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Expert Opinion by Dr Noam Lubell for petition concerning the involuntary transfer of Palestinians from the West Bank to the Gaza Strip

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This opinion concerns the involuntary transfer of Palestinians from the West Bank to the Gaza Strip, evaluating whether such action violates the prohibition of individual or mass forcible transfers or deportations of protected persons from occupied territory as codified under Article 49 of the Fourth Geneva Convention and in International Criminal Law. As will be outlined below, any Palestinian present within the West Bank qualifies as a protected person under the Fourth Geneva Convention. Consequently, notwithstanding limited exceptions, which will be shown to be inapplicable to the current case, any involuntary relocation of Palestinians from the West Bank to the Gaza Strip is unequivocally prohibited.

While geographically distinct, the West Bank, including East Jerusalem, and the Gaza Strip constitute a single territorial unit over which the Palestinian peoples right to self-determination is enshrined under international law.[1] This territorial integrity is rooted in the historical fact that both territories formed an inseparable part of Mandate Palestine, and UN General Assembly Resolution 181, concurrent to the creation of the State of Israel, included both the West Bank and Gaza Strip within a newly created 'Arab State'.[2]

On several occasions the UN Security Council,[3] General Assembly[4] and Human Rights Council[5] have all stressed the territorial integrity of the West Bank and Gaza Strip – a position that is also

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[1] See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* International Court of Justice, Advisory Opinion, 9 July 2004, para 118. See also, General Assembly Resolution 58/163 of 22 December 2003. For a collection of documents on the Palestine question in international law that discuss self-determination, see M. Cherif Bassiouni (ed.), *Documents on the Arab-Israeli Conflict,* Transnational Publishers, New York, 2005.
[2] UN General Assembly Resolution 181, *Future Government of Palestine*, 29 November 1947.
[3] See for example, Security Council Resolution 1860 adopted on 8 January 2009, stressing that "the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state." Numerous other Security Council Resolutions reiterate or reaffirm "its vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders." See for example, UN Security Council Resolution 1850, adopted 16 December 2008. See Also, Security Council Resolution 1515, adopted 19 November 2003. See also,

widely supported by the international community.[6] This position was recognized by the State of Israel, which acknowledged the territorial integrity of the two geographically distinct areas when it signed the Oslo Interim Agreement with the Palestine Liberation Organization. Stated explicitly in Article 11(1), and repeated verbatim in Article 31(8); "[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim agreement."[7] The Supreme Court of Israel, sitting as the High Court of Justice, has also detailed the historical, political, cultural and legal territorial integrity of the West Bank and Gaza Strip. In *Ajure*, the Court opined;

> " … The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content. … In view of this purpose, the area of Judaea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory."[8]

In September 2005, Israel completed a unilateral disengagement from the Gaza Strip, withdrawing all military installations, personnel, and the settler population from the territory. This action undeniably raises numerous legal implications concerning the 'post-disengagement' status of the Gaza Strip and, in turn, Israel's international obligations towards the territory and its inhabitants. The degree of effective control Israel retains over the Gaza Strip post-disengagement is disputed and remains a contentious issue. The controversy over the status of the Gaza Strip as occupied or not is immaterial to the integrity of the West Bank and Gaza Strip as a single

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Security Council Resolution 1397, adopted 12 March 2002.

[4] The United Nations General Assembly has continuously stressed "the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem" and/or reaffirmed the "right of the Palestinian people to self-determination, including the right to their independent State of Palestine." See for example, General Assembly Resolution 64/150 of 18 December 2009; General Assembly Resolution 63/165 of 18 December 2008; General Assembly Resolution 62/146 of 18 December 2007; General Assembly Resolution 61/152 of 19 December 2006; General Assembly Resolution 60/146 of 16 December 2005.

[5] The Human Rights Council continually stresses "the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem" and/or reaffirms the "unqualified right of the Palestinian people to self-determination, including their right to live in freedom, justice and dignity and to establish their sovereign, independent, democratic and viable contiguous State." See for example, A/HRC/13/L.27 of 19 March 2010; A/HRC/10/L.7 of 20 March 2009; A/HRC/7/L.3 of 18 March 2008. See also, the Reports of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967, which stresses, "the right of self-determination of the Palestinian people has been recognized by the Security Council, the General Assembly, the International Court of Justice and Israel itself. The territory of the self-determination unit within which this right is to be exercised clearly includes the West Bank, East Jerusalem and Gaza." See for example, A/HRC/7/17 of 21 January 2008.

[6] This is evident from the Resolutions of the General Assembly as well as the statements of the Middle East Quartet - comprising the Secretary-General of the United Nations, the United States of America, the European Union and the Russian Federation – which affirms "Arab-Israeli peace and the establishment of a peaceful state of Palestine in the *West Bank and Gaza*, on this basis, is in the fundamental interests of the parties, of all states in the region, and of the international community. (Emphasis added). For a full list of Quartet Statements see; http://www.unsco.org/q.asp

[7] See for example, Article XXXI(8) and 11(1) of the Israeli Palestinian Interim Agreement of 28 September 1995; Article 5 of the "Declaration of Principles" of 13 September 1993, signed by Israel and the PLO; Article 23(6) of the Cairo Agreement on the Gaza Strip and Jericho Area, signed by Israel on 4 May 1994; The Interim Agreement was enshrined in the internal military legislation in the Territories: see Military Proclamation regarding the application of the interim agreement, Minshar Zeva'i [military proclamation] no. 7.

[8] *Ajuri et al.* v. *IDF Commander in the West Bank et al.* Israeli High Court of Justice, *7015/02, para 22.*

territorial unit and consequently to the subsequent determination of protected persons within the West Bank.[9] It may, however, hold significance in relation to the internment or assigned residence of protected persons, as both the former and latter are prohibited beyond the frontiers of the occupied territory. All these issues are discussed in detail below.

It is well established that a single territory, such as that of a State, can be subject to belligerent occupation only in certain areas and not in others. The International Criminal Tribunal for the former Yugoslavia held in *Naletilic and Martinovic,* that "[t]here is no requirement that an entire territory be occupied, provided that the isolated areas in which the authority of the occupied power is still functioning are effectively cut off from the rest of the occupied territory."[10]

The International Court of Justice confirmed this territorial scope when it held that Ugandan forces possessed effective control over the eastern province of Ituri in the Democratic Republic of Congo, rendering Uganda an Occupying Power with international legal obligations towards the Ituri province and its inhabitants.[11] The enduring conflict in Iraq provides another elucidating example. Although international humanitarian law unconditionally applied from the outset of the military campaign against Iraq in March of 2003, the southern city of Basra was the first area to fall under the effective control of Coalition Forces and therefore become subject to the law of belligerent occupation. At the same time however, the Iraqi capital of Baghdad was not under such 'effective control' and consequently not subject to the law of belligerent occupation.[12] This legal reality did not undermine the political sovereignty or territorial integrity of Iraq. This position was explicitly confirmed by numerous Resolutions of the UN Security Council which, acting under both Chapter VI and VII of the UN Charter, continuously reaffirmed the political sovereignty and territorial integrity of Iraq.[13]

These territorial limits and inherent consequences for the law of belligerent occupation can be equally applied to the occupied Palestinian territory. Whether the entire Palestinian territory is subject to the laws of occupation, or just identifiable areas where Israel exercises sufficient effective control, is of no consequence to the integrity of West Bank and Gaza Strip as a single territorial unit. This position was recently and explicitly confirmed by the UN Security Council when it stressed that the "Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state."[14]

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[9] As was confirmed by the Security Council in Resolution 1860 "*Stressing* that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state." See UN Security Council Resolution 1860, 9 January 2009.

[10] For the constitutive elements of "effective control" see, *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela", Trial Judgment,* IT-98-34-T, International Criminal Tribunal for the former Yugoslavia, 31 March 2003, para. 217.

[11] See, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* International Court of Justice, 19 December 2005, para 178.

[12] Although the remaining provisions, including customary norms of international humanitarian law, applied to the entirety of Iraq.

[13] For Chapter VII Resolution see, Security Council Resolution 1511, 16 October 2003. For Chapter VI Resolutions confirming the same see, Security Council Resolution 1472, 28 March 2003 and Security Council Resolution 1483, 22 May 2003.

[14] See UN Security Council Resolution 1860, 9 January 2009.

Unlike the Gaza Strip, the belligerent occupation of the West Bank is uncontested. Accordingly, the civilian population within the West Bank may qualify as protected persons under the Fourth Geneva Convention. Article 4(1) delineates the scope of protection extended to any individual "who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power to which they are not nationals."[15]

Similar to other categories of individuals under international humanitarian law, the definition of 'protected persons' was drafted in a negative form "as it is intended to cover anyone who is *not* a national of the Party to a conflict or Occupying Power in whose hands he is."[16] The text "at a given moment and in any manner whatsoever", was intended to ensure that "all situations and cases were covered"[17] and "refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances…"[18] The Commentary to this provision further clarifies that the informal expression "in the hands of" is used in an extremely general sense and in no way requires an individual to physically be in enemy hands, as a prisoner is. Mere physical presence within occupied territory implies that one is in the power or "hands" of the Occupying Power.[19] Such an interpretation has been confirmed by the International Criminal Tribunal for the former Yugoslavia in *Naletilic and Martinovic*, when the Trial Chamber held that "the expression 'in the hands of' a party or occupying power, as it appears in Article 4 of Geneva Convention IV, refers to persons finding themselves on the territory controlled by that party or occupying power."[20]

While Paragraph one of Article 4 sets down a considerably broad definition, the scope of protected persons is narrowed in the subsequent paragraphs to exclude four additional categories of individuals from protection under the Fourth Convention. These exclusions take account of: nationals of a State which is not party to the Convention; nationals of a neutral State who find themselves in the territory of a belligerent State; nationals of a co-belligerent State whose State in which they are nationals has normal diplomatic relations in the State of the Occupying Power, and individuals who enjoy protection under one of the other three Geneva Conventions.[21] Any individual beyond the ambit of one of these categories, who finds themselves 'in the hands of a Party to the conflict or Occupying Power of which they are not nationals' qualifies as a protected person under the Fourth Geneva Convention.

Existing jurisprudence from the International Criminal Tribunal for the former Yugoslavia has further clarified the meaning and scope of protected persons as defined under the Fourth Geneva Convention. Various Chambers of the Tribunal have interpreted Article 4 to determine possible

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[15] Article 4(1), Fourth Geneva Convention.
[16] Pictet, Jean S, Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958, 46. Hereinafter Commentary on the Fourth Convention. The only exception to this rule however is the second paragraph of Article 70, which refers to refugees with the same nationality as the Occupying Power.
[17] Article 4, Commentary on the Fourth Convention, 47.
[18] Article 4, Commentary on the Fourth Convention, 47.
[19] Article 4(1), Commentary on the Fourth Convention, 47.
[20] *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela", Trial Judgment,* IT-98-34-T, International Criminal Tribunal for the former Yugoslavia, 31 March 2003, para. 208
[21] Article 4(2)(4), Fourth Geneva Convention.

victims of grave breaches, and in doing so, took into account the existence of diplomatic protection as well as the substance of relations between the individual and the 'enemy hands' or 'Occupying Power'. In *Tadic*, the Appeals Chamber stated that the primary purpose of Article 4 is to "ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves."[22] The Tribunal's interpretation of Article 4 however did not consistently focus exclusively on this 'nationality criteria' to determine an individual's status, but also on the ethnicity and allegiance of an individual to determine if such protection was in fact necessary. In *Tadic*, discussing the complexity of contemporary armed conflicts, the Appeals Chamber definitively held that,

> "While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."[23]

Notwithstanding the above detailed exclusions, protection under Article 4 of the Fourth Convention, entailing the status of protected person, must be afforded to all remaining individuals within occupied territory; this includes stateless individuals,[24] spies and saboteurs,[25] and members of armed resistance movements.[26] The inclusion of spies and saboteurs under the ambit of Article 4 is evident from the text of Article 5, which authorizes the denial of "rights of communication" to such individuals upon capture and detention.[27] Similarly, members of armed resistance movements within occupied territory who do not qualify for protection under Article 4(A)(2) of the third Convention must also be afforded the status of protected persons under the Fourth Convention unless such individuals fall within the ambit of one of the five exclusion

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[22] *Prosecutor v. Dusko Tadic, Appeal Judgement*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, 15 July 1999, para. 168; See also, *Prosecutor v. Tihomir Blaskic, Trial Judgement*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia, 3 March 2000, para. 145. The Trial Chamber held ""[I]n those situations where civilians do not enjoy the normal diplomatic protection of their State, they should be accorded the status of protected person."

[23] *Prosecutor v. Dusko Tadic, Appeal Judgement*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, 15 July 1999, para 166. This understanding was confirmed in *Prosecutor v. Tihomir Blaskic, Trial Judgement*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia, 3 March 2000, para 126-7; See also, and *Kordic and Cerkez. Prosecutor v. Dario Kordic, Mario Cerkez, Trial Judgement*, IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia, 26 February 2001, para. 152. The Appeals Chamber reiterated the Trial Chambers position and held "…it was not bound by the common citizenship of both perpetrators and victims and could instead apply the *allegiance* test, which provides that nationality is not as crucial as allegiance to a party to the armed conflict." See, *Kordic and Cerkez,* Appeals Chamber, 17 December 2004, paras, 322-323, 328-330.

[24] Article 4, Commentary on the Fourth Convention, 47.

[25] Article 4, Commentary on the Fourth Convention, 47.

[26] Article 4, Commentary on the Fourth Convention, 50.

[27] Article 5, Fourth Geneva Convention. See also, Dinstein, Yoram; The International Law of Belligerent Occupation, Cambridge University Press 2009, 167.

categories.[28] This interpretation of Article 4 follows the object and purpose of the Fourth Convention - the protection of civilians during armed conflict – and is based on the legal premise that "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention." There is no "intermediate status; nobody in enemy hands can be outside the law."[29]

Based on the nationality criteria, the absence of diplomatic protection, a clearly professed allegiance, and the very text of the provision, the scope of Article 4 includes all Palestinians within the West Bank, irrespective of an officially Israeli-given recognised residency status. To return to the example of the recent occupation of Iraq, when Basra fell under the effective control of Coalition Forces and was subject to the law of belligerent occupation, the status of 'protected person' could not have been denied to individuals or families who where born elsewhere in Iraq but currently resided in Basra, nor to students who studied and lived in Basra but whose families remained in Baghdad. Denying such individuals the status of protected persons would have been in direct contravention to the object and purpose of Article 4 and a clear breach of the Fourth Convention. Any individual within occupied territory, who does not fall within the ambit of one of the five limited categories of exclusion, must be considered a protected person under the Fourth Geneva Convention; Palestinians within the West Bank are protected persons.

Individuals who qualify as protected persons benefit from a series of fundamental guarantees and specific protections under the Fourth Geneva Convention.[30] A number of prevailing circumstances during armed conflict or belligerent occupation may necessitate placing restrictions on certain rights of protected persons and, indeed, the Conventions do provide for limited restrictions.[31] Paragraph four of Article 27 authorizes the Occupying Power to "take such measures of control and security in regard to protected persons that may be necessary as a result of war."[32] Although not specified within the text of the provision itself, the various security measures an Occupying Power is authorized to undertake range from comparatively mild restrictions such as the duty of registering with and periodically reporting to the police authorities, the carrying of identity cards, or a ban on the carrying of arms; to more severe restrictions, including the prohibition of access to certain areas and restrictions on movement

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[28] This however does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions of Article 64 of the Fourth Convention and the Articles that follow it. See Article 4, Commentary on the Fourth Convention, 50.

[29] Article 4, Commentary on the Fourth Convention, 51.

[30] Including respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs, freedom from physical and moral coercion, freedom from measures causing physical suffering or extermination, such as murder, torture, or corporal punishment, freedom from collective punishment or reprisals against persons and their property, the right to equality and non-discrimination and without any adverse distinction based in race, religion or political opinion. It should be noted that Article 27 designates these guarantees as the absolute or "supreme rights" of protected persons. See Article 27, Commentary on the Fourth Convention, 207.

[31] Such restrictions however, cannot be subject to Article 27 of the Fourth Geneva Convention, widely considered the very basis on which the Convention rests, the central point in relation to which all its other provisions must be considered. See, Article 27, Commentary on the Fourth Convention, 207.

[32] Article 27(4), the Fourth Geneva Convention. For the inherent restrictions on such measures see Article 27(4), Commentary on the Fourth Convention, 207.

within the occupied territory.[33] At the most extreme end of such security-based restrictions, the Conventions permit the internment or assigned residence of protected persons.[34] Necessarily, and as a consequence of the extreme nature of both these restrictions, they are intended only as a recourse of last extremity and subject to specific rules and constraints.

It is of imperative importance however, to remember that both the rights and obligations of the Occupying Power vis-à-vis protected persons are "based on the idea of the personal freedom of civilians remaining in general unimpaired" or for the direct benefit or safety and well being of the civilian population.[35] Therefore, it must be made emphatically clear that the ability of the Occupying Power to restrict, or in extreme circumstances suspend, certain rights of protected persons, is not unlimited; it cannot be taken in a general manner and must occur within the limits laid down by the Convention itself. Under no circumstances whatsoever can the Occupying Power deport or forcibly transfer protected persons from or within the occupied territory.

Both individual and mass forcible transfers, as well as, deportations of protected persons are expressly prohibited under international humanitarian law. The text of Article 49(1) of the Fourth Convention states unambiguously; "individual or mass forcible transfers, as well as deportations 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."[36] It is manifestly clear from the text of the provision itself that Article 49(1) applies to both mass and individual forcible transfers and deportations. Furthermore, the inclusion of "regardless of their motive" has profound consequences on the scope of Article 49, leaving no room for uncertainty that even the most compelling security concerns of the Occupying Power cannot justify the deportation or forcible transfer of protected persons within[37] or from occupied territory.[38]

Existing jurisprudence has clarified both the meaning and scope of deportation and forcible transfer as set forth under international humanitarian law. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia has consistently held in several judgments that "both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State."[39] Thus, it was held that Bosnian

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[33] Article 27(4), Commentary on the Fourth Convention, 207.
[34] Article 27(4), Commentary on the Fourth Convention, 207.
[35] Article 27(1), Commentary on the Fourth Convention, 202.
[36] Article 49(1), Fourth Geneva Convention.
[37] *Prosecutor v. Mladen Naletilic aka "Tuta", Vinko Martinovic aka "Stela", Trial Judgment*, IT-98-34-T, International Criminal Tribunal for the former Yugoslavia, 31 March 2003, *para 521.* See also, Arai – Takahashi, Yutaka; The Law of Occupation: Continuity and Change of International Humanitarian Law, and its interaction within international human rights law, Martinus Njhoff Publishers 2009, 339.
[38] Dinstein, Yoram; The International Law of Belligerent Occupation, Cambridge University Press, 2009,161.
[39] *Prosecutor v. Radical Krstic*, Trial Judgment, IT-98-33-T, International Criminal Tribunal for the former Yugoslavia, 02 August 2001, para 521. See also *Prosecutor v. Blagoje Simi et al., Trial Judgement*, IT-95-9-T, International Criminal Tribunal for the former Yugoslavia, 17 October 2003, para 122, where the Chamber held that "deportation is defined as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, across a national border, without lawful grounds. Forcible transfer has been defined as a forced removal or displacement of people from one area to another which may take place within the same national borders."

Muslim civilians being forcibly moved from one area to another within Bosnia amounted to forcible transfer rather than deportation.[40] Similar reasoning was followed in *Simic*, where the Trial Chamber defined forcible transfer as "a forced removal or displacement of people from one area to another which may take place within the same national borders."[41] While distinction between deportation and forcible transfer is both necessary and valuable, it is worth emphasizing that the destination of deportation or forcible transfer is inconsequential with respect to its prohibition as both are equally prohibited under Article 49. This position was confirmed in *Krnojelac*, when the Appeals Chamber held, "the forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent."[42]

It is unmistakably clear that Article 49 prohibits absolutely both individual and mass forcible transfers as well as deportations of protected persons within or from occupied territory. However, if the security of protected persons or imperative military reasons so demand, the Occupying Power may, subject to certain restrictions and obligations, temporarily evacuate a given area in the interests of the protected persons themselves. Furthermore, unless material reasons render impossible, evacuation must occur within the frontiers of the occupied territory.

Unlike deportation and forcible transfer, evacuation is a provisional measure taken in the interests of the protected persons themselves and, unless material reasons render impossible, must be carried out within the occupied territory.[43] These two exceptions are indicative of two distinct sets of circumstances that may justify the evacuation of protected persons. First, is the raging of hostilities that threaten the safety and well being of protected persons and is perhaps the foremost valid reason for an Occupying Power to carry out an evacuation.[44] The fragile balance between the dictates of humanity and military necessity is the basis of the second justification for evacuation, which may be conducted if 'imperative military reasons so demand'. The concept of military necessity encompasses the measures which are essential to attain legitimate goals during armed conflict and which are lawful in accordance with international humanitarian law.[45] It is interwoven into the fabric of international humanitarian law, and cannot be invoked as a justification to violate this body of law. It appears in various guises in a number of specific rules, and it is within these formulations that it can be raised. In the rule at hand, the test is the demand of "imperative military reasons" which denotes a concrete and specific demand arising from ongoing military operations, rather than a general policy invoked for other reasons. Absent one of the two aforementioned reasons, any evacuation will be considered an unlawful banishment of protected persons from their homes.[46]

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[40] *Prosecutor v. Radislav Krstic*, Trial Judgment, IT-98-33-T, International Criminal Tribunal for the former Yugoslavia, 02 August 2001, para 521.
[41] *Prosecutor v. Blagoje Simic et al., Trial Judgment*, IT-95-9-T, International Criminal Tribunal for the former Yugoslavia, 17 October 2003, para 122.
[42] *Prosecutor v. Milorad Krnojelac, Appeal Judgment*, IT-97-25-A, International Criminal Tribunal for the former Yugoslavia, 17 September 2003, para 218.
[43] Article 49(2), Fourth Geneva Convention.
[44] See, Dinstein, Yoram; The International Law of Belligerent Occupation, Cambridge University Press, 2009,171.
[45] Sandoz *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva/The Hague, 1987), p. 392, para 1389.
[46] *Prosecutor v. Radislav Krstic*, *Trial Judgement*, IT-98-33-T, International Criminal Tribunal for the former Yugoslavia, 02 August 2000, para 527. See also, Dinstein, Yoram; The International Law of Belligerent Occupation, Cambridge University Press, 2009,171.

In the event that imperative military reasons necessitate the evacuation of protected persons, the Occupying Power is obliged to ensure the general safety of the evacuated persons, both during the execution and throughout the duration of the evacuation. For example, the Occupying Power must ensure: that proper accommodation is provided; the existence of satisfactory conditions of health, hygiene and nutrition; and members of the same family are not separated.[47] More importantly, when the prevailing circumstances that necessitated evacuation cease to exist, all protected persons that have been evacuated must be permitted to return to their homes.[48]

It is clear that the inclusion of the concept of evacuation was intended to cover temporary relocation of all individuals in a given area, and only subject to the limited conditions detailed above. The notion of evacuation does not cover a general policy of permanently transferring individuals based on procedural registration and residency requirements. It is thus inapplicable to the case at hand.

Outside of Article 49, the other source of exception lies within the rules on detention and internment. The Occupying Power is obligated to restore and ensure public order and safety within the territory that it occupies,[49] and in the course of fulfilling such obligations, the Fourth Convention provides various measures of control and security regarding protected persons that an Occupying Power may undertake "as may be necessary as a result of the war."[50] Such measures include the right of an Occupying Power to arrest and detain,[51] as well as the right to impose internment or assigned residence on protected persons.[52] Such actions must nevertheless comply with the requirements established under their respective provisions. Concerning occupied territory, Article 78(1) of the Fourth Geneva Convention states;

> "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at most, subject them to assigned residence or to internment."

Civilian internment pursuant to Article 78 is distinct from a sentence of imprisonment imposed by a competent Court pursuant to a fair trial.[53] Internment seeks to thwart a *future* danger to public safety or the security of the Occupying Power, based on supporting evidence or past activities of a particular individual. The object of assigned residence in accordance with Article 78 is to "move certain people from their domicile and force them to live, as long as the circumstances motivating such action continue to exist, in a locality which is generally out of the way and where supervision is more easily exercised."[54]

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[47] Article 49(3), Fourth Geneva Convention.
[48] *Prosecutor v. Blagojevic and Jokic, Trial Judgment*, IT-02-60-T, International Criminal Tribunal for the former Yugoslavia, 17 January 2005, para. 597.
[49] Article 43, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907.
[50] Article 27(4), Fourth Geneva Convention.
[51] Article 69, Fourth Geneva Convention.
[52] Article 78, Fourth Geneva Convention.
[53] See Dinstein, Yoram; The International Law of Belligerent Occupation, Cambridge University Press, 2009, 173.
[54] Article 41, Commentary on the Fourth Geneva Convention, 256.

Internment and assigned residence are preventative rather than punitive measures, and both are exceptional measures that can only be ordered for imperative reasons of security.[55] Furthermore, recourse to such measures can only be based exclusively on individual security considerations, there can be no questions of taking collective measures; each case must be decided individually within a specific context.[56] Finally, protected persons will unconditionally benefit from the provisions of Article 49, thus neither internment nor assigned residence can manifest outside the frontiers of the occupied territory; any attempt to do so may amount to deportation or forcible transfer.[57]

With respect to Palestinians in the West Bank, if the question of the continued occupation of the Gaza Strip is answered in the negative, Israel is prohibited from interning or assigning residence of Palestinians from the West Bank in the Gaza Strip. Indeed, should the State's position be that the Gaza Strip is no longer occupied, the principle of estoppel would deny this argument being made. Even if, however, the State is of the position that it remains in occupation of the Gaza Strip, the Court has in the past ruled that the extreme measures of assigned residence and internment can only be applied on an individual basis, following a founded concern that a particular individual poses a risk to security.[58] An exceedingly cautious assessment of the prevailing circumstances and individual concerned cannot be overstressed, as the unlawful confinement of a protected person is a grave breach of the Fourth Convention.[59] Indeed, even the disregard of the procedural safeguards attached to internment may taint an initially lawful internment with illegality.[60] Consequently, the rules on internment cannot provide a legitimate basis for a wholesale policy of forcibly transferring large numbers of individuals devoid of individual security considerations, from the West Bank to the Gaza Strip.

The severity of deportation or forcible transfer of protected persons is highlighted by the inclusion of "unlawful deportation or transfer" as a grave breach of the Fourth Geneva Convention.[61] The term 'unlawful' must be understood in relation to other provisions contained within international law more generally, and in particular, within the Fourth Geneva Convention. The Occupying Power cannot make deportation or forcible transfer lawful simply by enacting legislation; such measures would violate numerous provisions of the Fourth Convention and are thus beyond the legislative competence of an Occupying Power. The inclusion of the term unlawful simply distinguishes the various involuntary relocations permitted under the Fourth Geneva Convention - evacuation, assigned residence and internment, from the absolute prohibition of deportation and forcible transfer. Grave breaches are among the most serious violations of international humanitarian law and invoke third party responsibility to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and

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[55] Article 78, Commentary on the Fourth Geneva Convention, 367-9.
[56] Article 78, Commentary on the Fourth Convention, 367-8.
[57] Article 78, Commentary on the Fourth Convention, 368.
[58] *Ajuri et al.* v. *IDF Commander in the West Bank et al.* Israeli High Court of Justice, *7015/02,* paras 24,25,39.
[59] Article 147, Fourth Geneva Convention.
[60] *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic, Trial Judgment*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia, 16 November 1998, para 583. See also, Dinstein, Yoram; The International Law of Belligerent Occupation, Cambridge University Press, 2009, 173.
[61] Article 147, Fourth Geneva Convention. Article 85(4)(a), of Additional Protocol I also considers unlawful deportation or forcible transfer as a grave breach.

bring such persons regardless of their nationality, before its own courts.[62]

Deportation and forcible transfer also qualify as war crimes during both international and non-international armed conflicts.[63] The term war crime is much broader in scope than that of grave breaches, encompassing a greater range of serious violations of the laws and customs of war. The most detailed and authoritative codification of the concept of war crimes is contained in Article 8 of the Rome Statute of the International Criminal Court. A vast majority of the provisions contained under Article 8 of the Rome Statute are uncontroversial and generally reflective of customary international law. No State, Israel included, has challenged the attribution of deportation or forcible transfer as a war crime. It is widely known however that Israel challenged the inclusion of Article 8(2)(b)(viii) relating to the "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory that it occupies" as a war crime and also contests the customary status of this provision. While this point of law bears no consequence on the particular case at hand, it is worth noting that while Israel voted against the text of the *Rome Statute,* it stated that had this provision not been included it would have been able to vote in favor; thus implicitly confirming its acceptance of the remainder of the Article, including Article 8(2)(a)(vii), prohibiting unlawful deportation or transfer.[64]

To the extent that forcible relocations of Palestinians present in the West Bank to the Gaza Strip is carried out pursuant to a general policy of the Government of Israel, such actions may also constitute a crime against humanity. Under Article 7(1)(d) of the Rome Statute, when carried out as part of a "widespread or systematic attack directed against any civilian population" deportation and forcible transfer qualify as a crime against humanity. According to Article 7(2)(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". Article 7(2)(d) defines the scope of deportation or forcible transfer to include any "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." In this particular context, the term "without grounds permitted under international law" must be read in conjunction with the provisions of international humanitarian law as discussed above. Crimes against humanity entail individual criminal responsibility for those who planned, ordered, or executed such acts.

There is strong support to accept that the prohibition of deportation and forcible transfer is of customary status under international law.[65] The Appeals Chamber of the Yugoslavia Tribunal endorsed the view that "displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law."[66]

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[62] Article 146, Fourth Geneva Convention.
[63] Article 49(1), Fourth Geneva Convention and Article 17(1) of Additional Protocol II respectively.
[64] See UN Doc. A/CONF.183/SR.9, para 34. See Also, Schabas, William, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press 2010, 234.
[65] See generally Henckaerts, Jean-Marie, Louise Doswald-Beck; *Customary International Humanitarian Law, Volume 1: Rules*, Cambridge University Press, (2005); hereinafter, *ICRC Study.*
[66] *Prosecutor v. Milorad Krnojelac, Appeal Judgment*, IT-97-25-A, International Criminal Tribunal for the former Yugoslavia, 17 September 2003, paras 222-223.

Furthermore, the codification of the prohibition dates back to the Lieber Code of 1863,[67] and has since been explicitly prohibited under numerous subsequent international human rights,[68] humanitarian[69] and criminal law[70] instruments. The statutes of every major military or war crimes tribunal, both past and present, have qualified deportation or forcible transfer as either a war crime or crime against humanity, including for example; the International Military Tribunal of Nuremburg,[71] the International Military Tribunal for the Far East,[72] the International Criminal Tribunal for the former Yugoslavia,[73] the International Criminal Tribunal for Rwanda,[74] the Special Court for Sierra Leone,[75] the Extraordinary Chambers in the Courts of Cambodia,[76] and the International Criminal Court.[77]

Individual or mass forcible transfers, as well as deportations of protected persons within or from occupied territory are unequivocally prohibited during situations of armed conflict and belligerent occupation. In addition, deportation or forcible transfer of a civilian population may

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[67] Article 23 of the Libber Code declares, "private citizens are no longer … carried off to distant parts." Lieber Code of 24 April 1863, also known as Instructions for the Government of Armies of the United States in the Field, General Order No.100.

[68] Article 9 of the 1948 Universal Declaration of Human Rights states that "none shall be subjected to arbitrary arrest, detention or exile. Additionally, Article 13 off the Declaration states "Everyone has the right to leave any country, including his own, and to return to his country." Article 12(4) of the 1966 International Covenant on Civil and Political Rights states "No one shall be arbitrarily deprived of the right to enter his own country." Article 3(1) of Protocol 4(1963) to the European Convention of Human Rights and Fundamental Freedoms (1950) declares, "No one shall be expelled, by means of either an individual or collective measure, from the territory of the State from which he is a National." The second paragraph of the same Article reads, "No one shall be deprived of the right to enter the territory of the State of which he is a national." Article 25(5) of the American Convention on Human Rights (1969) states " No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it." Article 12(2) of the African Charter on Human Rights and People's Rights (1981) promulgates "Every individual shall have the right to leave any country including his own, and to return to his country …"

[69] Article 49(1) and 147 (grave breach) of the Fourth Geneva Convention; Article 85(4)(a) Additional Protocol I; Article 17 Additional Protocol II; see also, Rule 129 of the ICRC study of Customary International Humanitarian Law.

[70] Article 8(2)(b)(viii) of the Rome Statute (war crime during occupation); Article 8(2)(a)(vii) of the Rome Statute (war crime during international armed conflicts); Article 8(2)(e)(viii) of the Rome Statute (war crime during non-international armed conflicts); Article 7(1)(d) (crime against humanity).

[71] The Charter of the Nuremburg International Military Tribunal expresses in article 6(b) that "deportation to slave labor or for any other purpose" is a war crime. Similarly, subparagraph C of the same Article includes deportation among those crimes amounting to "crimes against humanity."

[72] Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including "deportation, and other inhumane acts committed against any civilian population, before or during the war."

[73] Article 5(d), ICTY Statute qualifies deportation as a crime against humanity while under article 2(g) of the 1993 ICTY Statute, the Tribunal is competent to prosecute unlawful deportation or transfer of civilians as a grave breach of the Fourth Geneva Convention.

[74] Article 3(d) of the Statute of for the International Criminal Tribunal for Rwanda qualifies deportation as a crime against humanity.

[75] Article 2 of the Statute for the Special Court for Sierra Leone qualifies deportation as a crime against humanity.

[76] The Extraordinary Chambers in the Courts of Cambodia has jurisdiction over both deportation and forcible transfer. Article 5 considers deportation as a crime against humanity, while Article 6 considers unlawful deportation or transfer a grave breach of the Geneva Conventions.

[77] The Rome Statute of the International Criminal Court qualifies deportation and forcible transfer of the civilian population as a war crime during both international (Article 8(2)(a)(vii)) and non-international armed conflicts (Article 8(2)(b)(viii) and as a crime against humanity (Article 7(1)(d))

also amount to a crime against humanity; such crimes are not dependent upon or precluded by the existence of armed conflict or belligerent occupation. Both war crimes and crimes against humanity entail individual criminal liability for those who planned, ordered or executed such acts. Under international humanitarian law, unlawful deportation or transfer amounts to a grave breach of the Fourth Geneva Convention and invokes third party responsibility. The customary status of the prohibition of forcible transfer and deportation is also irrefutable. Indeed, in the establishment of the Yugoslavia Tribunal, the Secretary General of the United Nations made clear that 'grave breaches' were recognized as crimes at the level of customary international law.[78]

While the prohibition of deportation and forcible transfer as contained within Article 49 of the Fourth Convention was drafted with the fresh and painful memory of Nazi atrocities in mind, it was nonetheless intended to prohibit any future incarnation of the egregious crime of deportation and forcible transfer. Indeed, this prohibition has since been invoked in other contexts and upheld in the Statutes and jurisprudence of international tribunals. Notwithstanding the exceptions detailed above – and demonstrated to be inapplicable to the current case – any involuntary relocation of Palestinians from the West Bank to the Gaza Strip is unequivocally prohibited and amounts to a serious violation of Israel's obligations under international law.

Respectfully submitted,

Dr Noam Lubell

30 June 2010

[78] Unlawful deportation or transfer is a grave breach under Article 147 of the Fourth Geneva Convention. See, Convent Report of the Secretary- General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para 34.