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**Human rights situation in Palestine and other occupied Arab territories**

# Situation of human rights in the Occupied Palestinian Territory, including East Jerusalem, with a focus on the legal status of the settlements

## Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*

*Summary*

In the present report, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 examines the current human rights situation in the Occupied Palestinian Territory, including East Jerusalem, with a particular focus on the legal status of the settlements according to the Rome Statute of the International Criminal Court.

Other aspects covered in the report include the recent escalation of violence in Gaza and the West Bank, including East Jerusalem, the situation in Sheikh Jarrah and forced displacement, the impact of forced displacement and demolitions on children and the accountability of third States.

* The present report was submitted after the deadline in order to reflect the most recent developments.

# I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, pursuant to Commission on Human Rights resolution 1993/2 A and Council resolution 5/1.

2. The Special Rapporteur would like to note that he has yet to be granted access to the Occupied Palestinian Territory, nor have his requests to meet with the Permanent Representative of Israel to the United Nations been accepted. The Special Rapporteur notes again that access to the Occupied Palestinian Territory is a key element in the development of a comprehensive understanding of the human rights situation on the ground. He regrets the lack of opportunity to meet with many human rights groups, owing both to his exclusion from the territory, to difficulties with travel, the barriers put in place by the coronavirus disease (COVID-19) pandemic and the barriers that many individuals face should they seek exit permits from the Israeli authorities, particularly from Gaza.

3. The present report is based primarily on written submissions. The Special Rapporteur was unable to travel to the region for further consultations owing to COVID-19.

4. In the present report, the Special Rapporteur focuses on the human rights and humanitarian law violations committed by Israel, in accordance with his mandate.[1] The mandate of the Special Rapporteur is focused on the responsibilities of the occupying power, although he notes that human rights violations by any State or non-State actor are deplorable and only hinder the prospects for peace.

5. The Special Rapporteur wishes to express his appreciation for the full cooperation extended to his mandate by the Government of the State of Palestine. He further acknowledges the essential work of civil society organizations and human rights defenders to create an environment in which human rights are respected and violations of human rights and international humanitarian law are not committed with impunity and without witnesses.

# II. Current human rights situation

6. The human rights situation of Palestinians in the West Bank, East Jerusalem and Gaza was marked by a significant deterioration towards the end of the period under review, owing to an escalation of violence in May 2021. Although it is not possible to provide a comprehensive review of all human rights concerns since his previous report, submitted to the Human Rights Council at its forty-fourth session,[2] the Special Rapporteur would like to highlight several issues of concern, including the recent escalation of violence, the situation in Sheikh Jarrah and forced displacement, the impact of forced displacement and demolitions on children and the accountability of third States.

## A. Recent escalation and impact on civilians

7. Over a period of two weeks in May 2021, the human rights situation in the Occupied Palestinian Territory deteriorated significantly and the worst levels of violence and civilian casualties in years were seen in Gaza and across the West Bank, including East Jerusalem. Tensions had escalated against the backdrop of the impending forced displacement of Palestinian families from their homes in the East Jerusalem neighbourhoods of Sheikh Jarrah and Silwan. In parallel and during the last days of Ramadan, Israeli Security Forces further restricted the access of Palestinian worshippers to the Aqsa Mosque compound and limited their movement, while using excessive force within the mosque itself, thus further aggravating tensions. On 10 May, the situation escalated militarily between armed groups in Gaza and Israel. At the same time, Palestinian demonstrations spread from East Jerusalem

[1] As specified in the mandate of the Special Rapporteur set out in Commission on Human Rights resolution 1993/2 A.

[2] A/HRC/44/60.

and the West Bank to various parts of Israel, particularly in mixed cities, leading to violence primarily perpetrated by right-wing Israeli extremist groups against Palestinians.[3]

8. From 10 to 20 May and in the aftermath of rocket fire from armed groups, Israel, with its vastly superior firepower, launched intensive airstrikes against targets in Gaza from the land and sea, which resulted in the deaths of 256 Palestinians including 66 children and 40 women. Thousands of others have been injured and over 74,000 Palestinians have been displaced.[4] In the West Bank, including East Jerusalem, 28 Palestinians, including 5 children, had been killed as of 24 May. Ten Israeli citizens and residents were killed as a result of rockets fired from Gaza and damage to civilian infrastructure and houses was reported in many areas. A ceasefire was reached on 21 May, however tensions remain high in the occupied Palestinian territory and in Israel.[5]

9. Israeli attacks on Gaza resulted in civilian deaths and injuries, as well as large-scale destruction and damage to civilian objects. They included government buildings, residential homes and apartment buildings, the offices of international humanitarian organizations, medical facilities, media offices and roads connecting civilians to essential services, such as hospitals. Indiscriminate and disproportionate attacks on civilians and civilian objects may constitute war crimes.[6]

10. This escalation is the fourth of its kind since 2008, with more yet to come if the root causes of such violence are not addressed. These latest events have made it abundantly clear that the persistent discrimination against Palestinians throughout the West Bank and East Jerusalem, threats of forced displacement, forced displacement, demolitions, settlement expansion and settler violence and the 14-year blockade of Gaza, to name but a few, have all contributed to and will continue to contribute to cycles of violence.

11. On 27 May, the Human Rights Council adopted resolution S-30/1 on ensuring respect for international humanitarian law and international human rights law, in which the Council requested the High Commissioner to update the Council at its forty-eighth session on progress made on the resolution and report to the Council and the General Assembly on an annual basis. The resolution mandates the Human Rights Council to urgently establish an ongoing, independent, international commission of inquiry to investigate in the Occupied Palestinian Territory and in Israel all alleged violations and abuses of international human rights law leading up to and since 13 April 2021 and all the underlying root causes of recurrent tensions, instability and protraction of conflict. The Special Rapporteur welcomes the creation of the commission of inquiry.

12. Human rights organizations have estimated that the recent escalation will have considerable long-term effects on the infrastructure in Gaza and in particular on water, sanitation and electricity, all of which were already in a dire state. The Office for the Coordination of Humanitarian Affairs has estimated that as a result of the escalation, 400,000 people have no regular access to safe piped water, 58 education facilities have been damaged, 1,165 housing and commercial units have been destroyed, 9 hospitals have been partially damaged and 19 clinics have been damaged.[7] The 10-day Israeli bombardment resulted in damage to numerous elements of civilian infrastructure, including 18 sewage water pumps, and 18,734 meters of the sewage networks. Four central sewage treatment stations were inoperable during the attacks as staff could not travel to their workplace.[8]

13. COVID-19 prevention measures, as well as testing and vaccination, have been severely disrupted as a result of the escalation, with the Office for the Coordination of Humanitarian Affairs reporting that as of June 2021, testing has been limited to symptomatic people reporting to hospitals. In addition, people requiring urgent medical care outside Gaza were reportedly not allowed to leave in the period between 11 May and 3 June due to the

[3] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27095&LangID=E.

[4] See Office for the Coordination of Humanitarian Affairs, "Protection of civilians report, 24–31 May".

[5] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27116&LangID=E.

[6] Ibid.

[7] See www.ochaopt.org/content/gaza-strip-escalation-hostilities-3-june-2021.

[8] Al-Mezan Center for Human Rights, "In focus: the effects of Israel's military offensive on Gaza's wash facilities, 10–21 May 2021".

closing of the Erez and Kerem Shalom crossings, well beyond the date of the ceasefire agreement.[9] Non-governmental organizations (NGOs) have repeatedly warned that this policy is extremely unreasonable and puts lives at risk.[10]

## B. Gaza

14. The Israeli-imposed land, sea and air blockade of Gaza is now 14 years old and continues to trap 2 million people with little hope for the future or option of leaving. The situation in Gaza had continued to be dire, even prior to the recent escalation of violence, as a result of the blockade and the impact of COVID-19.

15. A spike in COVID-19 cases in early May 2021 led the Palestinian Ministry of Health to declare almost all of the Gaza Strip a "red zone", noting that the increase in cases was having an impact on all aspects of life in Gaza.[11] Following the suspension of coordination between the Government of the State of Palestine and Israel in May 2020 and the introduction of new criteria for the submission of exit permits requiring only urgent medical referrals to be processed, fewer Palestinians have been able to benefit from access to life-saving treatment outside Gaza.[12] This resulted in a dramatic drop in exits from Gaza, down from approximately 21,032 recorded at the Erez crossing in February 2020 to 5,533 in March 2020. In April and May 2020, respectively, only 222 and 213 exits were recorded.[13]

16. The power supply in Gaza continues to be dangerously low, impacting all aspects of life, including health care, water, water treatment and sewage. In August 2020, Israel closed the crossings with Gaza for three weeks and stopped the fuel supply following the launch of incendiary balloons by Hamas.[14] Following the re-opening of the crossings on 1 September, power supply went back to eight-hour rotations.[15] In June 2021, the Israeli authorities continued the ban on fuel shipments into Gaza, thereby making the ongoing electricity crisis worse, despite a recent increase in supply by the Gaza Electricity Distribution Company. The deficit in power is estimated at 69 per cent of demand as of June 2021, resulting in approximately 6–12 hours of electricity available each day.[16] Approximately 902,600 citizens in Gaza were left without any power at all during the 10 days of the escalation in violence.

17. Gaza humanitarian aid worker, Mohammad el-Halabi, continues to be detained by the Israeli authorities, as reports suggest that closing arguments in his case are being presented by his lawyer. He was arrested in June 2016 on allegations that he had diverted millions of dollars in development to armed groups in Gaza. He denies the charges and a financial audit by his employer, World Vision, uncovered no evidence of misappropriation of funds. Mr. el-Halabi has attended more than 150 court hearings so far. The Special Rapporteur has raised serious concerns that Mr. el-Halabi is not being granted a fair trial, given that the prosecution has relied on secret evidence and did not initially allow him access to a lawyer.[17] The Special Rapporteur reiterates his call for Israel to grant him a fair trial or immediately release him.

[9] See https://gisha.org/en/israel-continues-to-ban-exit-of-goods-from-gaza-cancer-patients-exit-in-first-since-may-11/.

[10] See https://gisha.org/UserFiles/File/letters/Gisha_PHRI_HaMoked_Adalah_letter_May_26_2021.pdf (in Hebrew only).

[11] Sharmila Devi, "COVID-19 surge threatens health in the Gaza Strip", *The Lancet*, vol. 397, No. 10286 (May 2021).

[12] A/HRC/46/63, para. 43.

[13] Gisha, "Gaza up close" (September 2020).

[14] Btselem, "Summer 2020: Gaza's electricity crisis deepens again, with 4 hours of daily supply", 20 October 2020.

[15] Ibid.

[16] Al-Mezan Center for Human Rights, "In focus: the effects of Israel's military offensive on Gaza's wash facilities, 10–21 May 2021", p. 3.

[17] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26496&LangID=E.

## C. Emblematic cases of Sheikh Jarrah and Silwan

18. The situation in East Jerusalem continues to be extremely tense, as many Palestinian families face the risk of imminent forced displacement by the Israeli authorities. The case of the neighbourhood of Sheikh Jarrah, where eight families face forced displacement, four of them imminent, has become emblematic of the threats of forced displacement facing many Palestinian families in East Jerusalem with the aim of establishing a Jewish majority in the city and creating irreversible demographic facts on the ground.[18] It also underlines Israeli attempts to permanently change the Palestinian character of East Jerusalem and pave the way for further settler expansion, thus further cementing the Israeli annexation. Israeli settler organizations have particularly intensified their applications for evictions, significantly increasing the number of lawsuits facing the Palestinian families and the pressure by settler groups who, with the protection of the Israeli police, continue to provoke and attack Palestinian inhabitants. The Special Rapporteur stresses that eviction orders, if carried out, would amount to a violation by Israel, the occupying power, of the prohibition against the forcible transfer of the protected population under article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).[19] Israel cannot apply its own laws in territory that is considered occupied under international law.

19. In May and June 2021, with the support of activists, Palestinian families residing in Sheikh Jarrah mobilized to prevent the forced displacements from taking place, including through peaceful demonstrations, sit-ins and the use of social media campaigns.[20]The Israeli police responded to the demonstrations by fortifying the neighbourhood through the establishment of multiple road blocks, thus severely limiting the movement of its inhabitants. The Israeli Security Forces have also arrested a number of activists and journalists covering events around the neighbourhood and have used excessive force against demonstrators.[21] Other East Jerusalem neighbourhoods face the same threats of forced displacement including Batn el Hawa in Silwan. In total, more than 970 people, including 424 children, are facing the risk of displacement according to the Office for the Coordination of Humanitarian Affairs.[22] The latest escalation in May 2021, for which the events at Sheikh Jarrah were one of the main triggers, demonstrates that the status of East Jerusalem neighbourhoods and the possible outcome of current eviction lawsuits will have a determinant impact on the overall situation in the Occupied Palestinian Territory and on future escalation. On 10 May, the Israeli Supreme Court postponed its ruling on the possible forced displacement of four of the families in Sheikh Jarrah.

## D. Violations of the rights of Palestinian university academic staff and students

20. Patterns of arrest and harassment of Palestinian university students and professors have recently intensified. Birzeit University in Ramallah has been particularly targeted by the Israeli Security Forces, with more than 74 arrests of students reported there between September 2019 and January 2020 alone.[23] On 21 October 2020 in a serious escalation of tension, the Israeli military officially labelled the student bloc at Birzeit University a "prohibited terrorist organization" thus criminalizing its work on campus and justifying further arrests of students.[24] Many of those arrested have reportedly been tortured physically

[18] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27067&LangID=E.

[19] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26648&LangID=E.

[20] See Yara Hawari, "Why Israel is so desperate to silence #SaveSheikhJarrah", Aljazeera, 10 June 2021.

[21] See Aljazeera "Israeli police attack Palestinian protesters in Sheikh Jarrah", 22 June 2021.

[22] Office for the Coordination of Humanitarian Affairs, "Palestinian family evicted from its home in East Jerusalem", 10 December 2020.

[23] See A/HRC/WGAD/2021/8.

[24] See https://mesana.org/advocacy/committee-on-academic-freedom/2021/04/13/protesting-ongoing-policy-of-arrests-and-detention-of-students-in-palestinian-universities.

and mentally.[25] The Special Rapporteur expresses serious concerns about the patterns of targeting the staff and students of Palestinian universities. He stresses that these violent arrests by the occupying power, Israel, violate the right of students to the freedoms of speech and association, particularly in universities which should be beacons for such freedoms. He further emphasizes that it is the responsibility of the occupying power to ensure the right to education is respected.

## E. Impact of Israeli policies on children: home demolitions and detention

21. Since the beginning of 2021, the Israeli authorities have demolished or seized 387 Palestinian structures, resulting in the displacement of 309 children during a global pandemic.[26] The experience of demolitions severely impacts the livelihood and the mental state of children and their families. According to a study conducted by Save the Children, many families have lost their access to services, such as health care, water and electricity, in addition to the loss of food security.[27]

22. Children living in areas under full Israeli security control have been the most affected, given that demolitions and confiscations have markedly increased there. Consequent displacement and relocation negatively affect their education, their relationship with their parents and their connection to the community.[28] The traumatic experience of being expelled also changes their behaviour overall. The Special Rapporteur is extremely concerned about the impact of home demolitions on children, which may affect generations to come. It also revives the trauma that their parents have already undergone with their own experience of dispossession and displacement. He calls for an immediate halt to all demolitions, which constitute a serious violation of international humanitarian law.

23. According to the Palestinian NGO Addameer, 4,809 Palestinians were detained by the Israeli authorities between January and May 2021, 582 of whom were children. The Israeli Security Forces detain and persecute on average 500–700 Palestinian children each year.[29] According to military orders 1711 and 1726, Palestinian children may be held in military courts, where their detention could be extended for up to 10 days before they are referred to other courts. In addition, military order 1651 defines children in the Occupied Territories as persons under the age of 16, contradicting the first article of the Convention on the Rights of the Child. On the other hand, Israeli children are prosecuted in civil juvenile courts, where children are defined as persons below the age of 18. In contrast, Palestinian children are treated as adults in prisons and courts. The Special Rapporteur is alarmed by the number of children in detention and also the conditions of their arrest and calls on Israel to immediately stop this practice, which is in clear contravention of international law and should be used only as a last resort.

## F. Accountability measures by third States

24. Third States, which have their own set of responsibilities in relation to the situation in Israel and the Occupied Palestinian Territory, have failed thus far to ensure that Israel complies with international humanitarian law. Although many States have recognized the illegality of settlements under international law and have issued condemnations, few have taken any significant action. In an important development, however, on 26 May 2021 the Irish parliament passed a notion condemning the “de facto annexation” of Palestinian land by Israeli authorities. The notion passed in the parliament after receiving cross-party support.

[25] Ibid.

[26] Office for the Coordination of Humanitarian Affairs, “Data on demolition and displacement in the West Bank”.

[27] See Save the Children, “Hope under the rubble: the impact of Israel’s home demolition policy on Palestinian children and their families” (2021).

[28] Ibid.

[29] See www.addameer.org/statistics.

Ireland was the first country to take such a position and recognize that Israel has de facto already annexed large areas of the West Bank.[30]

25. The database on the activities of business enterprises in the settlements, published in February 2020, which the Special Rapporteur welcomed in his report to the Human Rights Council in July 2020, may be seen as another step towards accountability.[31] The purpose of the database is, among other things, to assist States in ensuring that companies domiciled in their territory and/or under their jurisdiction respect human rights. The report submitted by Office of the United Nations High Commissioner for Human Rights to the Human Rights Council at its forty-third session was an important step in the direction of accountability and outlines 112 business enterprises that have been involved in business activities related to the settlements.[32] Despite the report clearly recognizing that the Human Rights Council mandated the work on the database and its continuous nature, the High Commissioner for Human Rights stated in her speech to the forty-sixth session of the Council that: "Any further work in this area can only be discharged consistent with the Organization's budgetary process applicable to funding mandates of the Council."[33] Given the temporal limitations of the report (the period between January 2018 and August 2019) and the fact that it only included a fraction of the business enterprises with activities in the settlements, a lack of continuity of the work on the database may result in a devastating setback to any progress made by States or companies to ensure that companies respect human rights by ending their activities in the settlements.

# III. Legal status of Israeli settlements under the Rome Statute[34]

26. In July 1998, delegates from 120 States voted in favour of the negotiated text of the Rome Statute of the International Criminal Court. The Rome Statute created, for the first time, a permanent international court to try alleged perpetrators of war crimes, crimes against humanity and other serious international crimes. It built upon the legacy of the Nuremberg and Tokyo military tribunals established after the Second World War, as well as the war crimes tribunals for Rwanda, the former Yugoslavia, Cambodia and Sierra Leone set up in the 1990s and 2000s. The International Criminal Court came into being in July 2002.

27. In its preamble, the Rome Statute proclaims the purpose of the international community in creating the International Criminal Court. Citing universal values and the Charter of the United Nations, the Statute recognizes that the most serious of international crimes threaten the peace, security and well-being of the world, that these crimes must not go unpunished and that international cooperation is essential to combating those crimes. The final goal is to guarantee "lasting respect for and the enforcement of international justice". In his speech to the delegates in Rome on the adoption of the Statute, the Secretary-General remarked that this accomplishment would repudiate the bleak observation by Marcus Tullius Cicero from 2,000 years ago that "in the midst of arms, law stands mute".

28. Among the war crimes expressly listed in the Rome Statute is the transfer, directly or indirectly, by an occupying power of parts of its own population into the territory it occupies.[35] Its inclusion was deliberate, appropriate and linear. The prohibition against settler implantation by an occupying power was first entrenched in international law through the Fourth Geneva Convention of 1949. It was subsequently characterized as a "grave breach"

[30] See Aljazeera, "Ireland condemns Israel's 'de facto annexation' of Palestine", 26 May 2021.

[31] A/HRC/44/60, para. 14.

[32] A/HRC/43/71.

[33] See www.ohchr.org/SP/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26913&LangID=S.

[34] The Special Rapporteur is extremely grateful for the high-quality contributions to the present report submitted by academic institutions in Brazil, Colombia and Italy, by human rights defenders in Israel, the State of Palestine and the United Kingdom of Great Britain and Northern Ireland, and by the United Nations Relief and Works Agency for Palestine Refugees in the Near East. He is also appreciative of the pro bono research conducted by law students at Western University, Ontario. These contributions have substantially enhanced the present report.

[35] Article 8 (2) (b) (viii).

and a "war crime" in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts.

29. The phenomenon of settler implantation has historically involved the transfer by an empire or expansionary State of some of its own citizens or subjects into lands that it has acquired through conquest or occupation. These lands may have been already swept clean of their inhabitants, but more commonly they are still populated by some or all of the indigenous peoples. The objectives of the conquering power in implanting settlers have been to solidify its political and military control, augment its economic penetration, and ultimately bolster its legal claim to permanent sovereignty over the subjugated lands. The transferred settlers are almost always willing citizens or subjects of the dominant power, motivated by government inducements, enhanced economic prospects, special legal and political privileges in the subjugated lands and, on occasion, by nationalist, religious or civilizing missions.[36]

30. The flip side of the coin of settler implantation is the rupture of the established relationship between the indigenous population and its traditional territory and lands through demographic engineering. The common bond of any original society is the link between community and territory. Accordingly, the exercise of the right to self-determination is substantially abrogated if that link is disrupted through territorial alienation, the deliberate loss of majority status or the inability of an occupied or subjugated people to control its political destiny. Indeed, the rupture of this link is not only the frequent consequence of settler implantation, but invariably its very purpose. Needless to say, settler implantation projects throughout history have invariably occurred regardless of, and almost always against, the wishes of the indigenous population.[37]

31. A significant United Nations report in 1993 on population transfers determined that the consequences of settler implantation projects were usually multifold, calamitous and long-term, including military subjugation, indigenous civilian misery, environmental degradation, separate and unequal social structures, entrenched legal discrimination, segregated labour markets, the denial of political rights and a cycle of repression, resistance and instability.[38] Once the process of settler implantation has gained momentum, the authors of the report observed that the occupying power would often assert that: "humanitarian concerns compel it to remain in the territory to extend its protection to the implanted population. This argument may be combined with other ideological claims concerning the occupier's 'right' to possess the territory for putative security and humanitarian reasons, or even on the basis of rights, such as 'historical rights', which have no legal basis".[39]

32. As Patrick Wolfe has explained, settler colonialism, which encompasses settler implantation, is not an event but an enduring structure. It is not simply a historical moment of conquest but rather becomes an unfolding process of subjugation over time, entrenched through the political, social, economic, military and legal institutions of the conquering or occupying power.[40] Examples from history include the European conquest of the Americas, the British settlement of Scottish and English Protestants in Catholic Ireland; the French in Algeria; the Dutch and the British in South Africa; the British in Kenya; and the infusion of Russians into the Baltic republics carried out by the Soviet Union.

33. In this section of the report, the Special Rapporteur will explore the question of whether the Israeli settlements in the Occupied Palestinian Territory constitute a war crime under the Rome Statute. As such, he will first review the place of the prohibition against population transfer and settler implantation in international humanitarian, human rights and criminal law. He will then examine the history and character of the Israeli settlements and the role of the Government of Israel in developing and expanding the settlements before assessing their legal status under the Rome Statute.

[36] See Claire Palley, "Population transfers" in *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorn Eide*, Donna Gomien, ed. (Oslo, Scandinavian University Press, 1993).

[37] E/CN.4/Sub.2/1994/18, para. 131.

[38] See E/CN.4/Sub.2/1993/17 and Corr. 1.

[39] Ibid., para. 35.

[40] See Patrick Wolfe, "Settler colonialism and the elimination of the native," *Journal of Genocide Research*, vol. 8, No. 4 (2006).

## A. International law and settler implantation

### Fourth Geneva Convention of 1949

34. Prior to the creation of the Fourth Geneva Convention, the Hague Regulations of 1907 set out many of the laws and customs of war as they stood at the beginning of the twentieth century. The Regulations do not expressly prohibit the transfer of settlers from the occupying power into the occupied territory. However, the provisions in the Regulations restrict the actions of the occupying power to such an extent that any attempt to demographically transform the subjugated territory would be effectively prohibited. Article 43 compels the occupying power to respect the laws in force in the occupied territory. Article 46 provides that private property must be respected and not confiscated and article 55 designates the occupying power as the administrator and usufructuary – in effect the trustee – of public property during the period of actual control. All these provisions emphasize the inherent temporariness of the occupation.

35. The purpose of the Fourth Geneva Convention is to protect civilians during situations of armed conflict. Among its many protections, the Convention expressly prohibits an occupying power from implanting civilian settlers of its own population into the occupied territory in article 49 (6): "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

36. The objective of article 49 is to preserve the demographic and social structure of the occupied territory and to forbid attempts by an occupying power to treat the territory as a fruit of conquest.[41] Article 147 of the Convention establishes the gravity of the prohibition.

37. Three principles in particular are important to stress:

(a) First, the limitation on the role of the occupying power is explicitly cited: "The Occupying Power shall not …". This provides that the occupier and any State or private institutions that may come under its control or direction, cannot take any steps to alter the population character of the territory that it occupies.[42] Accordingly, paragraph 6 of article 49 of the Convention is breached when the occupying power, whether through active recruitment, wilful passivity or benign neglect, permits civilians from its own population to resettle in the occupied lands with the intent of altering its demographic character. This is a significant interdiction, since settler implantation enterprises in an occupied territory have rarely been successful without direct State involvement or at least some significant State compliance;

(b) Second, the prohibition in article 49 (6) extends to the voluntary and consensual transfer of civilians from the occupying power to the occupied lands and is not limited merely to an involuntary resettlement ("deportation") by the occupier of some of its civilian population. Notably, the term "forcible" does not appear in the paragraph, connoting a broader meaning than the prohibition against "forcible transfers" in article 49 (1) of the Convention. It is also apparent that the terms "deport" and "transfer" in article 49 (6) have a distinct meaning, arising from their use elsewhere in the article.[43] The International Court of Justice has stated that article 49 (6) should be understood in a broad fashion, as it "prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any transfers taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory";[44]

(c) The third principle is that article 49 (6) permits no exceptions. The broad wording of the prohibition is not circumscribed by subsequent limitations, as with article 49 (1). In addition, the history of the negotiations on the Convention does not contain any

[41] At a conference of the High Contracting Parties to the Fourth Geneva Convention in December 2001, the international Committee of the Red Cross issued a statement, in which it stated (para. 3): "Being only a temporary administrator of occupied territory, the Occupying Power must not interfere with its original economic and social structures, organization, legal system or demography."

[42] See E/CN.4/Sub.2/1993/17, para. 15.

[43] Ibid.

[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 120.

expressions of caution or restrictions recommended by the delegates and the votes approving the provision in both committee and plenary meetings were unanimous.[45] The occupying power is permitted to send military forces and civil servants into the territory in order to administer the occupation, but the transferring of any part of a civilian population as settlers is categorically forbidden.

38. The temporary nature of an occupation and the full preservation of national rights and the territorial integrity of the ousted sovereign – the protected population – lie at the very core of international humanitarian law. In his 1958 commentary on the Fourth Geneva Convention, Jean Pictet stated that "the occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied power of neither its statehood nor its sovereignty".[46] As for annexation, the Security Council has affirmed on at least 11 occasions since 1967, consistent with Article 2 (4) of the Charter of the United Nations, that the acquisition of territory by war or force is inadmissible.[47] Neither conquest nor occupation confer title.[48] The occupying power must administer the occupation in good faith, consistent with international law, and it must seek to fully terminate the occupation as soon as reasonably possible.[49] The very raison d'être of settler implantation – the creation of demographic facts on the ground to solidify a permanent presence, a consolidation of alien political control and a claim of sovereignty – tramples upon the fundamental precepts of humanitarian law.

**International human rights law**

39. The logic and the dynamic of settler implantation – rupturing the relationship between an indigenous people and its territory – is the denial of the right to self-determination. Self-determination is both a *jus cogens* right (a fundamental principle of international law),[50] and a right *erga omnes* (a right owed to all).[51] This right has been placed in the opening articles of the Charter of the United Nations, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights precisely to underscore the fact that the realization of all other individual and collective human rights depends upon the ability to exercise this cornerstone right.[52] Flowing from this cardinal principle, the international community has prohibited the demographic manipulation of a territory through settler implantation because it is incompatible with the fundamental rights of a people to retain its distinct identity and to freely determine its destiny on its own territory.[53]

40. In addition to self-determination, settler implantation projects frequently violate a range of protected individual and collective rights in international human rights law to which the indigenous population is entitled. As the Special Rapporteur on the human rights dimensions of population transfer, including the implantation of settlers and settlements, for the Commission on Human Rights (and later a judge on the International Court of Justice), Awn Al-Khasawneh, concluded in a 1997 report: "The range of rights violated by population

[45] See *Final Record of the Diplomatic Conference of Geneva of 1949*, 6th ed. (Buffalo, New York, William S. Hein & Co., 2005).

[46] See https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C4712FE71392AFE1C12563CD0042C34A.

[47] Most recently in resolution 2334 (2016).

[48] See Christian Tomuschat, "Prohibition of settlements", in *The 1949 Geneva Conventions: a Commentary,* Andrew Clapham, Paola Gaeta and Marco Sassoli, eds., (Oxford, Oxford University Press, 2015).

[49] A/72/556, paras. 32–38.

[50] See James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, Cambridge University Press, 2002), pp. 246–7.

[51] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, para.155.

[52] Both Covenants state in article 1 (1) that: "All peoples have the right of self-determination."

[53] See Eric Kolodner, "Population transfer: the effects of settler infusion policies on a host population's right to self-determination", *New York University Journal of International Law and Politics*, vol. 27, No. 1 (1994).

transfer and the implantation of settlers places this phenomenon in the category of mass violations of human rights."[54]

41. These rights, as set out in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights include the freedom of movement, the ability to work, the rights to housing and to own and enjoy property, the inherent right to life, the right to engage in political activity, the right to liberty and security of the person, the right to an adequate standard of living, and the right to be free from arbitrary interference with one's privacy, family and home.

42. Collectively, the practice of infusing citizens from the dominant power into the homeland of others commonly infringes the rights of the inhabitants to control their natural resources, the right to their own culture, religious practices and heritage, and their right to economic and social development.[55] A regime of special legal and political entitlements reserved only for the settler population creates a colonial or apartheid-like governing structure, infringing the right of the indigenous population to equality and the right to be free from racial and ethnic discrimination and apartheid.[56]

### Protocol I Additional to the Geneva Conventions of 1949

43. The designation of settler implantation as a "grave breach" under international humanitarian law was affirmed in 1977 by the adoption of the Protocols Additional to the Geneva Conventions of 1949. Article 85 of Protocol I Additional to the Geneva Conventions of 1949 lists the acts of armed conflict which would be considered as "grave breaches", including, as set out in article 85 (4) (a): "The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention."

44. Importantly, Protocol I Additional to the Geneva Conventions of 1949 elevated the prohibition of settler implantation to a "war crime". Article 85 (5) states that "grave breaches of these instruments shall be regarded as war crimes". According to the International Committee of the Red Cross (ICRC) commentary on the Protocol of 1987, the elevation of the gravity of the prohibition is because of the "possible consequences for the population of the territory concerned from a humanitarian point of view".[57]

### Customary international humanitarian law

45. Customary international law is the "general practice accepted as law".[58] It is among the primary sources of international law. A general practice becomes part of customary international law when the consistent conduct of States over a period of time is accepted by the international community as having established an obligatory rule of behaviour.[59] In addition, a critical component in the creation of customary international law is the belief by States (*opinio juris*) that following a particular action has become a legal obligation. Once a general practice has been accepted as part of customary international law, it becomes binding even upon those States who have not accepted the particular practice as a legal obligation.

46. ICRC, in its comprehensive 2005 study on customary international humanitarian law, stated under rule 130 that the prohibition against population transfers and settler implantation has become a part of customary international law.[60] The ICRC study noted the widespread

[54] E/CN.4/Sub.2/1997/23, para. 16.

[55] International Covenant on Civil and Political Rights, arts. 1 and 27, and International Covenant on Economic, Social and Cultural Rights, art. 1.

[56] International Covenant on Civil and Political Rights, arts. 2 and 26.

[57] Available from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7BBCFC2D471A1EAAC12563CD00437805.

[58] Article 38 (1) (b) of the Statute of the International Court of Justice.

[59] See Gerhard von Glahn and James L. Taulbee, *Law Among Nations. An Introduction to Public International Law*, 11th ed. (Abingdon, Oxfordshire, Routledge, 2017), chap. 3.

[60] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2005), chap. 38.

adoption of that prohibition through State practice and legislation, in military manuals, through resolutions of various deliberative bodies of the United Nations, through universal ratification and by statements from international organizations.

## B. Rome Statute and settler implantation

47. Article 8 of the Rome Statute provides the International Criminal Court with jurisdiction over an extensive list of codified war crimes "in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes" during international armed conflict. The list includes all the grave breaches expressly prohibited by the Fourth Geneva Convention and Protocol I Additional to the Geneva Conventions of 1949. Among the proscribed war crimes, as detailed in article 8 (2) (b) (viii) of the Rome Statute is: "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."

48. The language of article 8 (2) (b) (viii) is very similar to the language found in article 49 (6) of the Fourth Geneva Convention, with one notable addition. In article 8 (2) (b) (viii), the term "directly or indirectly" is added, which aims to clarify the express scope of the provision to include any active or passive support by the occupying power of a settler implantation project, such as settlement protection measures and economic incentives, subsidies, tax exemptions and discriminatory permits.[61] Legal commentators have taken the view that the addition of the term "directly or indirectly" in article 8 (2) (b) (viii) confirms, and does not add any substantive change to, the already extensive scope of its Geneva antecedents.[62] Israel voted against the 1998 Statute precisely because of the inclusion of article 8 (2) (b) (viii).

49. Following the adoption of the Rome Statute, the Assembly of States Parties directed a preparatory commission to create an interpretative guide to the crimes enumerated in the Statute. The purpose of the text was to aid the International Criminal Court in the interpretation and application of articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes) by establishing the material and mental elements necessary to constitute these crimes. The final text of the elements of crime was subsequently adopted in 2000, and the language agreed upon for article 8 (2) (b) (viii) sets out three elements of the crime of settler implantation that must be satisfied in order to establish a breach:

> "1. The perpetrator:
>
> (a) Transferred, directly or indirectly, parts of its own population into the territory it occupies; or
>
> (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
>
> 2. The conduct took place in the context of and was associated with an international armed conflict.
>
> 3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[63]

50. The Assembly of States Parties agreed to leave the interpretation of the term "transfer" to a future court, to be decided in accordance with the relevant provisions of international humanitarian law. That should not be a difficult task. The clarity of the language in the Rome Statute, together with its extensive antecedents in the development of twentieth century international humanitarian law, would invite a liberal and purposive reading. Such a reading would prohibit voluntary as well as involuntary settler implantation enterprises. It would also forbid passive, as well as active, government support by the occupying power for a settlement

[61] See Ghislain Poissonnier and Eric David, "Israeli settlements in the West Bank, a war crime?", La *Revue des Droits de l'Homme*, No. 17 (2020).

[62] See Michael G. Kearney, "On the situation in Palestine and the war crime of transfer of civilians into occupied territory", *Criminal Law Forum*, vol. 28, No. 1 (March 2017).

[63] PCNICC/2000/1/Add.2, p. 28.

project, while requiring as a threshold some critical mass of civilian settlers from the occupying power, although not necessarily a particularly large number.

51. The purposive application of the Rome Statute extends individual criminal liability throughout the senior governmental, administrative and military levels of command of the occupying power for those who knowingly instigated, planned, directed, facilitated, approved, participated in or carried out the settlement project. It would also include those who intentionally or negligently failed to act within the responsibilities of their position to prevent the implementation of the project.[64]

## C. Israel, the occupation and the settlements

52. The creation and expansion of Israeli settlements in the Occupied Palestinian Territory is the State's largest and most ambitious national project since its founding in 1948.[65] Starting with the very first Israeli settlements that were erected in the months following the war of June 1967, the full apparatus of the State – political, military, judicial and administrative – has provided the leadership, financing, planning, diplomatic cover, legal rationale, security protection and infrastructure that has been indispensable to the incessant growth of the enterprise.[66]

53. In an article in the *New York Review of Books*, Nathan Thrall succinctly described the indispensable role of the Government of Israel in fostering the settlements:

> "… the entire map of West Bank settlements has been meticulously planned by the Israeli government. An executive branch ministerial committee approves the settlements. A legislative branch subcommittee is devoted to advancing their connections to Israel's water, electrical, sewage, communications, and road infrastructure. The legislature passes certain bills that apply solely to the West Bank. The state comptroller supervises government policy in the West Bank, overseeing everything from wastewater pollution to road safety. The attorney general enforces guidelines that direct the Knesset to explain how every new bill passing through the legislature will apply to the settlements. The High Court of Justice – which exercises judicial review over all government bodies and agents, and is the court of last instance for every Israeli and Palestinian, whether citizen or occupied subject – issues rulings that entrench the segregated legal system in the West Bank, where, in the same territory, there is one set of laws and rights for Israeli settlers and another, inferior set for Palestinians. The Justice Ministry oversees local courts in the West Bank that apply Israeli laws to settlers but not to Palestinians. The Israel Prison Service extends its reach across the entire territory, holding both Palestinian subjects and Israeli settlers in jails within the Green Line."[67]

54. To incentivize Israeli and diaspora Jews to live in its settlements in the occupied territory, the Government of Israel actively offers a range of financial benefits, including advantageous grants and subsidies for individuals and favourable fiscal arrangements for settlements. These include subsidized housing benefits and premium mortgage rates, venture

[64] Article 25 (3) of the Rome Statute lays out the broad circumstances in which a person shall be criminally responsibility for a crime. This includes: (a) the actual commission of the crime, (b) the ordering, soliciting or inducing of the crime, (c) the facilitating, aiding, abetting or otherwise assisting in the crime, and (d) otherwise intentionally contributing to the crime. Article 28 establishes a broad liability for the superior command. Article 33 limits, but does not entirely remove, the defence by a subordinate that he or she was obeying orders issued by a superior.

[65] See Mordecai Klein, Haaretz (15 June 2019). "Israel's territorial expansion project and control over the Palestinian population is the largest state/national project the country has ever carried out … Almost the entire state is invested in this project. This does not refer only to the ideological investment and the transfer of settlers into the Palestinian territories. It's also about jobs for hundreds of thousands or millions of Israelis, as well as profits from exporting technological know-how and security products that maintain Israel's control over the Palestinian population and territory."

[66] See Idith Zertal and Akiva Eldar, *Lords of the Land: The War Over Israel's Settlements in the Occupied Territories* (Nation Books, 2007).

[67] Nathan Thrall, "A day in the life of Abed Salama", *New York Review of Books* (19 March 2021).

benefits for agricultural development, education and welfare benefits and the designation as a national priority area. It also makes available attractive business incentives for industrial zones in the settlements, such as discounted land fees, employment subsidies and reduced corporate taxes.[68] Beyond this, the settlements are treated as an integral part of the municipal and regional governance system of Israel, with budgetary funding for education, utilities, infrastructure, housing, water, transportation and other services.

55. The spatial placement of the Israeli settlements badly fragments Palestinian contiguity in East Jerusalem and the West Bank. In East Jerusalem, the 12 Jewish settlements are located primarily around the northern, eastern and southern perimeters of the city, blocking any Palestinian territorial continuity with the West Bank. In the West Bank, the settlements are organized into two main settlement blocs. South of Jerusalem is the Gush Etzoin bloc, stretching from Bethlehem to Hebron. The northern bloc is spread out from the Ramallah area to Nablus. There are also smaller settlement blocs just east of Jerusalem and in the Jordan Valley. In order to provide efficient transportation between the settlements and to Israeli urban areas, and to encourage new settlers and settlement expansion, the Government of Israel has invested heavily in building a dense network of highways through the West Bank and East Jerusalem, which is built on confiscated Palestinian lands and services only the settler population.[69]

56. Aside from 150 officially recognized settlements in East Jerusalem and the West Bank, there are another 150 so-called settlement outposts built without formal State authorization and which Israel does not officially recognize.[70] However, it has granted retroactive authorization to dozens of these outposts and it actively supports virtually all of the other remaining outposts. The 2005 Sasson report, commissioned by the Government, determined that Israeli State bodies had been discreetly funnelling significant public funds for decades to these outposts for housing, roads, education, utilities and security. Although the author of the report observed that this amounted to a "bold violation of laws" and recommended that criminal charges be brought against State officials, no charges were ever initiated and virtually all of the outposts remain thriving settlements today.[71]

57. Beyond the expansive support for the settlements provided by the Government of Israel, several significant international private organizations play a seminal role in supporting settler implantation. The Settlement Division of the World Zionist Organization, which is substantially funded by the Government, acts as a government agent in assigning land to Jewish settlers in the West Bank, including settlement outposts.[72] The Jewish National Fund has actively sought to purchase Palestinian lands in the West Bank and support infrastructure development, tourism and roads in the Israeli settlements.[73]

58. While the Israeli settlements have flourished and provide an attractive standard of living for the settlers, they have created a humanitarian desert for the Palestinians, reaching every facet of their lives under occupation.[74] Human rights violations against Palestinians arising from the Israeli settlements are widespread and acute.[75] and settler violence has created a coercive environment.[76] There is an apartheid-like two-tier legal system granting full citizenship rights for the Israeli settlers while subjecting the Palestinians to military rule.[77]

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[68] See B'tselem, "This is ours – and this, too: Israel's settlement policy in the West Bank" (March 2021), available from www.btselem.org/publications/202103_this_is_ours_and_this_too.

[69] See Israeli Centre for Public Affairs and Breaking the Silence, "Highway to annexation. Israeli road and transportation infrastructure development in the West Bank" (December 2020).

[70] See B'tselem, "This is ours – and this, too: Israel's settlement policy in the West Bank".

[71] Daniel Kurtzer, "Sleight of hand: Israel, settlements and unauthorized outposts" (October 2016), available from www.mei.edu/sites/default/files/publications/PF24_Kurtzer_Israelisettlements_web_0.pdf.

[72] See Yotam Berger, "World Zionist Organization Settlement Division finances illegal West Bank outposts", Haaretz, 7 December 2018.

[73] See Peace Now, "KKL-JNF and its role in settlement expansion" (April 2020).

[74] See A/HRC/22/63.

[75] See A/HRC/40/42.

[76] See Yesh Din, "Settler crime and violence inside Palestinian communities, 2017–2020" (May 2021).

[77] See Association for Civil Rights in Israel, *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (October 2014).

Access to the natural resources of the occupied territory, especially to water, is disproportionately allocated to the settlements[78] and the fragmented territory left to the Palestinians has resulted in a highly dependent and strangled economy, mounting impoverishment, daily impositions and indignities, and receding hope for a reversal of fortune in the foreseeable future.[79]

59. In the immediate aftermath of the 1967 war, the Israeli political leadership engaged in an intense debate over the future of the Palestinian territories that it now occupied. Two distinct but overlapping plans emerged. In the Allon Plan (named after Yigal Allon, the Israeli Labour Minister), the proposal was to settle and eventually annex specific sectors of the West Bank and Gaza, with the heavily-populated Palestinian towns and cities consigned to some future Israeli-Jordanian governance condominium. In the more ambitious but more ambiguous Dayan Plan (named after Moshe Dayan, the Israeli Defence Minister) the proposal was to retain de facto Israeli control indefinitely over the entire Palestinian territories, with a declaration of permanent de jure status to await some opportune moment in the future.[80]

60. What these arguments shared was the desire for Israel to permanently retain significant portions of the Palestinian territories, with intensive Jewish civilian settlement as the prime method for securing its sovereignty claim. As Allon stated in 1969: "Here, we create a Greater Eretz Yisrael from a strategic point of view, and establish a Jewish state from a demographic point of view."[81] Both plans recognized the constraints of international opinion and sought to establish the facts on the ground discreetly. Neither plan included the intention to offer Israeli citizenship or even a modicum of civil and political rights to the new Palestinian subjects. The authors of both plans disregarded explicit advice from the legal counsel of the Israeli Foreign Ministry in 1967 that civilian settlements in the occupied territories would contravene the Fourth Geneva Convention.[82] Where the plans diverged was primarily on pragmatism: whether the political and demographic cost of absorbing 1 million unwilling Palestinians was worth the acquisition of all the newly conquered territories. These two plans, with ongoing modifications in response to the progress and challenges of the occupation, have dominated the Israeli political debate on the Palestinian territories and the Israeli settlement project ever since.[83]

61. In 1978, Matityahu Drobles, a senior official with the Settlement Division of the World Zionist Organization rearticulated the strategy for Israeli settlement development as first proposed by Allon and Dayan, namely to thicken the Jewish settlements through the West Bank in order to forestall the possibility of a Palestinian State and ensure Israeli permanence:

> "To minimize the danger of the development of an additional Arab state in this territory. Since it would be cut off by Jewish settlements, it will be hard for the minority population to create territorial contiguity and political unity. There mustn't be even the shadow of a doubt about our intention to keep the territories of Judea and Samaria [the West Bank] for good … The best and most effective way of removing every shadow of a doubt about our intention to hold on to Judea and Samaria forever is by speeding up the settlement momentum in these territories."[84]

62. That strategy has been immensely successful. Three examples will suffice. First is its demographic achievement. At the end of 2019, there were approximately 300 settlements and 665,000 Jewish settlers in occupied East Jerusalem and the West Bank. The settler population

[78] See A/HRC/40/73.

[79] See TD/B/67/5.

[80] See Geoffrey Aronson, *Israel, Palestinians and the Intifada* (London, New York, Washington, Kegan Paul International, 1990).

[81] See Robert I. Friedman, *Zealots for Zion. Inside Israel's West Bank Settlement Movement* (New York, Random House, 1992).

[82] See Gershom Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967–1977* (New York, Henry Holt and Co., 2006).

[83] Shaul Arieli and others, "Historical political and economic impact of Jewish settlements in the occupied territories" (Israeli European Policy Network, June 2009).

[84] See Nathan Thrall, "A day in the life of Abed Salama", citing the Drobles plan.

increase in the West Bank in 2019 was 3.2 per cent, substantially higher than the overall 1.9 per cent growth rate for Israeli citizens and residents.[85] In 1980, two years after the Drobles plan was first announced, at a time when the Security Council stated in resolution 476 (1980) that there was an "overriding necessity to end the prolonged occupation", that the settlements were a "flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War", that Israel was in defiance of previous United Nations resolutions and that it would undertake accountability measures against Israel should it fail to comply with the resolution, there were 12,500 settlers in the West Bank. In 2019, there were 441,600 settlers, 35 times as many.

63. Second is the political achievement of the strategy. In an article for the *Financial Times* in June 2021, former Secretary-General, Ban Ki-Moon, stated that: "Israel has pursued a policy of incremental de facto annexation … to the point where the prospect of a two-State solution has all but vanished." In addition, Mordecai Klein, an Israeli political scientist, has observed that: "The settlements do not only create de facto annexation of the territory, they also constitute a form of control over the Palestinians."[86] In order to ensure maximum security a land base for the settlements and the utmost freedom of movement for the settlers, the Government of Israel has confined the 2.7 million Palestinians in the West Bank within a fragmented archipelago of 165 disparate patches of land (areas A and B), completely surrounded by an area under full Israeli control (area C) and hemmed in by hundreds of roadblocks, walls, checkpoints and forbidden zones.[87] The West Bank and East Jerusalem are increasingly demarcated from each other by intense settlement construction and both areas are separated from Gaza by severe travel restrictions.

64. Third is the diplomatic achievement of the strategy. Among senior diplomats who have worked on the Israel-Palestine file, there has been no serious effort in recent decades to demand that Israel comply with international law and United Nations resolutions by fully dismantling its settlements. Aaron David Miller, a senior American foreign policymaker, wrote in *Newsweek* magazine in January 2009: "In 25 years of working on the issue for six Secretaries of State, I can't recall one meeting where we had a serious discussion with an Israeli Prime Minister about the damage that settlement activity – including land confiscation, bypass roads and housing demolitions – does to the peacemaking process." Indeed, all of the international peace process initiatives over the past three decades, beginning with Madrid-Oslo in 1991, have accommodated the facts on the ground established by the Israeli settlements. Relying on realpolitik rather than international law, every peace proposal submitted by an American President, beginning with Bill Clinton in 2000, has assumed that Israel will retain most, if not all, of its settlement blocks in any final peace agreement.

## D. Israeli settlements in international law

65. The illegality of the Israeli settlements is one of the most settled issues in modern international law. Among the international community, there is a virtual wall-to-wall consensus that the settlements violate the prohibition on settler implantation in the Fourth Geneva Convention. The illegality of the settlements has been affirmed by the International Court of Justice in its advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestine Territory, by the General Assembly, the High Commissioner for Human Rights and the Human Rights Council in resolutions and reports, by the European Union, by Amnesty International, by ICRC, by the High Contracting Parties to the Fourth Geneva Convention, by the International Commission of Jurists, by Human Rights Watch, by Al-Haq and by B'tselem.

66. In December 2016, the Security Council, building upon a number of previous resolutions confirming the illegality of the Israeli settlements and the transfer of population, reaffirmed in resolution 2334 (2016) that the establishment by Israel of settlements in the

[85] See B'tselem, "This is ours – and this, too: Israel's settlement policy in the West Bank".

[86] Mordecai Klein, Haaretz.

[87] See B'tselem, "This is ours – and this, too: Israel's settlement policy in the West Bank". See also Badil Resource Centre for Palestinian Residency and Refugee Rights, *Israeli Annexation: the Case of Etzion Colonial Bloc* (July 2019).

Palestinian territory occupied since 1967, including East Jerusalem, had no legal validity, constituted a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace.

67. Yet, while the Israeli settlements are prohibited by an authoritative and well-articulated body of international law, the international community has been remarkably reluctant to enforce those laws. In resolution 2334 (2016), the Security Council reiterated its previous demands that Israel must immediately and completely cease all settlement activities. Since early 2017, the Special Coordinator for the Middle East Peace Process has reported to the Council on 18 quarterly occasions that Israel has taken no steps to comply with its obligations under the resolution.[88]

## E. Do the Israeli settlements violate the Rome Statute?

68. The Rome Statute requires three elements of the war crime of transfer of a civilian population in an occupied territory to be satisfied (see paragraph 49 above). The first two elements constitute the material element of the crime:

(a) The transfer by the perpetrator of parts of its own population into the occupied territory;

(b) The conduct took place arising from an international armed conflict.

69. In the case of the Israeli settlements, both the material elements are met. Israel captured the West Bank, including East Jerusalem, and Gaza in June 1967 as part of an international armed conflict. Virtually the entire international community accepts the designation of the Israeli control of the Palestinian territory as an occupation, to which the full scope of international humanitarian law and international human rights law continues to apply.[89]

70. In addition, the historical and contemporary evidence is abundantly clear that the senior political, military and administrative officials of the Government of Israel, as well as important international private organizations, have actively developed and implemented a practice of transferring hundreds of thousands of Israeli citizens into the occupied Palestinian territory through enabling large-scale housing, commercial and infrastructure construction, providing advantageous State funding and ensuring military security, in order to establish an immovable demographic presence.[90]

71. The third element of the crime is the mental element that the perpetrator was aware of the factual circumstances of the crime of transfer that established the existence of an armed conflict. In other words, the perpetrator has both the intent and the knowledge of the crime.[91]

72. In this case, the mental element is satisfied. The political, military and administrative leadership of Israel has directly and knowingly supported the decades-long State policy of encouraging and sustaining the growth of the settlements. Throughout those decades, the leadership has been fully aware of the clear direction from the international community that such activities violate fundamental prohibitions in international law.

73. It is the finding of the Special Rapporteur that the policy of settler implantation meets the definition of "war crime" under international humanitarian law and the Rome Statute. The Special Rapporteur also endorses the view that the Israeli settlements constitute a

[88] Special Coordinator for the Middle East Peace Process, Security Council briefing on the situation in the Middle East, reporting on Security Council resolution 2334 (24 June 2021).

[89] See, for example, Security Council resolution 2334 (2016) and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, paras. 101 and 111–114.

[90] See Ghislain Poissonnier and Eric David, "Israeli settlements in the West Bank, a war crime?", paras. 72–102.

[91] See Diakonia International Humanitarian Law Resource Centre, "Litigating settlements. The impact of Palestine's accession to the Rome Statute on the settlement enterprise" (December 2015).

continuing crime and therefore fall within the temporal jurisdiction of the International Criminal Court.[92]

# IV. Conclusions and recommendations

74. **In conclusion, the Israeli settlements are the engine of this forever occupation, and amount to a war crime. An occupying power that initiates and expands civilian settlements in defiance of international law and the Rome Statute cannot be serious about peace. Equally, an international community that does not impose accountability measures on a defiant occupying power contrary to international law cannot be serious about its own laws.**

75. **The Special Rapporteur recommends that the Government of Israel fully comply with its obligations under international law and completely dismantle its civilian settlements in the occupied Palestinian territory.**

76. **The Special Rapporteur recommends to the international community that it:**

(a) **Fully support the work of the Office of the Prosecutor of the International Criminal Court as it investigates the allegation that the Israeli settlements are in breach of the Rome Statute;**

(b) **Reiterate its long-standing demand upon Israel to fully dismantle the settlements in compliance with international law;**

(c) **Develop a comprehensive menu of accountability measures to be applied to Israel should it continue to defy international direction with respect to its settlements;**

(d) **Ensure the full accountability of Israeli political, administrative and military officials who are responsible for grave breaches of international law in the Occupied Palestinian Territory;**

(e) **Call upon all United Nations Member States to implement the injunction of the Security Council in resolution 465 (1980) not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories.**

77. **The Special Rapporteur recommends that the High Commissioner for Human Rights regularly update the database of businesses involved in settlements, in accordance with Human Rights Council resolution 31/36.**

[92] See Uzay Aysev, "Continuing or settled? Prosecution of Israeli settlements under article 8 (2) (b) (viii) of the Rome Statute", *Palestine Yearbook of International Law*, vol. 20, No. 1 (2019).