

## ISRAEL AND THE INTERNATIONAL CRIMINAL COURT\*

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*Israel "reluctantly" voted against adoption of the Statute of the International Criminal Court. It did so because of the inclusion in the Statute of a crime consisting of the transfer by an Occupying Power of parts of its civilian population into the occupied territory, based on the provisions of Article 49 of the Fourth Geneva Convention of 12 August 1949 and Article 85(4)(a) of Additional Protocol I to the Geneva Conventions of 12 August 1949. The Israeli delegation at the Rome Conference attempted to justify its negative vote on the assumption that these provisions of the Geneva Conventions and their Protocol were not part of customary international law and therefore should not be included in the ICC Statute. Israel's reasoning was not acceptable, since—as noted by a delegate from Syria—the provision in Protocol I "was approved by more countries than those present in this room today." We argue that Israel should have justified its negative vote on quite a different basis. The offence as defined in the ICC Statute is committed by the "Occupying Power," which in this instance is the State of Israel, whereas one of the most fundamental decisions of the Rome Conference was that the ICC can only prosecute natural persons and not states or legal persons. For that very reason prosecution of the crime of aggression was kept on ice at the Rome Conference, because acts of aggression are committed by states and a Review Conference had to be convened to decide on what basis an act of state can be converted into individual liability of a natural person. For the same reason Israel should have based its concerns on the fact that*

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\* On February 5, 2021 the Pre-Trial Chamber I of the International Criminal Court (ICC) ruled that Palestine is a State Party to the Statute of the ICC and accordingly that the Court's territorial jurisdiction in the Situation in Palestine extends to Gaza and the West Bank, including East Jerusalem (ICC-01/18). This article was written prior to this ruling.

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*the ICC cannot prosecute an Occupying Power. This article concludes that the State of Israel and Israeli citizens cannot be prosecuted in the ICC for the Jewish settlements in Palestinian Territories and that Israel should therefore ratify the ICC Statute.*

#### GENERAL INTRODUCTION

- A. THE CUSTOMARY LAW ARGUMENT
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### GENERAL INTRODUCTION

The International Criminal Court [ICC] was founded for the purpose of bringing to justice perpetrators of "the most serious crimes of concern to the international community as a whole."<sup>1</sup> The Statute of the ICC [ICC Statute] was adopted in Rome on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries that was convened for the purpose of "finalizing and adopting a convention on the establishment of an international criminal court."<sup>2</sup> The Statute was adopted by 120 votes in favour, 7 against, and 21 abstentions. It entered into force on 1 July 2002. Currently the ICC Statute has been ratified by 123 states, including 33 African states; 19 states from the Asia-Pacific region; 18 states from Eastern Europe; 28 states from Latin America and the Caribbean; and 25 Western European and other states. Israel has not ratified the ICC Statute and was indeed one of the seven states that voted against its adoption.<sup>3</sup>

1 Rome Statute of the International Criminal Court, Preamble para. 4, July 17, 1998, 2187 U.N.T.S. 90, 91 [hereinafter "ICC Statute"].

2 G.A. Res. 52/160 sec. 3 (Dec. 15, 1997). (Annex), U.N. GAOR Supp. No. 49, U.N. Doc. A/52/49, 384.

3 The States that voted against its adoption were most likely China, Iraq, Israel, Libya, Qatar, Yemen and the United States. Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, 27 (1999); Hans-Peter Kaul, *Durchbruch in Rom: Der Vertrag über den Internationalen Strafgerichtshof*, 46 VEREINTE

The delegations that voted against the adoption of the ICC Statute and the ones that abstained did so for quite different reasons. At the closing session of the Rome Conference, Judge Eli Nathan, head of the Israeli delegation, stated that Israel "reluctantly" cast a negative vote because of the inclusion of Article 8(2)(b)(viii) in the definition of war crimes, condemning "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside the territory."<sup>4</sup> Judge Nathan proclaimed that by signing onto this provision, Israel would condemn itself for its actions in Palestine.

It is quite understandable that Israel felt constrained to "reluctantly" cast a negative vote. Given the history of the Holocaust and problems that attended the prosecution of serious war crimes in *ad hoc* institutions such as the Nuremberg tribunals,<sup>5</sup> Israel had a great stake in securing the establishment of a permanent

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NATIONEN 125 (1998); Kai Ambos, *Der neue Internationale Strafgerichtshof: Funktion und vorläufige Bewertung*, in *JAHRBUCH MENSCHENRECHTE* 2000 122, 123 (herausg. v. Gabriela von Arnim *et al.*). Frankfurt a.M.: Suhrkamp (1999); Dominic McGoldrick, *Criminal Trials before International Tribunals, Legacy and Legitimacy*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 9, 42 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004); Dominic McGoldrick, *Political and Legal Responses to the ICC*, *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 389, 390 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004). Andreas Zimmermann also mentions the Marshall Islands, which would bring the number of negative votes to eight, which in this writer's respectful opinion is not correct. See Andreas Zimmermann, *Israel and the International Criminal Court - An Outsider's Perspective*, in 36 *ISR. Y.B. HUM. RTS.* 231, 236 (2006).

4 ICC Statute, *supra* note 1, art. 8(2)(b)(viii); and see also *id.* art. 8(2)(e)(viii) (proscribing the displacement of the civilian population in armed conflict not of an international character).

5 Problems that were inherent in the post-World War II prosecutions included the fact that the charges brought against German war criminals were only defined *ex post facto* in the Charter of the Nuremberg Tribunal and in Control Council Law No. 10; that the proceedings were conducted in conformity with the Anglo-American adversarial system of criminal procedure, which was foreign to the accused; and—perhaps most importantly—that it was a matter of "victor's justice" that left perpetrators of war crimes by members of the allied forces immune from prosecution. The ICC Statute, by contrast, clearly defines the crimes within the subject-matter jurisdiction of the ICC, its rules of evidence and procedure represent a good mix of adversarial and accusatorial components, and prosecutions following an investigation into a defined "situation" are not confined to members of the one or other political adversaries.

international criminal court. This article will analyse the reasons why Article 8(2)(b)(viii) should perhaps not have been included in the subject-matter jurisdiction of the ICC.

### A. THE CUSTOMARY LAW ARGUMENT

Article 8(2)(b)(viii) of the ICC Statute was based on Article 49 of the Fourth Geneva Convention of 12 August 1949, which provides:

"Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

...

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."<sup>6</sup>

The essence of this provision was confirmed in Additional Protocol (I) to the Geneva Conventions, 1977, which included in its list of Grave Breaches:

"[T]he transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention."<sup>7</sup>

Israel maintained from the outset that the section of Article 49 of the Geneva Convention of 12 August 1949 that prohibits the deportation or transfer by an Occupying Power of its own civilian population into the occupied territory was not part of customary international law—at least not in a general sense as the words of the Convention might seem to suggest. And it should be noted for the record that at the early stages of the deliberations for the establishment of a permanent international criminal court it was decided to confine the subject-matter jurisdiction to the most

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6 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49 Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; T.I.A.S. No. 3365.

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85(4)(a), *opened for signature* June 8, 1977, 1125 U.N.T.S. 3; 16 I.L.M. 1391.

serious crimes of common concern to the international community that have come to be accepted as customary-law offences.<sup>8</sup>

The Israeli position at the Rome Conference found support in judgments of the Israeli Supreme Court which decided that the provisions under consideration were not designed to apply generally to transfers and deportations but "was intended to protect persons from arbitrary actions of the occupying army and the object of Article 49 is to prevent the perpetration of acts such as the atrocities committed by Germans during the Second World War, when millions of people were deported from their homes for various purposes, usually to Germany to work as forced labour for the enemy and Jews and other nationalities were deported to concentration camps for torturing and extermination."<sup>9</sup> Transfers and deportations of selected individuals for reasons of public order or national security were therefore not covered by the provisions of Article 49. Professor Theodor Meron, adviser to the American delegation in Rome, echoed the substance of this decision when, on behalf of the United States, he spoke in support of the Israeli position that Article 49 was not intended to apply generally as customary international law.

However, in the Working Group that defined the war crimes to be included in the subject-matter jurisdiction of the ICC, members of the Israeli delegation argued that Article 49 of the Geneva Convention of 12 August 1949 is not part of customary international law and should therefore not form part of the Statute. In response, Dr. Aziz Chukri, Professor of International Law in the University of Damascus and member of the Syrian delegation, pointed out that Protocol I, which confirmed the provisions of Article 49, had been ratified by more countries than those represented in the Rome Conference, and how could one say this is not customary international law?

Contesting the customary-law status of Article 49 was perhaps not the best strategy for Israel to follow when it opposed the inclusion of Article 8(2)(b)(viii) in the list of war crimes in the ICC Statute. It is today generally accepted that the provisions of the Geneva Conventions of 12 August 1949 have come to be accepted

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8 Mahmouh H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 24–25 (1999).

9 HCJ 97/79 Abu Awad v. Commander of the Judea and Samaria Region 33(3) PD 309 (1979) (Isr.), summarized in 9 ISR. Y.B. HUM. RTS. 343, 345 (1979); and see also HCJ 698/80 Kawasme v. Minister of Defense 35(1) PD 617 (1980) (Isr.), summarized in 11 ISR. Y.B. HUM. RTS. 349, 350 (1981); HCJ 785/87 Abed el Afu v. Commander of the IDF Forces in the West Bank 42(2) PD 4 (1988) (Isr.), summarized in 23 ISR. Y.B. HUM. RTS. 277, 279–281 (per Shamgar, J.P.) (1993); and see *contra*, *Abed el Afu*, *supra*, at 284–285 (per Bach, J., concurring).

as norms of customary international law.<sup>10</sup> On 27 June 2006, Nauru ratified the Geneva Conventions, followed by Montenegro on 2 August 2006. This brought the number of states that have acceded to the Geneva Conventions to the grand total of 194, which meant that for the first time in modern history an international treaty has achieved universal acceptance. Even though there might be merit in the argument that Article 49 was intended to denote the type of resettlements practiced by Nazi Germany during World War II—the Geneva Conventions of 12 August 1949 were after all designed to combat the atrocities of World War II—the confirmation of the provisions of Article 49 by Protocol I was intended to update the proscriptions of the Geneva Conventions of 12 August 1949 beyond the confines of their legislative history. Leslie Green expressed the opinion that, given the large number of ratifications of Protocol I (150 at the time of her article, which has in the meantime increased to 174), one might assume that its provisions have also become part and parcel of customary international law.<sup>11</sup> However, subscribing to the provisions of Protocol I raises other problems for the State of Israel.

Protocol I applies in essence to international armed conflicts, but its provisions have also been made applicable to all wars of liberation, including those where "peoples are fighting against ... alien occupation ... in the exercise of their right to self-determination."<sup>12</sup> At the time of its adoption Israel emphatically rejected this provision,<sup>13</sup> and has done so persistently thereafter.<sup>14</sup> Having done so, Israel avoided the application of this decree as a norm of customary international law to its responses to militant activities of resistance movements in Palestine. If at the Rome Conference Israel had accepted the customary-law status of the rule under consideration, it would

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10 *Prosecutor v. Furundžija*, Case No. IT-95-17/I-T, para. 138 (10 Dec. 1998); Andreas Zimmermann, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme vor der Staatenkonferenz in Rom*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 47, 85–86 (1998); Andreas Zimmermann, *Israel and the International Criminal Court – An Outsider's Perspective*, in 36 ISR. Y.B. HUM. RTS. 231, 241 (2006).

11 Leslie C. Green, *'Grave Breaches' or Crimes against Humanity*, 8 U.S. A.F. ACAD. J. LEGAL STUD. 19, 19 (1997–1998).

12 Protocol I, *supra* note 7, art. 1(4).

13 Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 71 (1984).

14 Andreas Zimmermann, *Preliminary Remarks on Para. 2(c)–(f) and Para. 3: War Crimes Committed in an Armed Conflict not of an International Character*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 262, 266 (Otto Triffterer ed., 1999).

have broken the chain of persistent and consistent protest which is required by international law as a material requirement for escaping the application of a rule of customary international law to the protesting state.

## B. THE WORDING OF ARTICLE 8(2)(B)(VIII)

Drafters of the ICC Statute were committed to including only existing offences in the subject-matter jurisdiction of the ICC and to not changing the wording of such offences as defined in the laws and customs of customary international law. They deviated from this commitment in the drafting of Article 8(2)(b)(viii). Whereas the relevant wording of Article 49 of the Fourth Geneva Convention of 12 August 1949 provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies," and Article 85(4)(a) of Protocol I refers to: "The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies," Article 8(2)(b)(viii) of the ICC Statute prohibits: "The transfer, *directly or indirectly*, by the Occupying Power of parts of its own civilian population into the territory it occupies." [Emphasis added].

The precise meaning of "directly or indirectly" in this context is not at all clear. The phrase qualifies the transfer as such, and one may well ask: How does an Occupying Power indirectly transfer parts of its population into an occupied territory? Does it do so by first sending them to a third country before busing them off into the occupied territory? It would appear that the intention of the delegations who proposed the insertion of the phrase (Egypt and Libya)<sup>15</sup> was presumably to include in the definition of this crime instances of "indirect transfer policies" aimed at inducing, encouraging and facilitating the civilian population to settle in the occupied territory.<sup>16</sup> In the Working Group on Elements of Crimes a number of Arab States sought to explain direct or indirect transfers along those lines. According to the proposal, a person can be held criminally liable under this heading if he or she "(a) [i]nduced, facilitated, participated or helped in any manner in the transfer of civilian population of the Occupying Power into the territory it occupies, or (b) [d]eported or

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15 Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 99 (1999).

16 Hermann von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 79, 113 (Roy S. Lee ed., 1999).

transferred all or parts of the population of the occupied territory within or outside this territory."<sup>17</sup>

Mauro Politi maintained that indirect transfers of population denote those "effected by private agencies or organizations with the tacit consent of the government of the Occupying Power."<sup>18</sup> According to Michael Cottier:

"Confiscation laws, governmental settlement plans, protection of unlawful settlements and economic and financial measures such as incentives, subsidies, exoneration of taxes and permits issued on a discriminatory basis and inducing the migration and settlement of the Occupying Power's own population in the occupied territory might thus amount to indirect transfer."<sup>19</sup>

It is common cause that Israel has provided such incentives to encourage Israeli civilians to establish settlements within the occupied territory, including "mortgage and housing subsidies, tax incentives, business grants, free schooling, infrastructure projects, and defense—to the tune of about \$146 million in 2002."<sup>20</sup> Prior to the Rome Conference, the Israeli Foreign Ministry maintained that Article 49 only prohibited the Occupying Power from compelling its own nationals to settle in the occupied territory ("The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies") and therefore did not apply to voluntary settlements.<sup>21</sup> The Egyptian/Libyan proposal to include all state-sponsored

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17 *Proposal submitted by Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, the United Arab Emirates and Yemen on article 8, paragraph 2(b)(viii): War crimes of deporting or transferring population*, U.N. Doc. PCNICC/1999/WGEC/DP.25 (Aug. 10, 1999); and see Eve La Haye, *The Elaboration of the Elements of Crimes*, in 2 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 305, 320 (Flavia Lattanzi & William A. Schabas eds., 2004).

18 Mauro Politi, *Elements of Crimes*, in, 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 443, 472 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

19 Michael Cottier, *Other Serious Violations of the Laws and Customs Applicable in International Armed Conflicts, Article 8(2)(b)(vi)–(viii)*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 198, 214 (Otto Triffterer ed., Baden-Baden: Nomos Verlagsgesellschaft 1999); and see also GERHARD WERLE, *VÖLKERSTRAFRECHT* 364 (2003).

20 Michael Galchinsky, *The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence*, 9 *ISR. STUD.* 115, 117 (2004).

21 *Id.* at 120.

settlements in the ICC version of the crime was clearly submitted in response to this interpretation of Article 49.

Some analysts believe that inclusion of the phrase "directly or indirectly" will in practical reality be of negligible consequence.<sup>22</sup> Gerhard Hafner & others are of the opinion that direct as well as indirect transfers of (sections of) a population within the meaning of the ICC Statute are compatible with the corresponding proscription of the Geneva Conventions. Particularly so if the general directive of the ICC Statute that such transfers would only come within the jurisdiction of the ICC if they occur "within the established framework of international law"<sup>23</sup> is taken into account.<sup>24</sup> A footnote in the *Elements of Crimes* recorded that the term "transfer" must be interpreted "in accordance with the relevant provisions of international humanitarian law."<sup>25</sup> It is generally conceded that Jewish settlements in the West Bank "does not seem to satisfy the relevant provisions of international law."<sup>26</sup>

### C. THE PERPETRATOR

There is one aspect, though, which perhaps did not receive the attention it deserved: international humanitarian law, as well as the ICC Statute, designate "the Occupying Power"<sup>27</sup> as the perpetrator of this crime, whereas the jurisdiction of the ICC *ratione personae* has been confined to individuals (natural persons) only.<sup>28</sup> Prosecutions in the ICC of the crime of aggression were conditionally suspended by the Rome

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22 Gerhard Hafner, Kristen Boon, Anne Rübesame & Jonathan Huston, *A Response to the American View Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 123 (1999) (saying that the Rome Statute "only marginally" exceeds existing international law); and see also Von Hebel & Robinson, *supra* note 16, at 113.

23 ICC Statute, *supra* note 1, art. 8(2)(b).

24 Von Hebel & Robinson, *supra* note 16, at 120–121; and see also Ruth Wedgwood, *Improve the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? 53, 70 (Elton Frye Project Director, 1999).

25 *Finalized Draft Text of the Elements of Crimes, Article 8(2)(b)(viii)*, note 46, U.N. Doc. PCNICC/1999/L.5/Rev.1/Add.2 (Dec. 22, 1999) [hereinafter "Elements of Crimes"].

26 Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540, 548 (2006).

27 See Cottier, *supra* note 19, at 214.

28 ICC Statute, *supra* note 1, art. 25(1).

Conference<sup>29</sup> exactly because it is essentially a crime committed by states, and finding a formula for translating state action into individual liability in the case of aggression has avoided consensus at the Rome Conference and in the Preparatory Commission. The same jurisdictional problem was also not considered in the case of the crime of apartheid (as a crime against humanity), but since apartheid has most likely become part of the relics of the past, nobody really cared about it that much. But population transfers from, into and within an occupied territory—like acts of aggression—remain a problem to be dealt with in empirical reality, and while individual liability for an act of state received special attention in the context of aggression, it is not at all clear why it was not also perceived to be a problem in the case of population transfers and deportations by an Occupying Power. Drafters of the *Elements of Crimes* have been criticized for not using the *Elements of Crimes* to translate the liability of an Occupying Power for population transfers in occupied territories into the paradigm of individual liability.<sup>30</sup>

The *Elements of Crimes* in a sense do exactly the opposite. While the language of the ICC Statute speaks of the transfer, directly or indirectly, "by the Occupying Power of parts of its own civilian population" into the territory it occupies, the *Elements of Crimes* refers to *the perpetrator* transferring, directly or indirectly, "parts of *its own* civilian population into the territory *it occupies*,"<sup>31</sup> thereby implying that the Occupying Power and the perpetrator are the same person.<sup>32</sup>

According to Kurt Dörmann, controversies that were negotiated in the Preparatory Commission, mostly behind closed doors, were centered upon the following questions: Does the crime only apply to forcible transfers; does it apply only to transfers on a large scale; must the local population be prejudiced by the transfer; and what link must there be between the perpetrator and the Occupying Power?<sup>33</sup> These

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29 *Id.* art. 5(2).

30 Politi, *supra* note 18, at 472.

31 *Elements of Crimes*, *supra* note 25, at Article 8(2)(b)(viii): "*The Transfer, Directly or Indirectly, by the Occupying Power of Parts of Its Own 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.*" Emphasis added.

32 A Swiss proposal to state that "[t]he perpetrator transferred... parts of the population of the Occupying Power" did not go into the final text. See Knut Dörmann, *War Crimes in the Elements of Crimes*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS* 95, 134 (Horst Fisher, Claus Kreß & Sascha Rold Lüder eds., 2001). Omission in the *Elements of Crimes* of reference to "civilian" population was probably only a drafting error.

33 Dörmann, *id.* at 133.

questions were left unanswered. It is therefore quite incomprehensible why drafters of the ICC Statute decided to refer the question of translating state action into individual liability in the case of aggression to a Review Conference,<sup>34</sup> but did not feel constrained to do the same in the case of an offence attributed to an "Occupying Power."

The Review Conference was held in Kampala, Uganda on 31 May to 11 June 2010, and general agreement was reached on the main issues submitted to the Conference, but implementation of the decisions taken were kept on ice for a period of at least seven years.<sup>35</sup> The competence of the ICC to prosecute the crime of aggression would take effect one year after ratification or acceptance of the amendments by 30 States Parties. On 29 June 2016, Palestine became the thirtieth state to ratify the Kampala amendments on the crime of aggression; and at its Sixteenth Session of 4 to 14 December 2017, the Assembly of States Parties decided to activate the crime of aggression as from 17 July 2018.<sup>36</sup>

In the case of state party referral and investigations initiated by the Prosecutor *proprio motu*, states have the right not to accept the exercise of jurisdiction by the ICC over crimes of aggression committed by their nationals or on their territory.<sup>37</sup> Since prosecutions for the crime of aggression which is committed by a natural person are dependent on an act of aggression which is committed by a state, the ICC must first establish that an act of aggression has taken place before prosecution for the crime of aggression would be feasible. It has come to be accepted that international tribunals cannot take decisions that implicate state action without the consent of that state. For this reason, States Parties can decline to accept the exercise of jurisdiction by the ICC over the crime of aggression committed on the territory or by any of the

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34 In its final session of 17 July 1998 the Rome Conference adopted Resolution F, instructing the Preparatory Commission to prepare proposals in regard to the crime of aggression, including its definition and elements, and the conditions under which the ICC could exercise jurisdiction in regard to that crime. Resolution F, para. 2, U.N. Doc. A/CONF.183/C1/L.76/Add.14 (July 16, 1997).

35 I shall not dwell on all the problems that confronted the participants in the Review Conference. See in this regard, Johan D. van der Vyver, ACTS OF AGGRESSION AND PROSECUTING THE CRIME OF AGGRESSION (2015); Johan D. van der Vyver, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 NAT'L SEC. & ARMED CONFLICT L. REV. 1 (2011).

36 Report of the Working Group on the Review Conference, in Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighteenth Session, The Hague, 18–26 November 2009, Annex II, para. 9.

37 ICC-ASP/RC/Res.6, Annex I, para. 3, Article 15 *bis* (4) (June 11, 2010).

nationals of the State Party concerned. The opt-out provision applies to prosecutions deriving from State Party referrals and investigations *proprio motu* only.<sup>38</sup> The State Party can lodge the opt-out declaration with the Registrar of the ICC at any time, but for the declaration to be effective, it must be submitted before the act of aggression from which an investigation of the crime of aggression emerged has taken place.<sup>39</sup> A State Party can withdraw the opt-out declaration at any time and must reconsider the declaration within three years.<sup>40</sup>

The opt-out provision is seemingly in conflict with the provision in the ICC Statute that precludes states from ratifying the Statute subject to reservations.<sup>41</sup> However, it was supported by delegations that emphasized the unique political dimension of the crime of aggression.<sup>42</sup> It was based on a compromise proposal submitted by Canada during the second week of the Review Conference.<sup>43</sup>

Prosecutions in international tribunals of natural persons (individuals) for customary-law crimes are indeed not dependent on consent of the accused or of the state of their nationality. However, the competence of the ICC to decide that an act of aggression has taken place could arguably fall under the norm of general international law which makes the exercise of jurisdiction of international tribunals over states subject to consent of the states concerned. The judgment by the International Court of Justice in the *Monetary Gold Removal Case* of 1954 may be cited in support of the proposition that an international tribunal cannot decide a dispute between State A and State B that implicates the interests of State C without the consent of State C.<sup>44</sup> The rule was quite clearly summarized by the ICJ in that case:

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38 *Ibid.*

39 *Id.* at para. 4 (stating that the State Party that allegedly committed the act of aggression must "previously declare" that it does not accept the exercise of jurisdiction over the crime of aggression by the ICC).

40 *Ibid.*

41 ICC Statute, *supra* note 1, art. 120.

42 See Justin Haccius, *THE INTERNATIONAL CRIMINAL COURT: REVIEWING THE REVIEW CONFERENCE 6–7*, (Chatham House, 2010).

43 *Proposal by Canada*, Article 15 *bis*, para. 4 (June 8, 2010) (on file with author): ("...the Prosecutor may proceed with an investigation of a crime of aggression provided that: ...(ii) [all state(s) concerned with the alleged crime of aggression] [the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused of the crime] have declared their acceptance of this Paragraph").

44 *Monetary Gold Removed from Rome in 1943* (It. v. Fr., the U. K. of Great Britain and N. Ir. and the U. S.), 1954 I.C.J. 19, at 32–33 (June 15); and see Covey T. Oliver, *The Monetary Gold Decision in Perspective*, 49 AM. J. INT'L L. 216 (1955); D.H.N. Johnson,

"Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."<sup>45</sup>

Although in this case the ICJ was not dealing with criminal prosecution, the Review Conference nevertheless decided to play it safe by affording to States Parties, in the case of State Party referrals and investigations *proprio motu*, the right not to accept the exercise of jurisdiction by the ICC over crimes of aggression committed by their nationals or on their territory.<sup>46</sup>

It is therefore submitted that an Occupying Power can decline to consent to the exercise of jurisdiction in cases based on Article 8(2)(b)(viii), in which event the ICC will not be competent to exercise jurisdiction if the matter emerged from a State Party referral or an investigation initiated by the Prosecutor *proprio motu*. This would be in conformity with the decisions taken by general consent at the Review Conference held in Kampala in 2010 relating to the crime of aggression.

#### D. PALESTINE AS A STATE PARTY TO THE ICC STATUTE

There is one further matter that might be of concern to Israel: The admission of Palestine as a State Party to the ICC Statute.

Membership of the Assembly of States Parties of the ICC is confined to States only, and as from 2 January 2015 Palestine acceded to the ICC Statute. Although the statehood of Palestine is questionable because its territorial confines are in dispute, membership of the ICC constituted an important step in the recognition of Palestine as a State. Furthermore, 138 Member States of the General Assembly of the United Nations and two non-member States have to date recognized Palestine as a State. Israel is not among those States.

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*The Case of the Monetary Gold Removed from Rome in 1943*, 4 INT'L & COMP. L. Q. 93 (1955).

45 Case of the Monetary Gold, *supra* note 44, at 33; and see also East Timor (Port. v. Austl.), 1995 I.C.J. 90, sec. 34 (June 30); Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99, sec. 127 (Feb 3).

46 ICC-ASP/RC/Res.6, Annex I, para. 3, Article 15 *bis* (4), *supra* note 37.

On 22 May 2018, Palestine as a State Party referred the situation in Palestine to the ICC relating to offences committed in Palestine since 13 June 2014.<sup>47</sup> It is evident from the wording of the Article concerned that the Prosecutor's obligation is to establish "whether one or more specific persons"—not the State of Israel—"should be charged with the commission of such crimes."<sup>48</sup>

The referral of the situation in Palestine is subject to the following restrictions:

- a) In order to extend the exercise of jurisdiction by the ICC to offences allegedly committed prior to the date on which Palestine became a State Party, Palestine submitted on 16 January 2015 an Article 12(3) declaration under which it accepted the exercise of jurisdiction by the ICC with respect to crimes committed while it was not a State Party.<sup>49</sup>
- b) An investigation by the Prosecutor cannot be restricted to offences allegedly committed by Israeli armed forces since "the situation" might include offences committed by Palestinians.
- c) If a preliminary investigation by the Prosecutor implicates Israeli perpetrators, the Prosecutor must inform Israel of this fact in order to afford to Israel the primary opportunity to investigate the conduct of, and if need be to prosecute, the Israelis implicated under its municipal criminal justice system.<sup>50</sup>
- d) The ICC can only exercise jurisdiction if it finds that the proceedings in Israel was a "sham"; that is, an investigation and/or prosecution was conducted with the intent to preclude the ICC from prosecuting the Israeli perpetrator(s).<sup>51</sup>

The crux of the matter within the confines of the present analysis is that ratification of the ICC Statute by Israel will have no bearing whatsoever on the prosecution of Israeli nationals in the ICC following a referral of the situation in Palestine to the ICC by the Security Council of the United Nations or by a State Party to the ICC Statute, which now includes Palestine. Most important is the fact that the

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47 Referral of a situation by a State Party for investigation by the Office of the Prosecutor is authorized by art. 13(a) ICC Statute, *supra* note 1.

48 *Id.* art. 14 (1), instructing the Prosecutor "to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."

49 *Id.* art. 12(3).

50 *Id.* art. 18(1).

51 *Id.* art. 17(2).

exercise of jurisdiction by the ICC is in all circumstances subject to the principle of complementarity, which means that the first right and duty to prosecute Israeli nationals is vested in the municipal criminal justice system of Israel, and the ICC can only step in if Israel does not conduct a *bona fide* investigation into the allegations of wrongdoing; or if it is decided that the proceedings in Israel was a sham.

As far as the referral by Palestine is concerned, the Prosecutor did conduct a preliminary investigation to establish "whether there is a reasonable basis to proceed with an investigation,"<sup>52</sup> and decided that she is satisfied that such a reasonable basis does exist as required by Article 53(1) of the ICC Statute.<sup>53</sup> However, given the uncertainties that still prevail with regard to the territorial confines of Palestine, Prosecutor Fatou Bensouda requested a ruling by a Pre-Trial Chamber of the ICC "to confirm that the 'territory' over which the Court may exercise jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza."<sup>54</sup>

Due to the Corona Pandemic all proceedings in the ICC have been suspended and we can therefore not expect a ruling on the territorial issue in the near future.

## CONCLUDING OBSERVATIONS

Professor Nathan Lerner is generally regarded as an icon within the international community engaged in the promotion and protection of human rights. He was born in Poland, educated in Argentina and spent much of his professional and academic career in New York and in Israel. He has written elaborately in English, Hebrew and Spanish, including several publications on group rights and discrimination, religious human rights and similar topics within the field of international human rights. Perhaps it would be a special tribute to this great man if Israel were to ratify the ICC Statute.

Israel is after all committed to the directives of human rights. In Israel customary international law is self-executing as part of the Israeli common law, while

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52 Press release, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 16, 2015).

53 Situation in the State of Palestine ICC-01/18-12 22-01-2020 2/112 RH PT, Prosecution request pursuant to art. 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ¶ 93, (Jan. 22, 2020).

54 *Id.* at para. 220.

conventional international law (treaty law) is not.<sup>55</sup> Although the Israeli Supreme Court persisted that the Geneva Conventions, notably Article 49 of the Fourth Geneva Convention, remained part of conventional law,<sup>56</sup> it also decided that Israel does consider itself bound by "the humanitarian provisions" of the Fourth Geneva Convention.<sup>57</sup> In a case dealing with an order issued for security reasons by a Commander of the Israel Defense Forces for three residents of Judea and Samaria to leave their home and to go and live in the Gaza Strip, counsel for the respondent reiterated that the Fourth Geneva Convention does not reflect customary international law, but noted that "in accordance with longstanding practice of the Government of Israel" the humanitarian parts of the Convention should nevertheless be applied.<sup>58</sup> The Israeli Supreme Court, sitting as the High Court of Justice, decided accordingly that humanitarian international law as reflected in the Fourth Geneva Convention, "and certainly" in Hague Convention No. IV on the Law and Custom of War on Land, 1907, is to be applied in the case of forcible assignment of residence.<sup>59</sup> As noted in one of its judgments:

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- 55 See YORAM DINSTEIN, *INTERNATIONAL LAW AND THE STATE* 281 (1971), cited in *Abed el Afu v. Commander of the IDF Forces in the West Bank*, *supra* note 9; and see also HCJ 393/82 *Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region* 37(4) PD 785 (1983) (Isr.), summarized in 14 ISR. Y.B. HUM. RTS. 301, 303 (1984).
- 56 *Kawasme v. Minister of Defence*, *supra* note 9, at 350–351 (per Landau, J.P.), 352–353 (per Cohn, J.D.P., dissenting) (holding that the provision in art. 49 prohibiting forcible transfers constituted conventional law but the one prohibiting deportations was customary international law); *Abed el Afu v. Commander of the IDF Forces in the West Bank*, *supra* note 9, at 281–282 (per Shamgar, J. P.), 284 (per Ben-Porat, J., concurring), 286 (per Bach, J., concurring); and see *Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region*, *supra* note 55, at 303 (holding that Geneva Convention No. IV is "largely constitutive in nature").
- 57 HCJ 3278/02 *The Center for the Protection of the Individual v. IDF Commander in the West Bank*, in 34 ISR. Y.B. HUM. RTS. 293, 294 (2004); and see Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, in 9 ISR. Y.B. HUM. RTS. 106, 108 (1979).
- 58 HCJ 7015/02 *Ajuri v. Commander of the IDF Forces in the West Bank*, 15 ISR. L.REP. 83, para. 13 (2002–2003).
- 59 *Ibid.*; and see also HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* 58(5) PD 807, para. 23 (2004) (Isr.), translated in 38 ISR. L. REV. 83 (2005) (noting that "the Parties agreed that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review.")

"Indeed, every Israeli soldier carries in his pack the rules of customary public international law regarding the law of war, and the fundamental rules of Israeli administrative law."<sup>60</sup>

And, needless to say, the ICC regime is also founded on principles of human rights. The ICC Statute thus provides that the application and interpretation of the law to be applied by the ICC "must be consistent with internationally recognized human rights."<sup>61</sup>

The case mentioned above relating to the reallocation of three residents of Judea and Samaria<sup>62</sup> bears evidence of the fact that Israel did not, and did not need to, raise concerns based on that section of Article 49 of the Fourth Geneva Convention and on Article 85(4)(a) of Protocol I which prohibits the re-allocation of citizens of the occupied territory by the Occupying Power. The exercise of jurisdiction by the ICC is based on the principle of complementarity, which means in essence that the first right and duty to prosecute the crimes within the subject-matter jurisdiction of the ICC is vested in national courts, and ICC jurisdiction can only be triggered if the national prosecuting authorities take no action, or if the action taken by the national prosecuting authorities is found to be a sham; that is, if the action of the national authorities was taken with intent to safeguard the perpetrator from prosecution in the ICC.<sup>63</sup> As far as the transfer by an Occupying Power of its own civilian population into the occupied territory is concerned, it is quite evident:

- a) that the ICC cannot prosecute the Occupying Power (the State of Israel);  
and
- b) that prosecution of a natural person for the transfer of Israeli nationals into the occupied territory will depend on an act of state of the Occupying Power (the State of Israel) and will require the consent of the Israeli government.

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<sup>60</sup> *Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region*, *supra* note 55, at 810; HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 14, (2005) (Isr.), for summary of the case in 37 ISR. Y.B. HUM. RTS. 345 (2007).

<sup>61</sup> ICC Statute, *supra* note 1, art. 21(3).

<sup>62</sup> *Ajuri v. Commander of the IDF Forces in the West Bank*, *supra* note 58, the text accompanying note 49.

<sup>63</sup> See in general ICC Statute, *supra* note 1, art. 17.

It is therefore submitted that Israel can ratify the ICC Statute and should not decline to do so in virtue of Article 8(2)(b)(viii). In 2002, Nathan Lerner expressed a similar wish:

"Israel has no legal obligation to ratify its signature, but in my opinion it has a historical obligation to do so, on its behalf and indirectly on behalf of the entire Jewish people. When Israel signed the treaty, it signed a declaration of support for the idea of the ICC, emphasizing its importance and urgency. This, despite its disappointment at the last-minute mixing of certain states' political intentions within the Statute. For that reason, Israel rejected any attempt to interpret the Statute in accordance with these intentions. The court's vitality – the state's official declaration says – has never ceased to guide Israel, hoping that the court will follow fundamental legal principles based on objectivity and universality. There is no reason for Israel to think differently now. ... Israel, as a state expression of the Jewish people, needs to ratify the Rome Treaty."<sup>64</sup>

My final wish of ratification to the ICC would therefore also honour this great Israeli scholar.

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<sup>64</sup> Nathan Lerner, *From Nuremberg to Hague*, YNET (June 30, 2002), [www.ynet.co.il/articles/0,7340,L-1971057,00.html](http://www.ynet.co.il/articles/0,7340,L-1971057,00.html) [in Hebrew; translated by Yaniv Roznai].