attracts criminal responsibility under international law.<sup>110</sup> The following will address the issue of categorizing forms of population transfer as war crimes.

Various forms of deportation and settler implantation were adjudicated by the IMT at Nuremberg (i.e., plans of Germanizing occupied territories<sup>111</sup>) which concluded that the practices constituted both a war crime and a crime against humanity:

The Nuremberg judgment dealt in various instances with the practice of displacing civilians from the occupied territories and replacing

---

107 Joseph Schechla, "Bosnia and Palestine: So Close, and Yet so Far" in *Accountability and the Peace Making Process*, Al-Majdal, August 2007.

108 Including the prohibition against deportation; including Articles 49(1) and 147 (d) of the IV Geneva Convention and Article 85 (4) (a) of the Additional Protocol I.

109 See Alfred M. De Zayas, "International Law and Mass Population Transfers", 16 Harv. Int'l. L. J. 207 1975(hereinafter Zayas) arguing for the adoption of a specific convention that would provide an effective mechanism to enforce the prohibition of mass expulsions.

110 See on-going debate and the draft Declaration on Population Transfer and Implantation of Settlers, for example, Emily Haslam, "Unlawful Population Transfer and the Limits of International Criminal Law", Cambridge Law Journal, 61(1) March 2002, 66-75; Alfred M. de Zayas, "International Law and Mass Population Transfers", Harvard Int Law Journal, Vol. 16, 1975, 208; Maria Stavropoulou, "The Right not to Be Displaced", Am. U.J. Int. L & Pol'y, 9, 1993-1994, 690

111 Described in the IMT Judgement, *supra* note 36, at 19 (20 November 1945):GERMANISATION OF OCCUPIED TERRITORIES: In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavoured to assimilate those territories politically, culturally, socially and economically into the German Reich. The defendants endeavoured to obliterate the former national character of these territories. In pursuance of these plans and endeavours, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists. This plan included economic domination, physical conquest, installation of puppet Governments, purported de jure annexation and enforced conscription into the German Armed Forces. This was carried out in most of the Occupied Countries including: Norway, France (particularly in the departments of Upper Rhine, Lower Rhine, Moselle, Ardennes, Aisne, Nord, and Meurthe), Luxembourg, the Soviet Union, Denmark, Belgium, Holland."

them by German colonists. For example, count 3, section J of the judgement states:

“In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavoured to assimilate these territories politically, socially and economically into the German Reich. They endeavoured to obliterate the former national character of these territories.” In pursuance of their plans, the defendants forcibly deported inhabitants who were predominantly non-German and replaced them by thousands of German colonists.”<sup>112</sup>

... In conclusion, the Nuremberg judgment held that population transfers and colonization in occupied territory constituted both a war crime and a crime against humanity.<sup>113</sup>

With regard to prohibition and criminalization of settlement implantation as a matter of customary law, it is worth noting that Article 49(6) of GCIV codified the conclusion of the Nuremberg tribunal. As noted by Pictet:<sup>114</sup>

This clause was adopted after some hesitation, by the XVIIth International Red Cross Conference. It is intended 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. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

The paragraph provides protected persons with a valuable safeguard. It should be noted, however, that in this paragraph the meaning of the words “transfer” and “deport” is rather different from that in which they are used in the other paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power.

It would therefore appear to have been more logical-and this was pointed out at the Diplomatic Conference- to have made the clause in question into a separate provision distinct from Article 49, so that the concepts of “deportations” and “transfers” in that Article could have kept throughout the meaning given them in paragraph 1, i.e. the compulsory movement of protected persons from occupied territory.

---

112 IMT, vol. I, p. 63.

113 Khasawneh, *supra* n. 105, at 150-152, and Alfred de Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context*, 6 Pal Y. B. Int'l L 17 (1990/91).

114 Pictet, *Supra* n. 66.,

Turning to the issue of categorization of Israel's policies of population transfer as war crimes,

The conflict between Zionism and the Palestinian people is one of the richest population transfer cases in history, embodying virtually all of the conditions and consequences catalogued in the UN rapporteurs' initial report on "the human rights dimensions of population transfer." It involves a colonial-settler state engaging in a variety of military and administrative methods of dispossession of an indigenous people. These include discriminatory transfer as a function of "development," removing the indigenous population in favor of an exclusive group of external people, whom the state defined under its law as having "Jewish nationality" (*le'om yahudi*). Overarching these government practices is a "parastatal" apparatus – consisting of the Jewish Agency, World Zionist Organization and Jewish National Fund and their affiliates- that plans and implements this population transfer policy, just below the radar of public and legal scrutiny. Those parastatals continue to operate on behalf of the state, according to Israeli legislation, but do so in their own names and with claims to *charitable, tax-exempt* status.<sup>115</sup>

BADIL has documented the major periods and episodes of population transfer by the state of Israel from the days of the British Mandate, through the Nakba, the Israeli military government following the establishment of the state, the 1967 war up until today.<sup>116</sup> Moreover, BADIL has noted that various plans for population transfer have been developed since 1948:

The idea of transfer did not end with the establishment of Israel in 1948. Between 1948 and 1966, various official and unofficial transfer plans were put forward to resolve the "Palestinian problem". These included plans to resettle Palestinian refugees in Iraq (1948), in Libya (1950-58), and further plans for resettlement as a result of the 1956-57 Israeli occupation of the Gaza Strip and the Sinai. Israel also established several transfer committees during this period. The notion of population transfer was raised again during the 1967 war. Resettlement schemes focused on the Jordan Valley, but also considered locations as far as South America. Thousands of refugee shelters were destroyed in the Gaza Strip in an attempt to resettle refugees outside of

---

115 Schechla, *supra* note 106.

116 BADIL Survey, *supra* n. 2, Chapter 1. See also Akram and Rempel, *supra* n. 2, at 25, and De Zayas, *supra* note 108.

refugee camps. Similar proposals for population transfer also emerged during the second Intifada against the Israeli occupation of the West Bank and the Gaza Strip.<sup>117</sup>

Within the OPT, Israel maintains control over the movement of Palestinians and has on various occasions directly deported Palestinians outside the territory<sup>118</sup> or displaced persons inside the territory.

Data from BADIL suggests that since 1968, Israel has deported approximately 2000 Palestinians.<sup>119</sup> Deportees included “Palestinians, who fought against occupation and served time in Israeli prisons, political activists, school principals who protested against censorship of textbooks, teachers and students who initiated school boycotts, and attorneys who organized lawyers’ strikes. A substantial but unknown number of them had their deportation orders rescinded in the mid-1990’s”.<sup>120</sup> Since 2002, Israel has also forcibly transferred (“assigned residence”) to at least 76 Palestinians from the West Bank to Gaza Strip.<sup>121</sup>

The latest discriminatory legislative act, on the basis of which Palestinians in the West Bank might be illegally deported outside the OPT, entered into force in April 2010, in the form of Military Order 1650 concerning Prevention of Infiltration (Amendment 2).<sup>122</sup> The order changes the definition of an infiltrator from an enemy of the state to “a person who entered the area unlawfully following the effective date, or a person who is present in the Area and does not lawfully hold a permit.” An “infiltrator”, i.e., a person without a valid permit, can be deported from the area or be subject to imprisonment. As residency rights are linked to holding a permit, and given Israel’s practice of administering permit systems arbitrarily to the detriment of Palestinians, this new law means that any Palestinian in the West Bank could potentially

---

117 BADIL Survey, *supra* n. 2, at 4.

118 BADIL Survey, *supra* n.2, at 20. On the illegality of Israel’s deportation policy, see various contributions to Vol III of the Pal. Y. Int’l L., including Joost R. Hilberman, *Israel’s Deportation Policy in the Occupied Territories*. See also Alison M Fahrenkopf, *Legal Analysis of Israel’s Deportation of Palestinians from the Occupied Palestinian Territory*, 8 B.U. Int’l L. J. 125 (1990).

119 This figure excludes between 6,000 and 20,000 Bedouin farmers evicted from the Rafah salient southwest of Gaza Strip between 1969 and 1972. Badil Survey, *supra* n. 2, at 20. See also information from B’tselem’s website at: <http://www.btselem.org/topic/deportation>, last visited on 29 September, 2011, which suggests that 1,522 Palestinians were deported from the Occupied Territories 1967 up to 1992. For an overview of Israeli position on Deportations see Y. Dinstein, *The international law of belligerent occupation*, Cambridge University Press, 2009, pp 160-168.

120 BADIL Survey, *supra* n. 2, at 20.

121 On the issue of “assigned residence” see, Al-Haq, K. Coakley, M. Divac Öberg, *Israel’s Deportations and forcible transfers of Palestinians out of the West Bank during the second Intifada*, April 2006, pp. 23-38.

122 Available at [http://www.hamoked.org/files/2010/112301\\_eng.pdf](http://www.hamoked.org/files/2010/112301_eng.pdf)

be considered an infiltrator by the occupying power and, hence, be subject to illegal expulsion. Such a practice could constitute a war crime.<sup>123</sup>

Moreover, Israel continues to develop and use discriminatory domestic legislation to implement its policy of population transfer. Israel has, for example, applied various legislative rules to reduce the number of Palestinians living in the OPT, including East Jerusalem, for example by revoking residency rights<sup>124</sup> and imposing restrictions on family reunification.<sup>125</sup> BADIL has documented that by 1991, Israel had revoked the residency rights of more than 100,000 Palestinians by administrative decision.”<sup>126</sup> According to data from the UN Office for the Coordination of Humanitarian Affairs (OCHA), Israel revoked the residency rights of some 14,000 Palestinian Jerusalemites (not including dependent children), from 1967 till mid-2010, with over 4500 revoked in 2008.<sup>127</sup>

Israel is also undertaking different policies and practices that result in the forced displacement of Palestinians, and which may constitute forced population transfer as a breach of the Geneva Convention as well as a grave breach and war crime. The construction of the Wall in the occupied West Bank has triggered the forced displacement of 15,000 persons from 145 localities by 2005.<sup>128</sup> “By 2006, 17% of Palestinians in East Jerusalem, who had changed their previous place of residence since 2002 stated that they had done so, as a result of the Wall”.<sup>129</sup> Israeli restrictive zoning and planning policies, including the demolitions of Palestinian homes and other structures have also resulted in the forced displacement of Palestinians.

---

123 For a legal analysis of the Direct and Indirect Transfer of Palestinians in the OPT, see Amicus Brief by Dr Yutaka Arai submitted in the case HCJ 86579/08 *Quablan et al v. Commander of the Military Forces in the Occupied Territory* that includes an examination of relevant jurisprudence of the ITFY.

124 BADIL Survey, *supra* note 2, at 23 stating that the policy in East Jerusalem was “pursued in accordance with the express policy of limiting the ratio of Palestinians to no more than 28 percent of the city’s population.” For a legal analysis of Israel’s ‘demographic transformation of Jerusalem’, see Lea Tsemel, “The Continuing Exodus – The Ongoing Expulsion of Palestinians from Jerusalem”, *Pal. Y. Int’l L.*, 9 (1996-1997), at 39 stating more than ten years ago: “However, if the current policies against permanent residents meet with little or ineffective resistance, there is little doubt that Israel will continue to ethnically cleanse Jerusalem of its Palestinians.”

125 The Citizenship and Entry into Israel Law (Temporary Order) 5763 is an Israeli law first passed on 31 July, 2003 and most recently extended in June 2008. The law makes inhabitants of the West Bank and Gaza Strip ineligible for the automatic granting of Israeli citizenship and residency permits that is usually available through marriage to an Israeli citizen (ie Family reunification).

126 BADIL Survey, *supra* note 2, at 23.

127 OCHA Special Focus Report on East *Jerusalem, Key Humanitarian concerns*, March 2011, pp 2 and B’Tselem statistics which record the revocation of residency rights of 13,155 Palestinians from 1967 up to 2010, at: [http://www.btselem.org/jerusalem/revocation\\_statistics](http://www.btselem.org/jerusalem/revocation_statistics), visited 29 September, 2011.

128 BADIL Survey, *supra* n. 2, at . 24; See Compilation of data from “Impact of the Annexation and Expansion Wall on the Socio-economic Conditions of Palestinian Localities which the Wall Passes Through”, Ramallah: PCBS, 2003-2005.

129 *Ibid* and BADIL and the Internal Displacement Monitoring Center (IDMC), *Displaced by the Wall*, Bethlehem and Geneva September 2006.

ICAHN estimates that since 1967 up to 13 February 2009 some 24,130 Palestinian homes have been demolished in the OPT.<sup>130</sup> Thousands of Palestinians have been forcibly displaced, some of them permanently, as a result of Israeli restrictions and demolitions of Palestinian property in area C.<sup>131</sup> According to OCHA since the beginning of 2011 up to September 2011, 401 Palestinian owned structures have been demolished in East Jerusalem and Area C, displacing 771 people.<sup>132</sup> Moreover, settler violence against Palestinians, which remains largely unpunished by Israeli authorities, has also contributed in a number of cases in recent years, to the massive displacement of entire Palestinian communities.<sup>133</sup>

Israel also continues its policy of settlement implantation, strongly aided by the various parastatal institutions, such as the Jewish National Fund.<sup>134</sup> Israel has and continues to facilitate and encourage the establishment of settlements inside the OPT. It has done so through land seizure and confiscation for settlements' construction and through a systematic policy intended to encourage Jewish citizens to migrate to the West Bank for which financial benefits and other incentives to citizens - both directly and through the Jewish local authorities are provided.<sup>135</sup> Around 300,000 Israeli settlers live in approximately 121 Israeli settlements and 100 settlement outposts. The rest, some 194,000 live in 12 settlements in East Jerusalem.<sup>136</sup> In Gaza 22 Jewish settlements were withdrawn by Israel in 2005.<sup>137</sup>

The International Court of Justice (ICJ) concluded in its Advisory Opinion

---

130 Jeff Halper, *Obstacles to Peace, a reframing of the Israeli-Palestinian conflict*, ICAHD, 2009 pp 125.

131 See Human Rights Watch, *Separate but unequal*, 2010, pp 41. Save the Children UK, "Fact Sheet: Jordan Valley," Oct. 2009, [www.savethechildren.org.uk/en/docs/English\\_Jordan\\_Valley\\_Fact\\_Sheet\\_and\\_Citations.pdf](http://www.savethechildren.org.uk/en/docs/English_Jordan_Valley_Fact_Sheet_and_Citations.pdf), visited 1 August 2011.

132 OCHA, *Protection of Civilians Weekly report*, 7-13 September 2011, pp 2.

133 Examples of displacement of Palestinian communities as a result of settler violence include communities in the Israeli controlled area of Hebron city (H2), the Massafer Yatta hamlets in southeast Hebron governorate; and the Yanoun village in the Nablus area. For examples in Hebron see: B'tselem, Hebron area, H2, *Settlements cause Mass Departure of Palestinians*, 2003; and for Yanoun village in the Nablus, see OCHA, *Israeli Settler Violence in light of outpost evacuation plans*, 2009. See also OCHA Factsheet, "Israeli settler violence and the evacuation of outposts", November 2009, pp 3.

134 See Al-Majdal, no. 43, Winter-Spring 2010: Jewish National Fund – A Para-State Institution in the Service of Colonialism & Apartheid. See also Al-Haq Position Paper: "Unmasking the "Freeze": Israel's alleged Moratorium on Settlement Construction: Whitewashing Egregious Violations of International Humanitarian Law".

135 "These benefits are provided by 8 government ministries: the Ministry of Construction and Housing; the Israel Lands Administration; the Ministry of Education; the Ministries of industry and trade, tourism, and agriculture; the Ministry of Labor and Social Affairs; and the Ministry of Finance. Info available at: <http://www.btselem.org/settlements/migration>, last visited 27 September, 2011. See also, B'tselem, *By Hook and by Crook*, *supra* note 7, at 48-66.

136 B'tselem, *Human Rights in the Occupied Territories*, 1 January 2009 to 30 April 2010, at 22 and, B'tselem, *By Hook and by Crook*, *supra* n.. 7, pp 9-13.

137 BADIL Survey, *supra* note. 2, pp. 28-30;

on the Wall that Israel's settlement policy can be considered a breach of IHL since it violates Article 49(6) GCIV.<sup>138</sup> As noted above, under article 85 (4)(a) settlement implantation is recognized as a war crime under customary law, thus binding on Israel. On various occasions Israel has expressed its opposition to the categorization of settlement policy as a war crime.<sup>139</sup> However, the principle of "the persistent objector"<sup>140</sup> is inapplicable in the case of Israel since the ICJ has clearly rejected the argument that Article 49(6) would not be applicable to Israel's settlement construction. In addition, a state cannot prevent the criminalization of violations of a specific legal norm when the purpose of such objection is to protect its own officials against prosecution.

### ***Israel's Policy of Property Destruction and Confiscation***

Article 53 GCIV prohibits "any destruction by the Occupying Power of real or personal property..., except where such destruction is rendered absolutely necessary by military operations. Article 147 of the Convention stipulates that grave breaches of the convention include "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly." Article 8(2)(iv) of the Rome Statute contains a similar prohibition.

Israel has confiscated or restricted the use of more than 4,100 km<sup>2</sup> (70%) of the West Bank preventing the usage of these area by Palestinians.<sup>141</sup> Inside Israel, where Palestinian citizens of Israel constitute approximately 20 percent of the

---

138 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 [2004] ICJ Rep 136 (hereinafter the ICJ's Advisory Opinion on the Wall) at 120. See also various scholars, for example, W.T.Mallison, Jr., & S.V. Mallison, "A Juridical Analysis of the Israeli Settlements in the Occupied Territories", Pal. Y. Int'l L, 10 (1998-1999) 1, and Erik Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" 27 N.Y.U.J INT'L.L.&POL. 159 (1994). See also HSRC Report, *supra* note 15, at 89-97, which includes an examination of jurisprudence by the Israeli High Court concerning settlements, as well as reference to various resolutions by the Security Council and the General Assembly confirming the conclusion of the ICJ.

139 Israel has for example expressed its objection in the context of the ICC: "Israel's main concern about the ICC was that the settlement of Israeli citizens in the Palestinian Occupied Territories could be considered a war crime, according to the provisions contained in the Rome Statute. According to the Israeli Government, the inclusion of settlement activity as a "war crime" had no basis in international law", see FIDH Report "International Criminal Court Programme", January 2007, no. 468/2. For a development of this argument, see Ayelet Levy, "Israel Rejects Its Own Offspring: The International Criminal Court", 22, Loy. L. A. Int'l & Comp. L. Rev 207 (1999-2000).

140 The principle entails that if a state persistently objects to the development of a customary international law, it cannot be held to that law when the custom ripens – unless the customary law attains status of *jus cogens*. See Ian Brownlie, *Principles of Public international Law*, (Oxford 2003), at 11.

141 See BADIL's Written Report in Response to Israel's Third Periodic Report to the UN human Rights Committee re: Implementation of ICCPR, 30 September 2009 (CCPR/C/ISR/3) p.4. See also Supplement to BADIL's Written Report in Response to Israel's Third Periodic Report to the UN Human Rights Committee, June 2010.

population, they use and control only 3.4 percent of the land. Approximately 76 percent (1,113 km<sup>2</sup>) of their privately and collectively owned land was expropriated between 1948 and 2001.<sup>142</sup>

Israel's expropriation measures continue to date under the guise of a series of laws that assign Palestinian land as "abandoned" or "state property" for military use or for "a public purpose".<sup>143</sup> Aside from expropriation of West Bank land for Jewish colonies, approximately 555,000 dunams<sup>144</sup> of land have been confiscated for the construction of the separation Wall. Israel continues to confiscate Palestinian property for the purpose of expanding Jewish settlements or ensuring exclusive use of the property. Under the law, Palestinians are permanently denied use of or access to their expropriated land.<sup>145</sup> In August 2009, the Knesset adopted the *Israel Land Administration Law (Amendment No. 7)*, which allows privatization of land "owned" by the State of Israel, the Jewish National Fund (JNF) and the Development Authority, both within Israel and the OPT.<sup>146</sup> Moreover, a new Amendment to the Land Ordinance (Acquisition for Public Purposes), adopted in February 2010, gives the Finance Minister complete discretion to expropriate land for "public purposes", including "the establishment and expansion or developments of towns" and to define those purposes.<sup>147</sup>

Various NGOs and UN agencies have provided documentation of Israel's destruction of Palestinian houses during military operations.<sup>148</sup> Specifically, in the context of Operation Cast Lead, the United Nations Fact Finding Mission on the Gaza conflict report concluded that Israel had extensively destroyed Palestinian property:

From the facts gathered, the Mission found that the following grave

---

142 BADIL Survey, *supra* note 2, p. 28.

143 These laws and military orders include: the 1943 Land (Acquisition for Public Purposes) Law; 1967 Military Order No. 59 (Government Properties); 1969 Military Order No. 364 (Government Properties) Amendment No. 4; 1953 Jordanian Land Law (Acquisition for Public Needs) as amended by 1969 Military Order No. 321 (Concerning the Lands Law – Acquisition for Public Needs); 1981 Military Order No. 949 (Concerning the Lands Law – Acquisition for Public Needs); 1967 Military Order No. 25 (Transactions in Real Property); 1974 Military Order 569 (Registration of Special Transactions in Land); and 1983 Military Order 1060 (Law on Registration of Unregistered Immovable Property) Amendment No. 2.

144 BADIL Supplement report, *Supra* n.141, p.6. This equals approximately 555,000 km<sup>2</sup>.

145 *ib.* p.7.

146 *ib.* p.8.

147 *ib.* at p.9.

148 For example: Amnesty International, "Israel/Gaza, Operation Cast Lead: 22 Days of Death and Destruction", 2009; Al-Mezan, "Cast lead Offensive in Numbers: Statistical Report on: Persons killed and Property damaged or destroyed in the Gaza Strip by the Israeli Occupation Forces (27 Dec 08 – 18 Jan 09); Report of the Independent Fact Finding Committee on Gaza: No Safe Place, Presented to the League of Arab States, 30 April 2009 (hereafter DUGARD REPORT); Amnesty International: Israel and the Occupied Territories: Shielded from Scrutiny: IDF violations in Jenin and Nablus, 4 November 2002; Amnesty International, "Israel/Lebanon, Deliberate destruction or 'collateral damage'? Israeli attacks on civilian infrastructure", August 2006.

breaches of the Fourth Geneva Convention were committed by the Israeli armed forces in Gaza: willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly. As grave breaches these acts give rise to individual criminal responsibility.<sup>149</sup>

The Arab League Fact Finding Mission<sup>150</sup> supported that conclusion:

The Committee found that the IDF was responsible for the crime of indiscriminate and disproportionate attacks on civilians (para 20). The Committee found that the IDF was responsible for the crime of killing, wounding and terrorizing civilians (para 22). The Committee found that the IDF was responsible for the wanton destruction of property and that such destruction could not be justified on grounds of military necessity (para 25). There was considerable evidence that the IDF and its members had bombed and shelled hospitals and ambulances and obstructed the evacuation of the wounded. In the opinion of the Committee this conduct also constituted a war crime (para 26).

Based on the evidence it is thus clear that Israel's practice of destroying Palestinian homes and confiscating land in the OPT is extensive and does not involve purely isolated incidents. The practice would (could) therefore be considered a grave breach of GCIV, provided that the destruction and land confiscation are carried out unlawfully and wantonly, in relation to which individuals incur criminal liability, and Israel and third state parties have certain legal obligations to ensure investigation and prosecution of the crimes. However, a final answer can only be given if tried in a court room.

---

149 Goldstone Report, *supra* note 1, at 1935.

150 *Arab League Independent Fact Finding Mission*, n.128.

## 2. Crimes against Humanity<sup>151</sup>

*“You enter the village in the middle of the night... with stun grenades and explosives at the end. A village in which the people living there didn’t present a threat beforehand... and you basically disrupt their night. Children pee in their beds, mothers scream.”*<sup>152</sup>

### 2.1. Elements of Crimes against Humanity

The focus of the prohibition on crimes against humanity is aimed towards the protection of a group, namely a civilian population, against a systematic and widespread attack that involves various human rights offences, which have a serious negative impact upon the group. This crime has not been codified by a specific international treaty, but it is considered as firmly established by customary international law, as expressed in practice before international tribunals and national courts.

Bassiouni<sup>153</sup> has analysed the historical evolution of this category of crimes noting that, although it reflected ‘emerging rules of customary international law’ and prohibitions contained in domestic criminal law, the first definition of the crime appeared in Article 6(c) of the IMT Charter:

Crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This definition required a link between crimes against humanity and one of the other two crimes under the jurisdiction of the IMT. Such a link is no longer required under international law. The legal definition of crimes against humanity in the Rome Statute (Article 7) is considered an expression of international

---

151 Literature includes Cherif Bassiouni, *Crimes Against Humanity in International Law* (Cambridge Kluwer Law International 1999); Cherif Bassiouni, “Crimes Against Humanity: The Need for a Specialised Convention”, 31 *Colum J. Transnat’l* 457 (1994) (hereinafter Bassiouni).

152 Testimony by an Israeli Paratrooper stationed in the Tul Karem district (West Bank) from 2007 (Breaking the Silence, Occupation of the Territories, *Breaking the Silence* (2010), p. 314).

153 Bassiouni, *ib.*, at 461.

customary law with regard to the key contextual element of the crime: thus, the various underlying offenses should have been committed “as part of a widespread or systematic attack directed against any civilian population”. Such an attack can occur in times of war or peace<sup>154</sup> - thereby differentiating crimes against humanity from war crimes – and it does not need to be a military attack.<sup>155</sup> Article 7 (2) (a) sheds some light on the notion of an “attack”:

Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>156</sup>

In practice, the required intensity and scale of the commission of the underlying offences must be established to reach the specific threshold of a crime against humanity. The other objective elements of a crime against humanity consist in the commission of specific underlying offenses. The ICC definition in Article 7(1) lists the following acts:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally

---

154 Cassese, *supra* n. 22, at 99. SCHABAS, *supra* note 61, notes, however, that “...although an argument that customary international law still requires the nexus is not inconceivable, based upon the fact that at Rome a significant number of delegations argued vigorously that crimes against humanity could only be committed during an armed conflict, at 101.

155 Schabas, *supra* n. 61, at 102. See also ICC Elements of Crimes, *supra* note 44, at 116.

156 See also ICC’s Elements of Crimes, ib: “Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.

- recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
  - (j) The crime of apartheid;
  - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Thus, the provision adds, *inter alia*, the crime of apartheid and torture to the list of acts used in the IMT Charter and elaborates on elements of some of the other crimes, including forcible population transfer which is added to the concept of deportation. Article 7(2) of the Rome Statute sheds some further light on some of the above terms. Those subsections relevant for the purposes of this study are as follows:

- (b) “Extermination” includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1 [of the Rome Statute], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

As well as being a war crime during an armed conflict, then, deportation or forcible transfer, ‘without grounds permitted under international law’ is also categorised as a crime against humanity as a matter of customary law.<sup>157</sup> The subjective element in relation to crimes against humanity consists of two requirements. Thus, in addition to factual evidence proving intent to bring about the underlying offence,

---

<sup>157</sup> For a discussion on population transfer in the Former Yugoslavia, see Michael P. Roch, “Forced Displacement in the Former Yugoslavia: A Crime under International Law?”, 14 Dick. J. Int’l L. 1 1995-1996.

i.e., the intent to kill, to commit torture etc<sup>158</sup>, the perpetrator should be

cognizant of the link between his misconduct and a widespread or systematic practice.<sup>159</sup>

The perpetrator's *knowledge or awareness* of such a contextual practice and the existence thereof is exactly what characterizes crimes against humanity. In an actual court case, judges would require factual evidence proving that high-ranking officials or others were aware of the overall policy objective and that their decisions were based on these practices. According to the ICC's elements of crimes, it is not necessary to prove the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.<sup>160</sup>

## **2.2. Israeli Policies as Crimes Against Humanity.**

### ***Widespread or Systematic Attack***

When examining Israel's policies in the OPT and inside Israel, factual evidence of the systematic discriminatory measures taken against Palestinians supports the argument that the Israeli authorities are conducting a widespread and systematic attack against Palestinians. Whether the intensity and scale of this attack is at the level required to constitute a crime against humanity will ultimately be a question to be addressed by judges and investigators. However, in establishing the scale and intensity of the attack, the following factors would be relevant:

- the institutionalized discrimination against Palestinians and the clear pattern of atrocities over many decades (persecution);
- the continuous violations of international human rights standards within Israel and in the occupied Palestinian territory - as documented by the United Nations and others – as well as the gravity of these violations (i.e., torture, targeted assassinations, arbitrary imprisonment of children and other civilians, destruction of civilian property and various collective punishment measures, such as the recent blockade of Gaza) (murder, persecution, torture, forcible transfer);

---

158 Cassese, *supra* n. 22, at 114. Note that a special criminal intent is required for actions characterized as persecution.

159 *Id.* at 115.

160 See ICC Elements of Crime, *supra* note 44, at 116.

- the gravity of the various military operations carried out by the Israeli Army in OPT, as well as the ongoing practice of atrocities – for example illustrated by the high number of Palestinians killed since the beginning of the Intifada;
- the consistent condemnation of key Israeli policies by the international community;
- the consistency and systematic character of key Israeli policies over the last 60 years expressing clear political objectives;
- the duration of the Israeli occupation of the West Bank and the Gaza Strip.

Evidentially, the following factors are relevant to establishing the requisite intent:

- the Zionist ideology as a determining factor of Israeli state policies towards the Palestinians – for example in relation to land policies inside Israel, illegal settlements policy in the West Bank that dates back to the beginning of the occupation, forced displacement of Palestinians and destruction of their homes, and various measures adopted to control demographic development<sup>161</sup>;
- the underlining religious motivation<sup>162</sup>;
- key policies are decided at the highest governmental level<sup>163</sup>;
- the intentional changes to the demographic composition of the West Bank and Jerusalem;
- the role and power of the IDF generally within the Israeli society and specifically within the Israeli political structure, as well as its relationship with the executive branch;
- the impunity enjoyed by high-ranking Israeli officials domestically and internationally and the quasi-impunity enjoyed by IDF soldiers within the Israeli legal system.

The contextual requirement could also be determined by limiting the “widespread

---

161 For example denial of family reunification, see B'tselem 1999 report “Families torn apart”

162 According to Yesh Din, an Israeli human rights organisation, and to the testimonies of soldiers at The Yitzhak Rabin academy, the IDF's chief rabbi, Brigadier General Avichai Rontzki, distributed booklets to soldiers containing the message that we are the Jewish people, we came to this land by a miracle, God brought us back to this land and now we need to fight to expel the gentiles who are interfering with our conquest of this holy land. Many soldiers were left with the impression they were fighting a religious war, having been told that it is “terribly immoral” to show mercy to a “cruel enemy” and that they were fighting murderers (*The Independent*, 21 March 2009, Donald Macintyre, “Israelis told to fight holy war in Gaza”).

163 For example when the Israeli authorities in September 2007 declared Gaza “an enemy entity” and imposed various collective punishment measures on the Palestinian population denying them import of fuel, medicine and other basic goods.

or systematic attack” to a small geographically defined segment of the Palestinian population, for example with regard to the population of the OPT or even more restricted, the population of Gaza. This approach has recently been adopted by fact-finding missions, including the Goldstone Report.<sup>164</sup>

In terms of atrocities committed by Israel during 1948-1949 Professor Monique Chemillier-Gendreau has analyzed how to qualify these crimes in light of international law and concluded that the category of crimes against humanity is essential:

The qualification of crimes against humanity is central to our study. As established in the Nuremberg judgments, this category predates the period under consideration. Israel is thus guilty of such crimes, given the number and nature of the continuing and recurring offenses that are still being committed after more than fifty years. The events of 1948-49 should be examined in this broader context as we seek to qualify Israeli crimes in light of evolving legal criteria and to determine how such crimes may be suppressed in the future.<sup>165</sup>

Various fact-finding missions have concluded that Israeli officials, during specific military operations in the OPT, may have been guilty of crimes against humanity. In line with the conclusion of the Goldstone report, the Dugard Report reached a similar conclusion in relation to the military Operation Cast Lead<sup>166</sup>:

The Committee found that Israel’s offensive met the legal requirements for this crime and that the IDF was responsible for committing this crime.<sup>167</sup>

Various legal scholars have also discussed the relevance of the category of crimes against humanity. Schabas would likely agree that the crimes committed by Israeli officials in the OPT have escalated to the level of crimes against humanity:

---

164 Goldstone Report, *supra* note 1, at 1883: The report concluded for example that “the Gaza military operations were, according to the Israeli Government, thoroughly and extensively planned. While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defense, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole”.

165 See Gendreau, *Supra* n.61.

166 See also Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/10/20, at 32: “Reliance on the relevance of these crimes [crimes against peace, war crimes and crimes against humanity], especially crimes against peace, is singularly important to allow assessment of the underlying allegation that the Israeli attacks commencing on 27 December 2008 were intrinsically criminal because of their incapacity to maintain the distinction between military and civilian targets, a contention that Israeli political and military leaders challenge”.

167 Dugard report, *supra* note 129, at 27.

On a practical level, they [crimes against humanity] now largely overlap with gross and systematic violations of international human rights. This gives the evolving law of crimes against humanity considerable potential in the oPts and avoids much of the debate about the application of the law of armed conflict.<sup>168</sup>

William Bourdon's arguments point in a similar direction:

The systematic attacks on Palestinian civilians are sometimes so massive and widespread (claiming hundreds of lives and injuring thousands) that they may fairly be considered to be conducted pursuant to an express political objective, aiming to kill civilians and terrorize the whole of the Palestinian population. The widespread nature of the attacks on Palestinian civilians is particularly apparent if also we consider "indirect" victims, not directly affected by the attacks themselves.<sup>169</sup>

The following discussion will focus on three specific cases of crimes against humanity: population transfer, persecution and apartheid.

### ***Population Transfer as a Crime Against Humanity***

As previously discussed, BADIL has clarified Israel's policy of population transfer by way of expulsions and deportations, policies on settlement implantation, discriminatory land laws and other policies employed by Israel and parastatal agencies that have resulted in a systematic and gross discriminatory deprivation of fundamental rights of Palestinians, to such an extent as to be characterized as crime against humanity. A criminal case could thus be built around Israel's longstanding policy of population transfer within Israel and in the OPT, involving displacement of Palestinians and implanting of settlers, as a widespread attack upon the Palestinian people. It is therefore feasible that a number of Israeli officials might be liable for committing a crime against humanity when they order, plan, implement or

---

168 Wilhelm A Schabas, "Relevant Lessons from the Ad-Hoc Tribunals", *Palestine Yearbook of International Law*, 2002/2003.

169 William Bourdon, "Jurisdiction of the International Criminal Court over Human Rights Violations Committed by Israeli Forces in the Occupied Territories after July 1, 2002", *Palestine Yearbook of International Law*, 2002/2003. Professor Christine Chinkin, London School of Economics, referred to the same category of crimes when describing the collective punishment measures in Gaza in 2008: "I would certainly say that the concept of collective punishment in a situation of occupation constitutes the notion of war crimes and possibly of a crime against humanity," *Daily News*, Egypt, 30 May 2008.

otherwise contribute to the displacement of Palestinians on both sides of the Green Line.

### ***Persecution as a Crime Against Humanity***

Persecution entails an intentional and severe deprivation of fundamental rights on discriminatory grounds. Though lacking a specific definition, the ICTY has shed some light on the meaning of the crime of persecution. The Trial Chamber in *Prosecutor v. Krnojelac* defined the crime of persecution as consisting of an act or omission which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).<sup>170</sup>

In *Tadic*, the ICTY noted that:

The Crime of persecution encompasses a variety of acts, including, inter alia, those of physical, economic or judicial nature that violates an individual's right to the equal enjoyment of his basic rights.<sup>171</sup>

*Kupreskic* made clear that,

Persecution is usually used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context.<sup>172</sup>

In order to amount to a crime against humanity, the acts involved in the persecution must be equal in gravity to the other acts listed as crimes against humanity in the ICTY statute<sup>173</sup> (e.g. murder, deportation, imprisonment).

The Rome Statute confirms customary international law when stating that persecution against the group on some of the grounds that are “universally

---

<sup>170</sup> *Prosecutor v. Krnojelac* (Trial Chamber Judgment), Case No IT-97-25-T of 15 March 2002, para. 431.

<sup>171</sup> *Prosecutor v. Tadic*, ICTY, Trial Chamber, case No. IT-94-I-T of 7 May 1997, at 710.

<sup>172</sup> *Prosecutor v. Kupreskic et al.*, case No.IT-95-16-T, Judgement of 14 January 2000, para. 615.

<sup>173</sup> *Ibid.*, at para. 619.

recognized as impermissible under international law” might constitute a crime against humanity.

In light of the many examples of discriminatory policies implemented against the Palestinians and the severity of the ensuing deprivation of fundamental rights, there exists abundant evidence of the crime of persecution.<sup>174</sup> If the acts of persecution can be shown to be part of a widespread or systematic attack, and the intention to discriminate can be proven, then this persecution of the Palestinian people may amount to a crime against humanity. In relation to Gaza 2008-9, the Goldstone Mission was of the opinion that:

some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed.<sup>175</sup>

Policies of settlement construction could potentially violate the prohibition against persecution or fall within the broad category of “other inhumane acts of a similar character intentionally causing great suffering” in Article 7(1)(k) of the Rome Statute. One can also argue that as a matter of customary law, extensive settler implantation could potentially be considered a crime against humanity.<sup>176</sup>

## *Apartheid*

Lawyers could also consider prosecuting Israeli individuals for the crime of apartheid.<sup>177</sup> Apartheid is a serious form of racial discrimination<sup>178</sup> codified in the Convention on the Suppression and Punishment of the Crime of Apartheid

---

174 See the many examples of serious discrimination examined in the HSRC Report, *supra* n. 15.

175 Goldstone report, *Supra* n.1 at 1335.

176 See, for example, Draft Code on Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on its Forty-third Session, U.N. GAOR, 46th session Supp. No. 10, at 268, U.N. Doc. A/46/10 (1991): “a crime of this nature [population transfer] could be committed not only in time of armed conflict but also in time of peace.... Transfers of population under the draft article meant transfers intended, for instance, to alter a territory’s demographic composition for political, racial, religious or other reasons, or transfers made in an attempt to uproot a people from their ancestral lands. One member of the Commission was of the view that this crime could also come under the heading of genocide. The ILC commentary further observes that “establishing settlers in an occupied territory constitutes a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide.” See reference in Zayas, “Ethnic Cleansing 1945 and Today: Observations on its illegality and Implications”, available at [www.alfreddezayas.com](http://www.alfreddezayas.com)

177 See for more detail forthcoming working paper to be published by BADIL.

178 See Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination: “States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”

(Apartheid Convention)<sup>179</sup> and listed as a crime against humanity in the Rome Statute.<sup>180</sup> As Israel is not a state party to these treaties and considering the unlikelihood of the ICC exercising jurisdiction over this crime without Israel's consent, a criminal case would have to be based on customary law and, hence, would require proof that apartheid has become criminalized as a matter of customary international law. The inclusion of the crime as a grave breach in the Additional Protocol I of 1977<sup>181</sup> and the Rome Statute, combined with their large number of state parties, suggests that this is the case.

The Apartheid Convention defines the elements of the crime of apartheid:

[S]imilar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person [by various acts];
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups [ ];
- d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof.<sup>182</sup>

Many of the Israeli policies discussed previously, which are clearly implemented to maintain Israeli domination over the Palestinian people, would fall within

---

179 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. II, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, *entered into force* July 18, 1976.

180 Art.7.1(j) Rome Statute

181 Art.85(4)(c) Add. Protocol I 1977

182 Article 2 Apartheid Convention. See also definition included in the Rome Statute of the International Criminal Court, art. 7.

the above definition, including the policy of population transfer and land confiscation.<sup>183</sup> As concluded by the HSRC report, in relation to the OPT, Israel continues to violate the prohibition against apartheid. Other scholars<sup>184</sup> have reached the same conclusion with regard to the situation inside Israel, including Karine MacAllister:

Fundamental laws, policies and practices of the Israeli government aim to establish and maintain Zionist Jewish Israeli domination over Palestinian nationals through the colonization of their lands and resources. These laws, policies and practices affect all Palestinian nationals, irrespective of their location and status since at least the Nakba of 1948. Hence, the crime of apartheid is applicable to Israel over all of Israel and the OPT.<sup>185</sup>

Various UN Human Rights Treaty Bodies have also examined the discriminatory aspects of Israel's treatment of the Palestinian people on the basis of international human rights standards, including with reference to Article 3 of CERD.<sup>186</sup>

---

183 See HSRC report, *supra* note 15. See also the A/HRC/4/17 Report by the UN Special Rapporteur, Professor John Dugard: "Apartheid was enforced by a brutal security apparatus in which torture played a significant role. Although the two regimes are different, Israel's laws and practices in the OPT certainly resemble aspects of apartheid [ ] and probably fall within the scope of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid".

184 See John Quigley, "Apartheid Outside Africa: The Case of Israel", 2 *Ind. Int'l & Comp. L. Rev.* 221(1991-1992) and Uri Davis, *supra* note 11.

185 BADIL al-Majdal, Summer 2008 issue, "Applicability of the Crime of Apartheid to Israel".

186 See, for example, Concluding Observations of the UN Committee on the Elimination of Racial Discrimination, 14 June 2007, CERD/C/ISR/CO/13. See also Concluding Observations of the Human Rights Committee of 29 July 2010 (advance unedited version CCPR/C/ISR/CO/3 and BADIL's submissions in this regard (footnote 121) available at [www.badil.org](http://www.badil.org)

### 3. Genocide<sup>187</sup>

*“We are the Jewish people, we came to this land by a miracle, God brought us back to this land and now we need to fight to expel the gentiles who are interfering with our conquest of this holy land.”<sup>188</sup>*

#### 3.1. Elements of the Crime of Genocide

Genocide is considered the most abhorrent international crime – the crime of crimes<sup>189</sup> - committed against a national, ethnic, racial or religious group. With the Convention on the Prevention and Punishment of the Crime of Genocide<sup>190</sup>, genocide became criminalized as a specific category of crime - as a matter of treaty law and subsequently also as a matter of customary law. The essence of the crime has remained unchanged, the intention behind its codification being the protection of certain groups against five prohibited offenses committed with a very specific intent. Cassese has noted that:

Genocide is a typical crime based on the ‘depersonalization of the victim’; that is a crime where the victim is not targeted on account of his or her individual qualities or characteristics, but only because he or she is a member of a group.<sup>191</sup>

---

187 Literature on Genocide includes W. Schabas, *Genocide in International Law: The Crime of Crimes* (CUP, 2<sup>nd</sup> ed.2009, and e.g., Nina H. B. Jorgensen, “The Definition of Genocide: Joining the Dots in the Light of Recent Practice”, 1 Int’l Crim. L. Rev 285 2001, Peter Quayle, “Unimaginable Evil: The Legislative Limitations of the Genocide Convention”, 5 Int’l Crim. L. Rev 363 2005, Helmut Kreicker, “National Prosecution of Genocide from a Comparative Perspective”, 5 Int’l Crim. L. Rev 313 2005, Jan Wouters and Sten Verhoeven, “The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide”, 5 Int’l Crim. L. Rev 401 2005; Schabas, “National Court Finally Begin to Prosecute Genocide – the Crime of Crimes”, J Int of Criminal Justice, Vol 1, issue 1, April 2003, 39; Payam Akhavan, “Crime of Genocide in the ICTR Jurisprudence”, 3 J. Int’l Crim. Just. 989 (2005) (hereinafter Akhavan).

188 The Yitzhak Rabin academy, the IDF’s chief rabbi, Brigadier General Avichai Rontzki, distributed booklets to soldiers containing this message (*The Independent*, 21 March 2009, Donald Macintyre, “Israelis told to fight holy war in Gaza”).

189 *Kambanda* (ICTR 97-23-S), Trial Chamber I, 4 September 1998.

190 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, (hereinafter the Genocide Convention). The Convention has been in force since 12 January 1951 with Israel as a state party from the beginning. Jordan, Egypt and Lebanon are among the 133 state parties to the convention.

191 Cassese, *supra* n. 22, at 137.

Article 2 of the Genocide Convention stipulates:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

The crime of population transfer is not mentioned among these five categories of acts,<sup>192</sup> but actions taken in the course of implementing such a policy may, however, amount to one or several of the underlying offenses.<sup>193</sup> The destructive potential entailed in population transfer could also be seen as evidence of the special genocidal intention. The five acts of genocide are further explained in ICC’s Elements of Crimes<sup>194</sup> that noted about the first three acts:

The term “killed” is interchangeable with the term “caused death”.

This conduct [in Article 2(b)] may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.

The term “conditions of life” [in Article 2(c)] may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

---

192 Syria made a proposal to include ethnic cleansing as a specific offense during the drafting process, but it was not adopted, see A/C.6/234 of 15 October 1948. See also ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, 26 February 2007 (hereafter *Genocide Case*), at 190.

193 *Ib.*, at 190: “It [ethnic cleansing] can only be a form of genocide within the meaning of the Convention, if it corresponds to or fall within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can as *such* be designated as genocide; the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of a group even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.”

194 ICC-ASP/1/3 (part II-). See also Schabas, *supra* note 61, at 98.

Specifically with regard to the acts mentioned in Article 2 (2) (c) of the Statute of the ICTR (which replicates Art 2(c) of the Genocide Convention), the ICTR noted in the judgment of *Akayesu* that:

For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.<sup>195</sup>

There has been a debate whether the intent to destroy a group's cultural assets would constitute genocide. Schabas has explained that:

During the debates surrounding the adoption of the Genocide Convention, the forms of destruction were grouped into three categories: physical, biological and cultural. Cultural genocide was the most troublesome of the three, because it could well be interpreted in such a way as to include the suppression of national languages and similar measures. The drafters of the Convention considered that such matters were better left to human rights declarations on the rights of minorities and they actually voted to exclude cultural genocide from the scope of the definition. However, it can be argued that a contemporary interpreter of the definition of genocide should not be bound by the intent of the drafters back in 1948. The words "to destroy" can readily bear the concept of cultural as well as physical and biological genocide, and bold judges might be tempted to adopt such progressive construction.<sup>196</sup>

The threshold for the specific intent to destroy a group is thus high in customary international law and limited to the intention to destroy a group by physical or biological means.<sup>197</sup> According to Schabas, however, some decisions suggest that

---

<sup>195</sup> *Akayesu*, ICTR, TC I, 2 September 1998, case no ICTR-96-4-T, at 506.

<sup>196</sup> Schabas, *supra* note 61 at 94.

<sup>197</sup> The relevant case law was analysed by the European Court of Human Rights in *Jorgic v. Germany* judgement of 12 July 2007 (application no 74613/01).

the law may be evolving in a direction of including cultural genocide.<sup>198</sup>

In addition to the commission of genocide (Article 2), the Genocide Convention also criminalizes conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide (Article 3). Thus, planning a genocide would be considered a serious international crime even if the plan were not carried out. Finally, genocide and the acts mentioned in Article 3 are criminalized whether they are committed by “constitutionally responsible rulers, public officials or private individuals” (Article 4). Thus, only individuals can be prosecuted for genocide, but states can be held responsible for the commission of genocide, as the ICJ concluded in the Bosnia Genocide case<sup>199</sup>, or for failing to prevent or punish the crime.

### ***Mens Rea***

The core of genocide then is the requirement that the specific acts are committed with a special intent (*dolus specialis*) or an aggravated criminal intention “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, as stated in the Genocide Convention. This intent to destroy the group distinguishes genocide from the crime against humanity of persecution. The ICTR explained in *Akayesu*:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.<sup>200</sup>

---

198 Reference correctly being made to the Federal Constitutional Court of Germany of 12 December 2000 in *Jorgic* stating that: “[T]he statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group ... the intent to destroy the group ... extends beyond physical and biological extermination ... The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of the members of the group.” Schabas also refers to *Krstic*. One can also note that the Israeli definition of genocide does include destroying or desecrating Jewish religious or cultural assets or values (Nazi and Nazi Collaborators (Punishment) Law, Laws of the State of Israel 4, 154.

199 The application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ 26 February 2007 (Bosnia and Herzegovina v. Serbia and Montenegro).

200 *Akayesu*, *Supra* n.195, at para.498.

In *Krstic*, the Trial Chamber of ICTY explained the limits of *dolus specialis*:

The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.<sup>201</sup>

The special intent may be deduced from various circumstances and indicators, including the general context, statements of the accused and his/her behavior.<sup>202</sup> Evidence of violence and other attacks on the group that do not fall within the scope of the narrow definition might, therefore be taken as “an important indicator of the intent to perpetrate physical genocide”<sup>203</sup>, as also explained above in the *Krstic* decision. The existence of a plan or policy is also very significant in proving the requisite intent.<sup>204</sup>

---

201 Decision of 2 August 2001, *Prosecutor v. Krstic*, IT-98-33-T, at 580. Appeal judgment of 19 April 2004 IT-98-33-A, Appeals Chamber, at 25. The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. ... The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. ... See also ICJ Bosnia genocide case, *supra* note 192, at 190.

202 See for instance explanation in *Akayesu*, *supra* n. 195, at 728: “As stated in its findings on the law applicable to the crime of genocide, the Chamber holds the view that the intent underlying an act can be inferred from a number of facts [ ] The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, *inter alia*, from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators.” In *Jelusic*, the Appeals Chamber decided that specific intent can be inferred from “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”, *Prosecutor v. Jelusic*, IT-95-10-A, judgement of 5 July 2001, at 47.

203 Schabas, *supra* note 61, at 94.

204 See ICTR judgements *Kayishema and Ruzindana*, case No. ICTR-95-1-T, of 21 May 1999, para 276.

## *Israel's Policies*

When examining whether Article 2 of the Genocide Convention might apply to some of Israel's policies, it should first be noted that to argue that the Palestinian people constitute a group protected by the Convention would hardly be problematic. Credible evidence of intentional killing, torture and/or inhuman and degrading treatment could also be provided. There is also substantial evidence documenting the commission of the underlying acts in the context of the 1948 ethnic cleansing.

However, the main legal hurdle would lie in establishing the further subjective element (*mens rea*) of the crime of genocide, i.e., that Israeli authorities or others acted, not only with an intent to kill, etc, but with an "intent to destroy, in whole or in part" the Palestinian people. Evidentially establishing such intent is difficult since it is a very high threshold of proof and is ultimately an issue to be addressed by national or international judges or investigators.<sup>205</sup> One could point at Israel's longstanding and widespread practices of population transfer and dispossession, as well as the massive scale of these and other human rights abuses, and ask whether these facts imply a motivation to remove the Palestinian people from certain areas or to destroy the group. Evidentially, ICL does not require that the Palestinian group or a substantial part of it was indeed destroyed, but solely that the perpetrators had the intention that such destruction would occur as a result of their acts.<sup>206</sup>

---

205 See also Francis A. Boyle, *Palestine, Palestinians & International Law*, (Clarity press inc.2003) at 159: "Certainly, Palestine has a valid claim that Israel and its predecessors-in-law – numerous Zionist agencies, forces, and terrorist gangs – have committed genocide against the Palestinian people that actively started on or about 1948 and has continued apace until today". The General Assembly labeled the massacre in Sabra and Shatila as genocide, see Res 37/123D of 16 December 1982. The crime of genocide was one of the charges in the Belgium case against Sharon and others. See also Linda Malone, "Sharon vs Time: The Criminal Responsibility Under International Law for Civilian Massacres", *Pal. Y. Int'l L.*, 3 (1986), 41 and Linda Malone, "Kahen Report, Ariel Sharon and the Sabra-Shatilla Massacre in Lebanon: Responsibility under International Law for Massacres of Civilian Populations" 1985 *Utah L. Rev.* 373 (1985). See also Gay Beckerman, *Top Genocide Scholars Battle Over How to Characterize Israel's Actions*, available at <http://forward.com>

206 Cassese, note 22, at 66. Schabas, *supra* note 61, at 95: "There is much confusion about this, because it is often thought that there is some precise numerical threshold of real victims before genocide can take place. But the reference to quantity is in the description of the mental element of the crime, and what is important is not the actual number of victims, rather than the perpetrator intended to destroy a large number of members of the group. Where the number of victims becomes genuinely significant is in the proof of such a genocidal intent. The greater the number of real victims, the more logical the conclusion that the intent was to destroy the group "in whole or in part."". See also Payam Akhavan, "Contributions of the International Criminal Tribunals for the former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide", 94 *Am.Soc'y Int'l L. Proc.*, (April 2000), 279-282.

## *Israeli Military Operation in Gaza December 2008-January 2009*

The applicability of the crime of genocide was explored, in the context of Gaza, by the Independent Fact Finding Committee on Gaza (established by the League of Arab States). They considered, in 2009, whether genocide was committed during the Israeli military *Operation Cast Lead*. The Committee concluded with regard to Israel's responsibility that:

Israel's actions met the requirement for the *actus reus* of the crime of genocide contained in the Genocide Convention, in that the IDF was responsible for killing, exterminating and causing serious bodily harm to members of a group [the Palestinians of Gaza]. However, the Committee had difficulty in determining whether the acts in question had been committed with a special intent to destroy in whole or in part a national, ethnical or religious group, as required by the Genocide Convention. However, it found the main reason for the operation was not to destroy a group, as required for the crime of genocide, but to engage in a vicious exercise of collective punishment designed either to compel the population to reject Hamas as the governing authority of Gaza or to subdue the population into a state of submission.<sup>207</sup>

However, with regard to the liability of individual soldiers, the Committee concluded:

...individual soldiers may well have had such an intent [to destroy the Palestinians of Gaza as a group] and might therefore be prosecuted for this crime. This finding was based on the brutality of some of the killing and reports that some soldiers had acted under the influence of rabbis who had encouraged them to believe that the Holy Land should be cleansed of non-Jews.<sup>208</sup>

If the commission of genocide by individual IDF soldiers is proven, it becomes relevant to examine Israel's civil state responsibility under Article I of the Genocide Convention. Under Article IX of the Genocide Convention, any state party can take Israel to the ICJ, to examine state responsibility

---

207 (DUGARD REPORT), Report of the Independent Fact Finding Committee on Gaza: No Safe Place. 30 April 2009, at 29.

208 *Ib.*, at 30.

which is attributable to the state even if the organ of the state (e.g., the Military) “exceeds its authorization or contravenes instructions”.<sup>209</sup>

These complex legal questions have not yet been tried in a court case. Ultimately, answers to these questions will depend upon a number of factors and the availability of credible factual evidence from which the special intent may be deduced.

### **III: Enforcement of International Criminal Law**

Since Nuremberg, the international community has endorsed the moral and legal principle that individuals must be held accountable for the commission of serious international crimes and that there should be no impunity. Israel has accepted this core principle, as expressed in the Eichmann case.

However, enforcement of international law against powerful states always presents a big challenge for victims of human rights abuses because perpetrators from such states will rarely stand trial due to the political power of the state and its allies. A lack of effective enforcement mechanisms is an inherent weakness in the ICL system, as investigation and prosecution are often dependent upon political will.

Despite such obstacles, this section will outline the various judicial and non-judicial means available, at least in theory, to address international crimes and bring remedies and justice to the victims. It will firstly examine state party treaty obligations, obligations of the EU and UN bodies to ensure accountability. The judicial mechanisms, at the international level – the ICC and ICJ and the possibility of an ad hoc tribunal– will be explored and finally the criminal investigations that national judges have attempted to initiate against Israeli officials, on the basis of Universal Jurisdiction. As discussed below, the international community is under a legal obligation to promote accountability.

There is also an important role for civil society to play in advocating these enforcement mechanisms and in raising awareness of the lack of trials and accountability for Israeli perpetrators as recently exemplified by the establishment of the Russell Tribunal.

# 1. International Obligations and Mechanisms

## 1.1. Third Party Obligations

### *State Party Treaty Obligations*

It is written in the preamble to the Rome Statute that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Due to the heinous nature of international crimes, involving violations of customary norms, and being of concern for all states, obligations arise for states, not a party to the conflict, to act to ensure that impunity does not prevail for the perpetrator(s). These obligations are found in treaties and also within international customary law.

Under GCIV, the 194 state parties are under a clear legal obligation to “respect and to ensure respect for the present Convention in all circumstances” (Article 1) which encompasses an obligation collectively to ensure that serious violations of the Convention be investigated and prosecuted. The state parties re-convened a conference in December 2001<sup>210</sup>(boycotted by the US, Israel and Australia) reaffirming the illegality of the Israeli settlements and concluding that Israel should refrain “from committing grave breaches” of the Fourth Convention.<sup>211</sup> The state parties “underline[d] the need for the Parties, to follow up on the implementation of the present Declaration”. Following the recommendation of the Goldstone Report,<sup>212</sup> the General Assembly adopted a resolution recommending that,

“the Government of Switzerland, in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, undertake as soon as possible the steps necessary to reconvene a Conference of High Contracting Parties to the Fourth Geneva Convention on measures to *enforce* the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to *ensure its respect* in accordance with common article 1”<sup>213</sup>

---

210 The first conference was held in July 1999 as recommended by the General Assembly in resolution ES-10/6.

211 Declaration from the Conference of the High Contracting Parties to the Fourth Geneva Convention, December, 5 2001.

212 Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, para.1768(c)

213 UN General Assembly Resolution. Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza,U.N. Doc. A/Res/64/10, 5 November 2009 para 5.

The recommendation was subsequently endorsed by the Human Rights Council.<sup>214</sup> Since the Independent Committee of experts, appointed to monitor Israel's domestic investigations of allegations in the Goldstone Report, produced their second report<sup>215</sup> concluding that Israel's investigations were inadequate, the Human Rights Council passed a further resolution<sup>216</sup> recommending that the General Assembly reconsider Goldstone report at its 66<sup>th</sup> session.<sup>217</sup> The resolution also called upon all parties to implement the recommendations in the Goldstone report and recommended that the government of Switzerland convene a conference for the high contracting parties to the Geneva Conventions before September 2011.

Alongside this collective obligation, Article 146 GCIV obliges the state parties

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 and

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.

Thus, an obligation to exercise universal jurisdiction in their own courts. Alternatively the state party may extradite such persons.

Similarly, in the case of torture, state parties are obliged to enact legislation to prevent and punish torture committed on their territory<sup>218</sup> and to exercise universal jurisdiction to prosecute or extradite if the perpetrator is present on their territory.<sup>219</sup>

Under the Apartheid Convention<sup>220</sup> state parties may prosecute non-nationals for a crime committed in the territory of a non-State party where the accused is physically within the jurisdiction of a State party<sup>221</sup> and are obliged to:

---

214 UN Human Rights Council Resolution A/HRC/13/L.30, 22 March 2010, para. 7.

215 Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9 – A/HRC/16/24, 18<sup>th</sup> March 2011.

216 A/HRC/RES/16/32, 16<sup>th</sup> April 2011 (N.B. passed at a meeting of HRC on 25<sup>th</sup> March 2011).

217 Opening on 13<sup>th</sup> September 2011.

218 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA resolution 39/46 of 10 December 1984, entry into force 26 June 1987, Art.2.1.

219 *Ib.* Art.5.2 and Art. 7.

220 International Convention for the Suppression and Punishment of the Crime of Apartheid G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S.243, entered into force July 18, 1976.

221 *Ib.* Art.V.

bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.<sup>222</sup>

State parties to the Genocide Convention are obliged to prosecute genocide in their national courts if the genocide was committed on their territory.<sup>223</sup> While Article VI of the Genocide Convention does not provide specifically for universal jurisdiction, Raphael Lemkin, who coined the term “genocide” intended its application.<sup>224</sup> The judgement of the *Genocide Case* confirms that universal jurisdiction is available for national prosecution of genocide, though it is not obligatory.<sup>225</sup>

While ICL imposes criminal liability upon *individuals*, it contains no rules regulating criminal liability for states.<sup>226</sup> In the context of international crimes committed by state officials or others somehow linked to state policies, states can incur state responsibility for serious breaches of peremptory norms under the international rules set out in Article 40 of the Draft Articles on State Responsibility.<sup>227</sup> Such state responsibility is civil in nature and the commentaries attached to the Draft Articles include genocide, discrimination, apartheid, torture and the obligation to respect self-determination among the serious crimes, the prohibition on which is of a *jus cogens* nature. In theory then any state in the world can invoke Israel’s responsibility in relation to international crimes committed against Palestinians. All states are obliged, under Article 41 of the Draft Articles, to use lawful means to bring an end to serious breaches of Article 40.<sup>228</sup> States are also under an obligation not to recognize the illegal situation, nor to render aid

---

222 *Ib.* Art. IV(b).

223 Convention on the Prevention and Punishment of the Crime of Genocide 9<sup>th</sup> December 1948 , Art.VI.

224 Lemkin, R, *Axis Rule in Occupied Europe*, p.93-94.

225 *ICJ Genocide Case, Supra* n.192 at 449.

226 HSRC report, *supra* note 15, at 279 Such a concept was proposed by the International Law Commission in 1976 but was excluded from the 2001Draft Articles due to State opposition – examples of State crimes given included apartheid and colonial domination.

227 See Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in August 2001(Draft Articles on State Responsibility)approved by the General Assembly in resolution 56/83 of 12 Dec 2001). The General Assembly commended them again in resolution 59/35 of 16 December 2004. In relation to Israel’s State Responsibility vis Palestinian refugees, see Lena El-Malak, “Israel State Responsibility vis-à-vis Palestinian refugees” presented at the Damascus International Symposium “A Just Solution for Palestinian Refugees?”, September 2004.

228 Article 40 (2) stipulates that “a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation”. See also Cherif Bassiouni, “International Crimes: “Jus Cogens” and Obligations Erga Omnes”, Law and Contemporary Problems, Vol. 59, No. 4

nor assistance in maintaining that situation. In the ICJ advisory opinion on the wall,<sup>229</sup> the court said:

The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.<sup>230</sup>

It went on to elaborate on the obligations on states invoked by Israel's violations:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States...to see to it that any impediment, resulting from the construction of the wall, to the exercise of the Palestinian people of its right to self-determination is brought to an end.<sup>231</sup>

Some cases have been initiated on the basis of these obligations arising for other states.<sup>232</sup> One case, initiated by Al-Haq, began in February 2009 when a claim concerning the UK's obligations in respect to Israel's policies in the OPT was submitted to the High Court of England and Wales.<sup>233</sup> Al-Haq's main argument was that the UK had certain legal obligations under customary international law arising from Israel's violations of various preemptory legal norms since the launch of Operation Cast Lead, including the right to self-determination and the prohibition against acquisition of territory, and that the UK had failed to meet its obligations. Al-Haq claimed that the court had the competence to review the government's failure and to order the government to, *inter alia*, suspend all UK

---

229 ICJ's *Advisory Opinion on the Wall*, *Supra n.* 138.

230 *Ib.*, at 155.

231 *Ib.*, at 159.

232 See *Salah Hasan v. Secretary of State for Trade and Industry* Case no. CO/9605/2006 decided by the High Court of Justice Queen's Bench Division Administrative Court on 19 November 2007 and on appeal (Case no. C1/2008/0030) by the Supreme Court of Judicature Court of Appeal (Civil Division) 25 November 2008. Judgements are available at [www.haguejusticeportal.net](http://www.haguejusticeportal.net). See further Al-Haq's website: [www.alhaq.org](http://www.alhaq.org)

233 The High Court of Justice, Divisional Court, Case no: C0/1739/2009, decision of 27 July 2009. At appeal: The Court of Appeal of England and Wales, decision of 25 February 2010, see further Al-Haq's press release 8 March 2010. See also John Reynolds, *Seeking to Uphold Third State Responsibility: The Case of Al-Haq v. UK, Al-Majdal - Litigating Palestine -* (Spring-Summer 2009).

government financial or ministerial assistance directly given to UK companies exporting military technology or goods to Israel; to request that the EU suspend the EU-Israel Association Agreement and to call a Conference of the Parties to be convened to address Israel's grave breaches of the Fourth Geneva Convention. On the issue of justiciability of the matter, Justice Pill and Justice Cranston strongly disagreed with the plaintiffs. At appeal level, the Court of Appeal of England and Wales also rejected the claims and confirmed that the matter was non-justiciable.<sup>234</sup>

### ***Obligations of the European Union (EU) and its member states***

Alongside the obligations of member states of the EU, contained in treaties and customary international law, to respond to violations of peremptory norms by Israel, the EU itself has certain obligations. The Council of the European Union has adopted European Union Guidelines on promoting compliance with international humanitarian law<sup>235</sup> stipulating that a key objective of the European Union (EU) is to promote compliance with international humanitarian law. The guidelines stipulate that the EU has several means of action at its disposal in its relations with third countries, with a view to promoting compliance including political dialogue, general public statements and the granting of licenses for the export of arms. The Council has also set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.<sup>236</sup> Additionally, the Council has adopted an important decision in relation to investigation and prosecution of genocide, crimes against humanity and war crimes with the objective of “increasing cooperation between national units in order to maximize the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of persons who have committed” those crimes falling within the mandate of the ICC.<sup>237</sup> As a result of this, many European countries have established specialized units to investigate international crimes which have been instrumental in most universal jurisdiction cases.<sup>238</sup> Specifically in relation to Israel's treatment of the Palestinian

---

234 Decision of 25 February 2010, see al-Haq's press release 8 March 2010. See also in France, AFPS has brought to the administrative tribunal of Paris a claim against the State regarding the participation of French companies in the construction and operation of the light railway in West bank.

235 Official Journal C 327 of 23.12.2005.

236 Council Decision 2002/494/JHA of 13 June 2002.

237 Council Decision 2003/335/JHA of 8 May 2003.

238 FIDH: *Fostering a European Approach to Accountability for Genocide, Crimes against Humanity, War Crimes and Torture*, 2007. Human Rights Watch 2006 Report.

people, one should note that the European Parliament endorsed the Goldstone report<sup>239</sup> and recommended a strong EU common position on the follow-up to the report that would ensure accountability for all violations of international law.

However, despite these expressed intentions, the Russell Tribunal on Palestine, in considering whether the relations between the EU and its member states and Israel constituted wrongful acts under international law, concluded that,

While the European Union and its member states are not the direct perpetrators of these acts [international crimes committed by Israel] they nevertheless violate international law, either by failing to take the measures that Israel's conduct requires them to take, or by contributing directly or indirectly to such conduct. Moreover, the European Union and its member states do not comply with the relevant provisions of its own constitution, which confirms the attachment of the European Union to fundamental rights and freedoms, states its willingness to uphold and promote the respect of international Law and take appropriate initiatives to that end.<sup>240</sup>

Under the Euro-Mediterranean Association Agreement<sup>241</sup>, Israel engages in a huge amount of trade with the EU, an arrangement of great economic significance to both parties. Art. 2 of the Agreement states that:

Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.

Israel has been in breach of this clause since the agreement was signed in 1995. On 10 April 2002, the EU Parliament voted to suspend the EU-Israel Association Agreement on the grounds of Israeli violations of human rights; however, the Commission refused to comply with the democratic mandate. Instead, on 16<sup>th</sup> June 2008, the EU upgraded its relations with Israel, in the context of the agreement, strengthening its ties in the economic, trade, academic, security and diplomatic fields.

---

239 European Parliament resolution of 10 March 2010 on implementation of the Goldstone recommendations on Israel/Palestine.

240 Conclusions of the First International Session of the Russell Tribunal on Palestine, Barcelona 1-3 March 2010, para.20, referring to the European Union Lisbon Treaty, preamble, Art. 2, 3,17, 21

241 Euro-Mediterranean Association Agreement of 20<sup>th</sup> November 1995 (OJEC 147/1 of 21 June 2000)

The European Union and its member states have assisted Israel in its violations of international law in several ways, including the following:

- Exporting weapons to Israel, some of which were used during the Gaza onslaught.
- Importing produce from illegal settlements in the OPT.
- Allowing settlement participation in European research programmes.
- Tolerating commercial projects between European companies and Israel in the OPT (e.g. Veolia's management of the Tovlan landfill site in the Jordan valley and construction of the tramline in East Jerusalem).
- Failure to demand Israeli compliance with human rights clauses in association agreements.<sup>242</sup>

In order to constitute internationally wrongful acts, according to the International Law Commission draft Articles on State Responsibility<sup>243</sup>

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

It is impossible that the EU and its member states are unaware of violations of international law by Israel, since member states have regularly voted for UN resolutions condemning Israel's human rights violations, collective punishment and construction of settlements and the Wall. Therefore the Russell Tribunal concluded that the acts in question do indeed amount to wrongful assistance to Israel.<sup>244</sup> The tribunal called on the EU and its member states to impose diplomatic, trade and cultural sanctions on Israel in order to end the impunity with which it acts towards the Palestinian people.<sup>245</sup>

---

242 Conclusions of the First International Session of the Russell Tribunal on Palestine, Barcelona 1-3 March 2010, para. 28.

243 See Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in August 2001 (Draft Articles on State Responsibility) approved by the General Assembly in resolution 56/83 of 12 Dec 2001), Article 16.

244 Russell Tribunal, *Supra n.242*, para. 33.

245 *Ibid*, para. 34.

## *UN Obligations*

In the 2004 Wall Advisory Opinion<sup>246</sup>, the ICJ confirmed that the UN has responsibility for Palestine which dates back to the period of the British Mandate for Palestine which was entrusted to the United Kingdom by the League of Nations in 1922. When the United Kingdom withdrew, and the Partition Resolution was adopted, it envisaged UN responsibility over the administration of Palestine until independent Arab and Jewish States were established. The Court referred to the General Assembly's description of this responsibility as,

a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy.<sup>247</sup>

Israel's initial establishment was based on the 1947 UN Partition Plan, the terms of which it has violated by taking much more land than was allocated to it. Additionally, as with any other country, Israel's UN membership is conditioned upon its observance of the UN Charter. Israel has violated more Security Council resolutions than any other state. The UN Charter provides a strong legal basis for collective action through the Security Council. Israel has not stopped building settlements in the OPT, it does not abide by the Fourth Geneva Convention and has completely disregarded the 2004 advisory opinion of the ICJ on the wall. Since 2001, the United States has used its veto power in the permanent 5 to block many actions by the Security Council, including appointing a UN observer force, calling on Israel not to extend the wall and calling for an end to military activities in Gaza.<sup>248</sup> If it were not for the expected veto by the US, the international community would be able to pressurize Israel to abide by international law by considering economic sanctions or UN suspension under Art.6 of the UN Charter.<sup>249</sup>

However, the General Assembly's "Uniting for Peace" resolution allows the General Assembly to take action to maintain international peace and security in the event that the Security Council fails to act because of lack of unanimity between the five permanent members.<sup>250</sup>

---

246 ICJ's Advisory Opinion on the Wall, *Supra note*, 139.

247 GA Res. 57/107 of 3 December 2002.

248 Steiner, Alston, Goodman, *International Human Rights in Context, Law Politics Morals*, (OUP 3<sup>rd</sup> ed. 2008).

249 In 2007, a UN Special Committee - UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs in Occupied Territories - recommended to the General Assembly that it urge the Security Council to consider sanctions against Israel if it persists in paying no attention to its international legal obligations.

250 GA Resn.377(V), 3 November 1950.

A further framework emphasizing the obligations of states to act through the UN is the “Responsibility to Protect”(R2P) adopted by the Head of States and Governments at the 2005 World Summit and followed up by action of the Secretary General and the General Assembly. R2P confirms existing legal obligations to protect people from genocide, ethnic cleansing, war crimes and crimes against humanity. As the conclusion of the 2005 World Summit Outcome reminds us:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>251</sup>

This general responsibility is also confirmed by the obligation to “to take effective action to combat impunity”, as stated in the Updated Set of Principles for the Protection and Promotion of human rights through action to combat impunity.”<sup>252</sup> Thus, the “obligation to combat impunity” can be fulfilled in various ways and inaction is incompatible with member states’ commitment under the UN Charter. It is posited that the UN Guidelines describe clearly the situation of the Palestinian people in that impunity involves:

[T]he impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.<sup>253</sup>

The Secretary General of the UN, the Security Council, the General Assembly and the Human Rights Council then all have the power to adopt resolutions to

---

251 2005 World Summit Outcome at 139.

252 E/CN.4/2005/102/Add. 1 .

253 UN principles for the protection and promotion of Human Rights through Action to Combat Impunity Definitions

establish investigative fact-finding commissions which would serve as a means to collate evidence for future prosecutions. In 2002, for example, the Security Council requested an investigation into the atrocities in Jenin<sup>254</sup> and, in 2006, a high-level fact-finding mission was appointed by the Human Rights Council to investigate the crimes committed by the Israeli military in Beit Hanoun.<sup>255</sup> As noted above, the most recent Fact-Finding Mission was led by judge Goldstone and mandated to investigate crimes committed during Israel's military operations in Gaza in December 2008-January 2009. The Goldstone report recommended further investigations by the Israeli and Palestinian authorities; the involvement of domestic and international courts; as well as the establishment of a new mechanism by the Security Council to oversee whether Israel and the authorities in Gaza would properly investigate some serious allegations concerning war crimes and crimes against humanity:

The Mission further recommends that the Security Council should at the same time establish [a]n independent committee of experts in international humanitarian and human rights law to monitor and report on any domestic legal or other proceedings undertaken by the Government of Israel in relation to the aforesaid investigations.<sup>256</sup>

This recommendation was subsequently ignored by the General Assembly, the Secretary-General and the Security Council<sup>257</sup> and only implemented at the level of the Human Rights Council.<sup>258</sup>

## **1.2. International Judicial Mechanisms**

### *International Court of Justice (ICJ)*

According to Article 96(1) of the UN Charter, the General Assembly or the Security Council may request an advisory opinion from the ICJ on any legal question. In perhaps the most significant legal opinion given thus far on Palestine, the 2004 ICJ *Wall Opinion*<sup>259</sup> was given as a result of a request by the General Assembly.

---

254 UNSC Res 1405, 19 April 2002. See also UN Report August 2002 and Independent "UN issues "seriously flawed" report on Jenin killings", 2 August 2002, by Justin Huggler.

255 Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, A/HRC/9/26, United Nations Human Rights Council, September 1, 2008.

256 Goldstone Report, *supra* n. 1, at 1969.

257 See G.A. Res 64/10 U.N. GAOR 64 Session (5 November 2009) and G.A. Res 64/254 A 64/L48 (23 February 2010).

258 Resolution A/HRC/13/L.30 of 28 March 2010.

259 The ICJ's *Advisory Opinion on the Wall*, *supra* n. 138.

Though legally non-binding, such advisory opinions are respected as carrying much legal weight and moral authority and as contributing to the development of international law. The Court was of the opinion that the right of the Palestinian people to self-determination over the OPT is enshrined in international law<sup>260</sup>, and is in fact *erga omnes*.<sup>261</sup> *Inter alia*, the Court held that the construction of the wall and its associated regime are contrary to international law. It ordered Israel to cease construction, to dismantle parts of the wall situated in the OPT and to make reparation to those whose rights have been violated. The Court made it clear that all states are obliged not to recognize the illegal situation, nor to render aid or assistance. State parties to GCIV are additionally obliged to ensure compliance by Israel with IHL. It was recommended that the General Assembly and Security Council consider what further action can be taken to bring an end to the illegal situation and regime. This case illustrates very well the problem of lack of enforcement measures available and political influence on the implementation of the rule of law. The US opposed the ICJ decision and Israel has completely ignored the ruling. States have continued their cooperation with Israel despite the illegalities of the regime.

In his 2007 report to the Human Rights Council, Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, John Dugard, stated:

The international community, speaking through the United Nations, has identified three regimes as inimical to human rights - colonialism, apartheid and foreign occupation. Numerous resolutions of the General Assembly of the United Nations testify to this. Israel's occupation of the West Bank, Gaza and East Jerusalem contains elements of all three of these regimes, which is what makes the Occupied Palestinian Territory of special concern to the international community.<sup>262</sup>

He went on to pose the question:

But what are the legal consequences when such a regime has acquired some of the characteristics of colonialism and apartheid? Does it continue to be a lawful regime? Or does it cease to be a lawful regime, particularly in respect of “measures aimed at the occupants’ own interests”? And if this is the position, what are the

---

260 *Ibid.*, para. 118. See also: GA Res. 58/163, 22<sup>nd</sup> December 2003.

261 *Ibid.*, para. 88.

262 Report of the Special Rapporteur on the situation of Human Rights in the Palestinian Territories occupied since 1967, John Dugard, 29 January 2007, A/HRC/4/17 at para. 58.

legal consequences for the occupied people, the occupying Power and third States? Should questions of this kind not be addressed to the International Court of Justice for a further advisory opinion?<sup>263</sup>

Despite the non-implementation of the measures ordered by the ICJ then, the option to submit a request for a second advisory opinion to the ICJ remains. Dugard made the point that the UN requested four ICJ advisory opinions during South Africa's occupation of South-West Africa/Namibia.

As mentioned in Chapter II, in relation to the crime of genocide, any other state party to the Genocide Convention, that disputes Israel's "interpretation, application or fulfillment" of the Convention is entitled to bring a case to the ICJ under Article IX. Israel has accepted the ICJ's jurisdiction under the Genocide Convention without any reservations. Since the prohibition on genocide is *erga omnes*, a State party bringing such an action does not need to have a national interest in the dispute.<sup>264</sup> Acts of genocide committed by individual Israelis and the corresponding civil state responsibility of Israel could thus be adjudicated by the ICJ, as in the Bosnia genocide case. However, in order to succeed in a claim against a State, it would have to be proven that a genocidal act has taken place<sup>265</sup>, though a conviction in another tribunal is not necessary as the ICJ is capable of establishing that finding.<sup>266</sup> In the *Genocide Case*, the ICJ endorsed Article 8 of the ILC Draft Articles which provides that,

The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, under the direction or control of, that State or carrying out the conduct.<sup>267</sup>

Responsibility is attributable to the State even if the organ of the State (for example the military) "exceeds its authority or contravenes instructions."<sup>268</sup> If it can be proved that any members of the IDF had the requisite intent for genocide then their actions can be attributed to Israel. Even though State responsibility is a civil wrong, the burden of proof required is higher than the usual "balance of probabilities." The ICJ, in the *Genocide Case*, required "proof at a high level of certainty appropriate to the seriousness of the allegation."<sup>269</sup> Schabas asserts that

---

263 *Ibid*, para. 62.

264 Article 48(2), ILC Draft Articles, 2001.

265 *Genocide Case Supra* n.192, para.180.

266 *Ibid.*, para.181.

267 *Ibid.*,para. 398.

268 Article 7, ILC DraftArticles, 2001.

269 *Genocide Case, Supra* n.192 para. 210.

this level bears a “family resemblance” to the usual level of proof in international criminal law, that of “beyond reasonable doubt.”<sup>270</sup>

### ***International Criminal Court (ICC)***

The preamble to the Rome Statute affirms:

“that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” and by recalling “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>271</sup>

However there are limitations: Firstly, the ICC does not have jurisdiction over crimes committed before 1 July 2002. The Statute enters into force about two months after ratification.<sup>272</sup> However, in the event that Palestine is recognized as a state, it can make a declaration under Art. 12(3) so that the ICC has jurisdiction over crimes committed in Palestine since 1<sup>st</sup> July 2002. Secondly, the ICC’s competence is complementary to national criminal jurisdiction, hence, the ICC will only exercise jurisdiction when a state is unwilling or unable to carry out an investigation or prosecution of the alleged crime – the principle of complementarity.

The ICC has jurisdiction over genocide, crimes against humanity, war crimes and aggression.<sup>273</sup> If a situation is referred to the Prosecutor by a State Party<sup>274</sup> or the Prosecutor initiates an investigation because of information he received<sup>275</sup> the ICC has jurisdiction if the State in which the crime occurred, or the State of which the accused is a national, is a party to the Rome Statute.<sup>276</sup> It is relevant to note here that Israel is not a state party, but many of its citizens and officials hold dual nationality which may make them eligible for prosecution. In the wake of Israel’s attack on the Gaza Freedom Flotilla, lawyers of several Turkish victims presented a dossier to the Prosecutor of the ICC providing evidence that Israel

---

270 Schabas, *Supra* n. 61, 517.

271 Preamble to the Rome Statute of the International Criminal Court.

272 Art.126(2) Rome Statute.

273 Article 5(1) Rome Statute 1998.

274 In accordance with Article 14 Rome Statute 1998.

275 In accordance with Article 15 Rome Statute 1998.

276 Article 12(2) Rome Statute 1998.

committed war crimes and crimes against humanity. The prosecutor is conducting a preliminary investigation to determine whether to open an investigation.<sup>277</sup>

Israel voted against the adoption of the Rome Statute, its principal objection being the inclusion of the crime of “the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies” as a war crime.<sup>278</sup> Israel signed the Rome Statute initially but then refused to ratify and subsequently withdrew its signature. As Palestine is not officially recognized as a State it cannot become a party to the Rome Statute. Therefore it would appear that the ICC would not have jurisdiction over serious crimes committed by Israeli authorities in the OPT or within Israel, unless the Security Council, acting under Chapter VII, decides to refer these crimes to the ICC - as it did in the case of Darfur in 2008 and most recently with Libya in 2011. Politically, though, this is very unlikely due to the veto power of the “permanent five”, despite the fact that the Goldstone Report recommended the Security Council take such action in the absence of good faith national investigations.<sup>279</sup>

However, in accordance with Article 12(3), a State which is not a party to the Statute may lodge a declaration with the Registrar, accepting the jurisdiction of the court with regard to particular crimes. Between 27<sup>th</sup> December 2008 and February 13<sup>th</sup> 2009, the Prosecutor received 326 communications from NGO’s and individuals in relation to the Israeli onslaught on Gaza.<sup>280</sup> On 21<sup>st</sup> January 2009, the Palestinian National Authority (hereafter PA) filed an Article 12(3) declaration, signed by the Minister of Justice, Ali Khashan. The declaration accepted ICC jurisdiction over any crimes committed on “the territory of Palestine” since July 1<sup>st</sup> 2002, which is when the ICC Statute came into force.<sup>281</sup> This implies that it applies to Gaza, the West Bank and East Jerusalem.<sup>282</sup> If the Prosecutor decides there are reasonable grounds to begin an investigation, it would have to be authorised by a Pre-Trial Chamber<sup>283</sup> and in order to do so “victims may make representations to the Pre-Trial Chamber” (Article 15(3)). The case is still pending, but if the declaration is

---

277 *Guardian newspaper* 10 October 2010.

278 Israel Ministry of Foreign Affairs, 30 June 2002. *Israel and the International Criminal Court*

279 Goldstone Report, *supra n.1*, para. 1766.

280 Press Release, International Criminal Court Office of the Prosecutor, Visit of the Palestinian National Authority Minister of Foreign Affairs, Mr. Riad al-Maliki, and Minister of Justice, Mr. Ali Khashan, to the Prosecutor of the ICC (Feb. 13, 2009), available at: <http://www.icc-cpi.int>

281 Declaration recognising the Jurisdiction of the International Criminal Court, available at <http://www.icc-cpi.int>. See statement by the Office of the Prosecutor on 6 February 2009 noting that the Palestinian National Authority had lodged a declaration pursuant to Article 12(3) of the Statute with the Registrar of the Court.

282 Report of the Independent Fact Finding Committee on Gaza: No Safe Place, Presented to the League of Arab States, 30 April 2009, para. 588.

283 ICC Questions and Answers re Palestinian Declaration, para.3, available at <http://www2.icc-cpi.int>

accepted, the Prosecutor would then be entitled to initiate an investigation into such crimes based on information received by, for example, NGOs.

Following the declaration, submissions were made to the ICC Prosecutor, addressing whether the PA declaration meets statutory requirements. Many of the arguments, for and against the Court's acceptance of the declaration, were based on the question of whether or not Palestine is a State capable of accepting the jurisdiction of the Court. Some argued against such a conclusion on the basis that the PA does not satisfy the Montevideo criteria<sup>284</sup> because the government does not have full effective control over all of its territory and because it does not have the capacity to enter into relations with other states because of the restrictions within the Oslo Accords.<sup>285</sup> Opposing submissions argue that a strict and mechanical interpretation of the Montevideo criteria is outdated. Based on the Palestinian right to self-determination, engagement with other States and institutions, and recognition of Palestine by other States, they argue that Palestine is a State capable of engaging with the ICC.<sup>286</sup>

A third approach in the submissions posits that it may be more relevant to consider the international legal personality of Palestine, rather than the criteria of statehood in deciding whether it can be regarded as a State for the purposes of Article 12(3).<sup>287</sup> These submissions advocate a "functional approach", addressing the question in the particular context of Article 12, since it is not the ICC's role to proclaim Palestine a state or not. Since Palestine has the sole claim to sovereignty in OPT, and since the international community has recognized that the PA has the capacity to exercise jurisdiction over the crimes covered by the ICC Statute, then it must be capable of transferring this jurisdiction to the ICC by means of Article 12(3).<sup>288</sup>

---

284 Convention on the Rights and Duties of States, 26 December 1933, 49 stat 3097.

285 The International Association of Jewish Lawyers and Jurists, Opinion in the matter of the jurisdiction of the ICC with regard to the Declaration of the Palestinian authority, 9 September 2009, Opinion of Malcolm Shaw, 15, European Centre for Law and Justice, Legal Memorandum opposing accession to ICC jurisdiction by Non-State entities, 9 September 2009; David Davenport, Kenneth Anderson, Samuel Estreicher, Eugene Kontorovich, Julian G. Ku, and Abraham D. Sofaer, The Palestinian Declaration and ICC jurisdiction, 19 November 2009 available at [www.icc-cpi.int](http://www.icc-cpi.int)

286 Errol Mendes, Statehood and Palestine for the purposes of Article 12(3) of the ICC Statute: a contrary perspective, 30 March 2010, 2; John Quigley, Memo to the Prosecutor, 23 March 2009; Additional Memo, 20 May 2010, The Palestine Declaration to the International Criminal Court: The Statehood Issue, and The Statehood of Palestine: law and sovereignty in the Middle East Conflict, 19 May 2009 available at [www.icc-cpi.int](http://www.icc-cpi.int)

287 Errol Mendes, Statehood and Palestine for the purposes of Article 12(3) of the ICC Statute: a contrary perspective, 30 March 2010, p.44-48; Kearney and Denayer: Al Haq, Position paper on issues arising from the PA submission of a Declaration to the Prosecutor of the ICC under article 12(3) of the Rome Statute, 14 December 2009; Alain Pellet, Les effets de la reconnaissance par la Palestine de la compétence de la CPI, 18 February 2010 (English translation) available at [www.icc-cpi.int](http://www.icc-cpi.int)

288 Ibid, Al Haq and Alain Pellet.

Two arguments support this approach. Under the Oslo Accords, the PA temporarily waived their right to criminal jurisdiction over Israelis in the West Bank and Gaza, by way of a compromise to achieve an interim settlement. Al Haq has argued that, as bearers of the right to self-determination and to an independent State, they still hold this inherent right.<sup>289</sup>

Secondly, and more convincingly, the PA's capacity to exercise jurisdiction can be established by reference to the regime of grave breaches contained in GCIV, which is part of customary international law.<sup>290</sup> All states are obliged to search for and try or extradite those suspected of grave breaches, on the basis of universal jurisdiction, *regardless of the nationality of the perpetrator*<sup>291</sup>. The grave breaches that were documented in the Goldstone Report were alleged to amount to war crimes and crimes against humanity and the General Assembly resolution<sup>292</sup>, which endorsed the Goldstone Report, recommended that the "Palestinian side" investigate these serious violations within three months before their own courts. As Al Haq puts it:

The exclusion of Israelis from PA jurisdiction as provided for in the Interim Agreement cannot legitimately be considered as extending to the international crimes of war crimes and crimes against humanity as to do so would be incompatible with international law. As an entity acknowledged by the international community as having both the capacity and responsibility for investigating and prosecuting serious violations of international human rights and humanitarian law the PA must therefore be acknowledged as having the capacity and responsibility for investigating Israelis suspected of being responsible for such actions.<sup>293</sup>

In addition, Articles 8 and 47 of GCIV affirm that:

belligerents cannot conclude agreements which derogate from or deny to protected persons the safeguards of the Fourth Geneva Convention. Nor can any renunciation of rights by protected persons

---

289 Kearney and Denayer: Al Haq, Position paper on issues arising from the PA submission of a Declaration to the Prosecutor of the ICC under article 12(3) of the Rome Statute, 14 December 2009, para. 32.

290 *Legality of the Threat or Use of Nuclear Weapons*, ICJ, *Advisory Opinion*, 8 July 1996, ICJ Reports (1996) 257, § 79.

291 Article 146, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of war, 12 August 1949. Art. 146.

292 UN General Assembly Resolution A/RES/64/10, 2 November 2009.

293 Kearney and Denayer: Al Haq, Position paper on issues arising from the PA submission of a Declaration to the Prosecutor of the ICC under article 12(3) of the Rome Statute, 14 December 2009, para. 36.

have legal effect. On this basis it cannot be countenanced in law that the Interim Agreement can be regarded as having excluded from the jurisdiction of the PA, the obligation set forth in Article 146(2) to prosecute any individual allegedly responsible for grave breaches.<sup>294</sup>

If the PA has been acknowledged by the international community as being capable of exercising this jurisdiction then, in line with the purposes of the Rome Statute, it is capable of transferring such jurisdiction to the Court through Article 12(3).<sup>295</sup> The prosecutor has not yet made a determination on these issues and it remains to be seen whether a declaration of statehood by the PA in September will be successful and therefore have an influence on these proceedings.

### ***International Criminal Tribunal for Israel (ICTI)***

Another judicial avenue open to the Security Council, and the General Assembly<sup>296</sup> is the establishment of an ad-hoc tribunal for Israel/Palestine or some sort of hybrid tribunal with the mandate to prosecute serious international crimes committed by officials and individuals. The Security Council could do this under Article 41 of the UN Charter, with the mandate to prosecute serious international crimes committed by Israeli officials and individuals. The establishment of such a tribunal would, of course, require sufficient political will and its success would depend upon sufficient commitment from the two parties and cooperation by Israel.<sup>297</sup> Both of these requirements are currently highly unlikely.

---

294 Ibid, para. 38.

295 For further reading on this view and a summary of the arguments in the submissions, see: Dr. Michael Kearney, "Palestine and the international Criminal Court: Asking the Right Question", UCLA Human Rights & International Criminal Law Online Forum, Forthcoming.

296 With regard to the General Assembly's power, Francis A. Boyle has noted that it can "set up this ICTP [International Criminal Tribunal for Palestine] by a majority vote pursuant to its powers to establish "subsidiary organs" under the UN Charter article 22".

297 Regarding the four ad-hoc tribunals established between 1919 and 1994, see Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", Harvard Human Rights Journal, Vol. 10, 1997, 11.

## 2. National obligations and mechanisms

### 2.1. National Investigation and Prosecution

The obligation to investigate and prosecute international crimes lies primarily with national states<sup>298</sup> and, since Israel is highly unlikely to thoroughly and independently investigate some of the serious allegations concerning state policies that were discussed in Chapter II, investigation and prosecution of the crimes, and provision of remedies to the victims, will depend largely upon whether third states are able and willing to initiate trials.

Despite the establishment of the Palestinian Authority and various Palestinian courts with criminal and civil jurisdiction in certain areas of the West Bank and Gaza, the lack of a fully-fledged Palestinian state precludes, or at least complicates, certain criminal trials. According to the Oslo (II) Agreement, Palestinian courts do not have jurisdiction over crimes committed by Israelis.<sup>299</sup>

#### *Lack of Remedies within the Israeli Legal System*

Although Palestinians from the West Bank and Gaza have been granted access to the Israeli Supreme Court (sitting as the High Court) since the beginning of the Israeli occupation in 1967,<sup>300</sup> the Court has never seriously addressed key policy issues affecting Palestinians in the OPT such as the legality of Israeli settlements or of the occupation. In relation to many other main policies, such as destruction of Palestinian homes, it has accepted the government's general position. Given

---

298 See RATNER, *supra* note 41, at 177: "Although the international legal process has elaborated a corpus of law providing the individual criminal responsibility for various atrocities in peace and war, domestic legal systems remain the primary for rendering individuals accountable for these acts."

299 The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995. An argument could, however, be made in favour of jurisdiction of Palestinian courts over serious international crimes committed by Israelis, see discussion above and Al Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute (December 2009). For a description of the Palestinian court system, see *Human Rights Manual For Palestinian Lawyers – Identifying, Investigating and Prosecuting Human Rights Violations* (Bar Human Rights Committee of England and Wales 2006). For a discussion of the jurisdictional problem in relation to the Sabra and Chatila Massacres, see Victor Kattan, "From Beirut to Brussels: Universal Jurisdiction, Statelessness and the Sabra and Chatila Massacres", *Y.B of Islamic and Middle E.L.*, 32 (2004-2005).

300 See Israeli Basic Law: Judicature, 1984, Article 15(c): "...when sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court". See also David Kretzmer, *The Occupation of Justice* (Sunny Press 2002).

the nature of the Israeli occupation, it is not surprising that Palestinians have been deprived of effective judicial protection in the Israeli High Court. As explained by David Kretzmer:

Given this perception of the political context, Israeli judges will not be neutral in judging the conflicting claims of the government and Palestinians subject to military rule. In the struggle between government policies and Palestinian arguments of rights based on justice, international legal standards, or lofty legal principles, the Court has shown a marked preference for “state arguments”. The dominant narrative holds that the state is being attacked, the authorities are trying to protect it, and the ultimate duty of the Court is to assist them in this task.<sup>301</sup>

Thus, ‘the legitimizing function is still there’<sup>302</sup> and on key policy issues, the Court will continue to side with the authorities<sup>303</sup> and uphold - or even render further legitimacy to their policies in the OPT.<sup>304</sup> This discriminatory policy towards Palestinians is also applied within the criminal system leading to a failure to properly investigate and prosecute soldiers and commanders, as required by the Geneva Conventions and international human rights law.<sup>305</sup>

The Israeli Military Advocate General - who has the power to decide whether a criminal investigation should be initiated, and whether an indictment should be issued against a soldier alleged to have violated military law in the OPT

---

301 *ib.*, at 196.

302 Israel Chapter for Book Entitled ‘The Role of Domestic Courts in Treaty Enforcement: A Comparative Study’ <http://ssrn.com/abstract=1290714>, at conclusion.

303 See for example, *Gisha, B’tselem and others v. The Prime Minister and The Minister of Defense*, HCJ 9132/07 of 30 January 2008 concerning the limited supply of fuel and electricity to the Gaza Strip.

304 Sfar, “The Price of Internal Legal Opposition to Human Rights Abuses” 22<sup>nd</sup> March at 48: “This analysis leads to depressing conclusions. Limited success perfects the occupation and makes it sustainable; moreover, by lodging petitions to the Israeli Court, human rights lawyers act as public relations agents of the occupation by promoting the notion that Palestinians residents have a resource to justice.”

305 On the issue of Israel’s failure to implement Article 146 of the Fourth Geneva Convention, see generally Ardi Imseis, “On the Fourth Geneva Convention and the Occupied Palestinian Territory”, 44 *Harv. Int’l L.J.* 65 (2003). The Goldstone Report concluded in relation to Israel’s failure to investigate crimes committed by its soldiers: “The Mission concludes that there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult”, at 1832. See also PCHR Report August 2010: *Genuinely Unwilling: An Update*.

–most often decides not to carry out a proper criminal investigation.<sup>306</sup> It would be unrealistic to assume that Israel would yield to recent pressure from various UN bodies and change its fundamental policy of protecting its soldiers and commanders who are carrying out its key policies in the OPT. In addition to these various constraints caused by the nature and scope of the Israeli occupation, the international legal framework governing military occupation offers no effective mechanisms to ensure that the occupying power fulfils its legal obligations toward the victims.<sup>307</sup>

Palestinians living inside Israel – although citizens of Israel – also continue to be denied adequate, fair and effective remedies when the authorities confiscate their land and property. In the case of Iqrit<sup>308</sup>, the Supreme Court reversed its previous decision permitting the return of internally displaced Palestinian citizens of Israel to their village Iqrit and concluded that Palestinians should not be allowed to return to their lands and homes inside Israel and should not be provided with restitution of their properties. Therefore, one may conclude, as stated by BADIL:

---

306 In the case of the crimes committed in Beit Hanoun in November 2006, for example, Israel conducted an internal investigation, but concluded that “shelling the civilians’ homes was “a rare and grave technical error of the artillery radar system”, see “Human Rights Situation in Palestine and Other Occupied Arab Territories”, Report of the High-Level Fact-Finding Mission to Beit Hanoun established under Council Resolution S/3/1, A/HRC/9/26 of 1 September 2008, at 34. The Israeli authorities then announced in February 2008 that no charges would be brought against Israeli forces involved in the incident. In relation to Operation Cast Lead in Gaza, Israel conducted a number of investigations and submitted three reports to the UN Secretary-General in July 2009, January 2010 and July 2010. The latest report was attached as annex 1 to the Second Report of the Secretary-General of 11 August 2010, A/64/890 (see also the First Report of the Secretary-General Report 4 February 2010, A/64/651). As it is clear from the report, Israel had not conducted any investigations of the serious allegations documented in the Goldstone report, but solely addressed minor offenses as evident from paragraphs 10 of the report: “Since the *January 2010 Update*, Israel’s Military Police Criminal Investigative Division (“MPCID”) has opened 11 additional criminal investigations, resulting in a total of 47 criminal investigations initiated so far into specific incidents relating to the Gaza Operation. Some of the investigations have resulted in criminal indictments and trials: two IDF soldiers were recently indicted for compelling a Palestinian minor to assist them in a manner that put the minor at risk; the MAG has also filed criminal charges in the case of an IDF soldier who is suspected of killing a Palestinian civilian who was walking with a group of civilians towards an IDF position. These cases are in addition to an earlier indictment and conviction of an IDF soldier for the crime of looting, as reported in the *January 2010 Update*.” See also B’tselem Press Release 4 November 2009 noting that almost a year later only one soldier had been prosecuted, and he was convicted of stealing a credit card from a Palestinian.

307 For a general discussion on the issue of the right to access to justice, see *Access to Justice as a Human Right*, (Francesco Francioni ed. 2007). Specifically in relation to an armed conflict, see contribution by Fionnuala Ni Aoldin and Natalino Ronzitti. For an argument in favor of setting up mechanisms to review illegal acts of the occupying power, see T. Ferraro, “Forty Years after 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context: ARTICLE: Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities”, 2008, 41 *Isr. L. Rev.* 331 at 356: “Therefore, in light of the absolute necessity to set up mechanisms that would enable real time review of acts of the occupants, the gap identified – consisting in a blatant lack of control over the occupant’s measures and actions – must be bridged in order to ensure effective compliance with the law.”

308 *Sbait et al. v. State of Israel*, HC 840/97, 2003.

An adequate, fair and effective remedy is also not available to Palestinian Arab landholders. Israel's arbitrary and discriminatory land regime therefore constitutes a consistent and gross pattern of violations of human rights under international treaty-based and customary law...<sup>309</sup>

### *Norms of Jurisdiction*

Traditional legal principles of criminal jurisdiction which permit or oblige national courts to exercise jurisdiction include the following:

- i. Territorial jurisdiction on the basis of which a state "has jurisdiction with respect to any crime committed in whole or in part within its territory."<sup>310</sup> "Territory" is defined as a state's "land and territorial waters and the air above its land and territorial waters."<sup>311</sup>
- ii. Principle of Active Personality or Nationality on the basis of which a state "has jurisdiction with respect to any crime committed outside its territory
  - (a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or
  - (b) By a corporation or other juristic person which had the national character of that State when the crime was committed"<sup>312</sup>
- iii. Passive Personality on the basis of which a state is entitled to prosecute an alleged criminal who has committed an international crime abroad if the victims are its own nationals.
- iv. Principle of "Protection –Security of the State" on the basis of which a State "has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State" [ ]<sup>313</sup>
- v. "Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator,

---

309 BADIL Submission of Petition Pursuant to Resolution 1503 of the Economic and Social Council of the United Nations, 19 February 2007.

310 Harvard Research, 1935, draft Convention on Jurisdiction with Respect to Crime.

311 lb.

312 lb.

313 lb.

the nationality of the victim, or any other connection to the state exercising such jurisdiction”.<sup>314</sup>

Historically criminal jurisdiction has been linked to sovereignty and, hence, the territorial principle, as well as the principle of active personality, has had primacy over other jurisdictional grounds. The territorial principle obligates a state to exercise criminal jurisdiction over crimes committed on its territory and it clearly has many advantages, for example in relation to collecting evidence. However, due to the developments of ICL, all of these principles are now accepted as valid grounds for exercising criminal jurisdiction, at least with regard to serious international crimes.<sup>315</sup> The principle of passive personality, for example, could form the basis of extraterritorial jurisdiction if a Palestinian victim has obtained citizenship in a third country that is willing to initiate a criminal case against Israeli officials. Similarly, if an Israeli perpetrator has a second nationality, the principle of active personality could be used as basis for extraterritorial jurisdiction in the country of his/her second nationality.

### ***Universal Jurisdiction***

Universal jurisdiction derives from the Principle of Universality, according to which international crimes, which violate fundamental human values, are of concern to the entire international community. Universal jurisdiction provides domestic courts with a jurisdictional basis to adjudicate cases that have no link with their state – thus adjudication irrespective of where the act was committed and the nationality of the accused or the victims. State practice shows two different versions of universal jurisdiction: a narrow notion which is conditional on the presence of the accused in custody, and a broad notion<sup>316</sup>, in which a national prosecutor, made aware of an international crime committed abroad is entitled to start an investigation for

---

314 The Princeton Principles on Universal Jurisdiction.

315 For state practice, see Secretary General report A/65/181, at 9: “In their comments, several Governments affirmed their commitment to promoting accountability and viewed universal jurisdiction as constituting an essential jurisdictional instrument in the fight against impunity. It was underlined that universal jurisdiction should be exercised in accordance with recognized rules of international law, not least those providing fundamental rights and guarantees for the accused. It was considered equally important that judicial independence and impartiality be safeguarded to ensure that the principle of universal jurisdiction was not manipulated for political ends.”

316 Cassese, *supra* note 22. See also the Princeton Principles mentioned above advocated for the broad notion of universal jurisdiction. See also state practice in Secretary General Report, *Supra* n.315, at para.17.

the simple reason that the crime is so abhorrent and the the perpetrator(s) would otherwise go unpunished and the victims would have no access to justice.<sup>317</sup>

The acceptance of some forms of universal jurisdiction is implicit in the adoption of the four Geneva Conventions,<sup>318</sup> the Torture Convention<sup>319</sup>, the Genocide Convention and the Apartheid Convention.<sup>320</sup> State parties to the GCIV are thus under an obligation to prosecute a war criminal present on their territory whether or not there has been a request for extradition by another State. Such treaty obligations can lead to the application of universal jurisdiction by national courts. In relation to other conflicts, universal jurisdiction has been applied alone or with other jurisdictional grounds by courts, for example, in Belgium<sup>321</sup>,

---

317 The absolute concept does not set aside national procedural rules – such as a prohibition against trial in absentia. A state is therefore entitled to require the suspect to be present before a trial can begin. However, such a requirement is not inherent in this concept of universal jurisdiction

318 See for example IV Geneva Convention, *supra* n.94, Art. 146(1): “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 defined in the following Article”, and Art. 146(2): “Each High Contracting Party 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.”

319 See Article 5(2) of the Torture Convention: “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.”

320 Article IV of the Apartheid convention states that: “The States Parties to the present Convention undertake: (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons. “ Article V states that: “Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.”

321 Secretary General Report, *Supra* n.315 at 57: “Four trials relating to acts committed during the 1994 genocide in Rwanda had been held before the Brussels Assize Court in 2001, 2005, 2007 and 2009. These cases were opened wholly or partly on the basis of the universal jurisdiction of Belgian courts and their investigation went smoothly because of very close cooperation between the Belgian and Rwandan judicial authorities. In addition, several dozen cases concerning grave violations of international humanitarian law were still at the stage of information-gathering or investigation and could, in the years to come, lead to new trials. However, only some of these cases were based on the universal jurisdiction of Belgian courts, the suspect being present in Belgian territory.”

Finland<sup>322</sup>, France<sup>323</sup>, Netherlands<sup>324</sup> Switzerland<sup>325</sup> and there are several ongoing cases.<sup>326</sup>

Some aspects of the concept of universal jurisdiction remain controversial and states continue to consider it a complementary mechanism to the traditional jurisdictional basis<sup>327</sup> and a mechanism that should be used with caution.<sup>328</sup> But the concept as such has been accepted as part of international law reflecting recognition of the need for a “fallback” category permitting investigation and prosecution of serious international crimes when impunity would otherwise prevail. As noted in the Goldstone Report:

---

322 Case against Francois Bazaramba, see <http://www.bbc.co.uk/news/10294529>

323 Secretary General Report, *Supra* n. 315 at 100: “In France, two individuals were convicted on the basis of “quasi-universal” jurisdiction: (a) In a 2005 ruling, the Court of Assizes of the Gard sentenced Ely Ould Dah, a national of Mauritania, to 10 years’ imprisonment and 15,000 euros in damages and interest for each of his victims, for acts of torture committed in Mauritania between 1990 and 1991. The conviction led to an application before the European Court of Human Rights, with the applicant, relying on article 7 of the European Convention on Human Rights (no penalty without law), alleging that he had been prosecuted and convicted in France for an offence committed in Mauritania, whereas he could not have foreseen that French law would override Mauritanian law. In a 2009 decision, the European Court of Human Rights concluded that France had not misinterpreted the legality principle guaranteed in article 7; (b) In a 2008 ruling, the Court of Assizes of the Bas-Rhin convicted Khaled Ben Said, a national of Tunisia, to eight years’ imprisonment for having ordered, while he was Police Commissioner, the torture of a Tunisian woman at the police station in Jendouba in 1996. The Office of the Public Prosecutor, which had requested acquittal, has appealed the decision and the appeal was still pending before the Court of Assizes of Meurthe-et-Moselle.”

324 Case against Joseph Mpambara 2009, <http://allafrica.com/stories/201009280159.html>

325 Secretary General Report, *Supra* n.315 at 65: “In the *F. N.* case in Switzerland, a 2000 ruling of the Military Court of Appeal and a 2001 decision of the Military Court of Cassation, the accused, F. N. (a national of Rwanda), was convicted by the Swiss military courts of war crimes committed in Rwanda against foreign nationals.”

326 Secretary General Report, at 60: “In France, there were some ongoing cases, three of which involved acts of torture committed in Algeria, Cambodia and the Republic of the Congo. In relation to Cambodia, in January 2010, an Investigation Chamber of the Paris Court of Appeal handed down a ruling approving the pursuit of investigations for a case concerning acts of kidnapping followed by acts of torture and disappearance, committed in Cambodia between 1975 and 1979... There were also 15 cases ongoing in France concerning acts committed in Rwanda in the context of laws passed to implement the statutes of the international criminal tribunals for Rwanda and for the former Yugoslavia; 14 of these cases were before the High Court of Paris, while the remaining one was before the Army Tribunal of Paris, since members of the French military were implicated.”

327 *Ib* at 11.

328 *Ib*, at 109: “Some Governments expressed their continuing concerns as to the application of universal jurisdiction, particularly when used selectively or arbitrarily, without due regard to requirements of international justice and equality. The unwarranted use of universal jurisdiction could have negative consequences for the rule of law at the international level, as well as in international relations. It was stressed that the principles enshrined in the Charter of the United Nations, in particular the sovereign equality and political independence of States and non-interference in the internal affairs of States, as well as the immunity of high-level officials under international law, should be scrupulously respected in judicial proceedings. Indeed, the comment was made that to the extent that there was no clear permission under international law, the unilateral exercise of universal jurisdiction against foreign officials by the judicial organs of a State violated the principle of sovereign equality of States, and constituted a breach of international law, engaging the responsibility of a State.”

It is uncontroversial today that States may confer upon their courts the right to exercise universal jurisdiction over international crimes, including war crimes, crimes against humanity and genocide.<sup>329</sup> However, there is lingering controversy about the conditions or requirements for the exercise of that jurisdiction and, in particular, about whether the alleged perpetrator should be physically in the territory of the prosecuting State or not.<sup>330</sup>

When analyzing national practice it becomes apparent that some states, for political reasons, are reluctant to use the tool, and that there is not yet a consistent general state practice clearly indicating that as a matter of *customary law*, a norm has yet crystallized obliging states to exercise universal jurisdiction over international crimes.<sup>331</sup> Such a norm might likely emerge in the future and there is clearly a trend towards encouraging states to exercise such jurisdiction.<sup>332</sup> The International Court of Justice has not yet ruled on the issue, but will have the chance to do so in a pending case.<sup>333</sup> The many individual and dissenting opinions of the judges in the Arrest Warrant Case<sup>334</sup> provide an insight into their divergent views on the issue. Judge Koroma expressed the opinion that, “universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide.”<sup>335</sup> Moreover, the General Assembly continues to discuss the issue.<sup>336</sup> The further development and success of universal

---

329 *Customary International Humanitarian Law...*, rule 157, p. 604.

330 Goldstone Report, *Supra* n.1, para. 1647.

331 The UN Secretary General has recently asked states to describe their universal jurisdiction practice. Replies are available at the website of the Sixth Committee of the General Assembly: [www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml). Eg, at 28: “Some Governments observed that customary law also extended universal jurisdiction for other crimes such as slavery, genocide, war crimes, crimes against humanity, crimes against peace, and torture, while some others additionally mentioned the prohibition against apartheid. The nuanced position in some other comments was that although universal jurisdiction extended to serious crimes of international concern, such as genocide, war crimes and crime against humanity, the exercise of jurisdiction in other cases was based on treaty or statute and accordingly only binding on parties thereto. It was nevertheless recognized that certain States enacted domestic law to claim extraterritorial jurisdiction over such crimes and premised the legality of such legislation on the basis of universal jurisdiction.”

332 See Ratner, *supra* note 41, at 170: “Nevertheless, the practice of states suggest any general duty to prosecute human rights abusers under the ICCPR or customary law has not yet solidified.”

333 The case concerning “Questions concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)”, proceedings instituted by Belgium on 19 February 2009. A previous case concerning certain Criminal Proceedings in France (Republic of the Congo v. France), was removed from the ICJ’s list in November 2010 upon the request of Congo.

334 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14 February 2002.

335 *Ib.* Separate opinion of Judge Koroma, para. 9.

336 See General Assembly Resolution 64/117 of 6 December 2009 pursuant to which the Secretary General drafted a report on the scope and application of the principle of universal jurisdiction A/65/181, available at <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml>. The issue was also discussed at the sixty fourth session and members states were requested to submit information about state practice.

jurisdiction will depend on various factors, including, of course, the position of national prosecutors and judges, but also the adoption of a clear domestic legal framework without which judges would be reluctant to admit such cases.<sup>337</sup>

### ***National Practice of Universal Jurisdiction in relation to Israel***

Israel's failure to implement fundamental human rights norms has led Palestinian victims to seek justice and remedies elsewhere, bringing their claims to courts in countries that have adopted favorable universal jurisdiction laws and/or legislation concerning corporate accountability for human rights abuses. For a number of reasons, however, approaching foreign courts remains elusive for the vast majority of Palestinians. For example, there are legal obstacles precluding foreign adjudication, and only the most serious human rights abuses would potentially fall within the criminal jurisdiction of a foreign court. Thus, trials in foreign courts would have to be complemented by other mechanisms in order to ensure remedies for all the victims. This section will examine how judges have responded to Palestinian plaintiffs' requests for foreign judicial jurisdiction over Israeli policies and crimes committed in the OPT and elsewhere. An analysis of the cases will shed some light on the judges' interpretations of relevant legal norms. More importantly, however, their choice of narrative may reveal conflicting values at stake (such as sovereignty/immunity v. universal justice; impunity v. accountability) and their underlying motivation in filling the "jurisdictional vacuum" left by the discriminatory Israeli legal system.<sup>338</sup>

Palestinians have only in a handful of cases brought forth their claims in countries whose legislation permits courts to exercise some sort of universal jurisdiction over international crimes.<sup>339</sup> A few judges have been willing to hear their cases, but as the case law stands today, no proper criminal trial has yet begun and none of the accused has been arrested. Some attempts to obtain an arrest warrant and initiate a criminal investigation of individuals ended prematurely with the police

---

337 For further discussion, see Cherif Bassiouni, "The History of Universal Jurisdiction and its Place in International Law", at 46, in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, (Stephen Macedoed. University of Pennsylvania 2004). See also in same publication: Anne-Marie Slaughter, "Defining the Limits: Universal Jurisdiction and National Courts" See also Akhavan, "Whither National Courts? The Rome Statute's Missing Half: Towards an Express and Enforceable Courts Obligation for the National Repression of International Crimes. *J Int Criminal Justice* (2010) 8 (5): 1245-1266.

338 The dissenting opinion in the decision by the High Court in the Spanish case (Appeal No. 31/09, Preliminary Proceedings No. 157/08), Ruling No. 1/09 of 9 July 2009, referred to the risk that "... definitely shelving the proceedings generates a situation of jurisdictional vacuum...", at para 6.

339 Austria, France, Greece and Italy have failed to comply with Article 146 (1) of GCIV in that they have not enacted national legislation for exercising universal jurisdiction over the crimes listed in Article 147.

or the public prosecutor.<sup>340</sup> A recent initiative relates to the criminal liability of a Dutch company involved in the construction of the Wall.<sup>341</sup>

Several cases have been submitted directly to judges, where the involvement of judges was possible due to favorable domestic rules that permitted individuals or NGO's to request an arrest warrant or an investigation directly from a judge.<sup>342</sup> Five of these cases concerned arrest warrants – the majority in the UK (four

---

340 In 2002, for example, solicitor Imran Khan submitted a dossier to the British Police related to Shaul Mofaz, but he left the UK before an arrest warrant could be issued. In September 2003, PCHR submitted two complaints to the Swiss Military Attorney General in Berne in relation to allegations concerning house demolitions and torture. In Denmark in August 2006, a Danish MP requested the Danish police to arrest Israeli foreign minister Tzipi Livni, but the case was dismissed on immunity grounds. In the Netherlands, on Friday 16 May 2008, a torture complaint was filed with the Dutch Prosecutor against Ami Ayalon, former head of the Israeli General Security Service (Shin Bet), who was planning to visit the Netherlands from 17 until 20 May of the same year. However, the prosecutor failed to initiate an investigation, initially due to a delay by the College of Procurators-Generals to provide him with a decision that Mr. Ayalon lacked immunity, and subsequently because he had left the country. The decision in favor of the plaintiff came on 21 May when Mr. Ayalon had just left the country. The case thus initially ended in May, but the defendant then submitted a complaint to the Court of Appeals concerning the failure to act on the complaint and initiate prosecution. This complaint was dismissed on 26 October 2009 (case on file with author). The Court accepted some of the plaintiff's arguments and concluded that in principle it can be sufficient to establish jurisdiction that an alleged offender is physically present in the Netherlands and, hence, the arrest of the person alleged to have committed the offence is not a condition for assuming jurisdiction. The Court noted, however, that in order for jurisdiction to be established there has to be an "alleged offender" in the sense of Article 5, para. 2 of the Convention Against Torture, i.e., there has to be prima facie evidence of a reasonable case against the defendant. The Court then noted that the evidence submitted by the plaintiff consisted of fairly general allegations and that this was insufficient for the purpose of establishing jurisdiction. The Court further noted that Mr. Ayalon had spent only a few days in the Netherlands; he had no other connection to the Netherlands; he was not expected to return to the Netherlands in the foreseeable future; and authorities had not initiated any prior investigation into the allegations made against Mr. Ayalon. On the basis of this, the Court concluded that the Netherlands currently has no jurisdiction. PCHR noted subsequently that "[u]ltimately, the Prosecutor's inaction during Mr. Ayalon's original visit was decisive. It is believed that the Dutch authorities, and the Prosecutor's office, may have been motivated by political considerations" (PCHR's Press Release 30 October 2009). Finally, in November 2009, Norwegian prosecutors announced that they would not open an investigation into war crimes allegations against Ehud Olmert and others. In addition, one case is pending in South Africa concerning mainly South African citizens who may have served in the Israeli army during Operation Cast Lead. The case is with the National Prosecuting Authority, and a decision has not yet been made whether to open an investigation into alleged war crimes, crimes against humanity and apartheid. A case is pending in Belgium since June 2010 involving 14 Israeli officials, including Ehud Barak, Ehud Olmert and Tzipi Livni. Finally in relation to Israeli attack on the Gaza Freedom Flotilla one case is pending in Spain and another in the UK, see [www.humanrightsfund.org](http://www.humanrightsfund.org).

341 Al-Haq Press Release 14 October 2010. The complaint asserts that Riwal is complicit in the commission of war crimes and crimes against humanity offences contrary to Holland's International Crimes Act - through its supply of mobile cranes and aerial platforms for the construction of settlements and the Wall in several locations in the West Bank. On 13 October 2010, the Dutch National Crime Squad searched Riwal's offices in the Dutch town of Dordrecht, under their statutory powers of investigation. The Prosecutor's office is yet to decide whether it is possible to pursue the criminal complaint against Riwal.

342 See further "Universal Jurisdiction in Europe; The State of the Art" (Human Right Watch 2006).

cases). The two cases in the UK which involved a request to arrest the sitting Israeli Defence Minister were dismissed due to immunity reasons.<sup>343</sup> In the case against former Defence Minister Shaul Mofaz, for example, Judge Pratt declined to issue the warrant although he was convinced of the credibility of the allegations and that he had "... jurisdiction to deal with the allegations made...<sup>344</sup> against Mofaz:

It strikes me that the roles of defence and foreign policy are very much intertwined, in particular in the Middle East. I recognize that I am working in somewhat unchartered waters but having given the matter very considerable consideration overnight and today I conclude that a Defence Minister would automatically acquire [S]tate immunity in the same way as that pertaining to a Foreign Minister. Given that finding, I decline to issue the warrant requested.<sup>345</sup>

However, in several cases, where immunity did not apply, judges have initially accepted the prima facie case against the accused and have issued arrest warrants or approved indictments. What has followed is indicative of the political pressure exerted in order to prevent the use of universal jurisdiction to indict Israeli political and military officials. Judges in Belgium, the UK and Spain have been particularly proactive in their attempts to enforce the principle of universal jurisdiction in relation to war crimes, crimes against humanity and genocide.

- In Belgium, in 2001, survivors of the Sabra and Shatila massacres filed a complaint against Ariel Sharon, Amos Yaron and others for

---

343 In the first case, the Bow Street Magistrates Court refused on 12 February 2004 to issue an arrest warrant against Israeli Defence Minister Shaul Mofaz (Application for Arrest Warrant against General Shaul Mofaz) (Bow St. Mag. Ct. Feb. 12, 2004) (per Pratt, Dist J). In the second case, the City of Westminster's Magistrates Court decided in late September 2009 not to issue an arrest warrant against the Israeli Minister of Defence, Ehud Barak, who according to the judge was entitled to immunity during his visit to the United Kingdom. The judge was, however, convinced about the evidence submitted to support the claims of war crimes committed during Operation Cast Lead, as well as evidence proving Barak's command responsibility. See Al-Haq Press Release 1 October 2009.

344 *Ib.*, at 772: "I have considered the extensive evidence of witnesses supplied to me, together with relevant reports, and I agree that these could certainly amount to 'grave breaches'.

345 *Ib.*, at 773.

their roles in those events.<sup>346</sup> In 2002, the Court of Appeal ruled the case inadmissible because the accused were not on Belgian territory. However the Belgian Supreme Court ruled on February 12<sup>th</sup> 2003, that Sharon (and others involved in the Sabra and Shatila massacre), could be indicted for war crimes, crimes against humanity and genocide, regardless of their presence on the territory or any other condition. The court did, however, establish that Sharon enjoyed procedural immunity while sitting as as Prime Minister. When, in 2003, Belgian lawyers initiated a case against the commander of US forces in Iraq, for the use of cluster bombs against civilians, the US exerted tremendous political pressure on Belgium by threatening to move NATO headquarters out of Brussels. The Belgian universal jurisdiction laws were then amended<sup>347</sup> to require a territorial link between Belgium and the perpetrator while also limiting the ability of private persons to initiate cases and providing the public prosecutor discretion over the handling of a case.<sup>348</sup>

- In 2005 in the United Kingdom, Bow Street Magistrates' court issued a warrant for the arrest of Major General Doron Almog, charged with war crimes in relation to, *inter alia*, house demolitions carried out by the IDF in Rafah in January 2002.<sup>349</sup> However, on landing at Heathrow, Almog was informed of the situation and was told not to get off the plane.

---

346 Complaint lodged by Survivors Against Israeli Prime Minister Ariel Sharon, Director General of the Defence Ministry Amos Yaron and other Israelis and Lebanese Responsible for the Sabra and Shatila Massacre, 18 June 2001, published in the Palestine Yearbook of International Law, Vol. XII. 2002/2003, pp. 219-258, together with other documents on the case. Brussels Court of Cassation Decision on Appeals From 26 June 2002 Ruling by the Brussels Court of Appeals (Chambre des Mises en Accusation) of 12 February 2003, published in English translation in the Palestine Yearbook of International Law, Vol. XII. 2002/2003, pp. 279-284. Subsequently, on 10 June 2003, the Brussels Appeals Court confirmed that "in the present state of the proceedings, there is no cause for nullity, inadmissibility or extinguishment of the case brought against Amos Yaron and other parties unknown". See also Luc Walley, "The Sabra and Shatila Massacre and Belgian Universal Jurisdiction", in *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, John Borneman (ed), 2004. Antonio Cassese, "Belgian Court of Cassation: The Sharon and Others Case", 1 J. Int'l Crim. Just. 437 (2003) and Linda Malone, "Sharon vs Time: The Criminal Responsibility Under International Law for Civilian Massacres", Pal. Y. Int'l L, 3 (1986), 41.

347 Loi relative aux violations graves du droit international humanitaire, 5 August 2003, Moniteur Belge (Law Gazette), No. 286, August 7, 2003; unofficial English translation available online in International Legal Materials, vol. 42 (2003), p.1248. For an overview of the changes see Luc Reydam, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law," Journal of International Criminal Justice, vol. 1 (2003), p. 679.

348 Rikhof, *Supra* n. 33, at 32.

349 Press Release by Palestinian Center for Human Rights of 12 September 2005 "Anyone Responsible for Perverting the Court of Justice Must also Face Prosecution". The decision by Judge Timothy Workman has not been published, but an analysis of the case by the plaintiffs' lawyers Daniel Machover and Kate Maynard is provided in: "Prosecuting Alleged Israeli War Criminals in England and Wales", 20 Denning Law J, 95, (2004).

- In 2006, in New Zealand, the District Court in Auckland<sup>350</sup> issued an arrest warrant against Lieutenant General Moshe Ya'alon, charged with war crimes for his role in the dropping of a one-ton bomb in Al-Daraj neighborhood in Gaza City in July 2002 (the Al-Daraj case). The bomb was dropped on the house of Saleh Shehadeh, killing 14 civilians and injuring 150 others. The case was stayed by an intervention by the deputy Prime Minister and the Attorney-General.

- In December 2009, City of Westminster's Magistrates Court issued a warrant for the arrest of the former Minister of Foreign Affairs, Tzipi Livni for crimes committed during Operation Cast Lead.<sup>351</sup> However, Livni cancelled her trip and the warrant was subsequently cancelled due to non-execution. After this incident roused considerable objection by the Israeli government, David Miliband<sup>352</sup> and Gordon Brown promised to change the UK laws on universal jurisdiction.<sup>353</sup> This change was indeed made on the 15<sup>th</sup> September 2011 and means the consent of the Director of Public Prosecutions is required before the issue of an arrest warrant. This removes the possibility of individuals or organizations getting an arrest warrant before the suspect leaves the country. The Government introduced this change surreptitiously, by burying it in a new Act.<sup>354</sup>

- The above-mentioned Saleh Shehadeh incident led to proceedings before the National High Court in Spain in which Judge Fernando Andreu Merelles initially decided to hear the case<sup>355</sup> against 7 former Israeli military officials, rejecting the claim by Israel that

---

350 District Court at Auckland, decisions of 27 and 29 November 2006 in the case between Janfrie Julia Wakim and Lieutenant General Moshe Ya'alon, CIV-2006-004.

351 *BBC News* 15 December 2009.

352 See Official Statement by the former Foreign Secretary, the Rt Hon David Miliband MP, 15 December 2009, 'Response to UK arrest warrant for Tzipi Livni', available at: <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21448373>

353 Geneva Conventions Act, Act No. 103 of 1957, which allows the UK to prosecute war crimes committed in international conflicts, by non-UK residents. As it stands, an individual or NGO can apply to a magistrate for an arrest warrant. Once ruling out immunity, if there is prima facie evidence of the crimes, the judge can issue the warrant with no requirement to consult public prosecutors – S.25(2) Prosecution of Offences Act 1985.

354 Police Reform and Social Responsibility Bill 2010-11.

355 The officials accused in the case *Raed Mohammed Ibrahim Mattar, et al. v. Dan Halutz, Commander of the Israeli Air Force, et al* (most often referred to as the "al-Daraj" case) *The officials* included Dan Halutz, then Commander of the Israeli Air Forces; Benjamin Ben-Eliezer, then Israeli Defense Minister; Moshe Yaalon, then Israeli army Chief of Staff; Doron Almog, then Southern Commander of the Israeli army; Giora Eiland, then Head of the Israeli National Security Council; Michael Herzog, then Military Secretary to the Israeli Defense Ministry; and Abraham Dichter, then Director of the General Security Services. Decisions by the Central Court No. 4 (J Fernando AndreuMerelles), Madrid, No. 157/2.008-G.A. of 29 January 2009 and 4 May 2009.

it had sufficiently investigated the crime.<sup>356</sup> At this stage, Ehud Barak declared his intention to appeal to the Spanish Foreign and Defence ministers and to the Spanish Prime Minister.<sup>357</sup> The decision was overturned on appeal<sup>358</sup>, and this decision to close the case was upheld by the Supreme Court.<sup>359</sup> Political pressure was exerted on Spain by China (regarding an investigation of its former Foreign Minister for genocide in Tibet), Israel and the US (regarding allegations of torture at Guantanamo) and the Spanish universal jurisdiction laws were changed as a result. Universal jurisdiction is now limited to cases where alleged perpetrators are present in Spain or victims are Spanish or there is some other relevant link to Spanish interests.<sup>360</sup> The Palestinian Centre for Human Rights then took the case to the Constitutional Court.<sup>361</sup> However, following the defeat within the Spanish legal system, the case has now been brought to the European court of Human Rights.<sup>362</sup>

Despite the paucity of cases that have passed preliminary hurdles, there are nevertheless some positive aspects worth highlighting, especially in relation to national judges' acceptance of the legitimacy of the claims and the need for judicial intervention by a foreign court. In the preliminary proceedings of all cases, national judges underlined the seriousness and credibility of allegations made by the plaintiffs. Judge Deobhakta in the Court in Auckland noted, for example, that:

I have carefully perused all the material placed before me and I am satisfied that it disclosed that there are “good and sufficient reasons” to believe that he [Moshe Ya’alon] was together with others responsible for the bombing at Al Daraj that resulted in the deaths of several persons and destruction of civilian property. The Informant has made out a prima facie case for their issue and they were issued accordingly.<sup>363</sup>

---

356 PCHR: “The Principle and Practice of Universal Jurisdiction”, 2010, at 130.

357 *Haaretz*, 4<sup>th</sup> April 2009.

358 Decision by the High Court on 30 June 2009, Ruling No. 1/09.

359 Decision by the Supreme Court of 13 April 2010

360 Human Rights Watch: “The world needs Spain’s universal jurisdiction law”, Reed Brody, May 27<sup>th</sup> 2009.

361 See PCHR Press Release of 16 April 2010: PCHR take Al Daraj case to Constitutional Court; Challenge Restrictions on Universal Jurisdiction Law in Spain.

362 .. More recently in March 2011, the case was submitted to the European Court of Human Rights. For a discussion of the cases, see Carmen Perez Gonzales and Rafael Escudero Alday, *La Responsabilidad Penal Par La Comision De Crimenes De Guerra: El Caso De Palestine* (2009).

363 District Court at Auckland, *supra* note 350.

Judge Fernando Andreu in Spain noted that “...the denounced facts show one “notitia criminis” which it must investigate”<sup>364</sup> Therefore, if a *prima facie* case existed, the judges were willing to issue an arrest warrant (New Zealand and the United Kingdom) or accept their competence to investigate the allegations (Belgium). Other reasons for interpreting the legal norms in favor of the Palestinian plaintiffs seem to have been the nature and scale of the crimes, as well as the lack of proper criminal proceedings within the Israeli legal system. These cases have, thus, succeeded in raising awareness about the shortcomings of the Israeli criminal system. In the Spanish case, for example, one group of judges in their dissenting opinion concluded that no proper criminal investigation and prosecution was forthcoming within the Israeli criminal system and that Spanish courts had competence to investigate the crimes:

The concurrence of jurisdictions to avoid impunity is a consequence of universal prosecution. The principle of universal competence and the concurrence of jurisdictions is the result of the obligation to prosecute crimes. All jurisdictions are equal because the idea is to protect property which transcends the victims themselves to the international community...Thus, the duty to pursue crimes under international law has nothing to do with the territory. The *locus delicti* is a criterion to determine jurisdiction, but it is not the deciding factor nor is it the only one. This is particularly applicable in the case under consideration: the events took place in Gaza where the Palestinian Authority has legal competence over the territory...Furthermore, due to the perpetrators’ position within the State structure, frequently the territorial jurisdiction does not investigate or prosecute the perpetrators of major crimes against humanity. This is why, in order to avoid impunity, international law has made possible – in the case of war crimes in which intervention is obligatory – the intervention of other national jurisdictions.<sup>365</sup>

The majority of judges at the appeal level, however, disagreed and argued for priority of jurisdiction *locus delicti*:

As all States have the common commitment (at least in respect to principles) to pursue such abominable crimes as they affect the international community, elementary procedural and political-

---

364 Decision of 29 January 2009, *supra* note 355, at 3.

365 Dissenting opinion of 30 June 2009, *supra* note 355, at 2.

criminal reasonableness must be given priority to the jurisdiction of the State where the crime was committed<sup>366</sup>

...to question the impartiality and the organic and functional separation of the Executive branch from the Military Attorney General, the Attorney General and the Investigation Commission named by the Government of Israel implies ignoring the evidence of the existence of a social and democratic rule of law, under which the members of the executive and judicial branches are subject to the law.<sup>367</sup>

This cautious approach towards criticizing and reviewing Israel's investigation of the Al-Daraj incident, which inevitably leads to *de facto* impunity of Israeli officials, was, in the view of the minority, contrary to the purpose of the Spanish universal jurisdiction legislation. They were therefore convinced that Spanish courts were obliged to investigate and eventually prosecute "...the perpetrators of major crimes against humanity..."

These criminal cases, then, demonstrated that the national judges were cognizant of the realities for the Palestinians and they were convinced, based on the evidence put before them, that the allegations were credible. They have, at least from that narrow perspective, acted as allies for the Palestinian plaintiffs.<sup>368</sup> However, the cases also disclosed a disagreement among judges as to when to prioritize the fight against impunity of the perpetrators over sovereignty and immunity concerns.<sup>369</sup> The changes in the universal jurisdiction laws of these countries illustrates the political pressure exerted by powerful states, when their senior officials are under threat, on countries attempting to fulfill their obligations to prosecute international crimes and abide by the rule of law.

---

366 Majority vote 30 June 2009, *supra* note 355, at 3.

367 *Ib.*, at 5.

368 For a discussion about how national judges generally have "been a source of hope for international lawyers", see Anne-Marie Slaughter, "Judicial Globalization", 40 VA. J. INT'L. L. 1103 (1999-2000).

369 The most recent criminal case was initiated in Belgium in late June 2006 when two Belgian lawyers working on behalf of Palestinians filed suit against 14 Israeli leaders.

## Conclusion

The ICL framework was established during the Nuremberg trials following the atrocities of WWII, especially the genocide of Jews, gypsies, the disabled and other minority groups. The idea behind the development of ICL was to ensure that impunity for international crimes of a heinous nature would no longer exist, in light of those tragic events. Considerable jurisprudence was developed at the ICTY and ICTR during the prosecution of perpetrators of international crimes committed in the former Yugoslavia and Rwanda. This led to the establishment of the International Criminal Court in 2002. The principles of ICL, including universal jurisdiction, were utilised in the trials of Adolf Eichmann, Augustus Pinochet and Slobodan Milosevic. So far, the only situations and cases being investigated by the ICC are those in African countries.

Following the Israeli onslaught on Gaza in 2008-2009, the Goldstone Report and the Dugard Report, among others, provided the international community with detailed evidence that war crimes and crimes against humanity may have been committed by Israel. This is not the first time that Israel has been accused of such crimes. In 2000, following the killing of 120 Palestinian civilians, the UN Human Rights Commission specified that Israel's actions constituted war crimes and crimes against humanity.<sup>370</sup> Along with other human rights groups, Amnesty International accused Israel of committing war crimes and crimes against humanity following Operation Defensive Shield in Jenin in the West Bank in 2002.<sup>371</sup> Again, following Israel's attack on Lebanon in 2006 rights

---

<sup>370</sup> UN Commission on Human Rights, UN Doc. E/CN.4/RES/S-5/1, 19 October 2000.

<sup>371</sup> Amnesty International: Israel and the Occupied Territories: Shielded from Scrutiny: IDF violations in Jenin and Nablus, 4 November 2002.

groups were calling for accountability for war crimes.<sup>372</sup> A year ago, Israel shot dead 9 activists and injured many more during its attack on the Gaza Flotilla in international waters. Once again, it acted with impunity.

From the examination in this paper of war crimes, crimes against humanity and genocide, it would appear that all three categories of international crimes are relevant in assessing the criminal nature of Israel's policies towards the Palestinian people. The notion of crimes against humanity, however, is of particular relevance because of its essential contextual requirement that criminalizes the widespread and systematic nature of state-sponsored policies, underpinning crimes committed by Israeli officials. This concept also encompasses the 63 year old pattern of policies of human rights abuses, displacement and dispossession, expressing clear political objectives, which may amount to the crime against humanity of persecution.

Yet, when looking at the enforcement of ICL, we may conclude that key perpetrators have gone unpunished for the crimes committed in 1948 and during the next 63 years. Not a single high-ranking Israeli official has ever stood trial for any of the serious crimes committed against the Palestinian people, neither at the international nor national level. Furthermore, the crimes have never been investigated independently and thoroughly by an impartial judicial body. Israel continues to maintain a discriminatory legal system that precludes independent investigations and denies Palestinians effective remedies.

A very great obstacle to achieving justice for the Palestinians has been the hitherto unconditional diplomatic and financial support given to Israel by the United States. Israel's military might would not be possible without the four billion dollars per year<sup>373</sup> that it receives from the US. Having such a strong ally among the permanent five nations on the Security Council has ensured Israel's impunity. As stated in the Goldstone report:

The Mission is firmly convinced that justice and respect for the rule of law are the indispensable basis for peace. The prolonged situation of impunity has created a justice crisis in the OPT that warrants action.<sup>374</sup>

---

372 Amnesty International, "Israel/Lebanon, deliberate destruction or 'collateral damage'? Israeli attacks on civilian infrastructure", August 2006

373 F. Boyle "The United States Promotes Israeli Genocide Against the Palestinians", 10 January 2009.

374 Goldstone report, *Supra* n.1, para. 1755.

However, the Goldstone report remained in the arena of the Human rights Council from its publication in September 2009 until March 2011, when the Human Rights Council referred it for reconsideration by the General Assembly,<sup>375</sup> following the conclusion by the independent committee of experts that Israel's domestic investigations were unsatisfactory.<sup>376</sup> Zionists exerted enormous pressure on Richard Goldstone and the other authors of the report<sup>377</sup> resulting in Goldstone publishing an article in which he "reconsidered" some of the findings of the report.<sup>378</sup> Israel and the US have blatantly exerted political pressure on the governments of countries whose judiciaries have attempted to bring prosecutions against Israeli officials under the principle of universal jurisdiction. In several countries, this has led to the changing of universal jurisdiction laws<sup>379</sup>, limiting the use of a principle enshrined in the Geneva Conventions - an essential tool in the fight against impunity. This despite the fact that universal jurisdiction was the very principle used against Eichmann to hold him responsible for the entire "final solution".<sup>380</sup>

The purpose of the Charter of the United Nations is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>381</sup>

Various mechanisms exist within the Charter which allow the international community to take action to achieve this end and to combat impunity. The General Assembly's "Uniting for Peace" resolution allows it to take action when the Security Council is failing to take action through lack of unanimity

---

375 A/HRC/RES/16/32, 16<sup>th</sup> April 2011 (N.B. passed at a meeting of HRC on 25<sup>th</sup> March 2011).

376 Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9 – A/HRC/16/24, 18<sup>th</sup> March 2011.

377 Goldstone report: Statement issued by members of UN mission on Gaza war, Hina Jilani, Christine Chinkin and Desmond Travers, guardian.co.uk, Thursday 14 April 2011.

378 *Washington Post*, "Reconsidering the Goldstone Report on Israel and war crimes." Richard Goldstone, 1<sup>st</sup> April 2011.

379 See Press Release by PCHR of 1 August 2010: PCHR and Hickman & Rose Oppose Proposed Changes to Universal Jurisdiction in the UK; Politic Considerations Must Not Be Allowed to Triumph over the Rule of Law. See also debate in the House of Commons available at [www.parliament.uk](http://www.parliament.uk).

380 *Eichmann case*, *Supra* n.26, para. 196.

381 Art. 1 UN Charter.

among the permanent five. There has recently been much talk at the UN and in the media about the “responsibility to protect” (R2P)<sup>382</sup> civilians, in relation to Libya and Syria. Even before operation “Cast Lead”, in January 2008, the then High Commissioner for Human Rights, Louise Arbour, referred to R2P in her condemnation of Israel’s collective punishment of the Gazan people as she urged Israel to lift the siege.<sup>383</sup> This begs the question of why the international community did not intervene to protect the civilians of Gaza during three weeks of Israeli bombardment, leaving 1400 dead and 5000 injured, especially considering that Gaza is unique in that there was nowhere to which civilians could flee. Over the course of the 2011 Nakba and Naksa Day marches commemorating the massed forced exile of Palestinian refugees in 1948 and 1967 respectively almost 40 unarmed civilians were shot dead by Israeli forces with many more injured.<sup>384</sup> Hardly an objection was raised at the time by the international community which illustrates the deep seated impunity Israel enjoys.

The UN, the European Union and individual states all have responsibility to ensure that international crimes do not go unpunished as it is a well-acknowledged fact that there can be no peace without justice. One of the arguments in favour of the declaration of a state by the Palestinian Authority in September, is that it would allow the Palestinians more access to justice mechanisms, such as the ICC. It would appear, however, that there are already sufficient means by which international crimes can be investigated and prosecuted if the political will is available for the implementation of the rule of law across the board, rather than on a selective basis. It seems that Israel operates outside the rule of law and is never held accountable for its actions which have continued for 63 years. Alongside India and Pakistan, Israel is one of only three countries not a party to the Non-Proliferation Treaty. With an unregulated and unmonitored nuclear arsenal and a long record of atrocities committed with complete impunity, Israel continues to pose a great threat to international peace and security.

As recently stated by Richard Falk:

To call appropriate attention to the effects and implications of these unambiguously unlawful patterns, and their somewhat perverse

---

382 2005 World Summit Outcome document, A/Res/60/1.

383 UNHCR, Address by Ms. Louise Arbour, UN High Commissioner for Human Rights on the occasion of the 6<sup>th</sup> Special Session of the Human Rights Council, 23 January 2008, Geneva, Security Council resolution S/RES/1674, 28<sup>th</sup> April 2006 and the Fourth Geneva Convention of 1949 also emphasise the need for protection of civilians during armed conflict.

384 Al-Jazeera, Palestinians killed in ‘Nakba’ clashes (15.05.2011); Al-Jazeera, UN’s Pillay condemns Israeli ‘Naksa’ killings (08.06.2011).

ex post facto attempted “legalization” and “normalization” requires stronger expository language to better understand the unbridled assault upon Palestinian rights and prospects for meaningful self-determination. It is against this background that this report has decided to employ such terms as “annexation”, “ethnic cleansing”, “apartheid”, “colonialist” and “criminality” as more adequately expressing the actual nature of the situation in the occupied Palestinian territories.<sup>385</sup>

While the international community continues to neglect its obligations, for political reasons, it falls to civil society to call Israel to account for its actions. The Russell Tribunal on Palestine<sup>386</sup> will hold its next session, focusing on apartheid, in South Africa in November 2011 and the international boycott, divestment and sanctions movement continues to flourish with multiple victories and achievements.<sup>387</sup>

---

385 Richard Falk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, 10 January 2011, A/HRC/16/72.

386 Russell Tribunal, *Supra* note 242.

387 See [www.bdsmovement.net](http://www.bdsmovement.net).



Over the past decades there has been an increasing amount of attention directed towards international criminal law (ICL) and how to ensure that perpetrators of international crimes will be held accountable and that victims will obtain justice. The purpose of this paper is to apply ICL to Israel's policies towards the Palestinian people. Rather than attempting to make a specific case against specific perpetrators, the aim of this paper is to set out the relevant legal framework for the application of international criminal law to some of Israel's policies towards the Palestinian people. This paper will thereby supplement other papers published by BADIL in the field of criminal justice, legal accountability and remedies as well as work by lawyers and other organizations with a view to combating the ongoing impunity of Israel and its officials.

This BADIL working paper will constitute the first of a new BADIL series looking into the subject of International Criminal Law.