

## **Amicus Brief on the Direct or Indirect Transfer of Palestinians within the Occupied Territories**

### **Expert Opinion by Dr. Yutaka Arai LL.M. (Keio) & PhD (Cambridge)**

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### **Introduction**

It has come to the attention of the present writer that upon the outbreak of the Second Intifada, Israel froze the procedure for updating addresses switched from the Gaza Strip to the West Bank in its copy of the registry. As a result of this, the Palestinians whose registered addresses remain in the Gaza Strip are said to be regarded by the Israeli authorities as "illegal aliens" in the West Bank and according to Israel must hold a permit to be present in their homes and with their families. It has been suggested that among the issues that have arisen under these circumstances, one specific issue ought to be highlighted: the fact that the occupation authorities are locating and forcibly transferring Palestinians, whose registered addresses are in the Gaza Strip but resident in the West Bank, to the Gaza Strip.

It seems clear that this scenario would raise the issue of a direct transfer of persons within the occupied territories. The remaining question would be whether the measure of locating and forcibly transferring those whose registered addresses are in the Gaza Strip from the West Bank to the Gaza Strip is arbitrary and unlawful. In that respect, it ought to be examined whether such a measure is undertaken in compliance with the

requirements of international humanitarian law, and those of international human rights law, including the principle of self-determination of peoples.

### **Legal Status of the Gaza Strip –Brief Examinations**

The Israeli Supreme Court in the *Bassiouni* case held that since the withdrawal or disengagement of the Israeli Defence Forces *qua* occupying armed forces in 2005, the Gaza Strip ceases to be defined as an occupied territory under international humanitarian law.<sup>1</sup> Instead the Court has categorised it as a “hostile territory”, and that the Israeli responsibility for ensuring the rights of the civilian population in that territory can arise from the post-occupation duties that are supplemented by the standards of international human rights law.

In view of this judicial finding, it is necessary to examine whether the Israeli authorities are still bound by the relevant rules of the law of occupation in the Gaza Strip. On this matter, two approaches may be suggested. First, it can be submitted that an ultimate authority retained by the disengaging occupant and its ability to redeploy troops at a short notice (or even “within a reasonable time to make the authority of the occupying power felt”)<sup>2</sup> are sufficient to continue labelling it as the occupying power under IHL.<sup>3</sup> This suggests that the Gaza Strip can continue to be described as the occupied territory under international law. Second, it may be argued that the question whether or not the Gaza Strip is the occupied territory is simply irrelevant to identifying individual criminal responsibility for war crimes of deportation and forcible transfer examined in the immediate circumstances of the case. Indeed, the legal status (occupied territory or otherwise) of the territory to which displaced persons are destined does not feature in respect of the two relevant war crimes: “[u]nlawful deportation or transfer” of protected persons under the Geneva Conventions, which is a grave breach of these Conventions (Article 8(2)(a)(vii) ICC Statute); and “the deportation or transfer of

<sup>1</sup> See *Israel, Petition for an Order Nisi and an Urgent Request for Injunction, Jaber al Bassiouni Ahmed et al v. The Prime Minister and Minister of Defence*, HCJ 9132/07, 28 October 2007 [*Gaza Fuel and Electricity case*]. This is different from a gradual transfer of powers to a local administration in the occupied territory, which can be contemplated within the framework of occupation laws: ICRC's *Commentary to GCIV*, at 62-63.

<sup>2</sup> ICTY, *Prosecutor v. Naletilić*, Case No. IT-98-34-T, Judgment of 31 March 2003, para. 217 (reflecting the position of the US *Field Manual 27-10* (1956), sec. 356). See also G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law And Practice of Belligerent Occupation* (1957) at 28-29.

<sup>3</sup> See *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict*, 25 September 2009, UN Doc. A/HRC/12/48, para. 279 (“Goldstone Report”) (referring to the occupied status of Denmark during World War II, despite the local administration left in place); and Israel, *Tsemel v. Minister for Defence*, HCJ 102/82, 37(3) *Piskei Dinn* 365 at 373-374; as cited in: Y. Shany, “Faraway, so Close – the Legal Status of Gaza After Israel’s Disengagement”, (2005) 8 *YbkIHL* 369 at 376.

...parts of the population of the occupied territory...outside this territory”, which is premised on other serious violation of the laws and customs of war (Article 8(2)(b)(viii) ICC Statute). The same is true of the crime against humanity of “[d]eportation or forcible transfer of population” under Article 7(1)(d) ICC Statute.

### **Deportation or Forcible Transfer**

As will be explored below, in the present circumstances of the case, the war crime of deportation and forcible transfer of civilians may be recognized in case civilian persons are found to be forcibly relocated from the West Bank, which is no doubt the occupied territory, to the Gaza Strip. There has been controversy over the merit of distinguishing the two nomenclatures, namely between deportation (cross-border or external displacement of forcible nature) and forcible transfer (internal displacement or displacement within national borders of forcible nature).<sup>4</sup> Further, it is disputed whether the concepts of deportation and forcible transfer can encompass a forcible relocation beyond “some kind of demarcation line or barrier which, if crossed, effectively prevents or at least seriously inhibits the return of the forcibly displaced population to its accustomed areas of residence”.<sup>5</sup> Nonetheless, these questions are immaterial to the present circumstances, irrespective of whether or not one endorses the train of thought that the Gaza Strip is a “hostile territory” and not an occupied territory. Clearly, the impugned displacement involves the Palestinians concerned traversing the *de facto* boundaries between Israel and the occupied Palestinian territories (which the West Bank is), which are relatively fixated and far from being “constantly changing frontlines” of the kind examined by the ICTY in the *Stakić* case.<sup>6</sup>

### **Deportation or Forcible Transfer of Persons as a War Crime**

Deportation or unlawful displacement of civilians within occupied territories, while engaging State responsibility,<sup>7</sup> may constitute an underlying offence of both war crimes

<sup>4</sup> It may be contended that deportation denotes displacements that involve the crossing of an international border while forcible transfer relate only to relocations within a State. See, for instance, W.A. Schabas, *The UN International Criminal Tribunals – The former Yugoslavia, Rwanda and Sierra Leone*, (2006) at 203; and ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006. In contrast, see the jurisprudence of the ICTY which has jettisoned the cross-border element with respect to deportation: *Prosecutor v. Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 674; and *Prosecutor v. Stakić*, IT-97-24-A, dissenting opinion of Judge Shahabuddeen, paras 23-32.

<sup>5</sup> *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, Partly Dissenting Opinion of Judge Shahabuddeen, para. 46.

<sup>6</sup> *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, para. 303.

<sup>7</sup> The state responsibility for forced displacement of civilians has been recently highlighted by the Eritrea Ethiopia Claims Commission. See, for instance, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27-32, 17 December 2004, paras 79-106, 44 ILM 601; and Partial Award, Civilians Claims,

and crimes against humanity (as well as even genocide). Existing rules of IHL provide a basis for individual criminal responsibility for forcible displacement of civilians within or outside occupied territories. Article 147 GCIV specifically categorises “unlawful deportation or transfer” of protected persons as a grave breach of the GCIV.<sup>8</sup> The States parties to the Geneva Conventions are obligated to penalise the violation of the prohibition under their national law and to search for and prosecute perpetrators present in their territories or to extradite them to another party willing to establish the jurisdiction.<sup>9</sup> Further, according to Article 85(4) API, “the deportation or transfer of all or parts of the population of the occupied territory within...this territory in violation of Article 49 of the Fourth Geneva Convention” is included in the expanded list of grave breaches of API and expressly designated as war crimes. Further, the International Committee of the Red Cross’ *Customary International Humanitarian Law Study* confirms the individual criminal responsibility for this grave breach of API.<sup>10</sup>

Under the Rome Statute of the International Criminal Court, forcible transfer of civilians within the occupied territories can give rise to two forms of war crimes: (i) the grave breach form of war crimes under Article 8(2)(a)(vii) ICC Statute, which incorporates one of the grave breaches of the Fourth Geneva Convention stipulated under Article 147 GCIV;<sup>11</sup> and war crimes based on “[o]ther serious violations of the laws and customs of war applicable in international armed conflict” within the meaning of Article 8(2)(b)(viii) ICC Statute,<sup>12</sup> which corresponds to Article 85(4)(a) API.

With respect to crimes against humanity, coercive displacement may be encompassed within the material scope of any of its three underlying acts: deportation or forcible transfer of population; persecution; and other inhumane acts. Indeed, if the contested measures are intended to result in the demographic changes in the occupied West Bank, this would be a clear violation of the conservationist premise underlying the laws of occupation, as embodied under Article 43 of the Hague Regulations annexed to the

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Ethiopia’ Claim 5, 17 December 2004, paras 128-131, 44 ILM 630.

<sup>8</sup> GCIV, Article 147.

<sup>9</sup> GCIV, Article 146(1) and (2).

<sup>10</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (2005), Vol. I, at 578-9.

<sup>11</sup> Insofar as the war crime of deportation or transfer of all or parts of the population of the occupied territory within or outside the territory under Article 8(2)(b)(viii) is concerned, this formulation is considered a reproduction of the grave breach listed in Article 8(2)(a)(vii): K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, (2003), at 212.

<sup>12</sup> Article 8(2)(b)(viii) concerning war crimes expressly contemplates the internal displacement, as can be seen from the wording (“within or outside this territory”).

Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907.<sup>13</sup> Surely, this does not necessarily lead to an individual criminal responsibility for war crimes.<sup>14</sup> Still, it might not be excluded that the implementation of the contested acts is either systematic or widespread in nature, and that their cumulative effects are sufficient to reach the threshold of “other inhumane acts”, the residual category of the crime against humanity. However, in the absence of first-hand information that clearly demonstrates systematic policy on the part of the Israeli occupying authorities with regard to the contested measures, or a widespread pattern of these measures, this question goes beyond the scope of discussions of this amicus brief, and the following discussions will focus only on issues of war crimes.

#### **Differences between the Grave Breach Form and the War Crime Based on Serious Violations of Laws and Customs of War**

It is generally understood that insofar as the acts constituting deportation or forcible transfer of persons are concerned, the material elements of the war crimes under Article 8(2)(a)(vii) and Article 8(2)(b)(viii) ICC Statute are identical.<sup>15</sup> However, it is worth noting that this understanding may be qualified in two respects. First, there is difference in the personal scope of the victims of such forced removal. The grave breach form under Article 8(2)(a)(vii) must be directed against the persons protected by the Geneva Conventions 1949. This means that with respect to GCIV, the victims of deportation or unlawful transfer must fall within the scope of “protected persons” under Article 4 GCIV, namely those who have fallen “in the hands of” a party to the conflict, whether in occupied territories, in the territories of the adverse party to the conflict, or even in battlefields. The ICTY has construed the concept of protected persons under GCIV in a broader manner so as to be consistent with humanitarian object and purpose of the Convention.<sup>16</sup> On the other hand, the war crime of coercive displacement under the heading “other serious violations of the laws and customs of war” (Article 8(2)(b)(viii)) deals with “the population” in the occupied territories (“peaceful civilians” and even civilians who have become unprivileged belligerents by taking a direct part in

<sup>13</sup> The same conclusion can be reached even when such demographic changes are not intended but occurring as a result of gross negligence on the part of the occupation authorities.

<sup>14</sup> Not all violations of IHL rules will amount to war crimes. *Contra*, J.J. Paust, “The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War”, (2003) 27 *Suffolk Transnational Law Review* 1, at 13.

<sup>15</sup> See, for instance, *ICRC's Commentary to APs*, paras. 3503 *et seq*; and G. Werle, *Principles of International Criminal Law*, (2005), at 327.

<sup>16</sup> See, for instance, *Prosecutor v. Tadic*, IT-94-1-A, Judgment of 15 July 1999; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment of 24 March 2000, para. 151; and *Prosecutor v. Mucić, Delalic et al. (“Čelebići Camp” case)*, IT-96-21-A, Judgment 20 February 2001, para. 84.

hostilities). It does not, however, cover civilians finding themselves in an active combat zone.<sup>17</sup>

Second, while this is only a semantic question, there might be difference in the number of victims of forced displacement contemplated in those two provisions. Article 8(2)(b)(viii) ICC Statute provides that “the deportation or transfer of all or parts of the population of the occupied territory within...this territory” may constitute a war crime. The reference to the wording “parts of the population” suggests that the coercive removal would be of collective nature.<sup>18</sup> On the other hand, the Elements of Crimes for Article 8(2)(a)(vii) ICC Statute in its paragraph 1 (1) recognises that displacing only one person may satisfy the material requirement.<sup>19</sup> Be that as it may, what is at least agreed upon is that there is no requirement of a minimum number of displaced persons.<sup>20</sup>

Turning to the Palestinian persons affected by the impugned measures, if one starts with the premise, as this amicus brief does, that the GCIV is *de jure* applicable to the West Bank,<sup>21</sup> it is clear that they are both the protected persons within the meaning of Article 4 GCIV and “parts of the population of the occupied territory” within the meaning of Article 85(4)(a) API.

#### **“Unlawful Transfer” and “Forcible Transfer”**

The development of the case-law by the ICTY suggests that “unlawful transfer” as a grave breach of the Geneva Conventions is understood as the forced displacement of persons from where they reside to a place that is not their own choosing.<sup>22</sup> This understanding is in harmony with the concept of “forcible transfer” embodied under Article 49(1) GCIV.

The focus on the coercive nature of relocation is crucial for diminishing the importance

<sup>17</sup> For the same view, see P. Akhavan, “Reconciling Crimes Against Humanity with the Laws of War – Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence”, (2008) 6 JICJ 21 at 35-37 (criticising the ICTY Trial Chamber in the *Gotovina* case for obliterating the requirement of the forced transfer of persons occurring in occupied territories).

<sup>18</sup> Dörmann, *supra* n. 12 at 212.

<sup>19</sup> On that basis, Werle argues that the transfers of a single person is sufficient to meet the definition of the crime: Werle, *supra* n. 16 at 328.

<sup>20</sup> *Prosecutor v. Momcilo Krajisnik*, IT-00-39-A, Judgment of 17 March 2009, para. 333.

<sup>21</sup> See, for instance, H.C. 337/71, *The Christian Society for the Holy Places v. Ministry of Defense et al.* 26(1) Piskei Din 574, at 580 (1972); English excerpt in: (1972) 2 Israel YbkHR 354, at 356 (*per* Sussman J.) (recognizing the applicability of customary international humanitarian law, including many rules derived from GCIV, to the West Bank and the Gaza Strip).

<sup>22</sup> *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment of 31 March 2003, para. 519.

of examining the *lawfulness* of the place of residence from which persons are removed. It is true that the ICTY case-law has referred to “displacement from the area in which they are lawfully present”.<sup>23</sup> Even so, it has been stressed that among the main legal values safeguarded by forcible transfer stands out the right of the victims to stay in their home and community.<sup>24</sup> Further, with respect to *actus reus*, the judicial appraisal has focused almost exclusively on the involuntary nature of removal. Indeed, one of the leading legal experts of the International Committee of the Red Cross (and Red Crescent) (ICRC) once wrote that “Article 49 comes into play whenever people are forcibly moved from their *ordinary* residences”.<sup>25</sup> In view of the reduced importance of the lawfulness of the abodes from which persons are relocated, the war crime of forcible transfer seems to mark a contrast to the crime against humanity of “forcible transfer of population” laid down in Article 7 ICC Statute. The latter stipulates that this crime denotes displacement of persons “from the area in which they are *lawfully* present...”.<sup>26</sup>

In the present instances, it is clear that locating and removing the Palestinians, whose registered addresses are in the Gaza Strip and who reside in the West Bank, to the Gaza Strip can constitute relocating persons from their *ordinary* place of residence where they have enjoyed the rights to private and family life, and the right to participate in community life. The lawfulness of their abodes is immaterial, primarily because the Gaza Strip and the West Bank constitute one territorial unit (a basic position that Israel affirmed in the Oslo Accords and the Free Passage Agreement and never formally revoked). Further, even if the lawfulness of their stay in the West Bank becomes an issue by reference to their registered addresses, which are in the Gaza Strip, it ought not to be overlooked that the Israeli occupation authority is responsible for freezing the population registry in 2000.

### **Involuntary Nature of Transfer**

In order to assess the forcible nature of the transfer, one key criterion is that the

<sup>23</sup> See, for instance, *Prosecutor v. Simić et al.*, IT-95-9-T, Judgment of 17 October 2003, paras. 129-131; and *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment of 27 September 2006, para. 723.

<sup>24</sup> *Prosecutor v. Simić et al.*, IT-95-9-T, Judgment of 17 October 2003, para. 130.

<sup>25</sup> J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (1995) at 144, emphasis added. See also Jack Goldsmith, US Department of Justice, *Memorandum for the Files, Re: Voluntary Departure from Occupied Territory*, 16 July 2004, at 2.

<sup>26</sup> ICC Statute, Article 7(2)(d), emphasis added. Indeed, the Preparatory Commission for the International Criminal Court specifically rejected the proposition by some delegates that this lawful residence should be part of the elements of this war crime under Article 8(2)(a)(vii) ICC Statute: Dörmann, *supra* n. 12, at 106.

contested movement is contrary to an individual's own "genuine wish to leave"<sup>27</sup> or "a genuine choice to go".<sup>28</sup> The coercive nature of the transfer is to be interpreted broadly so as to include many (if not all) involuntary forms of displacement. The Trial Chamber of the ICTY has held that the term "forcibly", when used to refer to "forcible transfer", should not be confined to physical coercion, but that the interpretation of this term can be guided by the general prohibition of physical and moral coercion stipulated under Article 31 GCIV.<sup>29</sup> By applying liberal interpretation, it has ruled that this term "includes threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".<sup>30</sup>

The survey of the ICTY case-law suggests that even where displaced persons have requested to be removed, this does not necessarily indicate the exercise of a genuine choice.<sup>31</sup> Indeed, the evaluations of a genuine consent to (or genuine free will of) relocation depend on particular circumstances of the case. It is of the present writer's view that relevant criteria for assessing the vulnerability of the victims should include their gender, ethnicity, religion, age, disability etc.

Turning to the present circumstances, with respect to Palestinians whose registered addresses are in the Gaza Strip, and who are therefore removed to the Gaza Strip, it is obvious that their genuine wish to leave is absent.

#### **Absence of Lawful Grounds for Displacement**

The absence of valid legal grounds for displacement under international law is a key to rendering forcible transfer criminally punishable. While Article 8(2)(a)(vii) ICC Statute codifies the war crime of "unlawful deportation or transfer" as a grave breach of the Geneva Conventions,<sup>32</sup> the Elements of Crimes for this provision does not clarify the concept of unlawfulness.<sup>33</sup> Even so, under Article 7(2)(d) ICC Statutes, the crime

<sup>27</sup> ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment of 31 March 2003, para. 519.

<sup>28</sup> ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgment of 2 August 2001, paras. 528 *et seq.*

<sup>29</sup> *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment of 31 March 2003, para. 519.

<sup>30</sup> *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, para. 281, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment of 17 September 2003, paras 229 and 233; and *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment of 27 September 2006, paras. 724 and 730. See also *Prosecutor v. Krstić*, IT-98-33-T, Judgment of 2 August 2001, paras. 528-530.

<sup>31</sup> ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment of 17 September 2003, para. 229;.

<sup>32</sup> ICC Statute, Article 8(2)(a)(vii), emphasis added.

<sup>33</sup> The Elements of Crimes in relation to Article 8 (2) (a) (vii)-1 only highlights five elements:

1. The perpetrator deported or transferred one or more persons to another State or to another location.



against humanity of deportation or forcible population transfer is defined as “forced displacement of the persons ...without grounds permitted under international law”.<sup>34</sup>

The Allied military trials established in the aftermath of the Second World War furnish some crucial guidance on this issue. In the *A. Krupp* case, the US Military Tribunal at Nuremberg, which was set up to implement the Control Council Law No. 10 after World War II, confirmed the position taken by Judge Phillips in the *Milch* case.<sup>35</sup> According to this, the unlawfulness of deportation or transfer could be identified in three circumstances: (i) when this is undertaken “without a legal title”; (ii) when the purpose of the displacement is illegal”; (iii) “whenever generally recognized standards of decency and humanity are disregarded”.<sup>36</sup> In the *Von Leeb and Others* case, the same US Military Tribunal clarified the meaning of an unlawful purpose by holding that “There is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power”.<sup>37</sup> For the purpose of the present-day system of IHL, the requirement of unlawful purpose can be obliterated.<sup>38</sup> The reference to “the generally recognized standards of decency and humanity” is reminiscent of the Martens Clause. These standards can be deployed as a “dynamic and generative” vehicle<sup>39</sup> for systematically

2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

<sup>34</sup> ICC Statute, Article 7(2)(d), emphasis added. For the case-law, see, for instance, ICTY, *Prosecutor v. Krajisnik*, Trial Judgment, para. 723.

<sup>35</sup> US Military Tribunal at Nuremberg, *Trial of Erhard Milch*, 20 December 1946-17 April 1947, (1948) 7 LRTWC 27 at 45-6 and 55-6; (1947) 14 AD 299, Case NO. 129, at 302.

<sup>36</sup> US Military Tribunal at Nuremberg, *The Krupp Trial (Trial of A.F.A. Krupp von Bohlen und Halbach and Eleven Others)*, 17 November 1947-30 June 1948, (1949) 10 LRTWC 69, Case No. 58, at 144 *et seq*; and 15 AD 620 Case No. 214, at 626.

<sup>37</sup> US Military Tribunal at Nuremberg, *Trial of Wilhelm Von Leeb and Thirteen Others (The High Command Trial)*, 30 December 1947-28 October 1948, (1949) 12 LRTWC 1, Case No. 72, at 93; and 15 AD 376 at 394. See also *Trial of Carl Krauch and Twenty-Two Others (I.G. Farben Trial)*, Judgment of 29 July 1948, (1949) 10 LRTWC 1 at 4 *et seq*; and 15 AD 668 at 679.

<sup>38</sup> By comparison, note that the “purpose requirement”, which is included for the definition of torture in Article 1 of the UN Convention against Torture, is missing under Article 7 ICCPR and under the corresponding provisions of the regional human rights instruments (Article 3 of the European Convention on Human Rights; Article 5 of the American Convention on Human Rights; and Article 5 of the African Charter of Human and Peoples’ Rights).

<sup>39</sup> I. Scobbie, “The Approach to Customary International Law in the Study”, in: E. Wilmschurt and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (2007) 15,

transplanting (rather than mechanically translating) appropriate standards of customary human rights law with a view to assessing the lawfulness of forcible transfer.

I submit that the unlawfulness of the forcible displacement within or outside occupied territories should be determined by reference to the requirements of conventional and customary international humanitarian law, and where appropriate, to those of conventional and customary human rights law.<sup>40</sup> In case an occupying power invokes its national laws as a legal basis for displacement, such national laws must be consistent with the appropriate international rules applicable in occupied territories. It is one of the established principles of international law that States cannot invoke provisions of their domestic laws as justifications for their failure to perform obligations under international law.<sup>41</sup>

Grounds for unlawfulness of deportation or forcible transfer (and the exceptions to the prohibition of such a measure) are laid down in Articles 45 and 49 GCIV. Under Article 45 GCIV,<sup>42</sup> unlawfulness of transfer of persons can be contemplated in two circumstances: (i) transferring aliens who are in the territory of a State party to an international conflict to a non-State party; and (ii) transferring a protected person to a country where she or he may have reason to fear persecution for her or his political opinions or religious beliefs (the earlier version of the principle of non-refoulement). Article 49(2) GCIV provides that evacuations can constitute the exceptions to the prohibition on forcibly displacing civilians within occupied territory. However, the evacuations must be of temporary duration. They can be made only for the security of the civilian population in the occupied territories or for imperative military reasons. Evacuated persons must also be transferred back to their homes as soon as hostilities in the area have ceased.<sup>43</sup> While this provision sets out conditions for lawful evacuations, it is regarded as applicable *a fortiori* in all situations of unlawful displacement.<sup>44</sup>

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at 18 and 44.

<sup>40</sup> Schabas refers to other provisions of the Geneva Conventions, and to "general norms of international customary law" as the basis for assessing "unlawfulness": Legal Opinion on deportations, Expert Opinion by Professor William A. Schabas, 7 August 2002.

<sup>41</sup> Vienna Convention on the Law of Treaties, Article 27. See also Permanent Court of International Justice, *Free Zones* case, Judgment of 7 June 1932, (1932) PCIJ, Ser. A/B, No. 46, at 167; The Greco-Bulgarian "Communities" case, Advisory Opinion of 31 July 1930, (1930), PCIJ, Ser. B, No. 17 at 32; and *The Polish Nationals in Danzig* case, Advisory Opinion of 4 February 1932 (1932), PCIJ, Ser. A/B, No. 44 at 24.

<sup>42</sup> Under this provision, the term "transfer" is employed to denote displacement of persons beyond national boundaries.

<sup>43</sup> GCIV, Article 49(2), third sentence.

<sup>44</sup> E.-C. Gillard, "The Role of International Humanitarian Law in the Protection of Internally Displaced

In my opinion, the contested measure would infringe some salient rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR), to which Israel is a party: (i) the rights to private and family life under Article 17(1); (ii) the right to marriage under Article 23; and (iii) the right to free movement and freedom to choose one's own residence under Article 12(1). It is worth noting that while those rights do not feature as non-derogable rights under Article 4 ICCPR and even in the expanded catalogue of non-derogable rights contemplated by the Human Rights Committee's *General Comment No. 29* (2001),<sup>45</sup> their suspension in emergency circumstances of occupation or armed conflict cannot be recognised automatically. This provision makes clear that States Parties...*may* take measures derogating from their obligations...."<sup>46</sup> Further, the lawfulness of derogation is contingent upon the occupying power meeting the three requirements: (i) notification of the derogation measures to the other States parties to the ICCPR; (ii) proportionality of the derogating measure to a legitimate aim of dealing with the exigencies; and (iii) non-discrimination of derogating measures on the basis of race, colour, sex, language, religion or social origin.

With respect to the first requirement, it is not clear whether the Israeli Government has duly complied with this procedural requirement (even retroactively). In relation to the second requirement, the contested measures, even if pursuant to the legitimate aim of addressing Israel's paramount security concerns,<sup>47</sup> seem to be out of proportion, given that they unnecessarily obstruct meaningful exercise of the rights to marriage and family life of the Palestinians, the rights that are irrelevant to security considerations. As regards the third requirement, when derogating from the substantive rights described above, the Israeli occupation authorities must ensure that there is no arbitrary or unreasonable distinction between the Palestinian residents, who are affected by the contested measures and already undergoing considerable economic and social hardships on one hand, and Jewish settlers who have moved, by their own volition or through the

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Persons", (2005) 24 *Refugee Survey Quarterly* 37 at 41. For the sake of completeness, reference should also be made to Article 17 of Additional Protocol II (APII), which refers to the security of the civilians or imperative military reasons for determining the lawfulness of internal displacement. This provision is of special relevance in case an outbreak of hostilities in certain areas of the occupied territories are considered the initiation of a non-international armed conflict, with such areas, even temporarily, slipping out of the control of the occupying power.

<sup>45</sup> Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), 31 August 2001 (adopted on 24 July 2001), para. 6.

<sup>46</sup> ICCPR, Article 4(1), emphasis added.

<sup>47</sup> There is no doubt that very few democracies are faced with such intractable and existential security threat as Israel.

governmental “policy”, to the West Bank on the other.

As regards the Palestinians whose registered addresses are in the Gaza Strip and are settled in the West Bank for several years, expelling such persons on the formalistic ground of their registered address casts serious doubt on the “lawfulness” of their transfer. Its arbitrary nature is compounded by the grave consequences that they would endure for their closely knit family ties and communitarian values.<sup>48</sup> Their forced plight can become evident especially when compared to situations of many Jewish settlers in the West Bank.

It ought to be added that the overall impact of these measures may potentially jeopardise and fragment the social, cultural, economic and political unity of the Palestinians residing in the West Bank and Gaza Strip, whose lives are already overstrained in the prolonged occupation. It would also seem reasonable to assume that the impugned measures of enforcing the system of permits that regulate Palestinians’ stay are, be they intended or otherwise, contributing to demographic changes in the West Bank. These would be squarely at variance with the right of self-determination of the Palestinian people. In the light of these considerations, it seems that the “lawfulness” of the impugned measures may be gravely contested.

**Indirect Forcible Displacement (Indirect Deportation or Indirect Forcible Transfer)**

“Indirect” deportation or forcible transfer refers to displacements of civilians outside or within occupied territories, which are not ordered by a government, but which can result from governmental actions or policies that create social and economic conditions intolerable to such civilians. Such hostile social and economic conditions include fear of threat, harassment and attacks by other civilians.

Both the first paragraph of Article 49 and Article 147 GCIV are silent on the direct or indirect nature of the displacement. It is worth pointing out that the Ethiopia-Eritrea Claims Commission was confronted with some claims relating to indirect forcible displacement of civilians, even though it is highly disputable whether the contested

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<sup>48</sup> Compare the finding by the Ethiopia-Eritrea Claims Commission with specific regard to Eritrea’s allegation concerning the unlawful separation of families caused by expulsions. The Commission held Ethiopia liable for expelling some family members who did not hold Eritrean nationalities: Partial Award, *Eritrean Civilian Claims* 15, 16, 23, & 27-32, para. 97. Nevertheless, the Commission found no evidence for a national policy of expelling Eritreans: paras 80 and 89.

displacement occurred within areas that could be considered occupied at the relevant time. With respect to the Eritrean claim that Ethiopia was liable for the massive flight of Eritrean civilians upon the offensive of the Ethiopian armed forces, the Commission rejected the claim on the ground of the lack of evidence. However, one may infer from its reasoning that the possibility of charging a State for indirect displacement occurring under coercive circumstances as such is not gainsaid.<sup>49</sup> In a separate case concerning Ethiopia's claim that unlawful Eritrean Government's actions and policies engendering social and economic conditions hostile to Ethiopian minority members resulted in their "indirect" expulsions, the Commission held that such displacements were economic and social dislocations caused by war and not imputable to Eritrea's action or even omission.<sup>50</sup> There was, however, recognition that the root causes of their departure were not limited to economic difficulties, but that this included family separation, harassment, sporadic discrimination, and even attacks instigated by Eritrean civilians.<sup>51</sup> As this case concerned the displacement during the conduct of hostilities, the broader scope of "indirect" expulsions that the Commission recognised as lawful need to be read in the light of the tumultuous circumstances of armed conflict.<sup>52</sup> By comparison, with respect to deportation or forcible transfer undertaken in the context of less volatile situations of occupation, the threshold for identifying State liability for this should be deemed lower.

Even if one comprehends, as this amicus brief does, that indirect forcible displacement of persons within or outside the occupied territories may constitute an infraction of Article 49(1) GCIV and raise the appropriate State responsibility, it is a separate question whether this act would also lead to the war crime for which individual criminal responsibility may arise. Under the second limb of Article 8(2)(b)(viii) ICC Statute, the enumerated act of transferring civilian persons within the occupied territory (the act regulated by Article 49(1) GCIV) does not explicitly refer to the case of indirect forcible removal.

In contrast, the first limb of Article 8(2)(b)(viii) ICC Statute expressly mentions the war crime of *indirect* transfer by the occupying power of part of its own civilian population

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<sup>49</sup> Ethiopia Eritrea Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 and 26, paras 134-136.

<sup>50</sup> Partial Award, Civilians Claims, Ethiopia's Claim 5, paras 9-95.

<sup>51</sup> *Ibid.*, para. 93.

<sup>52</sup> Further, the Ethiopia-Eritrea Commission was considered deliberately to set the higher threshold of identifying State liability within its scope of mandate.

into the occupied territory. There have been doctrinal debates over whether or not this war crime is recognized under customary international law.<sup>53</sup> The treaty-based rules of international humanitarian law (Article 49(6) GCIV and Article 85(4)(a) API) that furnish the basis for this war crime is silent on the case of *indirect* transfer. Admittedly, this question does not have direct bearings on the present litigation. However, the debates over the constitutive or declaratory nature of the first limb of Article 8(2)(b)(viii) ICC Statute may entail important implications upon the second limb of the same provision. If the drafters of the ICC Statute intended to recognise individual criminal responsibility for a violation of the prohibition of *indirect* deportation or transfer of persons within or outside the occupied territory under the second limb of that provision, then it would seem incoherent that they omitted the word “indirectly”.

Be that as it may, the jurisprudence of the ICTY, which has demonstrated liberal construction of the involuntary nature of displacement,<sup>54</sup> may help extend the material scope of deportation or forced transfer to cover what can be termed *indirect* forcible displacement. Special note should be taken of the *Krajišnik* case. There, the ICTY Appeals Chamber confirmed the Trial Chamber’s finding of the crime against humanity of forcible transfer in relation to the displacement that took place within the national borders of Bosnia Herzegovina. Many Muslims and Croats abandoned their homes in the Serb-controlled municipalities in Bosnia and Herzegovina due to the “severe living conditions” created by the Serb authorities through such measures as house searches, arrests, physical harassment, and cutting of electricity supplies.<sup>55</sup> The *mens rea* of the responsible Serbs in driving out the Muslims and Croats in their controlled areas seems clear. It is fair to assume that they intended (or at least were aware) that the relocation of the members of non-Serb ethnic groups would occur as a consequence and “in the ordinary course of events”.<sup>56</sup>

In the present circumstances, the Israeli occupying authorities in the occupied

<sup>53</sup> See, for instance, D. Kretzmer, “The Advisory Opinion: the Light Treatment of International Humanitarian Law”, (2005) 99 AJIL 88 at 94.

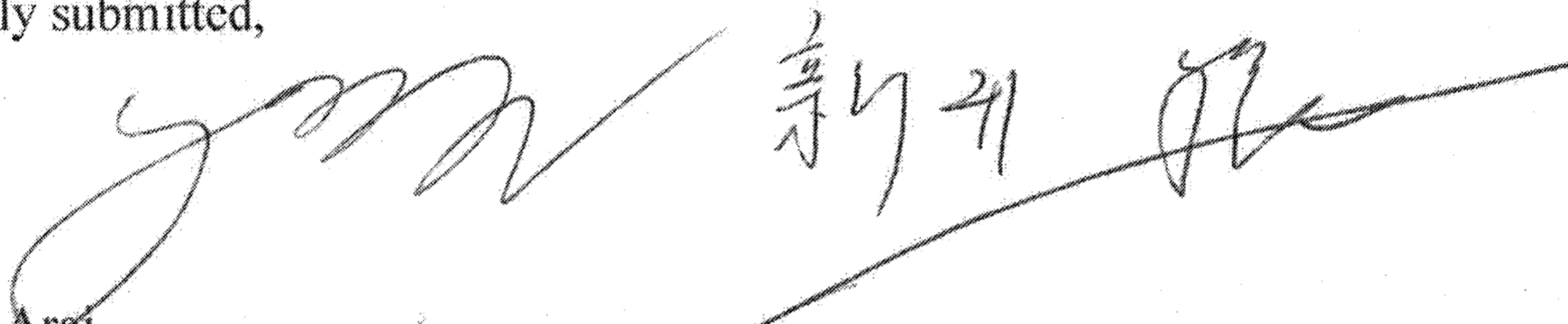
<sup>54</sup> *Prosecutor v. Stakić*, IT-97-24-A, Judgment of 22 March 2006, para. 281, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment of 17 September 2003, paras. 229 and 233; and *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment of 27 September 2006, paras. 724 and 730.

<sup>55</sup> *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment of 17 March 2009, para. 319; and *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment, 27 September 2006, paras 724 and 729. In that case, the Trial Chamber found not only forcible transfer but also deportation because some Muslims and Croats left the Serb-controlled municipalities in Bosnia and Herzegovina for the neighbouring countries (Croatia and Macedonia).

<sup>56</sup> See ICC Statute, Article 30.

Palestinian territories, through their failure to update the Palestinian population registry and through their measures of searching for and removing the Palestinians whose registered addresses are in the Gaza Strip from the West Bank to the Gaza Strip, can be said to create a particularly difficult social context for many Palestinians. To that extent, it would seem reasonable to argue that such removal amounts to a war crime of deportation or forcible transfer of persons outside or within the occupied territory, as stipulated under the second limb of Article 8(2)(b)(viii) ICC Statute. In these lights, it is proposed that the Israeli occupation authority should fully update the population registry and stop the contested measures detrimental to family lives of those Palestinians.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized cursive name followed by the Japanese characters '新井 隆行' (Arai Yutaka).

Dr. Yutaka Arai  
17 January 2011

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