

JOHN QUIGLEY\* 

## PROHIBITION OF PALESTINE ARAB RETURN TO ISRAEL AS A CRIME AGAINST HUMANITY

Accepted: 3 December 2022

**ABSTRACT.** A displaced population of Palestine Arabs, numbering over seven million, is dispersed around the world, with major concentrations in Lebanon, Jordan, Syria, and Palestine itself. This population is prohibited from entry for renewed residence in home areas situated in Israel. In international law a right of return to one's country is guaranteed as a matter of fundamental rights. Severe deprivation of internationally defined rights victimizing a civilian population based on ethnicity or nationality constitutes the crime of persecution, a sub-category of crimes against humanity, prosecutable at the International Criminal Court. With respect to a major portion of the displaced Palestine Arabs, jurisdictional prerequisites obtain for the opening of an investigation that might lead to charges against Israeli officials responsible for denying return to the Palestine Arabs.

### I SCOPE OF ANALYSIS

In 2011, Israel's Prime Minister Benjamin Netanyahu, in a speech to the US Congress, declared that 'the Palestinian refugee problem will be resolved outside the borders of Israel'.<sup>1</sup> That statement was consistent with a practice Israel has followed since the departure in 1948 of the majority of the Arab population from the segment of Palestine over which Israel gained control in that year. The prohibition of return to the displaced Arabs of Palestine (to whom we will refer as 'the Palestine Arabs') has been condemned in regard to the responsibility of Israel as a state.<sup>2</sup> The question arises whether Israeli officials who implement the policy thereby commit a crime that could be prosecuted at the International Criminal Court (ICC).

This question will be addressed by examining ICC jurisdiction and how it applies in this situation. The ICC has jurisdiction to prosecute only for

---

\* John Quigley is Professor Emeritus, Moritz College of Law, The Ohio State University, Columbus. E-mail: [quigley.2@osu.edu](mailto:quigley.2@osu.edu).

<sup>1</sup> US Congress, 157 *Congressional Record* 72, at H3350, 24 May 2011.

<sup>2</sup> See, eg, Assistance to Palestine refugees, UN General Assembly Res. 76/77, 9 September 2021 noting that repatriation ('has not yet been effected'). And see Section VI *infra*.

crimes specified in its founding treaty, the Rome Statute of the International Criminal Court, as falling within its subject matter jurisdiction. Four categories of crime are specified: aggression, genocide, war crimes, and crimes against humanity.<sup>3</sup> The article focuses on one particular sub-category within crimes against humanity, called the crime of persecution.<sup>4</sup> Beyond subject matter, however, other requisites of jurisdiction must be met before persons can be prosecuted. The criminal conduct must have occurred at a point in time when the Rome Statute was in force, and when it applied to relevant states. Jurisdiction over persons at the ICC is limited by reference to the adherence of relevant states to the Rome Statute.

These other requisites will be addressed preliminarily to determine whether, even if the prohibition of return to the Palestine Arabs qualifies as the crime of persecution, anyone could be charged. First will be jurisdiction over persons who might be responsible for prohibiting the return of the Palestine Arabs. Second will be the time frame of the conduct of such persons and whether it occurs at a time falling within the Court's jurisdiction.

Overall, the article addresses prescriptive jurisdiction only, namely, issues relating to whether charges may be brought. Enforcement jurisdiction – how the ICC might gain physical custody of a person who prohibits the return of the Palestine Arabs – is beyond its scope. Also beyond its scope is possible criminal liability for forcing the Palestine Arabs from their country. The article addresses only the question of criminal liability for prohibiting return.

## II JURISDICTION OVER THE PERSON OF ISRAELI OFFICIALS

The ICC has jurisdiction over persons committing crimes within its subject-matter jurisdiction on a worldwide basis only if a particular situation is referred to the Court by the United Nations Security Council.<sup>5</sup> Otherwise, its jurisdiction over persons is limited by the adherence of particular states to the Rome Statute.<sup>6</sup> It has jurisdic-

---

<sup>3</sup> Rome Statute of the International Criminal Court, Article 5, 17 July 1998, 2187 UNTS 3 [hereinafter, 'ICCS'].

<sup>4</sup> Article 7 ICCS.

<sup>5</sup> Article 13(b) ICCS. This article does not address the possibility that the Security Council might refer the situation of the prohibition against return of the Palestine Arabs. To date, no such referral has occurred.

<sup>6</sup> These constraints do not apply if a situation is referred by the Security Council. Article 13(b) ICCS.

tion over acts committed by a national of a state party. It has jurisdiction over acts committed on a vessel or aircraft registered to a state party. It has jurisdiction over acts committed in the territory of a state party.<sup>7</sup> Additionally, it has jurisdiction over nationals of, and in the territory of, non-party states that file appropriate conferrals with it.<sup>8</sup>

### 2.1 *Status of Israel in Relation to the International Criminal Court*

The conduct involved in prohibiting return of the Palestine Arabs is carried out in the territory of Israel by persons holding one or another official post.<sup>9</sup> Legislation determines who is eligible for entry.<sup>10</sup> The Cabinet oversees the executive-branch departments that monitor entry, like the Defence Force and the Population and Immigration Authority. Officials in the criminal law bureaucracy implement exclusionary legislation.

If Israel were a party to the Rome Statute, jurisdiction over the person would extend to Israeli nationals and to conduct undertaken in the territory of Israel. Israel did sign the Rome Statute on 31 December 2000. Under the Rome Statute, however, a signing state must ratify in order to become a party.<sup>11</sup> On 28 August 2002, Israel notified the United Nations Secretary-General ‘that Israel does not intend to become a party’.<sup>12</sup> Since that time, Israel has not ratified the Rome Statute. As a result, at least at present, the ICC has no jurisdiction based on a person’s Israeli nationality or on the fact of conduct taking place in Israel. If an Israeli official happened to have the nationality of a state that is a party, the jurisdictional requisite could be satisfied in that way.

Of the Palestine Arabs, however, many reside in states that are party to the Rome Statute, namely, Jordan and Palestine.<sup>13</sup> As to the

<sup>7</sup> Article 12(2) ICCS.

<sup>8</sup> Article 12(3) ICCS.

<sup>9</sup> Roger O’Keefe, *International Criminal Law* (OUP, Oxford 2015) 143 (noting that Article 7 ICCS does not limit liability to persons holding government positions). Hence, a non-official person could be charged.

<sup>10</sup> Israel, Entry into Israel Law 5712-1952, 5 September 1952 (and subsequent amendments).

<sup>11</sup> Article 125(2) ICCS.

<sup>12</sup> Multilateral Treaties Deposited with the Secretary-General, <https://treaties.un.org/pages/participationstatus.aspx>.

<sup>13</sup> Multilateral Treaties Deposited with the Secretary-General, <https://treaties.un.org/pages/participationstatus.aspx>.

latter, a chamber of the ICC has confirmed that its territory for purposes of ICC jurisdiction encompasses ‘Gaza and the West Bank, including East Jerusalem’.<sup>14</sup>

## 2.2 *Territoriality in Relation to the Prohibition of Return*

That pattern of residence opens the territorial base of jurisdiction in a way that applies to the prohibition of return of the Palestine Arabs.<sup>15</sup> For purposes of criminal jurisdiction, conduct occurs not only at the location of the perpetrator, but as well at the location of the conduct’s impact, or effect.<sup>16</sup> An example is that of a person who fires a bullet across an international border, killing someone in the other state. The conduct falls under the jurisdiction of each state.

Under the Rome Statute, for a state that is a party, prescriptive jurisdiction obtains if ‘the conduct in question occurred in its territory’.<sup>17</sup> The conduct of Israeli officials in prohibiting the return has effect on the Palestine Arabs residing in Palestine and Jordan. A comparable situation has arisen before at the ICC, and it has been held that territorial jurisdiction obtains in a state of impact. In the investigation of forcible deportation of population from Myanmar into Bangladesh, the conduct of the actors took place in Myanmar, which is not a party to the Rome Statute. The victims were forced into neighboring Bangladesh, which is a party.

The ICC Prosecutor determined that the conduct occurred not only in Myanmar but also in Bangladesh. A chamber of the Court agreed. The chamber said that the Court has prescriptive jurisdiction ‘if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party’.<sup>18</sup> The chamber referred to general international law as supporting that conclusion.<sup>19</sup> It quoted legislative provisions from a

---

<sup>14</sup> Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, ¶118, 5 February 2021, ICC-01/18.

<sup>15</sup> On the theoretical basis of ICC jurisdiction over nationals of non-party states, see generally, Monique Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge, Cambridge University Press 2020).

<sup>16</sup> See eg, US Supreme Court, *Heath v. Alabama*, 474 US 82 (1985).

<sup>17</sup> Article 12(2)(a) ICCS.

<sup>18</sup> Pre-Trial Chamber I, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’, ¶64, 6 September 2018, ICC-RoC46(3)-01/18.

<sup>19</sup> Id. ¶65.

## PROHIBITION OF RETURN TO ISRAEL

number of states that provide for prescriptive jurisdiction where only one aspect of the crime occurs in its territory.<sup>20</sup> It referred to ‘the inherently transboundary nature of the crime of deportation’.<sup>21</sup> The same circumstance obtains for prohibition against return. The perpetrators are in one state, while the victims are in another.

Another ICC chamber hearing a different phase of the Prosecutor’s request on Bangladesh/Myanmar quoted legislative provisions from a number of states providing prescriptive jurisdiction in the specific situation in which a crime is initiated abroad. Under these legislative provisions, states exercise jurisdiction over acts perpetrated in a foreign state but with impact in their territory.<sup>22</sup> As applied to the situation of the Palestine Arabs, the rule on territoriality in relation to crimes having impact in another jurisdiction means that territorial jurisdiction obtains, at least for conduct prohibiting the return of those inhabiting Palestine or Jordan.

### III PROHIBITION OF RETURN: JURISDICTION *RATIONE TEMPORIS*

One other jurisdictional prerequisite relates to the time at which a potentially delictual act is performed. The Court has jurisdiction only over acts committed after the Rome Statute came into force, which was 1 July 2002.<sup>23</sup> ‘No person’, reads a key provision, ‘shall be criminally liable under this Statute for conduct prior to the entry into force of the Statute’.<sup>24</sup> An additional time limitation is the dates of adherence to the Rome Statute for the states in which there is territorial jurisdiction. For Palestine Arabs in Jordan, 1 July 2002 is the date from which territorial jurisdiction obtains by virtue of Jordan’s ratification of the Rome Statute.<sup>25</sup> For Palestine Arabs in Gaza or the

---

<sup>20</sup> Id. ¶66.

<sup>21</sup> Id. ¶71.

<sup>22</sup> Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ¶56, 14 November 2019, ICC-01/19.

<sup>23</sup> Article 11(1) ICCS.

<sup>24</sup> Article 24 ICCS.

<sup>25</sup> Multilateral Treaties Deposited with the Secretary-General, <https://treaties.un.org/pages/participationstatus.aspx> (showing Jordan ratification dated 11 April 2002).

West Bank, the date is 13 June 2014 by virtue of a declaration lodged by Palestine in that year to confer jurisdiction.<sup>26</sup>

The Palestine Arabs departed, of course, prior to the existence of the ICC.<sup>27</sup> ‘Deportation or forcible transfer of population’ is punishable as a crime against humanity.<sup>28</sup> If conduct relating to the 1948 departure qualifies as ‘deportation’ or ‘forcible transfer’, the prohibition of return could be seen as conduct of a continuing nature that relates back to 1948. This article does not address this scenario. It asks, rather, whether the present-day conduct involved in prohibiting return can be prosecuted under the Rome Statute.

#### IV PROHIBITION OF RETURN: SUBJECT MATTER JURISDICTION

Although there have to date been no ICC prosecutions for prohibiting the return of a displaced population, one ICC chamber said that such conduct would fall within ICC subject matter jurisdiction. The situation was that of the Myanmar Rohingya, who found refuge in Bangladesh. The chamber noted that ‘following their deportation’:

the authorities of Myanmar supposedly impede their return to Myanmar. If these allegations were to be established to the required threshold, preventing the return of members of the Rohingya people falls within article 7(1)(k) of the Statute. Under international human rights law, no one may be arbitrarily deprived of the right to enter one’s own country. Such conduct would, thus, be of a character similar to the crime against humanity of persecution, which ‘means the intentional and severe deprivation of fundamental rights contrary to international law’.<sup>29</sup>

---

<sup>26</sup> Article 11(2) and Article 12(3) ICCS. Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014 (conferring jurisdiction for ‘identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014’). This was followed by Palestine’s accession to the Rome Statute on 2 January 2015.

<sup>27</sup> Palestine – Progress Report of the United Nations Mediator, ¶11, UN General Assembly Res. 194, 11 December 1948.

<sup>28</sup> Article 7(1)(d) ICCS.

<sup>29</sup> Pre-Trial Chamber I, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’ (Bangladesh/Myanmar), ¶77, 6 September 2018, ICC-RoC46(3)-01/18.

## PROHIBITION OF RETURN TO ISRAEL

A second ICC chamber hearing a later stage in the Bangladesh/Myanmar investigation found ‘a reasonable basis to believe that the following crimes against humanity were committed’, listing ‘other inhumane acts under article 7(1)(k), namely, the infliction of great suffering or serious injury by means of intentional and severe violations (colloquially, violation or deprivation) of the customary international law right of displaced persons to return safely and humanely to the State of origin with which they have a sufficiently close connection (colloquially, right to return)’, as well as ‘persecution on ethnic and/or religious grounds under article 7(1)(h) by means of deportation and violation of the right of return’.<sup>30</sup> It is to the elements of the crime of persecution that we now turn.

### V PERSECUTION: ELEMENTS OF THE CRIME

The crime of persecution appears in Rome Statute Article 7(1) as the eighth in a list of ten modes of conduct that can constitute a crime against humanity.

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;

---

<sup>30</sup> Pre-trial Chamber III, Situation in the People’s Republic of Bangladesh/Republic/Republic of the Union of Myanmar, Request for Authorization of an Investigation Pursuant to Article 15, ¶75, 4 July 2019, ICC-01/19.

JOHN QUIGLEY

- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The reference in Article 7(1)(k) to 'other inhumane acts' means that all ten are deemed 'inhumane'.

The conduct constituting persecution is described in a definition given in Article 7(2)(g): "'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. The elements of the crime of persecution are schematized in Elements of Crimes, a document composed by a committee of experts, as called for by the Rome Statute:<sup>31</sup>

Article 7 (1) (h)

Crime against humanity of persecution

Elements

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. [footnote]
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>32</sup>

Hence, for subject matter jurisdiction for the crime of persecution, rights must be violated. Human rights instruments are incorporated

---

<sup>31</sup> Article 21 ICCS.

<sup>32</sup> Elements of Crimes, Article 7, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.



## PROHIBITION OF RETURN TO ISRAEL

as a source of law by Rome Statute Article 21, which requires the ICC to apply ‘In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;’ but then ‘In the second place, where appropriate, applicable treaties and the principles and rules of international law’. An ICC chamber dealing with an allegation of persecution looked to relevant human rights and humanitarian law instruments and principles:

The Chamber considers that, for the purpose of identifying those rights whose severe infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration of Human Rights (UDHR), the two UN Covenants on Human Rights, and other international instruments on international human rights, as well as the rights reflected in international humanitarian law.<sup>33</sup>

Thus, the *actus reus* of persecution is a deprivation of rights. The deprivation must be severe. The rights must be ones that are fundamental and protected by international law. The deprivation must be intentional and be undertaken ‘by reason of the identity of the group or collectivity’. Although the ‘group or collectivity’ need not be any particular type of ‘group or collectivity’, the conduct impacting the ‘group or collectivity’ must be undertaken ‘on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3,<sup>34</sup> or other grounds that are universally recognized as impermissible under international law’.

## VI PERSECUTION: AS APPLIED TO RIGHT OF RETURN

The right of return to one’s country is established in human rights instruments. It appears in the Universal Declaration of Human Rights: ‘Everyone has the right to leave any country, including his own, and to return to his country’.<sup>35</sup> Two major human rights treaties incorporate this prescription. The International Covenant on Civil and Political Rights (‘ICCPR’) provides that ‘no one shall be arbi-

---

<sup>33</sup> Pre-Trial Chamber VI, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, Judgment, ¶991, 8 July 2019, ICC-01/04-02/06, citing and quoting ICTY, Prosecutor v. Kupreškić et al., Trial Chamber, Judgment, ¶621, 14 January 2000, IT-95-16.

<sup>34</sup> Per paragraph 3: ‘the two sexes, male and female’.

<sup>35</sup> UDHR, Article 13(2), UN General Assembly Res. 217, 10 December 1948.

trarily deprived of the right to enter his own country'.<sup>36</sup> The International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') provides for a right 'to return to one's country'. 'States Parties', recites Article 5, undertake to prohibit and to eliminate racial discrimination in all its forms. 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (ii) The right to leave any country, including one's own, and to return to one's country; (iii) The right to nationality'.<sup>37</sup> These instruments do not link a right of entry to a reason for being outside the country. The right of entry is a self-standing right that does not relate back to a time of departure. It may, in fact, apply to persons who never departed, so long as they have the requisite connection.

Israel is a party to both the ICCPR and ICERD, rendering them applicable under Rome Statute Article 21. Even absent Israel's party status, the right of entry as found in the two treaties, in the UDHR, and in international practice, is regarded as a customary norm.<sup>38</sup> It falls under Rome Statute Article 21 as part of 'the principles and rules of international law'. As already noted, an ICC chamber has affirmed a 'customary international law right of displaced persons to return safely and humanely to the State of origin'.<sup>39</sup>

### 6.1 *Right of Entry for Population Groups*

The victims of the prohibition of entry may be single individuals or an entire population. We have already seen that two different ICC chambers applied the right to the Rohingya population.<sup>40</sup> In Abkhazia, a breakaway sector of Georgia, after a population was dis-

<sup>36</sup> ICCPR, Article 12(4), 999 UNTS 171.

<sup>37</sup> ICERD, Article 5(d)(ii), 660 UNTS 195.

<sup>38</sup> Christian Tomuschat, 'Das Recht Auf Die Heimat Neue Rechtliche Aspekte', in *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Josef Partsch zum 75. Geburtstag* (Duncker & Humblot, Berlin 1989) 183, at 187, citing Commission on Human Rights Res 1988/4 of 22 February 1988 affirming 'the right of the Afghan refugees to return to their homes in safety and honour'. (UN Doc E/CN.4/RES/1988/4, ¶4).

<sup>39</sup> Pre-Trial Chamber III, Situation in the People's Republic of Bangladesh/Republic/Republic of the Union of Myanmar, Request for Authorization of an Investigation Pursuant to Article 15, ¶75, 4 July 2019, ICC-01/19.

<sup>40</sup> See *supra* nn 29–30.

placed during hostilities, the United Nations Security Council said that repatriation was required, noting ‘the right of refugees and displaced persons to return to their homes’.<sup>41</sup> The International Court of Justice found a violation in regard to the population of the Chagos Archipelago. The Court explained that ‘the entire population of the Chagos Archipelago was either prevented from returning or forcibly removed and prevented from returning by the United Kingdom’.<sup>42</sup> The Court found the deprivation of return to violate human rights: ‘As regards the resettlement’ of this population, the Court said, ‘this is an issue relating to the protection of the human rights of those concerned’.<sup>43</sup> The Court did not name a treaty for this proposition, evidently considering a right of resettlement to be protected independent of any treaty.

### 6.2 *Right of Entry for the Palestine Arabs*

The prohibition of return for the Palestine Arabs has been a matter of concern to the international community since 1948. It has been on the agenda of the international body responsible for tracking racial or ethnic discrimination, the Committee on the Elimination of Racial Discrimination, which conducts periodic review of states party to ICERD.<sup>44</sup> When the Committee completes the review of a state, it makes an assessment in a document headed ‘Concluding Observations’. In 1987, after reviewing Israel, the Committee stated the following in regard to Article 5, the provision on right of entry:

593. With regard to article 5 of the Convention, members of the Committee wished to know why Israel did not permit the Palestinian Arabs who had been driven from their lands to come back and obtain the same treatment as Jewish people in respect of the recovery of their land, and whether it was Government policy to ensure equal rights for Palestinians in respect of the rights referred to in article 5.<sup>45</sup>

<sup>41</sup> UN Security Council Res. 876, ¶5, 19 October 1993.

<sup>42</sup> Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (adv. op.), [2019] ICJ Rep 95, at 110.

<sup>43</sup> Id. at 139.

<sup>44</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Article 8, 660 UNTS 195.

<sup>45</sup> Report of the Committee on Racial Discrimination, §593, UN General Assembly, Official Records, 42nd session, Supp. No. 18, UN Doc. A/42/18.

The fact that the Committee found the denial to be within its mandate as a body monitoring discrimination showed that the Committee deemed the denial to be based on factors like those specified for the crime of persecution in the Rome Statute, namely, as acts against ‘any identifiable group or collectivity on political, racial, national, ethnic, cultural [or] religious’ grounds. In 1998, the Committee reverted to the issue in Concluding Observations after another review of Israel:

18. The right of many Palestinians to return and possess their homes in Israel is currently denied. The State party [Israel] should give high priority to remedying this situation.<sup>46</sup>

In a 2007 review of Israel, the Committee saw the violation continuing:

211. The Committee is concerned about the denial of the right of many Palestinians to return and repossess their land in Israel (article 5 (d) (ii) and (v) of the Convention).

The Committee reiterates its view, expressed in its previous concluding observations on this issue, and urges the State party to assure equality in the right to return to one’s country and in the possession of property.<sup>47</sup>

The prohibition of return to the Palestine Arabs is an annual agenda item for the UN General Assembly. Each year, it calls on Israel to repatriate. In a typical resolution, adopted in 2016, the General Assembly noted ‘with regret that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly resolution 194 (III), has not yet been effected’.<sup>48</sup> By so saying, the General Assembly indicated its view that repatriation was legally required.

Resolution 194 was adopted in 1948. In it, the General Assembly called on Israel to allow the Palestine Arabs ‘to return to their homes’

---

<sup>46</sup> Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel, 30 March 1998, §18, UN Doc. CERD/C/304/Add.45.

<sup>47</sup> Report of the Committee on the Elimination of Racial Discrimination, 70th session (19 February-9 March 2007) 71st session (30 July-17 August 2007), ¶211, UN General Assembly, Official Records, 62nd session, Supp. No. 18, UN Doc. A/62/18.

<sup>48</sup> Assistance to Palestine refugees, UN General Assembly Res. 71/91, 22 December 2016.

and set up a three-nation committee tasked with overseeing the modalities of repatriation.<sup>49</sup> The fact that the General Assembly set up a committee for this purpose showed that it considered repatriation not simply desirable but an action that was required as a matter of law. In 1967, the UN Security Council showed the importance it attached to repatriation of the Palestine Arabs by calling ‘a just settlement of the refugee problem’ a requisite for peace in the Middle East.<sup>50</sup>

### 6.3 *Identifiable Group or Collectivity*

Article 7(1)(h) specifies that acts qualify as the crime of persecution only if directed at ‘any identifiable group or collectivity’. This element would seem to be satisfied as regards the Palestine Arabs. They are a grouping that is identifiable. They are referred to in UN General Assembly resolutions as Palestine refugees.<sup>51</sup> An international institution has been created to provide them protection and assistance, the United Nations Relief and Works Administration for Palestine Refugees in the Near East.<sup>52</sup>

### 6.4 *Factors Underlying the Deprivation*

Per Rome Statute Article 7(1)(h), as relevant to the situation of the Palestine Arabs, the deprivation of rights must be found to be on grounds that are ‘political, racial, national, ethnic, cultural, [or] religious’, or are ‘other grounds that are universally recognized as impermissible under international law’. In one case, an ICC chamber found this criterion to be satisfied where the only link among the victims was their political allegiance.<sup>53</sup> The Palestine Arabs readily qualify as a group that falls into one or more of the factors listed.

---

<sup>49</sup> Palestine – Progress Report of the United Nations Mediator, ¶11, UN General Assembly Res. 194, 11 December 1948.

<sup>50</sup> UN Security Council Res. 242, ¶2(b), 22 November 1967. And see John Quigley, ‘Repatriation of the Displaced Arabs of Palestine and the Meaning of Security Council Resolution 242’ (2005–06) 12 *Yearbook of Islamic and Middle Eastern Law* 3 (explaining that the phrase ‘just settlement’ meant repatriation)

<sup>51</sup> Assistance to Palestine Refugees, UN General Assembly Res. 302, 8 December 1949.

<sup>52</sup> *Id.* ¶7.

<sup>53</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Muhammad Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and 61(7)(b) of the Rome Statute, ¶144, 23 January 2012, ICC-01/09 02/11.

They are descendants of an ancient population that took on the Arabic language and culture in the seventh century of the common era. Their territory was accepted as that of a state in the 1920s.<sup>54</sup> The prohibition against their return relates to them and to them only.

The prohibition, moreover, is based on their nationality or ethnicity. It was that aspect of the prohibition that brought it to the attention of the Committee on Racial Discrimination. Israel's legislation on Israel nationality is a key aspect of the exclusion of the Palestine Arabs. It bars them from eligibility for Israeli nationality. It reads:

A person who, immediately before the establishment of the State, was a Palestinian citizen ... shall become an Israel national with effect from the day of the establishment of the State if: ...he was registered on ... (1st March 1952) as an inhabitant ...; and ...he is an inhabitant of Israel on the day of the coming into force of this Law; and ...he was in Israel, or in an area which became Israel territory after the establishment of the State, from the day of the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.<sup>55</sup>

In the period 'immediately before the establishment of the State', inhabitants of Palestine of all ethnicities were 'Palestinian citizens'. This provision, by its reference to registration on 1 March 1952, accorded Israel nationality only to those who continued to reside in the country from the time of 'the establishment of the State', which was 1948, until 1952. On its face, this language applied equally to Jews and Arabs. But the Palestine Arabs were barred from entry after 1948, hence the language as drafted represented a bar on racial or ethnic grounds. Jews during the period 1948 to 1952 were freely allowed to enter.<sup>56</sup>

### 6.5 *Severity of the Deprivation*

To be prosecutable, the deprivation of rights must be severe, per the definition cited above in Rome Statute 7(2)(g), and the right must be

---

<sup>54</sup> Treaty of Peace (Britain, France, Italy, Japan, Greece, Roumania, Serb-Croat-Slovene State, Turkey), Lausanne, 24 July 1923, Articles 30, 46, 28 LNTS 11.

<sup>55</sup> Israel, Nationality Law 5712-1952, §3, 14 July 1953.

<sup>56</sup> Knesset, Law of Return, 5 July 1950, §4 ('Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an Oleh under this Law'). 'Oleh' means a Jew coming to Israel to reside.

## PROHIBITION OF RETURN TO ISRAEL

‘fundamental’. An ICC chamber faced with applying this definition in a persecution situation explained, ‘The commission of any act considered to be a crime against humanity will, in principle, result in a deprivation of fundamental rights of one or more individuals’, and would thereby ‘meet, in and of itself, the minimum level of severity required’.<sup>57</sup> While there may be some circularity in the chamber’s reasoning, the chamber was clearly setting a low bar for application of these elements.

These elements would, in any event, seem to be satisfied as regards the prohibition of return to the Palestine Arabs. Exclusion of persons from their country and from nationality deprives them of an array of other rights. The exclusion of the Palestine Arabs deprived them of protection. Much international attention has been devoted to preventing statelessness.<sup>58</sup>

The severity of the deprivation is reflected in the attention given by the UN General Assembly and Security Council, which we have already seen. In 1949 the deprivation was raised in the UN General Assembly as an issue bearing on Israel’s eligibility for UN membership, which is open only to states that are ‘peace-loving’.<sup>59</sup> Israel’s refusal to repatriate the Palestine Arabs was raised in a UN committee that was invoking this criterion while vetting Israel for membership.<sup>60</sup> Denmark asked how the repatriation refusal squared ‘with the principle laid down in Article 1, paragraph 2 of the [United Nations] Charter, dealing with the principle of equal rights and self-determination of peoples’.<sup>61</sup>

The life circumstances of the Palestine Arabs denied return attest to the severity of the violation. For those whose occupation was in agriculture before 1948, they were excluded from their means of livelihood. For those who had enough resources to have bank accounts, Barclays Bank, where many had their savings, refused them access to their accounts after Israel’s Custodian of the Property of

---

<sup>57</sup> Pre-Trial Chamber VI, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, Judgment, ¶994, 8 July 2019, ICC-01/04-02/06.

<sup>58</sup> Convention on the Reduction of Statelessness, New York, 30 August 1961, 989 UNTS 175.

<sup>59</sup> Article 4 UN Charter.

<sup>60</sup> UN General Assembly, 3rd session, Part II, Ad Hoc Political Committee, Summary Records of Meetings 6 April – 10 May 1949, 47th meeting, 6 May 1949, at 273ff., UN Doc. A/AC.24/SR.47.

<sup>61</sup> Id. at 283.

Absentees asked Barclays to turn over the accounts of the Palestine Arabs. Barclays complied.<sup>62</sup> The Arabs were ‘absent’ because they were being denied repatriation. A court case was raised against Barclays Bank in the United Kingdom, but the House of Lords, which heard the last stage in the proceedings, declined relief to the Arab account holders.<sup>63</sup> Only six years later did Israel release the funds.<sup>64</sup>

An international institution had to be created to provide shelter and sustenance, the United Nations Relief and Works Administration for Palestine Refugees in the Near East.<sup>65</sup> UNRWA functions to the present day, funded by contributions from various states. Its annual budget in recent years has been around one billion US dollars,<sup>66</sup> which means that the prohibition of return to the Palestine Arabs imposes a financial burden on the international community. The UN General Assembly noted that burden in its 2016 resolution on repatriation, stating that as a result of Israel’s refusal, ‘the situation of the Palestine refugees continues to be a matter of grave concern and the Palestine refugees continue to require assistance to meet basic health, education and living needs’.<sup>67</sup>

Deprived of their land, their wealth, and their communities, the Palestine Arabs depend on this charity.<sup>68</sup> In 2015, the UN General Assembly expressed regret over ‘the fact that, for more than six decades, the Palestine refugees have suffered from the loss of their homes, lands and means of livelihood’.<sup>69</sup> The deprivation to the

---

<sup>62</sup> J. Milnes Holden, ‘Relationship of Banker and Customer’ (1954) 17 *Modern-Law Review* 467, at 468.

<sup>63</sup> *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial, and Overseas), Ltd.*, [1954] 2 W.L.R. 1027, [1954] 2 All E.R. 226.

<sup>64</sup> Israel “unfreezes” Arab accounts: refugees to benefit, *Times*, 4 November 1954, 3. Rinna Grossman, As seen from Israel, *Jewish Advocate* (Boston), 11 November 1954, at A2.

<sup>65</sup> Assistance to Palestine Refugees, UN General Assembly Res. 302, ¶7, 8 December 1949.

<sup>66</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East, Programme Budget 2020–2021, Table 1-1 Biennium Budget 2020–2021 (September 2019).

<sup>67</sup> Assistance to Palestine refugees, UN General Assembly Res. 71/91, 22 December 2016.

<sup>68</sup> Francesca Albanese & Lex Takkenberg, *Palestinian Refugees in International Law* (OUP, Oxford 2020) 162–165.

<sup>69</sup> Assistance to Palestine refugees, UN General Assembly Res. 70/83, 9 December 2015.



Palestine Arabs would seem to constitute a ‘severe’ denial of a ‘fundamental’ right.

## VII PERSECUTION: CONTEXT ELEMENTS

In addition to the elements relating to the conduct of a perpetrator, the crime of persecution involves requisites referred to as ‘contextual’, or ‘chapeau’ elements. A perpetrator’s conduct must be ‘committed as part of’ an ‘attack directed against a civilian population’, and that attack must be either ‘widespread’ or ‘systematic’. The conduct constituting such ‘attack’ may be that of persons other than the perpetrator.

### 7.1 *Palestine Arabs as a Civilian Population*

An act must be undertaken ‘as part of a widespread or systematic attack directed against a civilian population’. The ‘civilian’ character of the Palestine Arabs would seem to be evident.<sup>70</sup> The term ‘civilian’ as it appears in Article 7 is not textually limited, and the purpose of ‘crime against humanity’ is to protect, without limitation, both individuals as such and individuals as members of groups.<sup>71</sup> It has been held to include ‘groups distinguished by nationality, ethnicity or other distinguishing features’.<sup>72</sup>

For purposes of Article 7(1), it matters not how their nationality is defined; nor would the presence of combatants among civilians deprive the population of its civilian identity.<sup>73</sup> That the attack must be against such a population means that the persecution is not based on

---

<sup>70</sup> See generally Leila Nadya Sadat, ‘Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement’ (2017) 31 Emory ILR 197 (on a population as civilian regardless of whether acts against it occur in wartime or peacetime).

<sup>71</sup> Kai Ambos, ‘The ECCC’s Contribution to Substantive ICL: The Notion of “Civilian Population” in the Context of Crimes Against Humanity’ (2020) 18 Journal of International Criminal Justice 689, at 692.

<sup>72</sup> Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶81, 31 March 2010, ICC-01/09-19-Corr,

<sup>73</sup> Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, ¶135. United Nations, International Law Commission, A/CN.4/680.

factors specific to an individual among them but that it is against the population as a group.<sup>74</sup> This is the case with regard to prohibition of return of the Palestine Arabs. The prohibition is aimed at the group, not at particular individuals.

## 7.2 *Prohibition of Return as an Attack*

The term ‘attack’ is defined for purposes of crimes against humanity in Rome Statute 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.

Per the ICC Elements of Crimes, ‘The acts need not constitute a military attack’.<sup>75</sup> One chamber of the Court has said, to the same effect, that ‘attack’ for purposes of the crime of persecution ‘does not necessarily equate with a “military attack”’.<sup>76</sup> The chamber took ‘attack’ to mean a ‘campaign or operation carried out’ against a ‘civilian population’.<sup>77</sup> The civilian population, said the chamber, must be ‘the primary object of the attack and not just an incidental victim’.<sup>78</sup>

The Palestine Arabs are the ‘primary object’ of the ‘campaign or operation’. The prohibition against their return is a ‘course of con-

---

<sup>74</sup> Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, ¶136. United Nations, International Law Commission, A/CN.4/680.

<sup>75</sup> Elements of Crimes, Article 7, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

<sup>76</sup> Pre-Trial Chamber II, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶75, 15 June 2009, ICC-01/05-01/08. And see Kai Ambos (ed), *Treatise on International Criminal Law* vol 2 (OUP, Oxford 2022) 58–59 (stating that legislation amounting to persecution may constitute an ‘attack’).

<sup>77</sup> Pre-Trial Chamber II, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶75, 15 June 2009, ICC-01/05-01/08.

<sup>78</sup> *Id.* ¶75.

## PROHIBITION OF RETURN TO ISRAEL

duct' that involves 'multiple commission' of acts by a number of perpetrators over a period of time. It is carried out 'in furtherance of a State or organizational policy', namely, a policy of Israel as a state,<sup>79</sup> as found by United Nations and treaty bodies.<sup>80</sup> The text of Article 7 contains no territorial limitation. An 'attack' by a state can be within its own territory or elsewhere.

Per the chapeau of Article 7, a perpetrator must act 'with knowledge of the 'attack'. 'Knowledge' is defined in the Rome Statute in regard to required mental elements as 'awareness that a circumstance exists'.<sup>81</sup> This requirement of 'awareness' makes clear that the 'attack' can be the work of others. A perpetrator need only be aware of it.

Under the Rome Statute's standard for knowledge, perpetrators would not need to be aware of the detail of the policy, and their awareness could be inferred from circumstances.<sup>82</sup> In particular, their awareness could be inferred from the nature of the official position held by the perpetrator.<sup>83</sup>

For the perpetrator's own acts, intentionality is required, since the crime is defined as the 'intentional' deprivation of fundamental rights. Persecution requires intentional deprivation plus awareness that the conduct is part of a widespread or systematic attack. The Rome Statute defines 'intention' with respect both to conduct and to consequences of conduct. For 'conduct', intention is present if the person 'means to engage in the conduct'.<sup>84</sup> For 'consequence', intention is present if the person 'means to cause that consequence or is aware

---

<sup>79</sup> See *supra* n 1. And see Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute, ¶160, 21 March 2016, ICC-01/05-01/08 (stating 'that the "policy" need not be formalised and may be inferred from a variety of factors which, taken together, establish that a policy existed').

<sup>80</sup> See sec. 6.2 *supra*.

<sup>81</sup> Article 30(3) ICCS.

<sup>82</sup> Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, ¶151, United Nations, International Law Commission, A/CN.4/680.

<sup>83</sup> Pre-Trial Chamber I, Situation in the Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, 30 September 2008, ¶402, ICC-01/04-01/07.

<sup>84</sup> Article 30(2)(a) ICCS.

that it will occur in the ordinary course of events'.<sup>85</sup> A perpetrator would have to 'mean to engage' in conduct that keeps Palestine Arabs from entering. The element that the deprivation is 'by reason of the identity of the group or collectivity' is a circumstance attending the conduct, for which awareness suffices.<sup>86</sup> A 'circumstance' falls under an awareness standard.<sup>87</sup>

If an Israeli official engages in conduct that keeps Palestine Arabs from entering, being aware that it is Palestine Arabs who are being excluded, being further aware of the international right of entry,<sup>88</sup> and cognizant that the conduct is part of an exclusionary policy of the State of Israel, there would seem to be liability for persecution. The attitude of the official towards the policy would not seem to matter. The official might even be of the opinion that Israel should allow the return of the Palestine Arabs.

It is said that for persecution, a discriminatory intent is required on the part of the perpetrator.<sup>89</sup> There is indeed a requirement of intent to deprive of rights, and the deprivation must be on a ground that relates to the identity of members of a group.<sup>90</sup> An animus

---

<sup>85</sup> Article 30(2)(b) ICCS.

<sup>86</sup> The phrase 'by reason of' indicates that a distinction is being made based on group identity. The phrase does not imply that the perpetrator is necessarily acting in order to discriminate against the group.

<sup>87</sup> Article 30(3) ICCS. Or reference could be made to domestic legal systems, as the ICC is directed to do by Article 21(c) ICCS. In domestic systems, the level of mental culpability for offense elements that accompany the conduct may be less than is required for the conduct itself. See eg, *US v. Feola*, 420 US 671 (1975).

<sup>88</sup> A belief that might be held by an official that the right of return does not apply to the Palestine Arabs would not negate an awareness that the right does apply. If non-awareness that the right applies to the Palestine Arabs were to be asserted such an assertion would be assessed in light of the notoriety of the applicability of the right to the Palestine Arabs, given its reflection in the work of UN and treaty bodies. Thus, mistake of law under Article 32(2) ICCS would seem not to excuse liability. On these issues, see Kai Ambos (ed), *Treatise on International Criminal Law* vol 1 (OUP, Oxford 2022) 488–491.

<sup>89</sup> O'Keefe, *International Criminal Law*, *supra* n 9, at 145 (stating that 'a discriminatory intent is required'). Kai Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck, Munich 2022) 294 (stating a need for 'some form of discrimination that is intended to be and results in an infringement of an individual's fundamental right').

<sup>90</sup> Article 7(2)(g) ICCS.

against members of a group is not required, however.<sup>91</sup> In the Israeli context of deprivation of the rights of the Palestine Arabs, a perpetrator might be an Arab.<sup>92</sup> The Rome Statute definition of persecution does not limit liability to perpetrators who are of the same nationality or ethnicity as the victims.<sup>93</sup> An Israeli official who acts to deprive Palestinian Arabs of their right of entry might do so in order to keep from being dismissed from employment, or for other reasons apart from racial or ethnic bias.

### 7.3 *The 'Widespread' or 'Systematic' Character of the Attack*

The attack of which the perpetrator's conduct forms a part must be either 'widespread' or 'systematic'.<sup>94</sup> The term 'widespread' refers to the extent of victimization, while 'systematic' refers to acts that are planned, or calculated, as opposed to random.<sup>95</sup> The 'campaign or operation' aimed at keeping the Palestine Arab population would seem to qualify under either criterion, even though one of the two suffices. The numbers of persons being kept away render the attack 'widespread'.<sup>96</sup> The population of displaced Palestine Arabs is estimated at seven million, a substantial portion of them in territory of the states that are party to the Rome Statute.<sup>97</sup> The widespread character would seem to be satisfied as well by the fact that the

---

<sup>91</sup> The mental element required for the circumstance 'by reason of the identity of the group or collectivity' is only awareness, a mental element that would not necessarily involve racial or ethnic animus.

<sup>92</sup> Arabs make up some 20% of Israel's population.

<sup>93</sup> The Elements of Crimes, by using the term 'targeting' to describe the perpetrator's conduct, *supra* n 32, may give the impression of a requirement of an anti-racial or anti-ethnic animus. That term does not appear in the Rome Statute definition of persecution. The ICC, per Article 9(3) ICCS, is directed to use the Elements of Crimes only to the extent they are consistent with the Rome Statute.

<sup>94</sup> Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, ¶¶125-127, UN, International Law Commission, UN Doc A/CN.4/680 (explaining that the two terms read in the disjunctive).

<sup>95</sup> Darryl Robinson, 'Drafting Crimes Against Humanity at the Rome Conference' (1999) 93 AJIL 43, at 47.

<sup>96</sup> Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, ¶128, UN, International Law Commission, UN Doc A/CN.4/680 (indicating that number of victims can show 'widespread' character as a context element).

<sup>97</sup> By UNRWA's count, a combined total for the displaced Palestine Arabs in Palestine (Gaza and West Bank) and Jordan is approximately four and one half million.

‘campaign or operation’ extends over a substantial geographic area, encompassing, as we have seen, Jordan, Gaza, and the West Bank.<sup>98</sup>

The prohibition of return against the Palestine Arabs would also seem to qualify as ‘systematic’. That term, as used in Article 7, has been said by one ICC chamber to refer to ‘the organised nature’ of the acts and ‘the improbability of their random occurrence’.<sup>99</sup> The prohibition against return is not ‘random’, stemming, as it does, from a policy of the Government of Israel.<sup>100</sup> The same chamber has said that the existence of a state policy automatically renders an attack ‘systematic’.<sup>101</sup>

The requirement that an attack must be widespread or systematic applies, to repeat, only to the attack of which the perpetrator’s conduct forms a part. It does not apply to the conduct of the perpetrator.<sup>102</sup> As a result, a single act or omission by an official would suffice for criminal liability.<sup>103</sup>

## VIII PERSECUTION: CONNECTION TO ANOTHER ACT OR CRIME

For the crime of persecution, the perpetrator’s act must bear a connection to ‘any act referred to in [Article 7(1)]’, or to ‘any crime within

---

<sup>98</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶177, 23 January 2012, ICC-01/09/01/11 (indicating that perpetration over a substantial geographic area can show ‘widespread’ character as a context element in a prosecution for crimes against humanity by way of persecution under Article 7(1)(h) ICCS).

<sup>99</sup> Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶62, 27 April 2007, ICC-02/05-01/07.

<sup>100</sup> Assistance to Palestine refugees, UN General Assembly Res. 76/77, 9 September 2021 (noting that repatriation ‘has not yet been effected’).

<sup>101</sup> Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman: Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ¶62, ICC-02/05-01/07. Accord: Darryl Robinson, ‘Essence of Crimes against Humanity Raised by Challenges at ICC’, EJIL:Talk! 27 September 2011 (stating that an attack is ‘systematic’ if undertaken by a state).

<sup>102</sup> O’Keefe, *International Criminal Law*, *supra* n 9, at 143.

<sup>103</sup> *Id.* at 143. On omission liability, see sec. IX *infra*.

the jurisdiction of the Court'.<sup>104</sup> Historically, this requirement finds its origin in the Charter of the International Military Tribunal (Nuremberg), which covered 'persecutions on political, racial or religious grounds'.<sup>105</sup> The United States initiated the inclusion, seeking a basis to investigate 'persecution, etc. of Jews and others in Germany'.<sup>106</sup> Since persecution had not previously been charged as a crime,<sup>107</sup> the inclusion of a connection to war crimes provided protection from an *ex post facto* challenge.<sup>108</sup> However, a later elaboration of 'crime against humanity', with a sub-category of 'persecution on political, racial, religious or ethnic grounds' omitted an element of a connection to any other act or crime.<sup>109</sup>

### 8.1 *Relationship of the Other Act or Crime*

The requirement of another act or crime is explained in the Elements of Crimes for persecution, as quoted above and as repeated here:

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.  
[footnote]

---

<sup>104</sup> Article 7(1)(h) ICCS.

<sup>105</sup> Agreement for the Prosecution of the Major War Criminals of the European Axis, London, 9 August 1945 (United Kingdom of Great Britain and Northern Ireland, United States of America, France, Union of Soviet Socialist Republics), Annex: Charter of the International Military Tribunal, Article 6(c), 82 UNTS 279.

<sup>106</sup> *Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials* (Department of State, Washington 1949), 394. And see Jonas Nilsson, 'The Crime of Persecution in the ICTY Case-law', in Bert Swart et al (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP, Oxford, 2011) 220–221 (tying the term to human rights violations committed by the Third Reich).

<sup>107</sup> O'Keefe, *International Criminal Law*, *supra* n 9, at 137 (noting references to protection of humanity in humanitarian law instruments, early 20th century). Kai Ambos, *Treatise on International Criminal Law* vol 2 (OUP, Oxford 2022) 46 (finding that crime against humanity had entered customary law prior to World War II).

<sup>108</sup> O'Keefe, *International Criminal Law*, *supra* n 9, at 138 (noting this aim behind the 'connection' requirement in the IMT Charter).

<sup>109</sup> Draft Code Against the Peace and Security of Mankind, Article 18(e), YBILC [1996, vol II (Part Two)] 47.

The requirement is jurisdictional only, that is, it provides jurisdiction for prosecution for the crime of persecution.<sup>110</sup> No mental element is required in regard to the other act or crime on the part of the perpetrator. The footnote to paragraph 4 reads, ‘It is understood that no additional mental element is necessary for this element other than that inherent in element 6’.

It has been called a requirement of a ‘contextual link’ with the elements of the crime of persecution; the other act or crime need not be carried out by the perpetrator, nor must the perpetrator know about the other act or crime.<sup>111</sup> If an Article 7(1) act is charged, rather than a ‘crime within the jurisdiction of the Court’, that ‘act’ need not amount to a crime against humanity on its own.<sup>112</sup> Nor must the ‘act’ be widespread or systematic. Only a single act or crime is required.<sup>113</sup> The appellation ‘contextual link’ is less than apposite. With the context elements, the perpetrator’s act must be ‘part’ of them, and the perpetrator must be aware. With the other act or crime, the perpetrator’s conduct must only bear a ‘connection’, and the perpetrator need not be aware. In Rome Statute Article 7(1)(h), neither the seriousness of the other act or crime nor the nature of its relation to the rights deprivation is spelled out. The requirement in any event has seemingly been honoured in the breach. One ICC chamber confirming a persecution charge found the Prosecutor’s allegations sufficient, without specifying a connection to another act or crime.<sup>114</sup>

---

<sup>110</sup> Kai Ambos, *Treatise on International Criminal Law* vol 2 (OUP, Oxford 2022) text at note 635 and text at note 662 . Comments and Observations on the 2017 Draft Articles on Crimes against Humanity as Adopted on First Reading at the Sixty-ninth Session of the International Law Commission, Whitney R. Harris World Law Institute, Crimes Against Humanity Initiative Steering Committee, 30 November 2018, 6.

<sup>111</sup> Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court* (Manchester UP, Manchester 2009) 233–234.

<sup>112</sup> Darryl Robinson, ‘Drafting Crimes Against Humanity at the Rome Conference’ (1999) 93 AJIL 43, at 55.

<sup>113</sup> Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court* (Manchester UP, Manchester 2009) 234. Kai Ambos, *Treatise on International Criminal Law* vol 2 (OUP, Oxford 2022) text at note 632.

<sup>114</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Muhammad Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and 61(7)(b) of the Rome Statute , ¶283, 23 January 2012, ICC-01/09 02/11.



8.2 *Article 7(1) Acts Connected to Denial of Return to the Palestine Arabs*

That said, there are other Article 7(1) acts, and other crimes within the jurisdiction of the Court, that are connected to the denial of return to the Palestine Arabs. As to an Article 7(1) ‘act’, Article 7(1)(e) specifies imprisonment ‘in violation of fundamental rules of international law’. A criminal statute was adopted in Israel in 1954 to prevent what was characterized as ‘infiltration’. This statute did not broadly criminalize entry into the country without authorization. It applied specifically to the Palestine Arabs, by defining ‘infiltrator’ as follows:

1. In this Law –

‘infiltrator’ means a person who has entered Israel knowingly and unlawfully and who at any time between the 16th Kislev, 3708 (29th November, 1947) and his entry was –

(1) a national or citizen of the Lebanon, Egypt, Syria, Saudi-Arabia, Trans-Jordan,

Iraq or the Yemen ; or

(2) a resident or visitor in one of those countries or in any part of Palestine outside Israel; or

(3) a Palestinian citizen or a Palestinian resident without nationality or citizenship or whose nationality or citizenship was doubtful and who, during the said period, left his ordinary place of residence in an area which has become a part of Israel for a place outside Israel.<sup>115</sup>

Section (2) covered Palestine Arabs who departed from home areas in 1948 and who found refuge in Gaza or the West Bank, which are parts of Palestine outside Israel. Section (3) covered most of the Palestine Arabs who departed in 1948. Palestine Arabs were jailed under this legislation.<sup>116</sup> The imprisonment was seemingly imposed ‘in violation of fundamental rules of international law’ since it excluded Palestine Arabs from their home areas.

Another Article 7(1) act relates to lethal force used against Palestinians who have demanded their right of return. Demonstrations were initiated in 2018 in Gaza under the name Great March of Return, aimed at pressuring Israel to repatriate. This effort was

<sup>115</sup> Israel, Prevention of Infiltration (Offences and Jurisdiction) Law 5714-1954, 16 August 1954.

<sup>116</sup> Sabri Jiryis, ‘Domination by the Law’ (1981) 11 *Journal of Palestine Studies* 67, at 77–78. Kennett Love, ‘Jordan checking Arab infiltrator’, *N.Y. Times*, 14 March 1955, at 8.

carried out, in part, at a fence separating Gaza from Israel territory. As described by a United Nations commission of inquiry, the Great March ‘involved weekly demonstrations by Palestinians near the fence that since 1996 has separated Gaza and Israel (along the Green Line traced by the armistice agreements of 1949), demanding that the blockade imposed on Gaza be lifted and the return of Palestinian refugees’.<sup>117</sup>

The Israel Security Forces used lethal means in response. As found by the United Nations commission of inquiry, ‘Since the end of March [2018] until 31 December 2018, over 6,106 Palestinians who participated in the GMR [Great March of Return] along the separation fence were shot, with 183 killed’.<sup>118</sup> The UN commission of inquiry noted, ‘Some 75 per cent of Gazans are registered refugees’ and that they ‘are among the descendants of the 750,000 Palestinians who, during the 1948 conflict, fled or were expelled from their previous homes in today’s Israel’.<sup>119</sup>

The commission of inquiry found that in a number of instances, ‘the Israeli security forces killed and maimed Palestinian demonstrators who did not pose an imminent threat of death or serious injury to others when they were shot’.<sup>120</sup> If that conclusion is accurate, this use of lethal force may qualify as ‘murder’, one of the acts specified in Article 7(1).

### 8.3 *Crimes Connected to the Prohibition of Return*

In addition to Article 7(1) acts, there are crimes that are connected to the prohibition of return. The law of war is implicated. The phrase ‘crime within the jurisdiction of the Court’ includes war crimes, which are listed in Rome Statute Article 8. The killings at the Gaza fence

---

<sup>117</sup> Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, ¶14, 25 February 2019, UN Doc. A/HRC/40/74.

<sup>118</sup> Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, ¶782, 18 March 2019, UN Doc. A/HRC/40/CRP.2.

<sup>119</sup> Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, ¶18, 25 February 2019, UN Doc. A/HRC/40/74.

<sup>120</sup> Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, ¶694, 18 March 2019, UN Doc. A/HRC/40/CRP.2.

## PROHIBITION OF RETURN TO ISRAEL

may qualify as acts of ‘wilful killing’, a war crime under the Geneva Civilians Convention,<sup>121</sup> and specified as a ‘crime within the jurisdiction of the Court’ in Rome Statute Article 8(a)(i). Belligerent occupation brings into play a war crimes designation, thus rendering Israel’s conduct at the border fence a ‘crime within the jurisdiction of the Court’. Gaza was occupied by Israel in 1967. Israel withdrew from administration within Gaza in 2005 but continued to exercise control in various ways. The states party to the Geneva Civilians Convention have referred to Gaza as being under Israel’s belligerent occupation.<sup>122</sup> An ICC chamber has already determined that both Gaza and the West Bank are under Israel’s belligerent occupation.<sup>123</sup>

Another war crime specified in the Rome Statute is the transfer of civilians into territory under belligerent occupation.<sup>124</sup> The Prosecutor has determined that ‘there is a reasonable basis to believe that, in the context of Israel’s occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014’.<sup>125</sup> The date of 13 June 2014, to remind, is the date from which the ICC has jurisdiction in relation to the territory of Palestine. Article 8(2)(b)(viii) is the Rome Statute provision on transfer of civilians into territory under belligerent occupation. Substantial numbers of Palestine Arabs displaced in 1948 found refuge in the West Bank.<sup>126</sup> As a result, the transfer of civilians into the West Bank bears a con-

---

<sup>121</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, Article 147, 75 UNTS 287.

<sup>122</sup> Letter dated 29 December 2014 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, Annex: Declaration of 17 December 2014 adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention, §8, UN Doc. A/69/711 – S/2015/1 (referencing ‘certain measures taken by the Occupying Power in the Occupied Palestinian Territory, including the closure of the Gaza Strip’.)

<sup>123</sup> ICC, Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report, ¶16, 6 November 2014. Pre-Trial Chamber I, Situation in the State of Palestine, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, ¶¶117–118, 5 February 2021, ICC-01/18.

<sup>124</sup> Article 8(2)(b)(viii) ICCS.

<sup>125</sup> ICC, Office of the Prosecutor, Situation in Palestine: Summary of Preliminary Examination Findings, ¶4, 20 December 2019.

<sup>126</sup> UNRWA has registered nearly 900,000 Palestine Arab refugees in the West Bank. *Where We Work* | UNRWA

nection to the prohibition of return. While keeping out those with legal entitlement, Israeli authorities facilitate the establishment of others.

Another set of war crimes relates to the war fought in Gaza in 2014. War crimes, under the Rome Statute, include the act of ‘intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians’.<sup>127</sup> The ICC Prosecutor ‘found that there is a reasonable basis to believe that, in the context of the 2014 hostilities in Gaza, members of the Israel Defense Forces (“IDF”) committed the war crime of intentionally launching disproportionate attacks’.<sup>128</sup> Disproportionate attacks mean attacks affecting civilians, many of whom in Gaza are, as just indicated, the very Palestine Arabs prohibited from returning. The commission of war crimes against those victimized by being denied return would seem to establish a connection between the prohibition of return and the war crimes.

## IX POTENTIAL PERPETRATORS

While anyone who perpetrates criminal conduct within its jurisdiction can be prosecuted, the ICC focuses on those who set policy for criminality.<sup>129</sup> Persons holding official positions are not exempted from criminal responsibility. The Rome Statute applies ‘equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute’.<sup>130</sup>

---

<sup>127</sup> Article 8(2)(b)(iv) ICCS.

<sup>128</sup> ICC, Office of the Prosecutor, Situation in Palestine: Summary of Preliminary Examination Findings, ¶12, 20 December 2019.

<sup>129</sup> The seriousness of the acts that qualify as crimes against humanity is expressed by one commentator: ‘The transgressor, that is, the criminal against humanity, becomes an enemy and legitimate target of all humankind, a *hostis humani generis*, who, in principle, anyone (‘the people’) may bring to justice. Kai Ambos, *Treatise on International Criminal Law* vol 2 (OUP, Oxford 2022) 49.

<sup>130</sup> Article 27(1) ICCS.

In a domestic court, certain high officials of foreign states enjoy immunity from prosecution for crime.<sup>131</sup> No such immunity applies in the ICC. Under the Rome Statute, ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.<sup>132</sup> That statement applies to ‘criminal responsibility’.<sup>133</sup>

### 9.1 *Liability Within a Hierarchy*

An official whose act or omission<sup>134</sup> keeps a Palestine Arab out may be prosecutable alone as a principal. The context and jurisdictional elements would need to be proved, but it would not be necessary to charge others at the same time, even though the policy of prohibiting the return of the Palestine Arabs involves implementation across a number of branches and departments of government. Nonetheless, the relationship of the putative perpetrator’s conduct to that of others in a hierarchical structure might arise. Under the Rome Statute, a superior is responsible for criminal acts of subordinates.<sup>135</sup> One who acts under orders of a government or of a superior can potentially be relieved of criminal liability. Criminal liability does not attach under the Rome Statute if a person acts ‘pursuant to an order of a Government or of a superior, whether military or civilian’. This exemption applies, however, only if the person did not know that the order was unlawful, and only if the order was not manifestly unlawful. The Rome Statute specifies that an order to commit a crime against humanity is ‘manifestly unlawful’.<sup>136</sup> As a result, criminal liability would not be negated where the perpetrator acted under order of a superior.

### 9.2 *Liability when Acting with Others*

Issues of acting together with others, however, might arise.<sup>137</sup> The ICC may need to deal with similar issues if prosecutions are under-

<sup>131</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, [2002] ICJ Rep 3.

<sup>132</sup> Article 27(2) ICCS.

<sup>133</sup> Article 27(1) ICCS.

<sup>134</sup> On omission liability, see *infra* this section.

<sup>135</sup> Article 28(b) ICCS.

<sup>136</sup> Article 33 ICCS.

<sup>137</sup> Marina Aksenova, *Complicity in International Criminal Law* (Hart, Oxford 2016) 133.

taken for the war crime of transfer of civilians into territory under belligerent occupation. There too, one sees a state policy being implemented by a variety of officials.<sup>138</sup> Responsibility attaches, according to the Rome Statute, for directly committing a crime, for ordering or soliciting commission, for inducing another, or for committing a crime jointly with others.<sup>139</sup>

Under general criminal law principles, the criminal liability of one perpetrator can be based on acting jointly with others to achieve a criminal aim.<sup>140</sup> The Rome Statute calls for employing ‘general principles of law derived by the Court from national laws of legal systems of the world’.<sup>141</sup> The Rome Statute, by its own provisions and by the incorporation of domestic criminal law principles, is well equipped to deal with a variety of modes of participation in the prohibition of return to the Palestine Arabs.

### 9.3 *Liability for Omission*

Another issue of attribution is that relevant conduct might in some instances involve affirmative acts, whereas in others it might involve abstention. In domestic penal law, omissions can entail criminal responsibility.<sup>142</sup> As a general principle, omission liability can be invoked by the ICC. One pre-trial chamber has said that persecution

---

<sup>138</sup> Simon McKenzie, *Disputed Territories and International Criminal Law: Israeli Settlements and the International Criminal Court* (Routledge, Abingdon, Oxon 2020) 182–183 (analyzing the conceptually similar issue of participation of Israeli officials in the war crime of transfer of civilians into settlements in occupied Palestine territory).

<sup>139</sup> Article 25(3) ICCS.

<sup>140</sup> Antje du Bois Pedain, ‘Participation in Crime’, in Kai Ambos et al (eds), *Core Concepts in Criminal Law and Justice* vol 1 (Cambridge, Cambridge University Press 2020) 127.

<sup>141</sup> Article 21(1)(c) ICCS. William Schabas, *An Introduction to the International Criminal Court* (Cambridge, Cambridge University Press 2020) 193.

<sup>142</sup> Kai Ambos, ‘Omissions’, in Kai Ambos et al (eds), *Core Concepts in Criminal Law and Justice* vol 1 (Cambridge, Cambridge University Press 2020) 17–27.

can be charged on the basis of omission to act.<sup>143</sup> Under general criminal law principles, criminal liability by way of omission must be based on a duty to act.<sup>144</sup> A duty, it is said, falls on persons who occupy a ‘protective position with regard to certain legal interests, resulting in a ‘protective duty’.<sup>145</sup> Liability on the basis of omission thus is limited to officials holding positions that relate to immigration policies and practice.

## X POTENTIAL ARGUMENTS IN DEFENCE

The principle *in dubio pro reo* applies to crime definition at the ICC.<sup>146</sup> ‘The definition of a crime’, recites the Rome Statute, ‘shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’.<sup>147</sup> The strict construction rule would provide a route to arguments that the right of entry might not apply to the situation of the Palestine Arabs.

### 10.1 *Possible Exceptions to the Prohibition of Entry*

In 2020, as result of the COVID-19 epidemic, a number of states denied entry to their nationals seeking to return from states where COVID-19 was widespread.<sup>148</sup> These denials of entry were not long-

---

<sup>143</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and 61(7)(b) of the Rome Statute, ¶46, 23 January 2012, ICC-01/09-02/11 (stating that ‘there is nothing in the Statute that can be interpreted to exclude acts by omission from the purview of the Court’). At Nuremberg, failure to rescue sailors drowning at sea was charged as a war crime. *Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany*, part 22 (London: His Majesty’s Stationery Office, 1950), 509.

<sup>144</sup> Kai Ambos, ‘Omissions’, in Kai Ambos et al (eds), *Core Concepts in Criminal Law and Justice* vol 1 (Cambridge, Cambridge University Press 2020) 27.

<sup>145</sup> *Id.* at 28.

<sup>146</sup> Caroline Davidson, How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court (2017), 91 *St. John’s Law Review* 47.

<sup>147</sup> Article 22(2) ICCS.

<sup>148</sup> Rutsel Martha & Stephen Bailey, ‘The right to enter his or her own country’, *EJIL Talk!* Blog of the European Journal of International Law, 23 June 2020, <https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/>.

term but were denials nonetheless. If prohibition of entry in such circumstances is lawful, a path might be open to arguments on various grounds against a right of entry for the Palestine Arabs. The text of ICCPR 12, however, presents an obstacle. Article 12 guarantees a right of movement within a country (paragraph 1) and a right to leave a country (paragraph 2). With respect to those rights, Article 12 specifies (paragraph 3) that they ‘shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant’.

The right to enter is found in paragraph 4. No language like that in paragraph 3 applies that would allow restrictions on a rationale of ‘national security, public order (ordre public), public health or morals or the rights and freedoms of others’. As a result, even the circumstances identified in paragraph 3 may not be invoked to prohibit entry. As for the COVID-19 situation, it has been addressed by the Human Rights Committee, which monitors the ICCPR. ‘States parties confronting the threat of widespread contagion may, on a temporary basis, resort to exceptional emergency powers’, the Committee said in 2020. The Committee explained that states parties may ‘invoke their right of derogation from the Covenant under article 4 provided that it is required to protect the life of the nation’.<sup>149</sup> Article 4 of the ICCPR provides a procedure whereby a state party may exempt itself from complying with a particular provision ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’.<sup>150</sup> Notice must be given to the Secretary-General of the United Nations.<sup>151</sup> The Committee indicated that a state prohibiting entry must file a derogation, as some states had in fact done in relation to their COVID-19 restrictions.<sup>152</sup>

The Committee thereby expressed the view that such a prohibition of entry as a COVID-19 restriction violates Article 12(4). A derogation is required to exempt a state of liability. A state invoking the

---

<sup>149</sup> Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, §2, 30 April 2020, UN Doc. CCPR/C/128/2.

<sup>150</sup> Article 4(1) ICCPR.

<sup>151</sup> Article 4(3) ICCPR.

<sup>152</sup> Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, §2, 30 April 2020, UN Doc. CCPR/C/128/2.



derogation procedure thereby acknowledges that it is acting in violation of the ICCPR. Thus, to invoke the procedure in regard to prohibition of entry to the Palestine Arabs, Israel would have to acknowledge that the denial is a violation. To date, Israel has not filed such a derogation. Such a derogation in relation to the prohibition of entry of the Palestine Arabs would in any event be problematic, because under Article 4 a derogation cannot be discriminatory on the sole basis of ‘race, colour, sex, language, religion or social origin’.

### 10.2 *Prohibition of Return Asserted to be Non-arbitrary*

Under ICCPR Article 12(4), a prohibition of entry is unlawful only if arbitrary: ‘No one shall be arbitrarily deprived of the right to enter his own country’. An Israeli official charged with prohibition of return might reply that the prohibition is not arbitrary. The issue of arbitrariness has been addressed by the Human Rights Committee. ‘The reference to the concept of arbitrariness’, the Committee said, ‘is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable’.<sup>153</sup> Tellingly, in its statement on COVID, as quoted, the Human Rights Committee did not suggest that a prohibition of entry to one’s country could be denied as being non-arbitrary. Rather, the Human Rights Committee said that the denial would violate Article 12 and that derogation would be needed to excuse the violation. In CERD Article 5, moreover, as quoted, the right of entry is not qualified by the word ‘arbitrarily’. As a result, under CERD, a prohibition of entry cannot be rationalized as non-arbitrary.

### 10.3 *Departure as Voluntary*

It might be asserted in defence that the Palestine Arabs have no right to be repatriated if they left of their own accord. A right to enter one’s country, however, as already indicated, is not limited by the reason for departure. It matters not that a person left on holiday, or

---

<sup>153</sup> Human Rights Committee, General Comment No. 27 Freedom of Movement (Article 12), §21, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9.

to escape a flood or earthquake or the dangers of war. The injunction in law is simply to allow return. The Committee on Racial Discrimination, which as we saw called on Israel to repatriate the Palestine Arabs, made no reference to the reasons for departure, apparently not considering them relevant.

#### 10.4 *Palestine Arabs Lacking Israel Nationality*

It might be asserted in defence that the Palestine Arabs need not be repatriated because they lack the nationality of Israel.<sup>154</sup> States do have an obligation to allow their own nationals to enter, but the right of entry is not limited to persons who have been accorded nationality by the state denying return. The right is for entry into 'one's country'.<sup>155</sup> The right of entry applies even when sovereignty changes. However one characterizes the sovereignty situation in Palestine and Israel, the home areas to which repatriation is sought lie within the 'country' of the Palestine Arabs. Newly emerging states like Israel are required to respect the residency rights of the population.<sup>156</sup> A change in sovereignty does not override the right of a person to return to 'his own country'.<sup>157</sup> The position in law is that 'no state has the right to rid itself of a population that was already located on the territory before the creation of the state'.<sup>158</sup>

The Human Rights Committee has explained that under Article 12(4):

The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country

---

<sup>154</sup> On which see sec. VI above.

<sup>155</sup> UDHR, Article 13(2), UN General Assembly Res. 217, 10 December 1948.. International Covenant on Civil and Political Rights, Article 12(4), 999 UNTS 171. International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(ii), 660 UNTS 195.

<sup>156</sup> Paul Hadrosek, *The Natural Rights of Peoples to Their Native Soil: Survey and Criticism of the Juridical Discussion* (Köln: Verlag Wissenschaft und Politik, 1969) 62–68.

<sup>157</sup> Tomuschat, 'Das Recht Auf Die Heimat', *supra* n 38, at 192.

<sup>158</sup> Les Transfers Internationaux des Populations, 44(2) *Annuaire de l'Institut de droit international* (1952) 138, at 183 (statement of Walter Schnitzel).

## PROHIBITION OF RETURN TO ISRAEL

of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them.<sup>159</sup>

‘A State party must not, by stripping a person of nationality’, the Committee added, ‘arbitrarily prevent this person from returning to his or her own country’.<sup>160</sup> Israel’s refusal to extend eligibility for its nationality to the Palestine Arabs did not sever the connection to the country.

Lack of Myanmar nationality on the part of the Rohingyas did not keep the ICC from saying that they have a right to return to Myanmar. According to the Government of Myanmar, the Rohingyas are not citizens. Myanmar legislation provides for citizenship by one’s membership in certain named ethnic groups, which are listed in the legislation. Rohingyas are not included in the listing.<sup>161</sup> As a result, they are stateless.<sup>162</sup> The ICC chamber that said that a prohibition of their return constitutes a crime against humanity apparently did not find their lack of citizenship to negate their entitlement to return.<sup>163</sup>

### 10.5 *Palestine Arab Repatriation as Inconsistent with Jewish Self-determination*

An obligation to repatriate the Palestine Arabs, it might be asserted in defence, would be inconsistent with Jewish self-determination. Jewish self-determination, it might be argued, gives Jews an exclusive right to the territory of Israel, thereby negating a right of the Palestine Arabs to be repatriated. By an Israeli legislative pronouncement on the matter, ‘The State of Israel is the nation state of the Jewish People in which it realizes its natural, cultural, religious and historical right to self-determination. The realisation of the right to national self-determination in the State of Israel is exclusive to the Jewish

---

<sup>159</sup> Human Rights Committee, General Comment No. 27 Freedom of Movement (Article 12), §20, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9.

<sup>160</sup> *Id.* ¶21.

<sup>161</sup> Burma, Citizenship Law, §3, 15 October 1982, available at: <https://www.refworld.org/docid/3ae6b4f71b.html>.

<sup>162</sup> Report of the independent international fact-finding commission on Myanmar, §21, 12 September 2018, UN Doc. A/HRC/39/64; and Briefing by Burmese Rohingya Organisation UK, *Myanmar’s 1982 Citizenship Law and Rohingya*

<sup>163</sup> Pre-trial Chamber III, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, Request for Authorization of an Investigation Pursuant to Article 15, ¶75, 4 July 2019, ICC-01/19.

people'.<sup>164</sup> Whatever standing this pronouncement may have in the domestic law of Israel, it would not stand as a negation of the international guarantees of a right of return. The right of entry is not limited by the fact that a particular group enjoys self-determination in the particular territory.

By the same token, demographic considerations would provide no defence. An Israeli official charged for prohibition of return might assert a need for Israel to preserve a Jewish majority in its population.<sup>165</sup> Such an assertion would not find support in the law related to right of entry.

### 10.6 *Right of Entry as Applicable to Descendants*

It has been argued that even if entry is a right for Palestine Arabs, the right is limited to those who personally departed.<sup>166</sup> Most of the persons who are among today's Palestine Arabs did not themselves depart Palestine or Israel. They are descendants born thereafter. As noted above, the UN commission of inquiry referred to the participants in the Great March of Return as descendants of persons who departed home areas in 1948.<sup>167</sup> UNRWA counts multi-generation families as Palestine refugees, as does the UN General Assembly.<sup>168</sup> If descendants are prohibited, moreover, those who departed are in effect prohibited, since families would be split. Prohibiting return for descendants would be a disguised way of prohibiting return generally. In the case of the Chagossians, the International Court of Justice, as seen above, found a right of return for the entire displaced popula-

---

<sup>164</sup> Israel, Basic Law: Israel – the nation-state of the Jewish People 5778-2018, §1, 19 July 2018.

<sup>165</sup> 'Palestinian Refugees: The "Right of Return" - A Plot to Destroy the Jewish State', Jewish Virtual Library (stating, 'Israel's acceptance of a "right of return" would amount to national suicide'), accessible at *The "Right of Return": A Plot to Destroy the Jewish State*

<sup>166</sup> Colum Lynch, 'For Trump & Co., few Palestinians count as refugees: Trump's attorney is among the activists trying to strip Palestinians of their status', Foreign Policy, 9 August 2018 (quoting Atty Jay Sekulow).

<sup>167</sup> Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, ¶18, 25 February 2019, UN Doc. A/HRC/40/74 (stating that 75% of Gaza's population are registered with UNRWA as refugees).

<sup>168</sup> See, eg, Assistance to Palestine refugees, UN General Assembly Res. 76/77, 9 September 2021.

tion, without distinguishing between those who departed and those born subsequently.<sup>169</sup>

Another legal impediment to excluding descendants is that children have a right to be with their parents. Under the Convention on the Rights of the Child, apart from situations of child abuse or child neglect by a parent, ‘States Parties shall ensure that a child shall not be separated from his or her parents against their will’.<sup>170</sup> Even if the parents separate from each other, a child is entitled to enter the territories where each lives under a provision of the Convention on the Rights of the Child that reads, ‘States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country’.<sup>171</sup>

## XI ADMISSIBILITY

Related to jurisdiction in the Rome Statute is an issue denominated ‘admissibility’. Even if a case falls within the Court’s jurisdiction, a case is inadmissible if the person is being investigated or has been tried in a domestic court.<sup>172</sup> A case may be dismissed if found inadmissible, upon motion of an accused person, or on the Court’s own motion.<sup>173</sup> In one recent instance, the Prosecutor began a preliminary examination for crimes against humanity but closed it when it appeared that prosecution was taking place in the state in which the crimes were alleged to have occurred.<sup>174</sup>

As regards prohibition of entry to the Palestine Arabs, a prosecution could, in principle, be commenced in a court of Israel, since relevant conduct took place in Israel. A prosecution could also be undertaken in courts of a state that follows the universal jurisdiction

---

<sup>169</sup> See *supra* nn 42–43.

<sup>170</sup> Convention on the Rights of the Child, 20 November 1989, Article 9(1), 1577 UNTS 3.

<sup>171</sup> *Id.* Article 10(2).

<sup>172</sup> Article 17(1)(a) ICCS. Schabas, *An Introduction to the International Criminal Court*, *supra* n 141, at 181.

<sup>173</sup> Article 19 ICCS.

<sup>174</sup> *Statement by ICC Prosecutor Karim A.A. Khan KC regarding the opening of the trial related to events of 28 September 2009 in Guinea, signature of Agreement with Transitional Government on complementarity and closure of the Preliminary Examination, 29 September 2022.*

approach to internationally defined crimes.<sup>175</sup> Prosecutions for crimes against humanity have taken place in states having no connection to the acts.<sup>176</sup> To date, no investigation or prosecution has taken place in Israel or elsewhere for prohibiting return to the Palestine Arabs.

## XII PROHIBITION OF RETURN AS AN 'OTHER INHUMANE ACT'

Beyond the crime of persecution, the prohibition of return might be charged as 'other inhumane acts'. This charge was suggested by two ICC chambers, as indicated above, for prohibition of the return to Myanmar of the Rohingya.<sup>177</sup> Under Rome Statute Article 7(1)(k), crimes against humanity include acts of a character similar to those specified elsewhere in Article 7(1) if they cause 'great suffering, or serious injury to body or to mental or physical health'.<sup>178</sup> 'Great suffering' or 'serious injury' are not necessary consequences for a charge of the crime of persecution. One ICC chamber defined the 'inhumane acts' of Article 7(1)(k) as 'serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute'.<sup>179</sup>

The severity of the deprivation to the Palestine Arabs was noted above.<sup>180</sup> The same factual considerations are relevant to 'great suffering'. 'Great suffering' could be found from the inability of the victims to access their country, from their status of virtual statelessness, from their loss of community and loss of property and of means of sustenance. Conditions in refugee camps have impacted mental

---

<sup>175</sup> See eg. Germany, Code of Crimes Against International Law (Völkerstrafgesetzbuch - VStGB), 26 June 2002, §7(10) (crimes against humanity: persecution).

<sup>176</sup> Jenny Hill, 'German court finds Syrian colonel guilty of crimes against humanity', BBC News Koblenz, Germany, 13 January 2022.

<sup>177</sup> See *supra* nn 62–69.

<sup>178</sup> M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP, Cambridge 2011) 407 (stating that omission can satisfy the *actus reus* of 'other inhumane acts').

<sup>179</sup> Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, ¶448, 30 September 2008, ICC-01/04-01/07.

<sup>180</sup> See *supra* nn 58–68.

## PROHIBITION OF RETURN TO ISRAEL

health.<sup>181</sup> Intentionality is required with regard to the causing of great suffering given that Article 7(1)(k) speaks of ‘intentionally causing great suffering, or serious injury to body or to mental or physical health’. The Rome Statute defines ‘intention’ with respect both to conduct and to consequences of conduct. For ‘conduct’, intention is present if the person ‘means to engage in the conduct’.<sup>182</sup> For ‘consequence’, intention is present if the person ‘means to cause that consequence or is aware that it will occur in the ordinary course of events’.<sup>183</sup> The suffering is a consequence of the prohibition of return. The Prosecutor could make out a case by showing awareness of the life circumstances in exile of the Palestine Arabs.

A prosecution for prohibition of entry as ‘other inhumane acts’ would not require a connection to another act or crime. Whereas such a requirement exists, as indicated, for persecution, no similar requirement obtains for ‘other inhumane acts’.

### XIII A BASIS OBTAINS FOR INVESTIGATION

In 2020, the question was pointedly posed by one legal practitioner whether the ICC Prosecutor would investigate Israeli officials for prohibiting entry to the Palestine Arabs.<sup>184</sup> To date, no investigation has been initiated. The crime of persecution, however, provides a route. A variety of Israeli officials engage in conduct that results in the prohibition of return to the Palestine Arabs, while aware that this conduct is part of a systematic governmental operation that is widespread in its effects. Their conduct bears a connection to other Rome Statute Article 7(1) acts, as well as to war crimes. Jurisdiction over the person obtains as well, given the adherence of Palestine and Jordan to the Rome Statute.

The ICC Prosecutor has been apprised of the situation of the Palestine Arabs,<sup>185</sup> which in any event is known through the efforts of

---

<sup>181</sup> Callum McKell, MD, et al, Barriers to Accessing and Consuming Mental Health Services for Palestinians with Psychological Problems Residing in Refugee Camps in Jordan (2017) 29 *Psychiatria Danubina*, (Suppl. 3) 157 (finding high prevalence of mental illness).

<sup>182</sup> Article 30(2)(a) ICCS.

<sup>183</sup> Article 30(2)(b) ICCS.

<sup>184</sup> Michael Kearney, ‘The Denial of the Right of Return as a Rome Statute Crime’ (2020) 18 JICJ 985, at 999.

<sup>185</sup> Pre-Trial Chamber I, Situation in the State of Palestine, Submission on Behalf of Palestinian Victims Residents of the Gaza Strip, ¶18, 16 March 2020.

the United Nations to achieve return. That information imposes a duty. Under the Rome Statute, the Prosecutor ‘shall,’ after evaluating information received about a crime within the Court’s jurisdiction, ‘initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute’.<sup>186</sup> That provision traces the *legalittsprinzip* of German penal law, which requires prosecution whenever warranted by the facts and law.<sup>187</sup> Constraints of budget and available personnel come into play for the Prosecutor,<sup>188</sup> and prosecutions need not be pursued for crimes that are not sufficiently serious or where the ‘interests of justice’ would not be served.<sup>189</sup> The Prosecutor, however, lacks the broad ‘prosecutorial discretion’ one finds in some domestic penal systems.<sup>190</sup> The Prosecutor would appear to be under an obligation to undertake a preliminary examination with a view to seeking authorization for an investigation.<sup>191</sup>

In 1993, the governments of Israel and Palestine agreed to negotiate about return of the Palestine Arabs.<sup>192</sup> The fact that return was put on the negotiating table created the appearance that return was subject to bargaining, perhaps even to consent on the Israeli side. Return may well be facilitated by negotiation as to its modalities. Under the Rome Statute, however, the prohibition of return to the Palestine Arabs is a crime.

**Publisher’s Note** Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Springer Nature or its licensor (e.g. a society or other partner) holds exclusive rights to this article under a publishing agreement with the author(s) or other rightsh-

<sup>186</sup> Article 53(1) ICCS.

<sup>187</sup> Mirjan Damaška, ‘The Reality of Prosecutorial Discretion: Comments on a German Monograph’, 29 *AJCL* (1981) 119.

<sup>188</sup> Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (London, Bloomsbury 2020), see chap. 3 (“A Duty to Investigate?”).

<sup>189</sup> Article 53(1)(c) ICCS. Farid Mohammed Rashid, *Prosecutorial Discretion in the International Criminal Court: Legitimacy and the Politics of Justice* (London, Routledge 2021), 123.

<sup>190</sup> Melba V. Pearson (ed), *Can They Do That? Understanding Prosecutorial Discretion* (Chicago, American Bar Association 2020).

<sup>191</sup> Article 15 ICCS.

<sup>192</sup> Declaration of Principles on Interim Self-Government Arrangements (Israel-P.L.O.), §5, 13 September 1993, UN Doc. A/48/486, S/26560 (Annex).



PROHIBITION OF RETURN TO ISRAEL

older(s); author self-archiving of the accepted manuscript version of this article is solely governed by the terms of such publishing agreement and applicable law.