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# Israeli Settlements in the West Bank, a War Crime ?

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- 1 Since 1967 the Israeli settlement policy in the West Bank<sup>1</sup> has resulted in the creation of 249 settlements, allowing the establishment of more than 640,000 Israeli settlers. Does this settlement policy in the Occupied Palestinian Territory come under any of the offenses covered by the Rome Statute (hereinafter "the Statute") of the International Criminal Court (ICC) ? This is the question which the present study attempts to answer, a question which is currently being examined by the ICC Prosecutor<sup>2</sup> and may be at the heart of a forthcoming investigation and possible prosecution.
- 2 In January 2015, the State of Palestine<sup>3</sup> filed a declaration, under Art. 12 (3) of the Statute<sup>4</sup>, recognizing the jurisdiction of the ICC with respect to alleged crimes committed "in the occupied Palestinian territories, including East Jerusalem, since June 13, 2014<sup>5</sup>". On 2 January 2015, Palestine acceded to the Statute by depositing its official demand for accession with the Secretary-General of the United Nations (UN)<sup>6</sup>. In accordance with Art. 126 (2) of the Statute, this entered into force with regard to Palestine on 1 April 2015.
- 3 Following the accession of Palestine to the Statute, the court Prosecutor decided on 16 January 2015 to open a preliminary examination of the situation in Palestine<sup>7</sup>, in order to verify whether there was a reasonable basis for investigation of the crimes alleged by Palestine and if these appeared to come under the jurisdiction of the court<sup>8</sup>.
- 4 On 22 May 2018, Palestine invoked Art. 13 (a) and Art. 14 of the Statute to refer the situation in Palestine to the ICC again, specifically requesting the court Prosecutor to "investigate, in accordance with the temporal jurisdiction of the court, over past, present and future crimes within the jurisdiction of the ICC, committed in all parts of the territory of the State of Palestine<sup>9</sup>". This new referral was necessary, according to Palestine, "given the acceleration of settlement-related crimes and their irreversible impact on the lives of Palestinians<sup>10</sup>".
- 5 Since Palestine's accession to the Statute on 2 January 2015, the ICC has been in a position to try all crimes within its jurisdiction (including war crimes and crimes

against humanity) committed in the Palestinian territory<sup>11</sup>. The opening of a preliminary examination of the situation in Palestine on 16 January 2015, and the new referral of 22 May 2018, allow the court Prosecutor<sup>12</sup> to open an investigation in the near future into the crimes alleged by Palestine<sup>13</sup>.

- 6 The crimes referred by Palestine are war crimes and crimes against humanity covered by the Statute<sup>14</sup>. Among the war crimes referred<sup>15</sup> is that of "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies (...)" covered by Art. 8 (2) (b) (viii) of the Statute<sup>16</sup>. This war crime can only be committed in the context of a situation of occupation resulting from an international armed conflict, a situation which has prevailed in the West Bank since 1967 (*infra*, paras. 55 to 72).
- 7 Could Israeli political and military leaders, who decide and implement Israeli settlement policy in the Occupied Palestinian Territory<sup>17</sup>, be brought to justice before the ICC for this war crime ?
- 8 The question is whether one can identify, in Israel's establishment of settlements in the West Bank, the elements of a war crime as outlined in Art. 8 (2) (b) (viii) of the Statute, namely the legal element (I), the material element (II) and the mental element (III) of the offense.

## I. The legal element of the crime of transfer by the Occupying Power of parts of its civilian population into a territory it occupies

- 9 The criminalization of the transfer by the Occupying Power of parts of its civilian population into a territory it occupies, is enshrined in the Statute (B) and has its source in a prohibition of such a transfer in international law (A).

### A. Prohibition under international law

- 10 The rule of the prohibition of any form of transfer, direct or indirect, by an Occupying Power, of parts of its civilian population into the territory it occupies is well established in international law.

#### 1. Violation of the Fourth Geneva Convention

- 11 Art. 49 al. 6, of the Fourth Geneva Convention (4<sup>th</sup> GC) of 12 August 1949 provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".
- 12 According to the commentary by lawyers of the International Committee of the Red Cross (ICRC), this provision was adopted to "prevent a practice adopted during the Second World War by certain Powers, who transferred portions of their own population to occupied territories for political or racial reasons or, as they proclaimed, to colonize these territories. Such transfers have led to a deterioration of the economic situation of the local population and have endangered their own existence as a race<sup>18</sup>".
- 13 This provision is generally interpreted as not allowing any exception, since no circumstances can justify the Occupying Power's deportation or transfer of all or part

of its population to the territory it occupies. The obligation applies only to the Occupying Power. Voluntary immigration of nationals of the Occupying Power into the territory it occupies is not in itself prohibited. Art. 49 al. 6 of the 4<sup>th</sup> GC only prohibits the Occupying Power from organizing or providing direct or indirect support for this transfer<sup>19</sup>.

- 14 Non-compliance with the provisions of Art. 49 al. 6 constitutes a violation of the 4<sup>th</sup> GC but cannot be considered as a "grave breach" within the meaning of Art. 147. This contains a precise and exhaustive list of acts described as grave breaches of the 4<sup>th</sup> GC<sup>20</sup>. The list includes "unlawful deportation or transfer or unlawful confinement of a protected person". However, the definition of protected persons outlined in Art. 4 of the 4<sup>th</sup> GC, implies that nationals of the Occupying Power –including those transferred to an occupied territory, such as Israeli settlers in Palestinian territory– are not persons protected by the convention<sup>21</sup>. Art. 147 of the 4<sup>th</sup> GC refers to "unlawful transfer" (of population) only if it is "committed against persons protected by the present Convention". Thus, only the (forced) transfer of the occupied population is classified as a grave breach. Consequently, the transfer of part of the Occupying Power's population to occupied territory violates Art. 49 al. 6 and constitutes an unlawful transfer but not a "grave breach" within the meaning of Art. 147, since Art. 147 only incriminates "the unlawful deportation or transfer" of "persons protected by the Convention"<sup>22</sup>.
- 15 On 6 July 1951 Israel ratified the four 1949 GCs which entered into force, as far as Israel is concerned, on 6 January 1952. It considers, however, that the establishment of Israeli settlements in Occupied Palestinian Territory does not violate Art. 49 al. 6 of the 4<sup>th</sup> GC<sup>23</sup>.

## 2. A prohibition confirmed by other applicable rules of the law of occupation

- 16 Art. 49 al. 6 of the 4<sup>th</sup> GC must be interpreted in the light of the other rules of the law of occupation. Customary International Humanitarian Law (IHL), codified by the ICRC in 2005, provides that "States may not deport or transfer parts of their own civilian population to a territory they occupy"<sup>24</sup>. In accordance with State practice, this rule constitutes a norm of customary international law in international armed conflicts<sup>25</sup>. In addition, many military manuals prohibit the deportation or transfer by a party to the conflict of part of its civilian population to the territory it occupies<sup>26</sup>. This rule is also enshrined in the legislation of a considerable number of States<sup>27</sup>. It was brought by the International Military Tribunal (IMT) in Nuremberg in 1946 against two of the defendants for attempted "Germanization" of the occupied territories<sup>28</sup>. Finally, the UN Human Rights Council stated in 2014 that the prohibition of transfer, by an Occupying Power, of a part of its civilian population into the territory it occupies was a conventional and customary rule<sup>29</sup>.
- 17 Likewise, the Regulations annexed to the 4<sup>th</sup> Hague Convention of 18 October 1907, if they do not specifically rule on the question of the transfer of civilian population, require that the Occupying Power take all measures "to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" as stated in Art. 43. This provision compels the Occupying Power to respect the social life of the occupied population<sup>30</sup>. The aim is to preserve, as far as possible, the demographic and social configuration of the occupied territory. To ensure that this objective is respected, the Occupying Power must take all measures to

prevent the possible migration of its nationals to the territory it occupies, since this migration, even if it is voluntary, modifies the demographic and social configuration of the occupied territory.

- 18 The Hague Regulations of 1907 also require the Occupying Power to administer public lands in accordance with the rules of the usufruct so that they are not transferred to the benefit of the Occupying Power<sup>31</sup>. The Occupying Power takes control only of the "fruits" of the land and can make profitable use of the public domain, but only for the benefit of the local population and to cover the cost of the occupation<sup>32</sup>. Thus, any confiscation or requisition of public land in the occupied territory for the settlement of inhabitants of the Occupying Power is illegal.
- 19 Art. 53 of the 4<sup>th</sup> GC states :
- 20 "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."
- 21 It is therefore forbidden to destroy public or private property situated in an occupied territory for the purpose of establishing settlements there, as these cannot be considered as falling under military necessity<sup>33</sup>.
- 22 All these rules of the law of occupation are in line with Art. 49 al. 6 of the 4<sup>th</sup> GC which prohibits the Occupying Power from transferring all or part of its population to an occupied territory and from taking any measure to organize or promote such transfer<sup>34</sup>.

### 3. A grave breach of Additional Protocol I

- 23 Over the last forty years, IHL has evolved towards the idea that the transfer by the Occupying Power of a part of its civilian population to a territory it occupies constitutes not only a violation of IHL but also a "grave breach", hence a war crime.
- 24 The First Protocol Additional to the GCs (AP I), dated 8 June 1977, added to the list of "grave breaches" covered by the GCs, "grave breaches" to AP I, as listed in Art. 11 et 85. Among these AP I "grave breaches", is the transfer by the Occupying Power of parts of its population to the territory it occupies<sup>35</sup>. This is an evolution of IHL, since such a transfer does not constitute a "grave breach" under the terms of the 4<sup>th</sup> GC<sup>36</sup> (*supra* para. 11).
- 25 Art. 85 (4) (a) of AP I thus stipulates that "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, [...], in violation of Art. 49
- 26 of the 4<sup>th</sup> GC" shall be regarded as a "grave breach" of said Protocol. Art. 85 (5) of AP I further specifies that such "grave breaches of these instruments shall be regarded as war crimes<sup>37</sup>".
- 27 This trend towards the criminalization of the transfer of parts of its civilian population by an Occupying Power was made in reference to Israeli settlements in the West Bank, as evidenced by the work of the Diplomatic Conference that resulted in the adoption of AP I<sup>38</sup>.
- 28 The consideration of the establishment of settlements by an Occupying Power in occupied territory as a war crime also appears in the Draft Code of Crimes against the Peace and Security of Mankind (Article 20, c, i), established in 1996 by the International Law Commission<sup>39</sup>.

- 29 However, has the criminalization of transfer by an Occupying Power of a part of its population to the occupied territory acquired a customary value ?
- 30 Many of the rules of AP I –currently in force in 174 States<sup>40</sup>– are the expression of customary rules of a universal nature, to the extent that their substance is found in customary IHL as codified by the ICRC<sup>41</sup>, in the UN Secretary-General's *Bulletin on Observance by UN Forces of International Humanitarian Law*<sup>42</sup> and in NATO Rules of Engagement<sup>43</sup>. The International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>44</sup> and the International Court of Justice (ICJ)<sup>45</sup> have referred to it but without saying that all the rules of AP I were the expression of a universal custom.
- 31 The criminalization of transfer, by the Occupying Power, of parts of its population to the territory it occupies is the subject of an international consensus. This consensus stems from the fact that the transfer of civilian population by an Occupying Power to the territory it occupies constitutes a totally unjustified attack (since no military necessity exists) both on the integrity of this territory and on its civilian population<sup>46</sup>.
- 32 On the one hand, the transfer of parts of its civilian population by an Occupying Power to an occupied territory necessarily gives rise to the appropriation of land belonging to the Occupied Power and its population. Such appropriation often goes along with acts of destruction or seizure of property which are prohibited by international law<sup>47</sup>, as well as acts of violence, including acts committed by settlers<sup>48</sup>.
- 33 Such transfer also gives rise to modifications which necessarily affect the geographical and demographic configuration of the occupied territory<sup>49</sup>. The changes engendered affect the economic, social and cultural life of the population of the Occupied Power<sup>50</sup> and may lead to the establishment of an institutionalized system of discrimination (apartheid)<sup>51</sup>. In addition, at political and diplomatic levels, changes generated alter the configuration of the Occupied Power, which weakens it and further strengthens the Occupying Power, allowing it to prolong the occupation and impose its conditions in the context of the search for a peaceful settlement of the conflict.
- 34 The international consensus on the rule laid by Art. 85 (4) (a) of AP I gathered substance and strength at the Rome Diplomatic Conference with the adoption of Art. 8 (2) (b) (viii) of the Statute and by the aforementioned resolution of the UN Human Rights Council in 2014 (*supra* para. 17)<sup>52</sup>. In view of these elements, it may be said that the rule of criminalization of the transfer by the Occupying Power of part of the population in the territory it occupies has acquired a customary value.
- 35 However, Israel is not a State party to AP I, contrary to Palestine who acceded to it on 2 April 2014. One of the reasons for Israel's refusal to ratify this text is precisely the content of Art. 85 (4) (a). Moreover, Israel does not recognize the customary value of AP I. The evolution of IHL had no effect on the Israeli position<sup>53</sup>. Thus, Israel seems not to accept the customary value of the rule criminalizing the transfer by the Occupying Power of part of its population into the territory it occupies. It could be for the Prosecutor and the court to determine if Israel can, or cannot, be considered as a "persistent objector"<sup>54</sup> to this customary rule.

## B. A war crime according to the Statute of Rome

- 36 Art. 8 (2) (b) (viii) of the Statute provides that "the transfer, directly or indirectly, by an Occupying Power of parts of its own civilian population to the territory it occupies (...)"

is one of the war crimes punishable in the context of an international armed conflict. Art. 8 (2) (a) of the Statute includes in the list of war crimes that of grave breaches against the GCs. However, there are other war crimes, which are not considered in the GCs as grave breaches of these conventions<sup>55</sup>. This is the reason why Art. 8 (2) (b) of the Statute lists the "other serious violations" which are considered as war crimes<sup>56</sup>, including the transfer by the Occupying Power of part of its civilian population to an occupied territory. 123 States<sup>57</sup> are so far parties to the Statute and therefore consider that such an act constitutes a war crime. Many of them have transposed into domestic law the crimes covered by the Statute and consider the transfer by the Occupying Power of part of its civilian population into the territory which it occupies as an internal war crime. This is, for example, the case of France, with Art. 461-26 of the penal code, and the case of Belgium, with Art. 136<sup>quater</sup> 31° of the penal code.

### 1. A war crime punishable in the context of an international armed conflict and a situation of occupation

- 37 The war crime outlined in Art. 8 (2) (b) (viii) of the Statute can only be committed in the context of an international armed conflict and in connection with it. This results both from the Statute<sup>58</sup> and the Elements of Crimes<sup>59</sup>. Moreover, the offense is always linked to a situation of occupation, i.e. a situation where "an Occupying Power" oversees a "territory it occupies"<sup>60</sup>.
- 38 This provision can therefore only apply after qualifying a given situation of international armed conflict and of occupation.
- 39 The international character of an armed conflict arises, conventionally, from the armed opposition of two or more States<sup>61</sup>, but it can also result from the participation in hostilities of an international organization or the armed intervention of a State in an internal armed conflict<sup>62</sup>. Also considered international are "armed conflicts in which peoples struggle against colonial domination and foreign occupation and against racist regimes, in the exercise of the right of peoples to self-determination"<sup>63</sup>.
- 40 For there to be "armed conflict"<sup>64</sup>, the existence of open hostilities (material criterion) must be noted, which makes it possible to rule out isolated and sporadic acts of violence<sup>65</sup>. International jurisprudence requires that there should be "military operations"<sup>66</sup> for a conflict situation to be considered an "armed conflict". It is not necessary, in the case of an international armed conflict, that these military operations reach a certain frequency and intensity<sup>67</sup>.
- 41 As for the concept of occupation, it is defined by Art. 42 of the 1907 Hague Regulations, which provides that :
- 42 "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."
- 43 For occupation within the meaning of this provision to be effective, two conditions are required : the Occupying Power is in a position to effectively control a territory that is not its own, and its intervention has not been approved by the legitimate ruler<sup>68</sup>. This definition is taken up again by case law, which considers that a situation of occupation requires a sufficient degree of effective control of the territory by the hostile army<sup>69</sup>. It is the criterion of the effective territorial control of the place where civilians live which

is mainly taken into account<sup>70</sup>, the second criterion, namely the absence of consent, is to be understood fairly broadly<sup>71</sup>.

- 44 A situation of occupation does not imply the end of the State of war and of the international armed conflict. The GCs include in the category of international armed conflicts "all cases of occupation of all or part of the territory of a High Contracting Party" (common Article 2 al. 2), even if the occupation of the territory does not meet any armed resistance<sup>72</sup>. While the Statute says nothing about this, the ICC Elements of Crimes also describe military occupation as an international armed conflict<sup>73</sup>.
- 45 These two aspects (occupation and international armed conflict) are inextricably linked, because in international law a situation of military occupation can only result from an armed conflict of an international character and continues as long as the territory is under the authority of the hostile army, even if there is no, or no more, fighting. The rules of IHL relating to occupation therefore remain applicable to a territory as long as it is under the effective control of foreign armed forces<sup>74</sup>. This is the case of the West Bank, whose territory has been, in the context of an international armed conflict, occupied by the Israeli armed forces since 1967 (*infra*, paras. 55 to 72).

## 2. The criminalization of "direct or indirect" transfer by the Occupying Power of its population in the territory it occupies

- 46 The wording of Art. 8 (2) (b) (viii) of the Statute is almost identical to that of Art. 85 (4) (a) of AP I. This was a wish of the majority of delegations to the Rome Diplomatic Conference, which, faced with proposals for the extension or limitation of the scope of application of the prohibition, wanted to stick to both the letter and the spirit of Art. 49 al. 6 of the 4<sup>th</sup> GC and 85 (4) (a) of AP I<sup>75</sup>.
- 47 The only difference with this last text lies in the fact that Art. 8 (2) (b) (viii) of the Statute criminalizes the "direct or indirect" transfer by the Occupying Power of its own population, and not the mere direct transfer as could be inferred from Art. 85 (4) (a) of AP I. In fact, Art. 8 (2) (b) (viii) of the Statute merely clarifies this point : some States, in particular some Arab countries, wanted it to be made clear in the text that it was not only the direct assistance of the Occupying Power to the transfer which was incriminated but also indirect help provided by that Power<sup>76</sup>.
- 48 It was undoubtedly a definitive rejection of Israel's argument that IHL only prohibited forcible transfer of population to the occupied territory and not voluntary transfer<sup>77</sup>. Perhaps there was a desire to remove any doubt about the fact that the offense is also constituted in the case of indirect measures of support for the transfer (such as fiscal or social measures)<sup>78</sup> or where no measure to prevent such a transfer of population is taken<sup>79</sup>. Most States consider that this is only a clarification, insofar as IHL (4<sup>th</sup> GC, AP I and customary IHL) definitely intends to prohibit for the Occupying Power any direct or indirect policy of transfer of its own population into occupied territory. Therefore, the wording of Art. 8 (2) (b) (viii) of the Statute does not introduce any substantive change in the crime referred to in Art. 85 (4) (a) of AP I<sup>80</sup>, according to them.
- 49 It follows in any event from this new wording that the involvement of the Occupying Power can take different forms, direct or indirect. Direct, for example, with the adoption of plans of settlement creation, construction and development in the occupied territory<sup>81</sup>. Indirect, for example, with any policy or measure aimed at provoking or facilitating the migration and settlement of part of the population of the

Occupying Power in the occupied territory, in the form of confiscation or requisition laws or decrees, settlement protection measures, economic and financial measures such as incentives, subsidies, tax exemptions and discriminatory permits<sup>82</sup>.

- 50 Israel participated in the negotiations at the Rome Diplomatic Conference and then signed the Statute on 31 December 2000 but has not ratified it and is therefore not bound to apply it. However, Israel "must refrain from acts which would defeat the object and purpose" of the Statute (Vienna Convention on the Law of Treaties, Article 18). In addition to that, it must respect the provisions of the Statute that reflect international custom. Indeed, the incriminations in the Statute do reflect customary IHL<sup>83</sup>. This is the case of the offense covered by Art. 8 (2) (b) (viii) of the Statute. Finally, Israel may well fall under the jurisdiction of the court. When the facts in question are committed on the territory of a State which is party to the Statute –in this case Palestine– these facts come under the jurisdiction of the court<sup>84</sup> and may lead to prosecution against their perpetrators or accomplices who are nationals of a non-party State.
- 51 At the Diplomatic Conference in Rome, Israel objected to the adoption<sup>85</sup> of the incrimination covered by Art. 8 (2) (b) (viii) of the Statute. Subsequently, with the support of the United States, it challenged the content of this rule when drafting the Elements of Crimes<sup>86</sup>, which, under Art. 9 of the Statute, serve the ICC in the application and interpretation of Art. 6 to 8bis (crimes within the jurisdiction of the court). Israel tried in particular to discuss the legal elements constituting the act of "transfer, direct or indirect" contained in Art. 8 (2) (b) (viii). Finally, a consensus was reached to leave it to the judges to interpret this notion : Elements of crimes<sup>87</sup> indicate that the term *transfer* "must be interpreted in accordance with the relevant provisions of IHL".
- 52 It follows from the foregoing that the text of Art. 8 (2) (b) (viii) of the Statute constitutes the legal element of the war crime of transfer by the Occupying Power of part of its population into the territory it occupies, an incriminating text that could be applied to the facts committed in the West Bank since 13 June 2014<sup>88</sup>. Once the legal element has been established, it is necessary to check whether the material element of the offense is constituted.

## II. The material element of the crime of transfer by the Occupying Power of parts of its civilian population into a territory it occupies

- 53 For the material element of the crime referred to in Art. 8 (2) (b) (viii) of the Statute, two conditions must be met : on the one hand, the existence of a particular context, namely an occupation situation resulting from an international armed conflict (A), which is a prerequisite ; and, on the other hand, the existence of an act, namely the "transfer, direct or indirect, by an Occupying Power, of part of its civilian population, into the territory it occupies, [...] (B). Are these two conditions met for Israeli settlement policy in the West Bank ?

## A. The existence of an international Arab-Israeli armed conflict and of a situation of occupation in the West Bank

- 54 In June 1967, an international armed conflict opposed Israel to Jordan, Egypt, Syria and Iraq for six days<sup>89</sup>. The occupation of the West Bank by the Israeli armed forces is a direct consequence of this conflict and of the Israeli military victory. As a result, the occupation of the West Bank is an occupation of a belligerent nature<sup>90</sup>.
- 55 According to IHL, the occupation situation resulting from an international armed conflict does not end until the end of this occupation. The rule follows from the interpretation *a contrario* of Art. 42 of the Hague Regulations of 1907<sup>91</sup> and of Art. 2 al. 1, of the GCs<sup>92</sup>. Art. 6 of the 4<sup>th</sup> GC provides that the Convention ceases to apply "one year after the general end of military operations" with the exception of various provisions that continue to apply as long as the occupation persists. Art. 3 (b) of AP I provides that the application of the Protocol shall cease with the general close of military operations and, for the occupied territories, "on the termination of the occupation".
- 56 Yet, since 1967, no factual or legal element has put an end to the occupation situation and in particular to the effective territorial control of the West Bank by the Israeli armed forces. The Oslo I and II agreements concluded in 1993<sup>93</sup> and 1995<sup>94</sup> between Israelis and Palestinians, which grant relative autonomy to certain parts of the West Bank, do not change anything: the West Bank remains an Occupied Palestinian Territory, under the total or partial control of Israel. As the fate of this territory has not been settled, the situation of occupation resulting from an international armed conflict persists.
- 57 The West Bank includes the territory of East Jerusalem, which is also occupied. East Jerusalem is not a separate entity, distinct from the rest of the West Bank. Located east of the Green Line, the East Jerusalem area is an integral part of the West Bank and therefore forms part of the Occupied Palestinian Territory<sup>95</sup>. Israel's adoption on 30 July 1980 of the Basic Law of Jerusalem, making the city the "complete and united" capital of Israel, does not change its status as an occupied territory, as reflected in resolution 478 of 20 August 1980, adopted by 14 votes with one abstention (that of the United States), in which the Security Council
- 58 "1. *Censures* in the strongest terms the enactment by Israel of the 'basic law' on Jerusalem and the refusal to comply with relevant Security Council resolutions ;
- 59 2. *Affirms* that the enactment of the 'basic law' by Israel constitutes a violation of international law and does not affect the continued application of the [4<sup>th</sup> GC] in the Palestinian and other Arab territories occupied since June 1967, including Jerusalem ;
- 60 3. *Determines* that all legislative and administrative measures and actions taken by Israel, the Occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith ; [...]"
- 61 It cannot be clearer and for the vast majority of States, Tel Aviv remains the capital of Israel. The embassies of all the States that recognize Israel are still there, with the notable exception of the United States, who moved their embassy in 2018 and recognized Jerusalem as the capital of Israel.
- 62 As the belligerent occupation of the West Bank continues, the provisions on the law of occupation in the event of an international armed conflict remain applicable in the

West Bank. Israel is therefore bound to respect these conventions, particularly the provisions of the 4<sup>th</sup> GC relative to occupation<sup>96</sup>.

- 63 Israel is also bound to respect the provisions of the Hague Regulations<sup>97</sup> relative to occupation. Admittedly, Israel is not a party to the 4<sup>th</sup> Hague Convention of 1907 and its Rules, but they have acquired a customary character that is recognized in international law<sup>98</sup> and this binds Israel, who did not express opposition on this point<sup>99</sup>. In addition, these two international texts are inextricably linked. Indeed, Art. 154 of the 4<sup>th</sup> GC states that this Convention supplements sections II and III of the 1907 Hague Regulations. One can deduct from this that by ratifying the 4<sup>th</sup> GC, Israel accepts the Hague Regulations and their provisions on the law of occupation.
- 64 Israel's occupation of the West Bank is documented by case law and practice. In its opinion of 9 July 2004, following a request for an Advisory Opinion from the United Nations General Assembly<sup>100</sup> (UNGA), the ICJ stated that the GCs, and in particular the 4<sup>th</sup> Convention, applied to the Occupied Palestinian Territory :
- 65 "that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories<sup>101</sup>".
- 66 Similarly, the UN Security Council has considered since 1967 that the Palestinian territory was "occupied"<sup>102</sup>. It asked in 1969 "Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation<sup>103</sup>". The Council has subsequently stated on several occasions that
- 67 "The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem<sup>104</sup>."
- 68 The UNGA has repeatedly reminded of
- 69 "The applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and of the Regulations annexed to the Hague Convention IV from 1907 to the Occupied Palestinian Territory, including Jerusalem, and to all other Arab territories occupied by Israel since 1967<sup>105</sup>".
- 70 A conference of the High Contracting Parties to the 4<sup>th</sup> GC on the application of IHL in the Occupied Palestinian Territory met on 15 July 1999 on the recommendation of the UNGA<sup>106</sup>. A second conference, which brought together 114 States Parties but which Israel did not attend, adopted a final declaration, identical to the first one, on 5 December 2001, which "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem"<sup>107</sup> and the need for full respect for its provisions in that territory. The ICRC, the guardian and promoter of IHL, recalled, in a public statement of the same day, the applicability *de jure* of the 4<sup>th</sup> GC in the Occupied Palestinian Territory<sup>108</sup>.
- 71 All these elements confirm that, since 1967, there has been an occupation situation in the West Bank resulting from an international armed conflict. This situation entails the full application of all IHL relevant provisions, including all the rules relative to the law of occupation which prohibit the transfer by Israel of part of its civilian population to Occupied Palestinian Territory.

## B. The transfer by the Israeli Occupying Power of part of its civilian population in the West Bank

72 In addition to the prerequisite condition of context mentioned above, Art. 8 (2) (b) (viii) of the Statute requires that the act of "transfer, direct or indirect, by an Occupying Power, of part of its civilian population to the territory it occupies" be established. This definition imposes the conjunction of two facts : the transfer of a part of the Israeli population to the West Bank (1) and the involvement of Israel in this displacement (2). Does Israeli settlement in Occupied Palestinian Territory meet these requirements ?

### 1. The transfer by the Israeli Occupying Power of part of its civilian population to the West Bank

73 The text of Art. 8 (2) (b) (viii) of the Statute requires the transferred persons to represent a minimum proportion of the civilian population of the Occupying Power and not a few isolated individuals<sup>109</sup>. In speaking of a "part" of the civilian population of the Occupying Power, the Statute implies a substantial and non-residual transfer of population. The text also requires that the transferred persons belong to the "civilian population" of the Occupying Power<sup>110</sup>. They may not be persons foreign to the Occupying Power or members of the Occupying Power's army. Lastly, the text requires that the movement and physical establishment of part of the civilian population to the occupied territory be of a certain duration<sup>111</sup>. It cannot be a temporary establishment.

74 Are the criteria set by Art. 8 (2) (b) (viii) of the Statute relating to the nature of the population transfer met in the West Bank ? Some figures indicate the extent of the transfer of part of the Israeli civilian population to settlements located in the Occupied Palestinian Territory and inhabited permanently and exclusively by Israeli citizens.

75 These settlements include the Israeli-authorized settlements<sup>112</sup> as well as those which have not been officially authorized –designated as "outposts<sup>113</sup>"– but are also supported by the Israeli authorities, as shown in the Sasson report<sup>114</sup>.

76 Since 1967, 143 settlements have been established in the Occupied Palestinian Territory<sup>115</sup>. Of these 143 settlements, 11<sup>116</sup>, called "large Israeli neighborhoods", are located in East Jerusalem<sup>117</sup> and 132<sup>118</sup> are located in the rest of the West Bank<sup>119</sup>.

77 It is necessary to add 106 "outposts<sup>120</sup>" established in the West Bank. In total, the Israeli population has been transferred to 249 locations in the Occupied Palestinian Territory.

78 In 1967, the West Bank had almost no Israeli citizens. In 1989, nearly 200,000 settlers lived there. In 2004, they were nearly 442,000. In 2012, 520,000 Israeli citizens lived in the West Bank<sup>121</sup>.

79 By 2018, more than 640,000 Israeli citizens were enumerated in the settlements, including about 222,000 in East Jerusalem. In comparison, about 300,000 Palestinians resided in East Jerusalem and 2.8 million in the rest of the West Bank. At present, 10 % of the total Israeli population lives in settlements in the Occupied Palestinian Territory.

80 The population of Israeli settlements is growing by 4 to 6 percent each year. The birth rate of settlers is certainly higher than that of the rest of the Israeli population. Thus, part of the increase in the Israeli population living in the West Bank is linked to this dynamic birth rate. This argument is put forward by the Israeli government to justify a so-called "natural" increase in settlement population<sup>122</sup>, which would imply the

expansion of settlements, with new requisitions of private land belonging to Palestinians or to the Palestinian public domain. However, the growth of the settler population in the West Bank is also linked to the steady and continuous transfer of Israeli citizens who come to settle there, either for ideological or religious reasons, or for economic reasons.

- 81 Since 13 June 2014<sup>123</sup>, the date stated by Palestine in its referral on the Palestinian situation to the ICC, the number of permits for housing construction in settlements has been increasing. Settlement-related activity has intensified<sup>124</sup>. Reports from the Office of the European Union<sup>125</sup> in Jerusalem as well as from the United Nations High Commissioner for Human Rights<sup>126</sup> document, for the years 2016, 2017 and 2018, an increase of the permits granted<sup>127</sup>, and construction in the settlements carried out at a steady pace.
- 82 Therefore, what has been taking place is indeed a substantial and even massive transfer (as the figures indicate) of part of the Israeli civilian population, who have now settled permanently in the Occupied Palestinian Territory. This transfer is continuous and has tended to accelerate since 2014. It still remains to be established that this transfer is organized by the Occupying Power.

## 2. Israel's involvement in the transfer of part of its civilian population to settlements in the West Bank

- 83 Art. 8 (2) (b) (viii) of the Statute requires that the transfer of population to an occupied territory be organized by the Occupying Power. Consequently, the transfer cannot have been organized by a few individuals acting in isolation and without State prerogative<sup>128</sup>. This article also requires that the persons organizing the transfer of population belong to the Occupying Power<sup>129</sup>. It follows from these two criteria relating to the organization of population transfer that, unlike war crimes, which can be attributed both to the performer and to accomplices (superiors and participants)<sup>130</sup>, the war crime outlined in Art. 8 (2) (b) (viii) of the Statute concerns only those who organize the transfer<sup>131</sup>. Therefore, likely to be concerned in priority, are all the political, civil<sup>132</sup> and military<sup>133</sup> leaders of the Occupying Power, who define and implement the population transfer.
- 84 Conversely, isolated individuals buying land or real estate in occupied territory, in accordance with the rules of property (including local rules), in the absence of any incentive from the Occupying Power, and of any coercive measure vis-à-vis the local population, do not commit the crime referred to in Art. 8 (2) (b) (viii)<sup>134</sup>.
- 85 Under these conditions, the criminal responsibility of private actors (company heads, association managers, patrons, for example) who do not act in the name of the Occupying Power or in connection with it, but contribute in a personal capacity to the establishment of settlers in the occupied territory is uncertain<sup>135</sup>.
- 86 Are the criteria set by Art. 8 (2) (b) (viii) of the Statute relating to the nature of the population transfer met in the West Bank? Since 1967<sup>136</sup>, all successive Israeli governments have engaged, albeit with varying degrees of intensity, in policies aiming at the establishment of Israeli citizens in the West Bank. In fact, the Israeli public authorities have never stopped supporting and financing the establishment and expansion of Israeli settlements in the West Bank, with a clear acceleration from 1977, when the Likud came to power<sup>137</sup>. In its 2004 opinion, the ICJ indicated that

- 87 "since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited<sup>138</sup>".
- 88 Thus, the settlement policy is the fruit of an intentional and undisguised policy, developed by successive Israeli governments.
- 89 Numerous international reports highlight the important political and financial means mobilized by Israel to allow the permanent development of settlements. For example, a report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 explains how the government of Israel
- 90 (...) offers settlers benefits and incentives relating to construction, housing, education, industry, agriculture and tourism, exclusive roads, and privileged access to Israel. The effort Israel has expended in the settlement enterprise —financially, legally and bureaucratically— has turned many settlements into affluent enclaves for Israeli citizens within an area where Palestinians live under military rule and in conditions of widespread poverty<sup>139</sup>".
- 91 This policy has never ceased, including during the engagement of the peace process in the early 1990s<sup>140</sup>. It has experienced a new upswing since the return to power of Likud in 2009.
- 92 In Israel, important and sensitive political decisions, particularly those relating to foreign affairs, defense and settlements, are collectively approved, under the authority of the Prime Minister, by the "security cabinet". Thus, decisions taken to organize the transfer of the Israeli population in the West Bank (creation of new settlements<sup>141</sup>, regularization of outposts<sup>142</sup>, extension of existing settlements, additional housing construction) must be approved by the "security cabinet".
- 93 The political role of the Prime Minister, Benyamin Netanyahu<sup>143</sup>, leader of the Likud, has been central in all settlement related decisions since 13 June 2014. However, all ministers who participate in the security cabinet have also played an important political role in the adoption and implementation of these decisions. Some members of the security cabinet sit as of right, according to the law of 2001 on the composition of this cabinet : the ministers of defense<sup>144</sup>, foreign affairs<sup>145</sup>, justice<sup>146</sup>, public security<sup>147</sup>, and finance<sup>148</sup>. The ministers of the interior<sup>149</sup>, education<sup>150</sup>, construction<sup>151</sup>, transport<sup>152</sup>, energy<sup>153</sup>, environment<sup>154</sup> and economy<sup>155</sup> also sit in the security cabinet on decision of the Prime Minister.
- 94 These ministers, who are also leaders of their political parties, represented in the Knesset, the Israeli parliament, are involved in the settlement process both by the decisions taken by the security cabinet and by the preparation and adoption of bills that facilitate and legalize this process.
- 95 In addition, through their own ministerial department, these ministers, as well as those who do not sit in the security cabinet, participate on the ground in the implementation of the settlement policy and the viability of the settlements. The various ministerial departments act, on their instructions, to make the land viable and secure, to facilitate administratively the construction of houses and housing estates, to install running water, electricity and telecommunication networks, to build public services (schools, health centers, transport, police, sports grounds, etc.), to add roads for settlers to access their homes and to go for the day to the big Israeli cities where most jobs are. As for the Israeli army, it ensures the protection of settlements and its inhabitants by

guards (military bases, patrols, guard posts) and by the construction, maintenance and monitoring of a sophisticated system of barriers, grids, watchtowers, checkpoints and other defense structures.

- 96 In East Jerusalem, which Israel considers to be part of Israeli territory and where Israeli civil law applies, it is the Planning and Construction Act 1965<sup>156</sup> which governs the extension of the 11 "large Israeli neighborhoods" and housing construction. This law gives the Ministry of the Interior a central coordinating role in the urban planning and realization of these real estate operations. Equally concerned are the government minister in charge of Jerusalem<sup>157</sup> and the mayor of the city<sup>158</sup> who, in connection with the municipal institutions and settlers' associations, propose extension plans of the East Jerusalem settlements as well as new constructions to the city planning committee.
- 97 In the rest of the West Bank, where Israeli military law applies, it is the Ministry of Defense<sup>159</sup> (via "the civil administration", which is in fact the military authority in the West Bank<sup>160</sup>, and via the assistant to the Defense Minister in charge of the settlements<sup>161</sup>) who authorizes and supervises the extension of the settlements and the construction of dwellings in them, i.e. declaration of the concerned lands as State-owned lands<sup>162</sup>, urban planning by a planning committee of the civil administration, publication in the Official Journal, call for tender for the construction, follow-up of works and constructions.
- 98 The mayors of the settlements, recognized as "cities" by Israel, and the presidents of the local and regional councils of the "settlements of Judea and Samaria", also contribute to the organization of the servicing of the land, the construction of housing and the extension of the settlements. On the security cabinet's instructions, the civil administration regularly issues decisions of regularization of housing that was already built at the initiative of those local officials, as well as of extensions of land that were already completed. The involvement of Israeli public or para-public agencies such as the World Zionist Organization (WZO), the Jewish Agency (JA) and the Jewish National Fund (JNF), which fund the settlement policy and sometimes implement it, must also be noted.
- 99 Once housing is built, settlers are attracted by a lower cost of living than on Israeli soil. Indeed, in addition to a dynamic equipment policy, the Israeli public authorities have also adopted a social and fiscal policy that is very much to the advantage of settlers. According to the Ministry of Construction and Housing, the majority of Israeli settlements are considered a "national priority area", a qualification usually reserved for weaker economic areas. This classification allows its inhabitants to benefit in particular from a price reduction for acquisition of properties, preferential borrowing rates or reduced tax rates<sup>163</sup>.
- 100 The Israeli Ministry of Construction and Housing devotes 30 % of its budget to financing settlement (housing construction, soft loans to facilitate access to property and various types of assistance to tenant settlers)<sup>164</sup>. There are also various tax incentives for individuals or businesses moving into settlements<sup>165</sup>. In total, the Israeli government provides more per capita grants to town halls and local communities in settlements than to those located in Israel<sup>166</sup>. The Israeli government spends about 10,000 shekels (about 2,000 euros) more per inhabitant each year for a settler than for an Israeli living within the borders of Israel<sup>167</sup>. All of this public policy has made

settlements very attractive to Israeli citizens, especially for the poorest citizens and recent immigrants.

- 101 The organization by the Israeli authorities of the transfer of part of the Israeli civilian population to Occupied Palestinian Territory constitutes the core of the alleged crime and is an essential element in the search for criminal responsibility. All individuals who plan, prepare, and apply such financial, administrative, military, logistical or other measures of assistance and encouragement to the transfer of population are likely to be held criminally liable before the ICC under the crime of Art. 8 (2) (b) (viii) of the Statute<sup>168</sup>. However, in practice, the Prosecutor initiates prosecution in priority against those who appear to bear the greatest responsibility for the crimes identified and who are therefore primarily responsible for them<sup>169</sup>. The Prosecutor will therefore target those who, at a high level, decide and organize the transfer of the Israeli population to the West Bank<sup>170</sup>.
- 102 Given the aforementioned rules of IHL and in a context of belligerent occupation, it is particularly in view of its massive and organized nature that the transfer of the Israeli civilian population to Occupied Palestinian Territory must be considered as the act of the material element of the war crime referred to in Art. 8 (2) (b) (viii) of the Statute.

### III. The mental element of the crime of transfer by the Occupying Power of parts of its civilian population into a territory it occupies

- 103 For there to be a crime, the mental element of the offense must be established. This mental element, also called "psychological element<sup>171</sup>", can be defined as the link (will or criminal intent) existing between the criminal act and the author<sup>172</sup>.
- 104 A voluntary criminal offense implies that the perpetrator acted intentionally and is aware of the illegality of the act<sup>173</sup>. The intentional nature of the act may be presented, either in the form of a general criminal will –the general fraud– which results in the awareness of committing and the will to commit an offense<sup>174</sup>, or in the form of a specific intent –special intent– which is the intention to violate the law so as to produce a specific damaging result<sup>175</sup>.
- 105 Art. 8 (2) (b) (viii) of the Statute does not have any specific requirement with respect to the mental element. It is not necessary for the offender to have a specific intention or motive : it is sufficient to prove, since the material element of the offense is established, that the person wished to transfer the population of the Occupying Power to the territory occupied by it. The requirement of a single general fraud stems from the logic of the criminalization, which seeks to ensure the prohibition of such a transfer with a view to protecting the population of the occupied territory, whatever the reasons for the transfer<sup>176</sup>.
- 106 However, the offender must be aware of the illegality of the act. This awareness is usually proven by a bundle of clues that reveal the criminal intent.
- 107 The criminal intent of the perpetrators of the transfer of part of the Israeli civilian population to the Occupied Palestinian Territory can be inferred from the various decisions and actions taken to organize such a transfer. However, the use of such a bundle of clues is probably not necessary in this respect. Indeed, the mental element of

the offense lies in the Israeli settlement policy, which presents a double peculiarity : on the one hand, the transfer by Israel, the Occupying Power, of part of its civilian population in the Palestinian territory has been repeatedly declared illegal in international law (B) and, on the other hand, the transfer is claimed by Israeli politicians (A).

### A. A policy claimed by Israeli politicians

- 108 The Israeli settlement policy in the West Bank is officially supported and claimed by the Israeli authorities. Thus, in the event of an ICC prosecution, it will be easy for the Prosecutor to establish the intention of the highest-ranking officials in charge of the settlement policy to commit the act of transferring part of the Israeli population to Occupied Palestinian Territory.
- 109 Since its creation in 1973, Likud, the main party of the Israeli right, has always been in favor of the settlement policy in the West Bank. Benjamin Netanyahu, leader of Likud since 2005 and leader of all successive Israeli governments since 2009, has repeatedly affirmed his support for Israeli settlements. For example, on 24 January 2016, he indicated : "The government supports the settlements at any time"<sup>177</sup>. On 3 August 2017, Benjamin Netanyahu, taking stock of his government's achievements, declared during a ceremony in the settlement of Beitar Illit : "No government has done as much for the settlements as the one I lead", before adding : "We act everywhere dynamically for the settlement movement"<sup>178</sup>.
- 110 Since 2013, the political parties The Jewish Home and Israel Beytenou (Israel our home) have participated, alongside Likud, in the Israeli governments led by Benjamin Netanyahu. Accelerating the settlement policy and supporting settlers are part of their political agenda. The Jewish Home party claims the legacy of the National Religious Party, which has always been, with the Gouch Emounim (Bloc of Believers), the heart of the settlement movement. This party is led by Naftali Bennett, who from 2013 to 2015 was Minister of Economy, Religious Affairs, Jerusalem and the Diaspora, then, from 2015 to 2019, Minister of Education and the Diaspora. The Israel Beytenou party is led by Avigdor Liberman, who from 2013 to 2014 was Minister of Foreign Affairs and from 2016 to the end of 2018 Minister of Defense.
- 111 The fact that the political parties represented in the government, who make up the majority in Parliament, claim the settlement policy in the West Bank has also resulted in legislative changes. On 6 February 2017, the Israeli parliament passed a law authorizing the Israeli State to appropriate, against compensation, Palestinian private land in the West Bank on which Israelis have built –without authorization– irregular settlements, or "outposts"<sup>179</sup>. The draft law was strongly criticized in December 2016 by the UN Special Coordinator for the Middle East Peace Process, Nickolay Mladenov<sup>180</sup>. The basic law of the country was also amended to facilitate settlement : Point 7 of the Basic Law "Israel as the Nation-State of the Jewish People", adopted on 19 July 2018, states : "The State views the development of Jewish settlement as a national value and shall act to encourage and promote its establishment and strengthening"<sup>181</sup>.
- 112 It is probably these Israeli leaders, along with the military leaders in charge of the West Bank administration, who are most likely to be prosecuted by the ICC Prosecutor for committing the offense described in Art. 8 (2) (b) (viii) of the Statute.

## B. A policy repeatedly declared illegal

- 113 Israeli settlement policy in the Occupied Palestinian Territory has been declared unlawful on many occasions by various international bodies. The illegality of this policy is the subject of a broad consensus at the international level. Israeli leaders are aware of these repeated international condemnations and of the illegality in international law of the policies they conduct. Thus, in the case of ICC prosecutions, the Prosecutor can easily establish that the main perpetrators of the settlement policy were aware of the illegal nature of the act of transfer of part of the Israeli civilian population to Occupied Palestinian Territory.
- 114 In its opinion of 9 July 2004, the ICJ referred to Art. 49 paragraph 6 of the 4<sup>th</sup> GC (cited above) and it observed that
- 115 "since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6 just cited".
- 116 It concluded that :
- 117 "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law"<sup>182</sup>.
- 118 The court has thus judicially affirmed what already resulted from international practice. Indeed, many Security Council resolutions have stated that Israeli settlement policies and practices in the Occupied Palestinian Territory are contrary to international law and seriously impede the achievement of peace in the Middle East<sup>183</sup>.
- 119 For example, the Security Council stated for the first time in a resolution dated 22 March 1979 that "Israeli policies and practices of establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity"<sup>184</sup>.
- 120 The Council called
- 121 "once more upon Israel, as the Occupying Power, to abide scrupulously by the [...] 4<sup>th</sup> GC, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories"<sup>185</sup>.
- 122 This resolution was followed by many other resolutions alluding to or directly referring to the contradiction with international law of the settlement policy of the State of Israel<sup>186</sup>. For example, resolution 452 of 20 July 1979 repeated that this policy "constitutes a violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949"<sup>187</sup>. Resolution 465 of 1 March 1980 determined that
- 123 "Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the [...] 4<sup>th</sup> GC"<sup>188</sup>.
- 124 The majority of these resolutions require of Israel
- 125 "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including

Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories<sup>189</sup>".

- 126 Even more recently, Security Council Resolution 2334 of 23 December 2016 condemned
- 127 "all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, ...".
- 128 The Council reaffirmed that :
- 129 "the establishment by Israel of settlements in the Palestinian Territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law."
- 130 It also demanded
- 131 "that Israel immediately and completely cease all settlement activities in the Occupied Palestinian Territory, including East Jerusalem, and that it fully respect all its legal obligations in this regard".
- 132 These resolutions are part of a policy of convictions by the Security Council of deportations or transfers of population during an armed conflict<sup>190</sup>, whether it is "the attempts to alter the demographic composition" of an occupied country as in Kuwait after the Iraqi invasion of 1990<sup>191</sup>, "the practice of 'ethnic cleansing' " as in Bosnia and Herzegovina in 1992<sup>192</sup>, "demographic changes resulting from the conflict" as in Georgia in 2001<sup>193</sup> or "forcible displacement of civilians in situations of armed conflict<sup>194</sup>".
- 133 The UNGA has also adopted a very large number of resolutions which are almost identical to those of the Security Council<sup>195</sup>, stating that "Israeli settlements in all the territories occupied by Israel since 1967 are illegal"<sup>196</sup>.
- 134 The illegality of Israeli settlements in the West Bank has also been noted by the UN Commission on Human Rights<sup>197</sup> and the UN Human Rights Council<sup>198</sup>.
- 135 According to the final report of the UN Special Rapporteur on population transfers from a human rights perspective, "Acts such as... the implantation of settlers are unlawful, and engage State responsibility and the criminal responsibility of individuals<sup>199</sup>".
- 136 In 1981, the XXIV<sup>th</sup> International Conference of the Red Cross affirmed that "the settlements in the occupied territories are incompatible with articles 27 and 49 of the Fourth Geneva Convention<sup>200</sup>". The Conference of the High Contracting Parties to the 4<sup>th</sup> GC on the application of IHL in the Occupied Palestinian Territory recognized in its final declaration of 5 December 2001 "the illegality of the settlements (...) and of the extension thereof<sup>201</sup>". On this occasion, the ICRC, though generally miserly in public denunciations<sup>202</sup>, indicated that
- 137 "in the course of its activities in the territories occupied by Israel, the ICRC has repeatedly noted various violations of IHL, such as the transfer by Israel of parts of its population to the occupied territory<sup>203</sup>".
- 138 The Council of Europe did not hesitate to recall in its "Declaration on the Middle East" of 13 December 2002 that "the expansion of settlements (...) violates international law", and the European Union stated that "the Israeli government's settlement activities (...) were contrary to international law<sup>204</sup>". The position of the European Union on this

point is steadfast and has led to the adoption of specific measures<sup>205</sup> so as "not to render aid or assistance<sup>206</sup>" to the development of Israeli settlements.

- 139 Even the United States, Israel's traditional ally, seems to condemn the principle of settlements. In 1978, the US Department of State took a stand, considering that the extension of Israeli settlements involving the transfer of Israeli civilians to the occupied territory was not in accordance with international law<sup>207</sup>. Some declarations of President Reagan and Secretary of State James Baker seemed to insinuate doubt, but never questioned this official position<sup>208</sup>. By vetoing the Security Council draft resolutions condemning the settlements because of their illegality, the United States explained that they were opposed to these texts not because of a supposed legality of the settlements but for a question of method<sup>209</sup>. However, the official position of the United States Department of State in 1978<sup>210</sup> was never changed, including under the chairmanship of Donald J. Trump, and the Mitchell report<sup>211</sup>, which, among other subjects, describes the American position on the settlements and repeats that the majority opinion concludes that these are illegal under international law.
- 140 Thus, the transfer of the Israeli population to the territory of the West Bank is an internationally wrongful act that entails the international responsibility of Israel<sup>212</sup>. The illegality under international law of Israeli settlements in the West Bank, including East Jerusalem, requires the Israeli authorities to immediately stop the settlement policy, to dismantle all existing settlements and to return all lands and real estate seized to the natural and legal persons concerned<sup>213</sup>. It also implies that Israel shall repair all damage caused by the construction and extension of the settlements to all natural or legal persons concerned<sup>214</sup>.
- 141 In view of these numerous international convictions, the main Israeli settlement policy makers who would be prosecuted before the ICC could not credibly claim that they were unaware of the illegality of the policy they were conducting in the Occupied Palestinian Territory, a policy they claim to be the authors and supporters of. Therefore, evidence of the mental element of the offense under Article 8 (2) (b) (viii) of the Statute will be greatly facilitated.

## Conclusion

- 142 The above developments show that Israel's settlement policy in the West Bank is a war crime within the meaning of Art. 8 (2) (b) (viii) of the Rome Statute. The constituent elements of the crime (legal element, material element and mental element) are present. Once an investigation into the situation in Palestine is initiated by the Prosecutor, it will not be difficult to establish the criminal responsibility of the Israeli (political, administrative and military) leaders, who have been organizing and implementing this settlement policy since 13 June 2014. Will these leaders be prosecuted before the ICC? The answer lies with the court Prosecutor: a delicate decision to make, not for legal reasons since the crime seems established beyond any reasonable doubt, but for political reasons. Indeed, prosecution of Israeli leaders may provoke a strong American reaction and possible sanctions. Yet, will the Prosecutor have the courage to do it? It will be a test of the court's credibility and, as Bertolt Brecht said, "He who fights, can lose. He who doesn't fight, has already lost".

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## NOTES

1. For this study, the term "West Bank" encompasses the territory of East Jerusalem. See *infra* paras. 58 to 61.
2. The present study uses the general title "the Prosecutor" [which is masculine in French, translator's note] as mentioned in the Statute. The authors are however aware that the person in charge since June 2012 is a woman, Mrs Fatou Bensouda.
3. Palestine is a "Non-Member Observer State" at the UN: A/Res/67/19 of 29 November 2012.
4. This provision allows States not party to the Statute to recognize, by way of a declaration made at the Registry of the Court, the jurisdiction of the ICC for crimes committed in a specified territory and for a specified period. Palestine had already made use of this provision on 22 January 2009. On 3 April 2012, the Prosecutor declared that since its status as an "observer entity" at the UN prevented it from adhering to international conventions, the Palestinian Authority could not legally join the Statute, whose ratification is effected by the intermediary of the Secretary General, depositary of the treaties. Hence, for defining the term "State" within the meaning of Art. 12 of the Statute, responsibility was delegated to the Secretary General, assisted, if necessary, by the UN General Assembly: See ICC Office of the Prosecutor, 3 April 2012, Statement available here.
5. Statement available here; The date of 13 June 2014, adopted by Palestine in its declaration, corresponds to that set by the UN Human Rights Council on 23 July 2014 (Res S-21/1) as the beginning of the mandate of the commission of inquiry it then created to investigate all violations of international humanitarian law and international human rights standards since the beginning of Israeli military operations in the West Bank ("Operation Brother's Keeper") and then in the Gaza Strip ("Operation Protective Edge").
6. Thus, in January 2015, Palestine made double use of its State prerogatives acquired on 29 November 2012, by first filing a new declaration under Art. 12 (3) and then by ratifying the Statute. The combination of these two approaches broadens the temporal jurisdiction of the court. Indeed, accession to the Statute gives the court jurisdiction to deal with crimes committed after the entry into force of the Statute for that State, hence here from 1 April 2015. The *ad hoc* declaration gives it the right to examine crimes previously committed, from a date determined by the State filing the declaration, i.e. in this case, from 13 June 2014.
7. Statement available here.
8. The present study deals only with the crime of transfer by the Occupying Power of part of its civilian population to a territory occupied by it in the light of Israeli settlement policy. It addresses only incidentally the issue of the ICC's competence to deal with these facts and does not address issues related to the admissibility of the case and the interests of justice (Statute, Articles 17 and 53 (1)).
9. Referral available here.
10. *Ibid.*, p. 4.
11. Israel, a signatory to the Statute on 31 December 2000, has not ratified it and does not intend to do so. According to Art. 12 (2) (a) of the Statute, this absence of ratification does not constitute a procedural obstacle to the exercise of the court's jurisdiction but could be a serious obstacle to cooperation with the Prosecutor in the investigation of crimes committed in Occupied Palestinian Territory.
12. In the case of a referral of a situation by one or more State Party(-ies) to the Statute (Article 14), it is not necessary to seek the authorization of the court's Pre-Trial Chamber to open an

investigation. The Prosecutor may proceed directly to the initiation of an investigation if one can consider that the legal criteria set out in the Statute are fulfilled (Article 53).

13. On 24 May 2018, the Presidency of the Court assigned the situation in Palestine to Pre-Trial Chamber I: ICC-01/18-1. On 13 July 2018, Pre-Trial Chamber I issued a decision on the establishment by the Registry of a "system of activities for public information and awareness raising of affected communities, in particular victims of the situation in Palestine": ICC-01/18-2.

14. Referral (*supra* no. 9).

15. *Ibid.*, p. 6. These war crimes are among those listed in the provisions of Art. 8 (2) (a) and (b) of the Statute, which constitute a violation of the rules applicable in the context of an international armed conflict.

16. Art. 8 (2) (b) (viii) also incriminates "the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory". The present study deals only with the criminalization of transfer by the Occupying Power of part of its own population in the territory it occupies and does not deal with the war crime of deportation or transfer of any or part of the civilian population from the occupied territory. However, this latter crime is likely to apply to the Israeli-Palestinian context and is evoked by Palestine in its referral of 22 May 2018 (*supra* no. 9), p. 6.

17. For this study, the term "Palestine" could have been used. For clarity, that of "Occupied Palestinian Territory" will be used. This territory includes in any case the West Bank (including East Jerusalem: *supra* n° 1) and the Gaza Strip. The latter, still occupied, given the control exerted by Israel on the airspace and the maritime space of the Gaza Strip, as well as on a buffer zone inside this territory along the terrestrial border with Israel, is however not directly concerned with the subject of the study since all the settlements which had been installed there were evacuated in 2005.

18. J PICTET (DIR.), *La convention de Genève relative à la protection des personnes en temps de guerre (IV)*, *Commentaire*, Genève, CICR, 1958, vol. IV, p. 283. It also reads: "This clause, added, after some hesitations, by the XVII<sup>th</sup> International Conference of the Red Cross, is opposed to transfers of population such as practiced by some Powers, during the Second World War, which, for politico-racial reasons or known as colonizing, transferred some elements of their own population in the occupied territories".

19. ICJ, *Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, 9 July 2004, (A/ES-10/273), ICJ Collection, 2004, pp. 136ff., para. 120: "That provision [Art. 49 paragraph 6] prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an Occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory."

20. "Grave breaches" are listed in Art. 50 of the 1<sup>st</sup> GC, 51 of the 2<sup>nd</sup> GC, 130 of the 3<sup>rd</sup> GC and 147 of the 4<sup>th</sup> GC.

21. 4<sup>th</sup> GC, Art. 4, al. 1: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". The ICRC commentary on Art. 4 of the 4<sup>th</sup> GC confirms that in an occupation situation, is protected "the entire population (excluding however nationals of the Occupying Power) in the occupied territories". Israeli settlers nonetheless remain civilians enjoying the general protection conferred by international humanitarian law.

22. See, in this regard, M COTTIER, in *Commentary on the Rome Statute of the International Criminal Court*, Ed. Otto Triffterer, 2<sup>nd</sup> ed., p. 364.

23. The High Court of Justice of Israel ruled in 1978 that Art. 49 al. 6 of the 4<sup>th</sup> GC was not applicable to the situation in the West Bank (HCJ 606/78, HCJ 610/78 - Ayub et al. v. Minister of Defense et al.). For an analysis of the Israeli position in relation to its international commitments

and international law, see: G POISSONNIER AND P. OSSELAND, "Les colonies israéliennes de Cisjordanie en droit international", *RGDIP*, 2010, pp. 63-92.

24. J-M HENCKAERTS AND L DOSWALD-BECK, *Droit international humanitaire coutumier*, CICR, vol I, Bruylant, 2006, Rule 130. Rule 129 also prohibits States "to deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperatives military reasons so demand".

25. The four GCs as well as many provisions of the APs of 1977 have acquired a customary value: this means that these texts apply even to States that have not signed them. See: E DAVID, *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2019, 6<sup>th</sup> ed., paras. 26-37.

26. J-M HENCKAERTS AND L DOSWALD-BECK, *loc. cit.*, Rule 130. The ICRC has listed the States whose military manuals provide for such a prohibition, for instance: Argentina, Australia, Canada, Croatia, Hungary, Italy, Netherlands, New Zealand, Spain, Sweden, Switzerland, United Kingdom, United States.

27. *Ibid.*, For instance: Armenia, Australia, Azerbaijan, Bangladesh, Belarus, Belgium, Bosnia, Canada, Congo, Cook Islands, Croatia, Cyprus, Czech Republic, Georgia, Germany, Ireland, Moldavia, Netherlands, New Zealand, Niger, Norway, Slovakia, Slovenia, Spain, Tajikistan, United Kingdom, Zimbabwe. Legislation is planned in Argentina, Burundi, Jordan, Lebanon, Trinidad and Tobago.

28. See the cases of Frick and Rosenberg, in *Procès des grands criminels de guerre*, Nuremberg, 1947, off. doc., vol. I, pp. 71, 192 and 197.

29. Resolution A/HRC/RES/25/28, 11 April 2014 (adopted by 46 votes to one): "Considering that the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies constitutes a breach of the Fourth Geneva Convention and relevant provisions of customary law (...)".

30. See for instance, E SCHWENK, "Legislative Power of the Military Occupand under Article 43, Hague Regulations", *Yale Law Journal*, 1945, p. 393.

31. Regulations annexed to the 4<sup>th</sup> Hague Convention of 18 October 1907 respecting the laws and customs of war on land, Art. 55. See also M SASSOLI AND A BOUVIER, *How does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, Geneva, 1999, p. 154, "Public property can obviously no longer be administered by the State previously controlling the territory (normally the sovereign). It may therefore be administered by the Occupying Power, but only under the rules of usufruct".

32. *Ibid.*, Art. 48, 49 and 55.

33. See Statute, Art. 8 (2) (a) (iv): this text qualifies as a war crime "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". See also Art. 8 (2) (b) (xiii): the same applies to "destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war". However, this last text is probably less relevant here than the former: indeed, it seems more intended for acts committed during the conduct of hostilities than for those committed in situations of occupation: ICC, Prel. Ch. 30 September 2008, ICC-01/04-01/07, Katanga and Ngudjolo Chui, para. 311.

34. And this in accordance with the interpretation adopted by the ICJ in its *Opinion on the Legal Consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 120.

35. AP I, Art. 85 (4) (a).

36. C PILLOUD, J DE PREUX, B ZIMMERMANN, P EBERLIN, H-P GASSER, C WENGER, *Commentaire du Protocole I relatif aux conflits armés internationaux*, Genève, CICR et Martinus Nijhoff, 1986, Art. 85, p. 1000, point 3504: "The part of the paragraph relating to the transfer or deportation of the population of the occupied territory only repeats Art. 147 of the 4<sup>th</sup> GC and the reference to Art. 49 leaves it to remain without change. The novelty of the present paragraph thus concerns the transfer by

the Occupying Power of a part of its population into the occupied territory: from an offense, this practice is transformed into a grave breach because of its possible consequences, from the humanitarian point of view, for the population of the said territory".

37. Art. 86 of AP I also provides that the occupiers' liability is incurred if they have not prevented or punished a war crime.

38. See in this respect M COTTIER, *loc. cit.*, p. 364: "Article 85 (4) (a) Add. Prot. I was adopted by the 1974-1977 Diplomatic Conference, not least in view of the Israeli settlements on the Golan Heights and in the West Bank". Same analysis of ROY S LEE, *The International Criminal Court: Elements of crime and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 159: "Under Additional Protocol I, the deportation or transfer of parts of the population of the Occupying Power into occupied territory became a grave breach [according to Article 147 of the Fourth Geneva Convention]. This was in 1977 already a highly controversial issue and was one of the reasons why Israel, and also the United States, did not ratify this Protocol".

39. Yearbook ILC, 1996, vol. II (2), p. 59.

40. For a complete status of signatures and ratifications of IHL conventions, see the ICRC IHL database, available at: <https://ihl-databases.icrc.org/ihl>.

41. J-M HENCKAERTS AND L DOSWALD-BECK, *op. cit.*, p. 961.

42. UN Secretary-General's *Bulletin* on "Observance by United Nations Forces of international humanitarian law", doc. ST/SGB/1999/13, August 6, 1999; See also A RYNIKER, "Respect du droit international humanitaire par les forces des Nations Unies", *RICR*, 1999, pp. 795 to 805.

43. The provisions of AP I are systematically incorporated in the rules of engagement issued by the North Atlantic Council. This application of the rules of AP I to all NATO member States, irrespective of their individual situation with respect to this text, in the context of allied forces operations makes sense: the NATO rules of engagement, which constitute the minimum framework applicable by all forces under its command, must be compatible with the obligations of the member States that have ratified AP I, i.e. all States except the United States and Turkey.

44. See the reasoning of the Appeals Chamber in its decision on jurisdiction of 2 October 1995, issued in the Tadic case (IT-94-AR72), to assert the customary value of certain provisions of the APs to the GCs (paras. 88, 126, 137).

45. ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996, ICJ Reports 1996, pp. 226ff. In this opinion, the ICJ, citing the Report of the UN Secretary-General on the Establishment of the ICTY, sets out the rules of IHL which are beyond any doubt part of customary law: AP I is not part of it (para. 81). But it goes on to declare that "all States are bound by those rules in AP I which, when adopted, were merely the expression of the pre-existing customary law" (para. 84).

46. See in this respect M COTTIER, *op. cit.*, p. 362: "Deportations and transfers of civilian population have severe humanitarian and long-term consequences, destroying the roots and local culture, of the deported or transferred population, protracting conflicts and frequently rendering them intractable. Population transfer and deportation is often used as an effective means to secure the controlling position and territory conquered by altering the demographic composition, and to create *faits accomplis*, that might strengthen the position of the conqueror in future peace negotiations and settlements of disputes."

47. This study, which focuses on the crime of transfer of the Occupying Power's civilian population, does not deal with other crimes that may accompany this transfer. It should be noted, however, that the Palestinian referral of 22 May 2018 does mention, in particular, the war crime of appropriation and destruction of private and public property, targeted by Art. 8 (2) (a) (iv) and 8 (2) (b) (xiii) of the Statute.

48. See UNOCHA-OPT annual reports on acts of violence by Israeli settlers.

49. J PICTET, *CICR*, *loc. cit.*, p. 283. See also, M EUDES, *Rome Statute of the International Criminal Court, commentary article by article*, J Fernandez and X Pacreau (eds.), Ed. Pedone, 2012, p. 516: "This

practice of changing the demographic makeup of a territory has multiple and unfortunate long-term humanitarian consequences (...)"

50. ICJ, *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, (A/ES-10/273), *ICJ Collection*, 2004. paras. 133ff. On the different types of violations of international human rights law following the Israeli settlement policy, see: G POISSONNIER AND P OSSELAND, *loc. cit.*, pp. 63-92.

51. See J DUGARD, J REYNOLDS, "Apartheid, International Law, and the Occupied Palestinian Territory", *EJIL* 2013, p. 867. It should be noted that the Palestinian referral of 22 May 2018 also mentions the crime against humanity of apartheid, referred to in Art. 7 (1) (j) of the Statute.

52. Resolution A/HRC/RES/25/28, 11 April 2014 (adopted by 46 votes to one): "Considering that the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies constitutes a breach of the 4<sup>th</sup> GC and relevant provisions of customary law, including those codified in AP I to the GCs of 12 August 1949". It is not clear, however, whether this customary character refers to the principle of prohibition or its criminalization.

53. See in this respect: ROY S LEE, *loc. cit.*, p. 159: "For most States, the relevant provisions here are the provisions from Geneva Convention no. IV and Additional Protocol I. For these States, all these provisions are considered part of customary international law, binding also for Israel. The latter however remains of the opinion, that the provision in Additional Protocol I making the transfer of population into occupied territory a grave breach does not reflect customary international law and is not binding on States not a party of that Protocol."

54. On the outlines and limits of this notion, see in particular O BARSALOU, "La doctrine de l'objecteur persistant en droit international public", *RQDI*, 2006, 19.1.

55. For example, grave breaches under AP I.

56. The Statute thus includes, in its Art. 8 (2) (b) items (i), (ii), (iv), (v), (viii), (xx), (xxiii) and (xxv) from among war crimes, as provided for in AP I.

57. For a complete record of signatures and ratifications of the Statute, see the ICC database: [www.cpi-icc.int](http://www.cpi-icc.int).

58. The crime described in Art. 8 (2) (b) (viii) of the Statute is included in a list of war crimes under Art. 8 (2) (b), entitled "Other serious violations of the laws and customs applicable in international armed conflicts".

59. Elements of Crimes adopted in 2002 (and revised in 2010) by the Assembly of States Parties to the Statute: Regarding transfer, it is written that "The conduct took place in the context of and was associated with an international armed conflict" and that "The perpetrator was aware of factual circumstances that established the existence of an armed conflict". This was also the choice of the French legislator. Art. 461-26 of the penal code is contained in a subsection of the penal code devoted to "means and methods of combat prohibited in an international armed conflict". This sub-section 2 is itself contained in a section of the penal code entitled "War crimes and offenses specific to international armed conflicts" (this section 3 can be found in Chapter 1 of Book IV *bis* of the penal code).

60. Statute, Art. 8 (2) (b) (viii). The wording of the text of Art. 461-26 of the French penal code also requires the existence of a situation of occupation, i.e. a situation where "an Occupying Power" is in control of a "territory it occupies".

61. Art. 2 common to the four GCs defines an international armed conflict as any "armed conflict arising between two or more High Contracting Parties". See ICTY, Ch. of Appeal, 15 July 1999, IT-94-1-A, Tadic: the judgment repeats the definition of international armed conflict as that which takes place between two or more States.

62. See: E DAVID, *op. cit.*, paras. 1.94-1.168.

63. AP I, Art. 1 (4).

64. GCs, common Art. 2; See ICTY, Ch. of Appeal, 15 July 1999, IT-94-1-A, Tadic; the judgment was delivered concerning an internal armed conflict, but the evaluation of the minimum threshold of

violence required to define an armed conflict is fully applicable to an international armed conflict.

65. AP II, Art. 1 (2).

66. AP I, Art. 3 (b); See ICTY, Ch. of Appeal, 15 July 1999, IT-94-1-A, Tadic.

67. The criterion of the intensity of military operations only applies to non-international armed conflicts. For an international armed conflict, a simple border-crossing between military units suffices, because it would be illogical, in case there would be wounded or prisoners, if the law of armed conflict did not apply and these people therefore remained without protection, until an undefined intensity threshold was reached. For non-international armed conflicts, political motives led to the inclusion of this criterion mentioned in AP II, States not wishing to have too much international scrutiny in rebellion situations, including in relation to their obligations under humanitarian conventions.

68. See E BENVENISTI, *The International Law of Occupation*, Princeton University Press, 1993, p. 4. The author defines the occupation as "the effective control of power (be it one or more States or an international organisation, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory". See also S VITÉ, "Typologie des conflits armés en droit international humanitaire", *RICR*, 2009, pp. 73-75.

69. See eg ICTY, Trial Chamber, 31 March 2003, T-98-34-T, Naletilić & Martinović, paras. 214-216 and ICJ, Judgment of 19 December 2005, *Armed activities on the territory of Congo (Democratic Republic of Congo v. Uganda)*, ICJ Reports 2005, p. 168, para. 172.

70. See in this respect M EUDES, *op. cit.* p. 494; and M DEYRA, *Dictionnaire encyclopédique de la justice pénale internationale*, O BEAUVALLET (ed.), Ed. Berger Levrault, 2017, p. 214.

71. It is not limited to cases where the seizure of power results from an armed conflict characterized by hostilities: See Art. 2 al. 2 of the 4th GC. See in this respect S VITÉ, *loc. cit.* pp. 73-75.

72. GC common Art. 2 al. 2. See ICRC (*Legal Division*), "L'occupation et le droit international humanitaire : questions et réponses", 2004, available at: <https://www.icrc.org/fr/doc/resources/documents/misc/63td88.htm>.

73. Elements of Crimes Adopted in 2002 (and Revised in 2010) by the Assembly of States Parties to the Statute, no. 34.

74. Art. 6 al. 3 of the 4th GC distinguishes among the provisions on occupation included in this Convention between those applicable before and after one year following the general end of military operations. Israel has not availed itself of this distinction.

75. See in this respect M COTTIER, *loc. cit.*, p. 365; Same analysis by ROY S LEE, *loc. cit.*, pp. 159 and 160.

76. For example, Egypt: See ROY S LEE, *loc. cit.*, p. 159. Same analysis by MG KEARNEY, "On the situation in Palestine and the war crime of transfer of civilians into occupied territory", 2017, *Criminal Law Forum*, 28, pp. 1-34.

77. See on this position for instance: Israeli Ministry of Foreign Affairs, "Israeli settlements and International Law", 2015, available at: <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>.

78. MG KEARNEY, *loc. cit.*, p. 17.

79. K KITTICHAISAREE, *International Criminal Law*, Oxford University Press, 2001, p. 168.

80. See in this respect M COTTIER, *loc. cit.*, p. 366; Same analysis by ROY S LEE, *loc. cit.*, p. 159. Likewise during the discussion of Elements of Crimes in 1999.

81. See in this respect M COTTIER, *loc. cit.*, p. 369.

82. *Ibid.*

83. ICTY, 10 December 1998, IT-95-17/1-T, Furundzija, para. 227.

84. Statute, Art. 12 (2) (a).

**85.** Israeli Ministry of Foreign Affairs, "The International Criminal Court Background Paper", 30 July 1998. The document considers that to make population transfer a war crime, in the same way as attacks against civilian populations, has no basis in international law. See in this respect M. COTTIER, *loc. cit.*, p. 365: "Israel opposed the inclusion of any war crimes based on Article 85 (4) (a) Add. Prot. I, supported, to a limited extent, only by the United States. The overwhelming majority of the delegations in Rome however rejected the argument of Israel that this grave breach would not be part of customary international law". Same analysis by ROY S LEE, *loc. cit.*, p. 159: "Although practically all States consider this latter provision [Article 85 (4) (a) of the Additional Protocol I] to be part of customary international law, the inclusion of this provision into the Rome Statute was again controversial (...) At the end of the Rome Conference, the insertion of this provision, with this additional phrase, caused Israel to vote against the Rome Statute".

**86.** See ROY S LEE, *loc. cit.*, p. 160.

**87.** Elements of Crimes Adopted in 2002 (and Revised in 2010) by the Assembly of States Parties to the Statute.

**88.** See declaration (*supra* no. 5). The date of 13 June 2014 concerns the exercise of its jurisdiction by the ICC. However, the crime of transfer by the Occupying Power of its population to the occupied territory is likely to be considered a continuing crime, which means that it may come under the jurisdiction of the court even if its commission began prior to 13 June 2014, as long as it happened after 1 July 2002, the date of entry into force of the Statute. This study, however, does not address this aspect, which may be subject to doctrinal discussion. See MG KEARNEY, *loc. cit.*, pp. 27 to 33.

**89.** On 5 June 1967, the Six Day War between Israel and Jordan, Egypt, Syria and Iraq broke out. As early as 7 June 1967, as the end of hostilities loomed on the Egyptian and Jordanian fronts, Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip. On the evening of 10 June 1967, a cease-fire marked the end of hostilities between the belligerents. Israel won the war and conquered the West Bank, the Gaza Strip, the Golan Heights and the Sinai Peninsula. Following the signing of the Israeli-Egyptian peace treaty of 26 March 1979, the Sinai Peninsula was returned to Egypt. Israel withdrew from the Gaza Strip in September 2005 and evacuated all its settlements there. To this day, the Golan Heights are still occupied.

**90.** *Expert meeting: Occupation and other forms of administration of foreign territory*, Report prepared and edited by Tristan Ferraro, ICRC, March 2012, p. 134: "The situation in the Occupied Palestinian Territory complicates the matter further because occupation law is applicable here as a consequence of an armed conflict (common Article 2 al. 1) and not because of the occupation of the territory of a State party as such (common Article 2, al. 2)".

**91.** Art. 42: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

**92.** Art. 2, al. 1: "Apart from the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them ". Art. 6, al. 3, of the 4<sup>th</sup> GC, which limits the application of the Convention to one year after the general end of military operations, is not applicable here. It is all the less so since Israel did not avail itself of this one-year conventional advantage, which does not correspond to customary law at all but constituted a special regime in 1949, for the specific cases of Germany and Japan.

**93.** Declaration of Principles on Interim Self-Government Arrangements signed in Washington by Israel and the PLO on 13 September 1993, known as the Oslo I Accord, International Legal Material, vol. XXXII, no. 6, November 1993, p. 1527.

94. Interim Agreement signed in Washington on 28 September 1995, known as the Oslo II Accord, International Legal Material, vol. XXXVI, no. 3, May. 1997, p. 551.
95. Res. 298 of the Security Council of 25 September 1971: "All the legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status".
96. In particular, the 4<sup>th</sup> GC includes in its part III on the status and treatment of protected persons, a section III concerning occupied territories which sets forth the rights and obligations of the Occupying Power (Art. 47 to 78).
97. The legal regime of the occupied territories of the Hague Regulations of 1907 is set out in an annex to the Fourth Hague Convention of 18 October 1907, which deals in its section III with military authority in the occupied territories: Art. 42 to 56 of the Regulations.
98. See for instance Judgment of the Nuremberg IMT of 30 September and 1 October 1946, p. 80: "these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war"; also ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 75.
99. ICJ, *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 89.
100. UN Gen. Ass. Res. A/RES/ES-10/14, 2003; For an analysis of the question asked and the circumstances in which the Advisory Opinion was requested, see P WECKEL, *RGDIP*, 2004/4, *Chronique de jurisprudence internationale*, pp. 1017-1036.
101. ICJ, *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, paras. 101 and 78.
102. Res. 242 of 1967 and 338 of 1973. Resolution 242 of 22 November 1967 also emphasizes the inadmissibility of the acquisition of territory by war and calls for the "withdrawal of Israel armed forces from territories occupied in the recent conflict". Resolution 338 calls, *inter alia*, for the implementation of resolution 242.
103. Res. 271 of 1969.
104. Res. 465 of 1980; See also Res. 444, 446 and 452 of 1979, 471 of 1980, 497 of 1981, 592 of 1986, 605 and 607 of 1988, 681 of 1990, 694 and 726 of 1991, 799 of 1992, 904 of 1994, 1296 of 2000.
105. A/RES/ES-10/2 of 1997; See also Res. 36/15 of 1981, 39/99 of 1984, 45/83 of 1990, 51/128 of 1996, 54/77 of 1999, 55/131 of 2000, 56/60 of 2001, 56/56 of 2002, 57 / 126 and 58/97 of 2003, 59/123 of 2004, 61/184 of 2007: each of them "reaffirms that the [GC] relative to the protection of civilians in time of war of 12 August 1949 is applicable to the Occupied Palestinian Territory, including Jerusalem, and other Arab territories occupied by Israel since 1967".
106. A/RES/ES-10/6 of 1999 entitled "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory", para. 6.
107. Final Declaration of 5 December 2001, para. 3: <https://www.un.org/unispal/document/auto-insert-199888/>; actually quoted by the ICJ in its *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 96.
108. ICRC official statement, Annex I, Conference of the High Contracting Parties to the 4th GC, 5 December 2001, para. 2; quoted in fact by the ICJ in its *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 97. See also, P MAURER, "Challenges to international humanitarian law: Israel's occupation policy", *IRRC*, 2012/4, pp. 323 to 331.
109. See in this respect M COTTIER, *loc. cit.*, p. 368.
110. *Ibid.*
111. *Ibid.*

112. In French, the Israeli government prefers using the term of "implantations" rather than "colonies" [more commonly used, ndlt]. It also prefers the term "Judea and Samaria", the historical cradle of Judaism, to that of "West Bank".

113. This study does not examine the legal status of unauthorized settlements as defined by Israeli law (domestic law), but focuses only on the legality under international law of all settlements.

114. Sasson Report (named after a former director of the Attorney General's Office of the State of Israel, Talia Sasson) of 8 March 2005.

115. See Office of the European Union Representative (West Bank and Gaza Strip, UNRWA), Six-Month Report on Israeli settlements in the occupied West Bank, including East Jerusalem, (Reporting period July-December 2018).

116. East Talpiyot, French Hill, Gilo, Har Homa, Jewish Quarter, Maalot Dafna, Neve Ya'akov, Pisgat Ze'ev, Ramat Eshkol, Ramat Shlomo and Ramot.

117. The eastern part of the city of Jerusalem is about 90 square km large.

118. The most populated settlements (more than 20,000 inhabitants each) are Modiin Illit, Beitar Elit, Ma'ale Adumim and Ariel.

119. The West Bank is about 5,880 square km large.

120. See Office of the European Union Representative (West Bank and Gaza Strip, UNRWA), *loc. cit.*

121. See Report of the Independent International Fact-Finding Mission to Investigate the Effects of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of Palestinians in the Occupied Palestinian Territory, Including East Jerusalem, UN Council of Human Rights, A/HRC/22/63, 7 February 2013, para. 28 ("Since 1967, some 250 settlements in the West Bank, including East Jerusalem, have been established, either with or without the authorization of the Government. The number of settlers is estimated at 520'000 (200,000 in East Jerusalem and 320,000 in the rest of the West Bank). According to the Israeli Central Bureau of Statistics, over the past decade, the population has grown at a much higher rate than the population in Israel itself, with a yearly average growth of 5.3 per cent (excluding East Jerusalem) compared with 1.8 per cent in Israel").

122. See G PARIS, "Qu'est-ce que la croissance naturelle des colonies israéliennes?", Blog Guerre ou Paix, *Le Monde*, 2 June 2009.

123. See declaration (*supra* no. 5).

124. See: M Lynk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A / 71/554, 19 October 2016, para. 33: "Recent months have seen a significant increase in settlement-related activity, including more government authorization of new buildings, retroactive authorization of construction considered illegal even under Israeli domestic law, demolition of the homes of Palestinians and the continuation of discriminatory planning practices and policies that make it extremely difficult for Palestinians to build. Such policies and practices are particularly prevalent in Area C and East Jerusalem, to such an extent that the Office for the Coordination of Humanitarian Affairs has referred to the situation as a 'coercive environment that undermines a Palestinian physical presence and exacerbates the risk of individual and mass forcible transfers'."

125. See Office of the European Union Representative (West Bank and Gaza Strip, UNRWA) and the reports published twice a year, "Six-Month Report on Israeli settlements in the occupied West Bank, including East Jerusalem".

126. See for instance A/HRC/37/43 of 6 March 2018.

127. Around 6,000 in 2016, 13,000 in 2017, 16,000 in 2018.

128. See in this respect M COTTIER, *loc. cit.*, p. 368.

129. *Ibid.*

130. E DAVID, *Éléments de droit pénal international et européen*, Bruxelles, Bruylant, 2018, 2<sup>nd</sup> ed., paras. 12.2.13ff., 13.1.3ff., 15.1.87, 15.1.98ff.
131. See MG KEARNEY, *loc. cit.*, p. 22. "Given the reference to an Occupying Power, the war crime can be understood also as a type of crime of State". See also, *supra* paras. 11 to 14.
132. Statute, Art. 25 (3), on individual criminal responsibility. See MG KEARNEY, *loc. cit.*, p. 25.
133. Statute, Art. 28, on the criminal responsibility of military commanders.
134. M COTTIER, *loc. cit.*, p. 369.
135. *Ibid.*, p. 368: "It is also uncertain whether private actors such as the director of a company moving parts of the Occupying Power's population to settle in the occupied territory or of a company constructing houses in settlements in occupied territory could be made criminally responsible for the offense under article 8 (2) (b) (viii)".
136. BENVENISTI, *op. cit.* p. 140. The Allon Plan of 1968 already provided for the establishment of settlers and the annexation of areas with a small Palestinian population.
137. In its report of 12 July 1979 (S/13450), the UN Commission in charge of studying the situation concerning settlements in the Arab territories occupied since 1967, including Jerusalem, concluded that the Israeli Government was engaged in a systematic and large scale process of establishing settlements in the occupied territories and noted that beside private contributions coming mostly from outside Israel, the financing of the settlement policy was essentially provided by the government (para. 227).
138. ICJ, *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 120.
139. R FALK, "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967", A/67/379, 19 September 2012, para. 9.
140. The settlement development policy, either by increasing the number of dwellings, or by extension of existing settlements, continued even during the Labor government, though they had announced a freeze on settlement on 27 July 1992.
141. On 30 March 2017, the security cabinet authorized the creation of a new settlement in the Shilo area, north of Ramallah. See P SMOLAR, "Nétanyahou valide la création d'une nouvelle colonie, une première depuis vingt-cinq ans", *Le Monde*, 30 March 2017.
142. Since 2014, the government has continued its policy of recurrent regularization of "outposts", described in the Sasson report of 8 March 2005. See: Office of the European Union Representative (West Bank and Gaza Strip, UNRWA), reports published twice a year, *loc. cit.*
143. In addition to his position as Prime Minister, he notably served as Minister of Finance (December 2014 to May 2015), Minister of Telecommunications (December 2014 to February 2017), Minister of Health (May to September 2015, then November 2017 to 2019), Minister of Economy and Industry (February to August 2016), Minister of Regional Cooperation (May 2015 to December 2016), Minister of Defense (November 2018 to 2019) and Minister of Foreign Affairs (May 2015 to 2019).
144. Moshe Ya'alon (member of Likud), from 2013 to 2016, then Avigdor Liberman (leader of Israel Beytenou), from 2016 to 2018 and finally Benjamin Netanyahu, himself, from 2018 to 2019.
145. Avigdor Liberman (leader of Israel Beytenou), from 2013 to 2015.
146. Tzipi Livni (member of Hatnuah), from 2013 to 2014, then Ayelet Shaked (member of the Jewish Home), from 2015 to 2019.
147. Yitzhaq Aharnovich (member of Israel Beytenou), from 2013 to 2015, then Gilad Erdan (member of Likud), from 2015 to 2019.
148. Yair Lapid (member of Yesh Atid), from 2013 to the end of 2014, then Moshe Kahlon (member of Koulanou), from 2015 to 2019.
149. Gideon Sa'ar (Likud member) from 2013 to the end of 2014, then Silvan Shalom (Likud member) in 2015, then Aryé Déry (Shas member) from 2016 to 2019.

150. Shai Piron (member of Yesh Atid), from 2013 to the end of 2014, then Naftali Bennett (leader of the Jewish Home), from 2015 to 2019.
151. Uri Ariel (member of the Jewish Home) from 2013 to 2015, then Yoav Gallant (Koulanou member), from 2015 to the end of 2018, then Yifat Sasha-Biton (Koulanou member), in 2019.
152. Israel Katz (Likud member), from 2013 to 2019.
153. Silvan Shalom (Likud member), from 2013 to 2015, then Yuval Steinitz (Likud member), from 2015 to 2019.
154. Amir Peretz (member of the Labor Party), from 2013 to 2015, then Moshe Kahlon (member of Koulanou), from 2015 to 2016, then Ze'ev Elkin (Likud member), from 2016 to 2019.
155. Naftali Bennett (leader of the Jewish Home), from 2013 to 2015, then Aryeh Machlef Deri (Shas member) in 2015, then Benyamin Netanyahu in 2016, and Moshe Kahlon (Koulanou member), end of 2016, then Eli Cohen (member of Koulanou), from 2017 to 2019.
156. Summary of the law available here.
157. Naftali Bennett (leader of the Jewish Home), from 2013 to 2015 and Ze'ev Elkin (Likud member), from 2015 to 2019.
158. Nir Barkat (Likud member), elected in 2008 and re-elected in 2013.
159. The position of Minister of Defense was held by Moshe Ya'alon (member of Likud), from 2013 to 2016, then by Avigdor Liberman (leader of Israel Beytenou), from 2016 to the end of 2018 and finally by Benyamin Netanyahu, from the end of 2018 to 2019.
160. This administration includes a department in charge of infrastructure.
161. See *loc. cit.*, Sasson Report of 8 March 2005.
162. The land concerned, owned by Palestinians (private persons) or the Occupied Power, is declared State owned land, thus becoming eligible for the construction of housing intended only for Israeli citizens. It is a form of requisition of lands of the occupied territory by the Occupying Power, which is illegal in international law.
163. See "Chapter 1: Israeli Banks Finance Illegal Settlement Construction - Areas of National Priority", in M. BAHL, *Business on Occupied Territory*, Danwatch, 31 January 2017 (Exhibit # 8), available at <https://www.danwatch.dk/en/undersøgelse/businessonoccupiedterritory/>. This is an old policy: see Btselem report, "Land Grab: Israel's settlement Policy in the West Bank", 2002, pp. 73 to 84, available at: [https://www.btselem.org/download/200205\\_land\\_grab\\_eng.pdf](https://www.btselem.org/download/200205_land_grab_eng.pdf).
164. *Haaretz*, 21 January 2015, "Settlement Housing Gets Third of Israeli State Funds for 'National Priority' Areas" <https://www.haaretz.com/.premium-national-priority-area-funds-go-to-settlements-1.5363270>.
165. Btselem report mentioned before, "Land Grab: Israel's Settlement Policy in the West Bank".
166. *Ibid.*, p. 79. "The level of general grants provided by the government for local councils in the West Bank in 2000 averaged NIS 2,224 per resident, compared with an average of NIS 1,336 per resident for local councils in Israel, i.e. sixty five percent more".
167. See for instance *Haaretz*, "The price of settlements", 26 September 2003; *Globes*, Y HAGAL, "How much do the settlements really cost?", 10 January 2017.
168. Statute, Art. 25 to 28.
169. See ICC Office of the Prosecutor, "Policy paper on case selection and prioritisation" (Latest Version: 15 September 2016), paras. 42-44.
170. See MG KEARNEY, *loc. cit.*, pp. 24 and 25.
171. Statute, Art. 30 which refers to the mental element.
172. B BOULOC, *Droit pénal général*, Dalloz, 25<sup>th</sup> ed., p. 249.
173. *Ibid.*, p. 253.
174. Statute, Art. 30 (2) (a).
175. Statute, Art. 30 (2) (b).
176. See in this respect M COTTIER, *loc. cit.*, p. 370.

177. See P SMOLAR, "Netanyahou dit soutenir la colonisation à tout moment", *Le Monde*, 24 January 2016.
178. See *Le Point*, AFP, 3 August 2017.
179. See P SMOLAR, "Colonies israéliennes en Cisjordanie: la nouvelle loi est une 'rupture historique' ", *Le Monde*, 8 February 2017.
180. See the document available here.
181. Available on the website of the Knesset, the Israeli Parliament.
182. ICJ, *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 120.
183. UN Security Council resolutions are binding on member States (Charter, article 25). In France, they do not have direct effect before the prescriptions they enact have been made mandatory or transposed into domestic law: Cass. Civ. 1, 25 April 2006, Bull. I, no. 202. This position of the Court of Cassation is very debatable, cf. E David, *Éléments ...*, *op. cit.*, paras. 3.3.31ff., 15.1.87ff.
184. Res. 446 of 1979, para. 1.
185. Res. 446 of 1979, para. 3.
186. See Res. 446 and 452 of 1979, 465, 471 and 476 of 1980, 497 of 1981, 592 of 1986, 605 and 607 and 677 of 1988, 694 and 726 of 1991, 799 of 1992. See W OLSON: "UN Security Council Resolutions regarding Deportations from Israeli-Administrated Territories", 24, *Stanford Journal of International Law*, 611 (1987-1988).
187. Res. 452 of 1979.
188. Res. 465 of 1980.
189. Eg. Res. 446 and 452 of 1979, 465 and 471 of 1980. In addition, regarding Jerusalem, resolution 478 of 1980 determines "that all legislative and administrative measures and actions taken by Israel, the Occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, (...) are null and void".
190. See in this respect E DAVID, *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2008, 4th ed., p. 575.
191. Eg. Res. 677 of 1990.
192. S/Res/787, 16 November 1992, para. 7. See also resolution 752, which had called for the immediate cessation, anywhere in the former Yugoslavia, of attempts to change the ethnic composition of the population.
193. S/Res/1339, 31 January 2001, para. 7.
194. S/Res/1674, 28 April 2006, paras. 5 and 12.
195. See e.g.: A/Res. 36/147 C, 37/88 C, 38/79 D, 39/95 D, 40/161 D, 44/48, A, para. 8, e, 8 December 1989 (107-2-41); 45/74 A, para. 8, e, 11 December 1990 (101-2-43); 51/135, 13 December 1996, para. 2; 52/66, 10 December 1997 (149-2-7), paras. 1 and 3; E5-10/2, 25 April 1997 (134-3-11), paras. 1-5; E5-10/3, 15 July 1997 (131-3-14), paras. 1, 3-5; A/Res. 54/78, 6 December 1999 (149-3-3), paras. 1 and 3; 55/132, 8 December 2000 (152-4-0), para. 1; 59/123 of 10 December 2004; 69/92 of 16 December 2014; 70/87 of 15 December 2015; 71/98 of 23 December 2016.
196. A/Res/ES-10/2 of 25 April 1997.
197. See eg E/CN.4/Res. 2002/7, 12 April 2002; 2003/7, 15 April 2003; 2004/9, 16 April 2004; 2005/6, 22 April 2005.
198. See eg, A/HRC/RES/25/28, 28 March 2014; 28/26, 27 March 2015; 34/31, 24 March 2016; 34/41, 24 March 2017; 37/36, 23 March 2018.
199. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the human rights dimension of population transfer, including the implantation of settlers and settlements, Final Report of 27 June 1997, para. 65.
200. Resolution III of the XXIV<sup>th</sup> International Conference of the Red Cross.

- 201.** ICRC official statement, Annex I, Conference of the High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, para. 12.
- 202.** Present in the territories occupied since 1967, the ICRC has since then constantly reminded Israel confidentially that its settlement policy is illegal under international law.
- 203.** ICRC official statement, Annex I, Conference of the High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, para. 5. See also, P MAURER, "Challenges to international humanitarian law: Israel's occupation policy", *IRRC*, 2012, pp. 323-331.
- 204.** General Affairs Council / External Relations of the EU, 22 January 2007 (BRU-07E75). See also: Council of the European Union, Brussels European Council (16 and 17 June 2005), Presidency Conclusion, 15 July 2005, Doc. no. 10255/1/05; See also Council Conclusions on the Middle East Peace Process, 10 December 2012, para. 4. And those adopted on 14 May 2012 and 17 November 2014 and the resolution of 10 September 2015 of the European Parliament (2015/2685 (RSP)).
- 205.** Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, OJ 2013/C 205/05, 19 July 2013, p. 9; Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, OJ 2015/C 375/05, 12 November 2015, p. 4.
- 206.** ICJ, *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 159.
- 207.** Letter of the State Department Legal Advisor (Mr. Hebert J Hansell) Concerning the Legality of Israeli Settlements in the Occupied Territories, 21 April 1978, *International Legal Materials*, 1978, pp. 777-779.
- 208.** J BOUDREAULT, E NAUGHTON, Y SALAAM, *US Official Statements: Israeli Settlements: The Fourth Geneva Convention*, Washington DC, Institute for Palestine Studies, 1992, p. 19.
- 209.** In their view, the fate of the settlements should be settled as part of the negotiation between Israelis and Palestinians and should not, therefore, be the subject of a UN resolution. For example, in the Security Council, the United States abstained in the vote on resolution 2334.
- 210.** Encouraged by an official statement by President Carter in 1978 asking why 9,000 Israelis were living in 13 settlements in the occupied territories.
- 211.** GJ MITCHELL, *Report of Sharm el-Sheikh Fact Finding Committee*, 30 April 2001, pp. 15 and 16.
- 212.** This responsibility "under international law" has been recognized by the ICJ in its *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, *op.cit.*, para. 147.
- 213.** *Ibid.*, Obligation recognized para. 153.
- 214.** *Ibid.*, Obligation recognized paras. 152 and 153.

## ABSTRACTS

Is the Israeli settlement policy in the West Bank the crime of transfer, direct or indirect, by an Occupying Power of parts of its own civilian population into the territory it occupies ? Following the request of the State of Palestine, the matter is currently under consideration by the Prosecutor of the International Criminal Court. Israel's establishment of settlements in the Occupied Palestinian Territory includes the elements of the war crime of Article 8 (2) (b) (viii) of the Rome Statute, namely its legal element, its material element and its mental element. It will

therefore be easy for the Prosecutor of the International Criminal Court to establish the criminal responsibility of the Israeli leaders, who organize the settlement policy.

La politique de colonisation israélienne en Cisjordanie constitue-elle le crime de transfert, direct ou indirect, par une puissance occupante d'une partie de sa population civile, dans le territoire qu'elle occupe ? La question est actuellement examinée, à la demande de la Palestine, par le Procureur de la Cour pénale internationale. L'implantation par Israël de colonies de peuplement en territoire palestinien occupé comporte les éléments constitutifs du crime de guerre de l'article 8, § 2, b), viii), du Statut de Rome, à savoir son élément légal, son élément matériel et son élément moral. Il sera dès lors aisé au Procureur de la Cour pénale internationale d'établir la responsabilité pénale des dirigeants israéliens, qui organisent la politique de colonisation.

## INDEX

**Mots-clés:** statut de Rome, conflit armé international, territoire occupé, Cisjordanie, crime de guerre, transfert de population civile, colonisation israélienne

**Keywords:** Rome statute, international armed conflict, occupied territory, West Bank, war crime, transfer of civilian population, israeli settlement policy

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