When Gravity Fails: Israeli Settlements and Admissibility at the ICC

Eugene Kontorovich

Israel Law Review / Volume 47 / Issue 03 / November 2014, pp 379 - 399
DOI: 10.1017/S0021223714000193, Published online: 29 August 2014

Israel Law Review **47**(3) 2014, pp 379–99. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2014.
doi:10.1017/S0021223714000193

When Gravity Fails:* Israeli Settlements and Admissibility at the ICC

Eugene Kontorovich[**]

In the wake of the UN General Assembly's recent recognition of Palestinian statehood, the Palestinian government has made clear its intention to challenge in the International Criminal Court (ICC or the Court) the legality of Israeli settlements. This article explores jurisdictional hurdles for such a case. To focus on the jurisdictional issues, the article assumes for the sake of argument the validity of the merits of the legal claims against the settlements.

The ICC only takes situations of particular 'gravity'. Yet settlements are not a 'grave breach' under the Rome Statute. No modern international criminal tribunal has ever prosecuted crimes that do not involve systematic violence and physical coercion. The ICC's gravity measure involves the number of persons killed; for settlements it would be zero. Indeed, the ICC Prosecutor triages situations by the numbers of victims; settlements do not appear to have direct individual victims. Finally, the ICC would at most have jurisdiction over settlement activity only from the date of Palestine's acceptance of jurisdiction. Settlement activity in this time frame would not immediately cross the ICC's gravity threshold.

Keywords: International Criminal Court, gravity, Israel, Palestine, settlements

1. Introduction

The UN General Assembly (GA), in a closely watched vote on 29 November 2012, granted Palestine 'non-member observer' status.[1] A major impetus of the resolution was to give Palestine access to the International Criminal Court (ICC), which had previously rejected an Article 12(3) declaration on the grounds that Palestine is not a 'state' within the meaning of the ICC Statute.[2] In the wake of the Resolution's passage, commentary and media coverage has focused on the new possibility of ICC investigations into the Israeli settlements in the West Bank, which many regard as a violation of international humanitarian law.[3] Indeed, Palestinian leaders repeatedly state their intention to 'go to the ICC' over continued Israeli settlement construction. Palestinian forbearance on ICC action has been used as a central incentive for Israel to

* See Bob Dylan, 'Just Like Tom Thumb's Blues', *Highway 61 Revisited* (1965) ('When … your gravity fails and negativity don't pull you through').

** Professor, Northwestern University School of Law, Chicago, Illinois, United States; ekontorovich@law.northwestern.edu.

[1] Status of Palestine in the United Nations, UNGA Res 67/19, 29 November 2012, UN Doc A/RES/67/19.

[2] ICC, Office of the Prosecutor, 'Situation in Palestine', 3 April 2012, para 7, http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf. Rome Statute (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

[3] See, for example, George Bishart, 'Why Palestine Should Take Israel to Court in The Hague', *The New York Times*, 29 January 2013, http://www.nytimes.com/2013/01/30/opinion/why-palestine-should-take-israel-to-court-in-the-hague.html?_r=0; Aeyal Gross, 'Following UN Vote on Palestine, Israel May Now Find Itself at The Hague', *Ha'aretz*, 2 December 2012, http://www.haaretz.com/opinion/following-un-vote-on-palestine-israel-may-now-find-itself-at-the-hague.premium-1.481919.

enter into negotiations with a promise of making major concessions.[4] Yet all these moves assume that a situation focused on Israeli settlements would be admissible before the Court.

There are numerous potential obstacles to the jurisdiction of the ICC over settlements. For example, Palestine may not be a 'state' under the ICC Statute despite the GA vote.[5] Even if it is, it may be argued that the activity does not take place 'on the territory' of Palestine.[6] This article puts those questions aside in order to focus on a novel question that a possible referral of settlement activity would raise: whether the alleged crimes meet the gravity requirement for admissibility.[7] Under the ICC Statute, a situation is inadmissible when it 'is not of sufficient gravity to justify further action by the Court'.[8]

The Israeli settlements present a question of first impression regarding gravity. The ICC's Office of the Prosecutor (OTP) has never investigated a situation that is defined primarily by non-grave breaches of Geneva norms, or that do not involve the killing, wounding or physical coercion of masses of people.[9] Whether such a situation would meet the gravity threshold requires thinking more systematically and comprehensively about how to measure and assess gravity, and compare the gravity of different crimes and situations. This article considers a variety of metrics for gravity and applies them to the Israeli civilian presence in the areas of Mandatory

[4] See Geoff Dyer and John Reed, 'John Kerry to Set Out "Framework" for Future Middle East Talks', *The Financial Times*, 2 March 2014, http://www.ft.com/intl/cms/s/0/a27d121c-a20c-11e3-87f6-00144feab7de.html#axzz35AtmmfxE.

[5] See Eugene Kontorovich, 'Israel/Palestine – The ICC's Uncharted "Territory"' (2013) 11 *Journal of International Criminal Justice* 979, 982. The Office of the Prosecutor would most likely treat the vote as settling the question, but the position of the Court remains unknown: see ICC, Office of the Prosecutor, 'Report on Preliminary Examination Activities 2013', November 2013, 53-54, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF.

[6] See Kontorovich, ibid. But see Yaël Ronen, 'Israel, Palestine and the ICC – Territory Uncharted but not Unknown' (2014) 12 *Journal of International Criminal Justice* 7.

[7] 'Settlement activity' is an informal term for violations of the ICC Statute (n 2) art 8(2)(b)(viii), which prohibits '[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies'. The language is lifted almost verbatim from Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287, art 49(6). The provision proved to be controversial at the Rome Conference, as Arab states wanted language that would clearly apply to Israeli settlements, which, after some negotiation, led to the phrase 'directly or indirectly' being added to the Geneva-based language. The legal impact of this is unclear because of the circumstances of drafting, the novelty of the provision and lack of subsequent applications. See Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (Kluwer Law International 1999) 79, 112–13. The ICC's Elements of Crimes provide that the language 'needs to be interpreted in accordance with the relevant provisions of international humanitarian law', a circular reference back to the Geneva Conventions. This provision in the Elements was sought by the American delegation to 'remove novel arguments about indirect tax incentives to transfer a population': see David J Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press 2013) 235–36.

[8] ICC Statute (n 2) arts 17(1)(d), 53(2)(b).

[9] To be sure, the situation in the Congo has resulted in prosecutions, such as *Lubanga* (see nn 50, 56 and 69), that involve forcible crimes that are not themselves grave breaches. However, the situation in the Congo was characterised by some of the largest atrocities in recent history, with millions killed. The Prosecutor opened the investigation because of reports of 'thousands of deaths by mass murder and summary execution in the DRC', along with rape, torture and the use of child soldiers: see ICC, 'The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation', ICC-OTP-20040623-59.

Palestine formerly under Jordanian occupation.[10] It concludes that a situation focused primarily on Israeli settlements may not meet the gravity requirement, or at least would represent the lowest gravity situation the Court has yet dealt with, and would set a very low bar for the future.

The ICC Statute requires all situations to meet a 'gravity' threshold as a basic condition of admissibility, along with complementarity. The OTP must make an affirmative determination of gravity in order to open an investigation, and the Court must then also satisfy itself that the gravity requirement under Article 17 of the ICC Statute has been met. Finally, aside from situational gravity, particular crimes – cases brought against individual defendants – must also satisfy a gravity test. Thus both the overall situation under investigation, and any crimes that are ultimately charged, must be of sufficient gravity, although presumably the required gravity of a situation composed of myriad crimes would be higher than that for individual charges.[11]

Article 17(1)(d) of the ICC Statute provides that an otherwise proper situation involving crimes within the Court's jurisdiction is nonetheless inadmissible if it 'is not of sufficient gravity'. Some suggest that the requirement is inherently paradoxical in light of the reference in Articles 1 and 5 to the Court having jurisdiction over 'the most serious crimes' of concern to the international community. The way to reconcile the tension is to understand that Article 17 explicitly 'limits' the Court's jurisdiction over the enumerated crimes; that is, from among these already extremely serious crimes, the jurisdiction of the Court is *restricted* by the gravity requirement to the most serious violations of the already serious crimes within the Court's jurisdiction. As the Court itself put it, the gravity requirement is an 'additional safeguard'; a necessary consequence is that even some of the 'most serious' international crimes will not meet the test.[12]

Indeed, other provisions make clear that even for the crimes that appear in the ICC Statute there is a spectrum of gravity: life imprisonment is authorised only for those convicted of a crime of 'extreme gravity'.[13] Thus the ICC Statute contemplates a spectrum from crimes 'not of sufficient gravity' which are inadmissible, to the standard case of 'sufficient' gravity, and the outlier 'extreme gravity' that warrants a life sentence.

Discussing the gravity requirement is an even more speculative endeavour than most ICC analysis. The ICC Statute and its drafting history offer no definition of 'gravity'. The Court has never defined it, and in almost all the situations before the Court the gravity of the crimes

[10] This article assumes that a Palestinian declaration would focus on settlements rather than more classic war crimes – such as those alleged during the 2009 and 2014 Gaza conflicts – because this is what Palestinian leaders have suggested in their pronouncements since the GA vote. To be sure, the Palestinian leadership has also discussed seeking ICC jurisdiction regarding use-of-force crimes in the 2014 Gaza conflict – after this article was written. Nonetheless, a settlements-focused referral remains the safest course for the Palestinian leadership, as a situation focused on settlements – assuming the inquiry could be defined so narrowly – would largely exclude Palestinian crimes, and is more likely to avoid complementarity barriers.

[11] The article focuses only on 'situational' gravity, which is a poorly illuminated area of ICC practice; questions about case gravity (which presupposes sufficient situational gravity) are even murkier, and are beyond the scope of this study.

[12] ICC, *Situation in the Republic of Kenya*, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber II, 31 March 2010, [56] (*Situation in Kenya*).

[13] ICC Statute (n 2) art 77(1)(b).

has been manifest, involving situations of mass atrocity,[14] as contemplated by the Preamble. The policy of the OTP, which has at times addressed gravity, has offered some guidance on its interpretation of the term, but this too has been inconsistent. Of course, a situation involving the indiscriminate targeting of civilians, as might arise from the 2014 Gaza campaign, would more easily satisfy the gravity definition. However, with a situation involving such crimes, settlement activity would clearly be the least grave crime within the situation, and thus even less likely to satisfy the gravity requirement for individual cases.

This poses important methodological limitations. It is impossible to demonstrate definitively whether a situation that focuses on Israeli settlements would satisfy the gravity requirement, as the floor for gravity has never been set. Rather, this article shows that the settlement crime, as allegedly committed by Israel, would be at the bottom of the Court's implicit hierarchy of crimes. Moreover, the timing and manner of commission of the alleged crime puts it below other instances already within the Court's jurisdiction. It would be inconsistent with the basic mission of the ICC to redress 'unimaginable atrocities that deeply shock the conscience of humanity' to accept a situation defined primarily by such lesser gravity crimes.[15]

Thus far, situations before the Court have almost exclusively involved what would be characterised as mass atrocities, and thus the definition of gravity has not been well clarified. Yet there are several explicit sources of guidance on the general criteria for evaluating gravity. First, the OTP has formulated general criteria of gravity to guide its otherwise very discretionary determinations. Second, the ICC Statute mentions gravity in two other relevant contexts that could inform the admissibility criteria. Third, the interests protected by the prohibition itself provide a standard by which to evaluate the gravity of its breach. Finally, general principles of law and international criminal law establish some framework considerations. Under all of these tests, the settlements arguably fail to meet the standard. At the very least, admitting an Israeli settlements case would require the setting of an extremely low and flexible gravity threshold.

This article uses the potential Israel/Palestine settlements issue as an occasion to explore the widely undefined concept of gravity, to identify novel problems and questions, and to suggest benchmarks to render it more precise. The answer to the gravity question in a Palestinian referral is not determined by what the Court has done, but will determine what the Court will be.

2. TEMPORAL LIMITATIONS

2.1. SETTLEMENTS GOING FORWARD

The ICC would not have jurisdiction over the 'settlement enterprise' as such – the current Jewish population of the West Bank. Rather, it would have jurisdiction only over the incremental

[14] See Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) ('So far, all situations in which investigations have been initiated involved hundreds or thousands of the gravest forms of crimes (such as murder or sexual violence)').
[15] ICC Statute (n 2) Preamble, para 2.

movement of Israeli civilians into the territory. It would be able to consider Israeli civilian migration into the occupied territories from the date of Palestine's acceptance of jurisdiction or, at best, the date of its recognition as a state by the GA, depending on how one views the retrospective effect of an Article 12(3) declaration. The explanation of the purely prospective understanding of declarations will be presented below. The only 'deportation or transfer' that would count towards the gravity of the crime would be those that occurred after the effective date of jurisdiction.

The Court's limited temporal jurisdiction has a quantitative and qualitative impact on the gravity assessment. How many Jewish civilians need to move to constitute an offence on a par with others with which the Prosecutor has proceeded? In recent years, somewhere between three and five thousand Israeli Jews have migrated into the West Bank annually;[16] the vast majority of population growth is from births, which are much harder to fit into the 'deport or transfer' category of crime. In one recent year, 3,600 Jews migrated to the West Bank,[17] most into communities very close to the Green Line. It is not clear whether a campaign of violence that killed ten people a day would meet the ICC's gravity threshold, whereas here the conduct in question is simply facilitating civilian migration, albeit in contravention of international law.[18]

According to the OTP's guidelines, the 'scale' component of gravity has a temporal component. '[L]ow intensity' crimes over a long period apparently are less grave than brief, intense eruptions.[19] According to both the Prosecutor and the Court, the inquiry into gravity focuses on surges – what the Court has called 'temporal intensity'[20] – not on dribbles. Many may see the long-standing nature of Israeli migration as an aggravating circumstance, but in light of the policies behind Article 49(6) of the Fourth Geneva Convention, this is not the case. Economic and demographic shocks and dislocations come from large, sudden migrations, not slow trickles. Indeed, the migration of peoples across frontiers across a period of decades is difficult to protect against even for a territory not under occupation. Thus, the settler population has grown, but so has the Palestinian population. As a result, when Palestine first accepts jurisdiction, the gravity of the crime will be zero or close to it. As gravity is determined at the outset and not prospectively, if Palestine were to immediately file a referral or declaration, it would be particularly hard to find gravity satisfied at that point.

---

[16] Yinon Cohen and Neve Gordon, 'The Settlement Project is Now Self-Sustaining', *The Daily Beast*, 13 November 2012, http://www.thedailybeast.com/articles/2012/11/13/the-settlement-project-is-now-self-sustaining.html; Tova Lazaroff, '2012 Settler Population Grew Almost Three Times as Fast as National Rate', *The Jerusalem Post*, 19 November 2012, http://www.jpost.com/National-News/2012-West-Bank-settler-population-growing-almost-three-times-as-fast-as-national-rate-326309.

[17] ibid.

[18] The Kenyan situation saw twice as many *killed* per day. Lubanga recruited approximately 3,000 child soldiers within a few years. Presumably these are all crimes of considerably greater inherent gravity than the indirect transfer of civilians into occupied territory.

[19] ICC, Office of the Prosecutor, 'Policy Paper on Preliminary Examinations', November 2013, para 62, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (Policy Paper).

[20] See *Situation in Kenya* (n 12) [62].

Some will suggest the inevitable end-run around prospectivity: the notion of the continuing offence, but the relevant prohibition focuses quite particularly on the act of 'transfer'.[21] There is no separate prohibition on civilians being in occupied territory. While the transferee may (or may not) remain in the occupied territory after the fact, the crime is the movement into the territory, which is transitory.[22] For example, if, after some years, transferees were to emigrate from the occupied territory, the crime would nonetheless have already been consummated. Moreover, the actus reus is clearly the actual transfer, and the ICC Statute does not allow for liability for acts prior to its entering into effect. The notion of a continuing offence is belied by the failure to require any removal of settlers in any of the several international peace plans dealing with such situations elsewhere, such as Cyprus, Morocco and East Timor.

2.2. PURELY PROSPECTIVE JURISDICTION

The ICC can deal only with crimes committed within its temporal jurisdiction, which runs from when the treaty came into effect for the relevant member state.[23] The prospectivity requirement is consistent with, and complementary to, the Court's lack of authority to exercise universal jurisdiction and with the principle of *nullum crimen sine lege*.[24] Yet some have argued that there is a loophole by which the Court may exercise jurisdiction over Palestine retroactively, perhaps even backdated to the establishment of the Court in 2002.[25]

There are two ways in which a state can accept the ICC's jurisdiction: by becoming a member, which is a blanket acceptance, or by making a 'declaration' pursuant to Article 12(3) to 'accept the exercise of jurisdiction by the Court with respect to the crime in question'. The declaration provision interacts with the temporal jurisdiction provision of Article 11, which provides:[26]

> If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, *unless that State has made a declaration under article 12, paragraph 3*.

Some commentators have suggested that the provision can be read to exempt Article 12(3) declarations from the general prospectivity rule.[27]

---

[21] Andreas Zimmermann, 'Palestine and the International Criminal Court *Quo Vadis*? Reach and Limits of Declarations under Article 12(3)' (2013) 11 *Journal of International Criminal Justice* 303, 324.

[22] The consequences of all actions persist, but that does not make everything a continuing offence. Stolen property stays stolen until returned, but pillage is not a continuing offence.

[23] ICC Statute (n 2) art 11.

[24] ibid art 22(1) ('A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'); see also ibid art 24(1) (barring criminal responsibility for crimes prior to the Statute's entry into force).

[25] cf Kevin Jon Heller, 'Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively', *Opinio Juris*, 29 November 2012, http://opiniojuris.org/2012/11/29/yes-palestine-could-accept-the-iccs-jurisdiction-retroactively, with David J Scheffer, 'How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction' (2004) 2 *Journal of International Criminal Justice*, 26, 32 (arguing that retrospective jurisdiction would be applicable only to nationals of the declaring state).

[26] ICC Statute (n 2) art 11(2) (emphasis added).

However, a stronger and more natural reading holds that Article 11(2) of the ICC Statute addresses temporal jurisdiction, dealing with the most common situation – that of member states. Indeed, the only purpose of Article 11(2) is to define temporal jurisdiction for member states that join after the Statute's entry into force. For those states, it provides the basic rule: jurisdiction runs from the entry into force for that state. However, there is one exception for the rule of prospectivity for member states. This is signalled by the word 'unless', which does not introduce a new rule of temporal jurisdiction for Article 12(3) declarations; rather, it explains the effect of a prior declaration on subsequent membership. It makes clear that where there has been a prior Article 12(3) declaration by the new member state, jurisdiction may relate back to that declaration, at least with respect to the relevant crimes. Thus the membership subsumes and supersedes the prior declaration in a manner that is entirely consistent with *nullum crimen sine lege*. Indeed, were it not for this 'unless' language in Article 12(3), one might have thought that the acceptance of membership destroys jurisdiction created by a prior declaration.

Thus Article 11(2) says nothing about the nature of temporal jurisdiction created by a declaration, but only about the jurisdiction arising from membership, which can be backdated to a prior declaration.

This helps to explain the wording of Article 11, which states the general rule of prospectivity. It provides that jurisdiction runs from the date of entry into force of the ICC Statute for a state 'unless' a declaration had been filed – but yet Article 11 does not provide a clear alternative temporal jurisdiction rule for such a situation. What this means is that when a state becomes a party to the treaty but had already filed a declaration, the treaty comes into effect from the time of the declaration. In other words, when a declaration is superseded by full accession, jurisdiction relates back to the date of the earlier instrument. The 'unless' wording clearly shows that the only retrospectivity arises in the context of the Statute entering into force for a state. Thus Article 11 simply has nothing to do with the temporal scope of a declaration.

Indeed, the notion of retrospective Article 12(3) declarations is inconsistent with Article 11(2), as the latter reaffirms that jurisdiction depends entirely on acceptance of jurisdiction at the time of the relevant conduct.[28] Such a view is consistent with the policy of encouraging states to become full members. Allowing retrospective jurisdiction *over non-nationals* through declarations would allow states to opportunistically invoke the jurisdiction of the Court at their convenience, without assuming the broader obligations of membership. Given the strong policy of the Statute for full assumption of obligations,[29] providing more flexibility for piecemeal acceptance of jurisdiction would seem to be inconsistent with this stance. The clear policy of the Statute, reflected in numerous articles, is prospectivity on a state-by-state level – as opposed to global prospectivity from the

[27] William A Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press 2004) 72.
[28] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 87.
[29] See ICC Statute (n 2) art 120 (prohibiting reservations). One might also note that the 'transitional provision' for member states is purely prospective, and limited to particular classes of crimes.

coming into force of the Statute – and any departure from that would need clear textual and policy expression. Indeed, the prospectivity policy is so strong that states may only withdraw from the Statute on a year's notice – to protect settled expectations of other states – and such withdrawal is not allowed to have any retrospective legal effect.

Further support for the prospective view of declarations comes from the chapeau of Article 12(2), which provides that 'the Court may exercise its jurisdiction if … [the relevant states] *are* Parties to this Statute or *have* accepted the jurisdiction of the Court in accordance with paragraph 3'.[30] The chapeau equates membership with a declaration for jurisdictional purposes, suggesting an equivalent, prospective, jurisdiction *ratione temporis*. Moreover, the chapeau is in the past tense – it speaks of states that 'have' made a declaration at the time when the conduct occurred. If declarations could be retrospective, it should say 'have or *will*'.

The drafting history and purpose of Article 12(3) also do not support retrospectivity. Declarations are made about 'the crime in question', a phrase that has been understood to refer to a particular 'situation' rather than a 'crime' in the sense of the offences specified in Article 5.[31] The language was taken from an early draft that envisioned the Court's jurisdiction to always be of an ad hoc nature; when a 'situation' would arise, the states involved could give the Court power to deal with crimes occurring in that ongoing situation. Yet nothing about this suggests that the Court may consider prior conduct in that situation, any more than if a state accepts full membership in the middle of a 'situation'. Rather, it encourages states involved in 'situations' to promptly issue declarations.

To be sure, the Pre-Trial Chamber (PTC) has apparently allowed some retrospective effect with regard to Côte d'Ivoire, the only Article 12(3) case it has considered so far. Yet the decision is far from conclusive of the issue. The country filed a declaration in 2003, and subsequently renewed it in 2010 and 2011. The Prosecutor's application to the PTC described the time frame under investigation as being 'since 28 November 2010' until 'the filing of this Application' in 2011.[32] The PTC's ruling concluded that the Court has jurisdiction over all crimes since 2002 on the basis of multiple, updated declarations. Thus, it authorised six months of retrospective jurisdiction based on the 2003 declaration.[33] Yet the opinion contained no discussion or explanation of the retroactive application, which also appears to be dicta, since it predates the period for which the Prosecutor sought an investigation. Moreover, given that Côte d'Ivoire did not object to the Court's exercise of jurisdiction, the issue was not specifically raised.

---

[30] Emphasis added.

[31] Schabas (n 28) 289 (explaining that the provision contemplated situations where the Prosecutor would initiate investigation and a non-member state would then consent through a declaration).

[32] ICC, *Situation in the Republic of Côte d'Ivoire*, Request for Authorisation of an Investigation pursuant to Article 15, ICC-02/11, Pre-Trial Chamber II, 23 June 2011, [40], [62].

[33] One might think that if the Court authorised jurisdiction over crimes up to the date of the Prosecutor's application, this would leave slightly under two months between the last acceptance of jurisdiction by Côte d'Ivoire on 3 May and the application on 23 June. However, nothing in the PTC's ruling makes clear which of these closely spaced dates constitutes the endpoint of jurisdiction. Moreover, the application referred only to events up to early April 2011. See ICC, Office of the Prosecutor, 'Request for Authorisation of an Investigation Pursuant to Article 15', ICC-02/11, 23 June 2011, para 14.

3. THE PROSECUTOR'S PRACTICE AND GUIDELINES

The primary approach of the OTP in assessing the gravity of a situation focuses on a combination of the number of victims and the nature of the crime. While numerous qualitative factors affect gravity, the basic inquiry is a product of the number of victims and the degree of brutality, which is often captured by the type of crime.[34] As one commentator has observed, 'practice suggests that the scale of atrocities must be quite extensive before the ICC Prosecutor will agree to devote resources to a case'.[35]

3.1. THE SCALE OF THE CRIMES

The Prosecutor has said that the primary criterion is the 'number of victims', particularly the number of deaths.[36] This is the quantitative part of determining the 'scale' of the crimes.[37] Generally, this approach focuses on victims who have suffered 'bodily or psychological harm'.[38] Thus the Prosecutor has refused to proceed with a case involving 12 unlawful killings by British soldiers in Iraq because it was 'of a different order' from the typical case that involves at least thousands of killed or injured.[39] Qualitative factors also come into play, but they do not supplant objective, quantitative gravity. Proceeding with an investigation into Israeli settlements would constitute a massive departure from the OTP's past practice. As one commentator describes it:[40]

> [T]he number of victims is the *only* factor that has played a significant role in the OTP's situational gravity determinations – an emphasis that it has defended on three different grounds. First, the OTP argues that its limited investigative resources require prioritizing situations involving mass atrocity. Second, the OTP believes that the international community is more likely to view investigations of situations involving large numbers of victims as legitimate. And third, the OTP points out that the number of victims tends to be reliably reported, making it a relatively objective factor.

Perhaps the 'smallest' situation the Court has accepted concerns the 2007 election violence in Kenya; this involved, in just a few weeks or months, roughly 1,200 murders, more than 900 rapes and the displacement of 350,000 persons. The murders and rapes were often accompanied by extraordinary brutality, such as burning persons alive, gang rapes and dismemberment.[41]

---

[34] See Policy Paper (n 19) para 61.
[35] See Gideon Boas and others, *International Criminal Procedure* (Cambridge University Press 2011) 85.
[36] Luis Moreno-Ocampo, 'Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21 *American University International Law Review* 497, 498.
[37] Policy Paper (n 19) para 62.
[38] ibid.
[39] ICC, Office of the Prosecutor, 'Letter dated 9 February 2006', 9 February 2006, 8–9, http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.
[40] Kevin Jon Heller, 'Situational Gravity under the Rome Statute' in Carsten Stahn and Larissa Van Den Herik (eds), *Future Directions in International Criminal Justice* (Cambridge University Press 2009).

Nonetheless, the situation was seen by some commentators, and perhaps the dissenting judge, as one of inadequate or borderline gravity.[42]

3.2. The Nature of the Crimes

A qualitative factor cited by the OTP[43] and the PTC[44] is the 'nature' of the crimes, with killings, sexual violence and attempts to destroy a group highlighted as crimes of a particularly grave nature. Aside from the quantitative scale of a particular crime, there is an implicit hierarchy of types of crime in international criminal law which reflects broader patterns throughout criminal law. Indeed, the OTP has recently acknowledged that some crimes within the ICC's jurisdiction are inherently graver than others, and that investigatory emphasis should be placed on the former.[45]

Crimes involving murder are the most serious, followed by sexual violence and those involving torture or extreme physical or psychological suffering. Somewhere after these may fall crimes involving deprivation of liberty or endangerment, such as the forcible conscription or use of child soldiers. Crimes against property 'rank at the low end of the gravity spectrum'.[46] The sentencing practice of the ad hoc international tribunals reflects such differences in gravity. Scholars have found that sentencing practices reveal a hierarchy, with genocide the most seriously punished, followed by crimes against humanity and then war crimes.[47] The Court's docket thus far has focused only on the high end of this spectrum, with all investigated situations involving 'hundreds or thousands of the gravest forms of crimes (such as murder or sexual violence)'.[48]

Notably, all of the situational gravity determinations involve aggregating bodily violence and coercion. Never has a situation that does not result in death or serious physical injury, implemented through large-scale violence, been held to satisfy the gravity criteria. *Lubanga*, for example, involved the crime of enlisting child soldiers, which does not necessarily involve physical coercion, though it does involve actions against individuals without their consent. However, he enlisted the child soldiers to 'us[e] them to participate actively in hostilities'[49] that left many dead, maimed and traumatised. If they had merely sat around a clubhouse wearing uniforms,

---

[41] *Situation in Kenya* (n 12) [190], [199].
[42] See Margaret M deGuzman, 'The International Criminal Court's Gravity Jurisprudence at Ten' (2013) 12 *Washington University Global Studies Law Review* 475, 485–86.
[43] Policy Paper (n 19) para 63.
[44] See *Situation in Kenya* (n 12) [62].
[45] ICC, Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes', June 2014, para 45, http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.
[46] See Margaret M deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2009) 32 *Fordham International Law Journal* 1400, 1452.
[47] Barbora Holá, Alette Smeulers and Catrien Bijleveld, 'International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR' (2011) 9 *Journal of International Criminal Justice* 411, 437. Presumably, among war crimes, non-grave breaches would be less severe than grave breaches, and would thus be the least severe crimes within the ICC's jurisdiction.
[48] Cryer and others (n 14) 160.
[49] ICC, *Prosecutor v Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, Trial Chamber I, 14 March 2012, [1350].

all things being equal, the situation would not have satisfied the gravity criteria. Similarly, several defendants have been charged with 'destruction of property', which is not a crime of violence against people. However, these charges have again been in *situations* characterised by crimes against humanity, large-scale murder and other war crimes. The property crimes did not create or characterise the gravity of the situation, and indeed were vastly overshadowed by other charges.

The 'transfer' crime does not involve murder or direct physical violence. Indeed, it is not even a property crime in the conventional sense. Though its commission may involve property crimes, it need not do so. Unlike perhaps any other crime, 'settlement activity' may, according to many authorities, be purely consensual – as when the settlers purchase property in the occupied territory. Indeed, the reason why groups like Peace Now are required to fly over the territories or pore through housing tenders to document settlement activity is that otherwise no one might know it happens, because this activity is not carried out against a person.[50] The transfer crime falls entirely outside the murder–property crime continuum, protecting more intangible interests.[51]

Aside from the violence/non-violence distinction, another way of describing the difference between transfer into occupied territory – and even more so, the indirect transfer – and other ICC crimes is the *malum in se/prohibitum* distinction.[52] Acts that constitute crimes of violence against the person or property crimes are illegal everywhere, independent of the existence of an armed conflict. Yet the migration of civilians into a territory, or indirect assistance to such migration, is a regulatory offence – that is, *malum prohibitum*. Some states choose to allow or even encourage immigration; others variously restrict it. By contrast, personal violence, physical coercion, property crimes and the like are universally criminalised and seen as morally wrong.

Notably, there was no corollary to the 'transfer' norm in the Hague Conventions. Moreover, the drafters of the Fourth Geneva Convention incorporated the new norm only 'after some hesitation',[53] underscoring its *mallum prohibita* nature.[54] The 'transfer' norm, as it is widely interpreted, provides a default immigration rule for the occupied territory (and by modern liberal standards, a highly restrictive and xenophobic zero immigration rule). In the absence of a state of hostilities, such migration would be governed entirely by immigration law, which is not regarded as *malum in*

[50] To be sure, local residents might find new neighbours to be disruptive or annoying, but it would be quite something to say that this rises to the level of disruption from war and pillage in the other ICC situations.

[51] Cryer and others (n 14) 308 (noting that the transfer prohibition does 'not originate in classic concerns of … protection of persons and property affiliated with the "other side"' and protects different values from those of all other war crimes).

[52] A *malum prohibitum* offence is one where 'the conduct proscribed is not wrongful … independent of the law that defined it as criminal', as opposed to conduct that is inherently evil: see Douglas N Husack, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press 2010) 411. Often *malum prohibitum* crimes are 'public welfare offences' that 'result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize': *Morissette v US* 342 US 246 (1952), 255–56.

[53] Jean S Pictet (ed), *IV Commentary on the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1958) 283.

[54] If 'direct or indirect' transfer were to be interpreted as going beyond the prohibitions of the Geneva instruments, this would further underscore its *malum prohibitum* nature.

se. The question here is not whether violations of such rules are war crimes, but rather how readily a situation characterised primarily by such crimes reaches the necessary gravity.

3.3. CRIME WITHOUT VICTIMS

Leaving aside the absence of dead or wounded, a secondary quantitative measure of gravity is the number of victims, regardless of the kind of injury they have suffered. This raises the question of how one calculates the 'victims' of a settlement. For all international crimes, the international legal order is in a sense a victim and, for crimes against particular groups, that group is in an abstract sense a victim. This more general aspect of injury is what gives the crimes an international character, but this is not what is meant by 'victims' in the ICC context. While an injury may be collective, it must also be 'personal' to create a victim.[55]

The ICC Statute specifically identifies 'victims' as a distinct legal status that comes with various defined rights within the ICC system, such as participation in the proceedings and restitution.[56] The Rules of Procedure and Evidence provide the definition of 'victims' as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.[57] This definition has two major elements: (i) a notion of 'harm', with (ii) a demonstrable causal link with the crime. '[H]arm', as interpreted by the PTC in light of international human rights instruments and standards, encompasses physical, property and psychological injuries, such as that caused by seeing family members tortured or witnessing other violent events,[58] but the alleged injury must be 'personal' as opposed to purely collective. The causal link requires that the harm is 'a consequence, a result' of the commission of the crime.[59]

'[D]eportation or transfer' of the occupying power's civilians poses an obvious challenge for the classic conception of victim. It is not done *to* particular protected persons or their property.[60] As the Commentaries make clear, Article 49(6) protects the occupied people as a 'population' or as a 'separate … race'.[61] Such interests are entirely collective, and not personal.[62] Taking the case of residential construction within existing Jewish neighbourhoods, without new expropriation

[55] ICC, *Prosecutor v Lubanga*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, Appeals Chamber, 11 July 2008, [35].
[56] Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross* 409, 425–32.
[57] ICC Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13_ENG, 2003, r 85(a), http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf.
[58] Baumgartner (n 56) 420–21.
[59] ICC, *Prosecutor v Bemba*, Fourth Decision on Victims' Participation, ICC-01/05-01708, Pre-Trial Chamber III, 12 November 2008, [72], [74]–[78].
[60] Any particular 'transfer' may involve an expropriation of property, which could be a separate offence, but it certainly need not do so.
[61] Pictet (n 53) 238.
[62] In some circumstances, individual Palestinians could claim economic harm from settlement construction, such as difficulty in obtaining access to agricultural lands. Yet, for settlement growth within their existing municipal boundaries or in densely Jewish 'settlement blocs', it would be hard to demonstrate that an increase in their

from Palestinian private owners, it would be difficult to demonstrate economic harm to particular Palestinians.[63] Indeed, it would be hard to demonstrate that the protected persons would have known about the new 'transfers' to established population centres if it were not for news accounts. Again, this is not to say the 'deportation or transfer' does not injure the 'protected persons'; rather, it does not injure them in the personal and identifiable way that creates individual – and thus quantifiable – 'victims'.

Moreover, the vast majority of 'settlement activity' over which the Palestinians complain takes place within a mile or so of the Green Line, which limits the number of protected persons that might be affected. Thus, there is no danger of a change in the demographic character of the occupied territory from these alleged 'transfers', or of undermining Palestinian self-determination: certainly since 2012, such activity has focused overwhelmingly on existing Israeli population centres.[64]

3.4. OTHER QUALITATIVE FACTORS

Both the PTC and the OTP have mentioned the 'manner of commission'[65] of the relevant crimes and their 'impact'.[66] The manner refers to the 'means employed to execute the crime'. Thus the OTP has cited, in support of a finding of situational gravity, that killings were accompanied by massive brutality and torture – such as burning alive, hacking off body parts, gang rape and so forth. By contrast, the transfer crime is committed primarily through the issuing of permits for building houses, accompanied by the provision of municipal and other governmental services. It may occasionally be accompanied by land expropriation, though this has been quite rare since 2012; this involves issues frequently adjudicated in Israeli courts[67] and is thus likely to be barred on the ground of complementarity. In any case, one cannot compare such a manner of commission with those of crimes that the Court has considered.[68] The means of commission may also refer to the 'systematic' nature of the crime.[69] Israeli settlement activity may be part of a

population has any direct effect upon individual Palestinians (regardless of the more general effect on 'prospects for peace').

[63] To the extent that an allegation of expropriation or economic harm is involved, that aspect of the alleged crime could be inadmissible on complementarity grounds, as Israeli courts entertain and grant relief to Palestinians claiming infringement of their property rights.

[64] Elliott Abrams and Uri Sadot, 'Facts on the Ground: Inside Israel's Settlement Slowdown', *Foreign Affairs*, 18 June 2014, http://www.foreignaffairs.com/articles/141582/elliott-abrams-and-uri-sadot/facts-on-the-ground.

[65] ICC, *Prosecutor v Muthaura*, Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, Pre-Trial Chamber II, 23 January 2012, [50]; Policy Paper (n 19) para 64.

[66] *Muthaura*, ibid [50]; Policy Paper (n 19) para 65.

[67] See, for example, Ethan Bronner, 'Israel's Top Court Orders Settlers to Leave Outpost', *The New York Times*, A8, 26 March 2012.

[68] The conscription of child soldiers, for example, which could in theory be achieved by sending out draft notices, is in the prosecuted cases typically committed by measures such as abduction and shooting those who failed the physical training regimen: see ICC, *Prosecutor v Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, Trial Chamber I, 10 July 2012, [13], citing the Special Court for Sierra Leone, *Prosecutor v Sesay, Kallon and Gbao*, Case No SCSL-04-15-T, Trial Chamber, Sentencing Judgment, 8 April 2009, para 180.

[69] Policy Paper (n 19) para 64.

government policy, but this would seem to be a necessary element of the crime itself, and thus it is not clear how it can substantially exacerbate gravity.[70] In any case, there is no precedent for the 'systematic' nature of a crime alone satisfying the gravity bar in the absence of mass physical violence and brutality.

Finally, gravity may include the social and economic effects of the crime, which will be discussed in Part 5, below.

4. GRAVITY ELSEWHERE IN THE ICC STATUTE

While the ICC Statute does not define 'gravity' for the purposes of admissibility, it does use the same term in three other contexts. These apparently refer to the same concept, and should be read to inform the Article 17(1)(d) definition. First, gravity is referred to in the Preamble in describing the kinds of situation to which the ICC was designed to respond; second, in the definition of war crimes, it borrows the Geneva Conventions' distinction between grave and non-grave breaches; and, third, the gravity of the crime is a factor in sentencing, distinct from aggravating circumstances.

First, the Preamble speaks of 'such grave crimes' in referring to 'unimaginable atrocities that deeply shock the conscience of humanity'. It goes on to say that punishing such crimes is the mission of the Court. Thus, from the beginning, 'grave crimes' are situated in the context of mass violent atrocity. Furthermore, the Statute's definition of war crimes continues the Geneva Conventions' distinction between 'grave breaches' and other, less severe violations.[71] Non-grave breaches have traditionally been thought of as less objectively atrocious, and certainly of less international concern: the Conventions' extradite-or-punish rule does not apply to non-grave breaches. Article 49(6) of the Fourth Geneva Convention, on which subsection (viii) is based, is not a grave breach,[72] and is not treated as such by the ICC Statute.[73] This does not mean that non-grave breaches will always fail the Article 17(1)(d) test of gravity, otherwise there would be no point in including them as statutory crimes. However, it does mean that these offences are already at the low end of the gravity spectrum, and thus they will be much less likely, in themselves, to result in sufficient situational gravity. In this case, the absence of physical violence and direct victims should be decisive.

---

[70] Israel's activity has had elements that contradict the existence of a systematic policy, such as periodic freezes on building tenders, the frequent failure to authorise building in pre-approved projects or private purchases by Israelis, the demolition of houses in certain settlements, and so on.

[71] See ICC Statute (n 2) art 8(a) and (b) (distinguishing 'grave breaches' from '[o]ther serious violations').

[72] Notably, the First Additional Protocol to the Geneva Conventions of 1977 does treat the crime as a 'grave breach': Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), art 85(4)(a). Israel is not a party to the Protocol, although 174 states are. Yet, regardless of the status of Additional Protocol I under customary international law, the ICC Statute explicitly incorporates the 1949 Geneva Conventions' definitions of 'grave breaches', rather than that of the Protocol: see ICC Statute (n 2) art 8(2)(a).

[73] ibid art 8(2)(b)(viii).

5. GRAVITY DEFINED BY THE POLICIES OF THE CRIME

Looking beyond the practice of the OTP and the text of the ICC Statute, one might characterise a crime as sufficiently grave when its commission implicates the policies behind its criminalisation.[74] For violent crimes, the purpose is straightforward – protecting the life, body or freedom of the victim. Yet, for the crime of transfer, the object of the prohibition is not simply to render an area free from members of a particular nationality. Rather, the injury to be prevented is a worsening of the economic conditions of the 'native population' and threatening its 'separate existence … as a race'.[75] Thus, transfer protects against two harms: economic welfare – on the aggregate, not individual, level – and racial purity or integrity.

The notion of 'separate races' seems anachronistic, and it is hard to measure racial existence. Nonetheless, these policies remain the underlying rationales behind the anti-transfer norm.[76] One might think this interest might come into play where the transferred population becomes a majority in the occupied territory, thus also potentially undermining the ability for self-determination.[77] Such 'demographic busting' transfers are, in fact, not uncommon – present day examples might include Northern Cyprus and Western Sahara, while earlier instances perhaps comprise East Timor and the Baltic states under Soviet rule. This does not destroy the protected population as a 'separate race', but does make a 'separate' existence more problematic. Yet Israeli settlers make up roughly just 10 per cent of the population of the occupied territory.[78]

---

[74] ICC, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application of Arrest, Article 58', ICC-01/05, Appeals Chamber, 13 July 2006 (*Situation in the DRC*), separate and partly dissenting opinion of Judge Pikis, [40] (noting that the crime may fail to satisfy the gravity criteria when its commission does not threaten the 'objects of the law in criminalising the conduct').

[75] Pictet (n 53) 283.

[76] For example, with regard to Additional Protocol I (n 72), while upgrading the crime to a 'grave breach', its commentary did not expand the rationale behind the prohibition: see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) paras 3503–04.

[77] The International Court of Justice (ICJ) has suggested that the construction of the separation wall, alongside settlement activity, could undermine Palestinian self-determination by amounting to de facto annexation: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [121]. Fundamentally, the ICJ found it was the wall which could serve as a de facto border that would undermine self-determination, rather than settlements: ibid [121]–[122]; that is, in the ICJ's logic, the wall could amount to an annexation without settlements, but it did not maintain the opposite. Moreover, the construction of the wall is a separate policy outside the scope of the anti-transfer norm; the ICJ based the relevant discussion of self-determination on instruments and principles exogenous to international humanitarian law (ibid [88], [118]) and thus such issues do not inform the rationale of the anti-transfer norm, and would accordingly be outside the ICC's purview.

[78] Khaled Abu Toameh, 'Palestinian Population in W. Bank, Gaza, about 4.5 Million', *The Jerusalem Post*, 11 July 2013, http://www.jpost.com/National-News/Palestinian-population-in-W-Bank-Gaza-about-45-million-319569; AP, 'A Look at Israeli Settlers, by the Numbers', *The Times of Israel*, 18 August 2013, http://www.timesofisrael.com/a-look-at-israeli-settlers-by-the-numbers/. In cases like Northern Cyprus or Western Sahara, where the implanted population rivals or exceeds the protected population, the political ability of protected persons to maintain their separate identity becomes imperilled.

While it is hard to measure 'separate existence as a race', the Palestinian population has grown dramatically in parallel with settlement growth, tripling since 1967. While historians argue whether Palestinian national identity predates the Six Day War,[79] it is clear that the subsequent decades have resulted in a crystallisation and unprecedented invigoration of Palestinian nationhood.[80] Finally, if one takes 'separate existence' as an anachronistic expression for self-determination, it is undercut by the 2012 recognition of Palestine as a 'state' capable of accession to the ICC. Emergence as a state is the pinnacle of self-determination. The Palestinians did not achieve this in the 19 years under Jordanian occupation, a quarter-century of British administration or four centuries of Ottoman imperialism.[81] The economic injury is even more clearly absent; the Palestinian Territories have seen considerable economic growth since 1967, outpacing many neighbouring states and certainly their prior rate of growth.[82] In any case, it would be difficult to causally attribute any economic harm suffered by the Palestinians to 'transfer' rather than the occupation itself, which is not a crime.

6. RELATIVE GRAVITY

The gravity of Israel's settlements may also be considered in relation to the magnitude of other arguable instances of the crime elsewhere in the world. Such comparisons are useful for a variety of reasons. First, gravity is in part an acknowledgement of the ICC's finite resources, and thus determinations should be guided with an eye towards the possible set of cases. Second, the rule of law requires a consistent approach to defendants regardless of nationality. There are at least two ICC member states currently suffering from occupation and potential violations of 'deportation or transfer' by non-member states – Cyprus and Georgia, occupied in part by Turkey and Russia, respectively. Turkish settlement in Cyprus is more long-standing – the Court would have jurisdiction from 2002 when Cyprus became a state party – and of significantly greater magnitude.

There is no precedent for the question of how one measures the scale of the transfer, but the policies behind the norm suggest that the number of transferees relative to the size of the target population would be the right measure, rather than the absolute number of transferees. Otherwise, if 1,000 persons are transferred into a territory of 500 inhabitants, it would not be considered grave, despite having massive demographic consequences for the protected persons. Turkish

[79] cf Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (Columbia University Press 1997) 19; Ephraim Karsh, *Palestine Betrayed* (Yale University Press 2010) 39.

[80] William Charles Brice and Rashid Ismail Khalidi, 'Palestine', *Encyclopædia Britannica*, 20, http://www.britannica.com/EBchecked/topic/439645/Palestine ('[A]fter 1948 – and even more so after 1967 – for Palestinians themselves the term came to signify not only a place of origin but, more importantly, a sense of a shared past and future in the form of a Palestinian state').

[81] This further reduces the relevance of the ICJ's decade-old dicta of self-determination threats to Palestinians. The ICJ's advisory opinion predates the establishment and recognition of the state of Palestine, and statehood is the highest form of self-determination.

[82] See Rosa Valdivieso, *West Bank and Gaza Economic Performance, Prospects and Policies: Achieving Prosperity and Confronting Demographic Challenges* (International Monetary Fund 2001) 26 (finding an average 6% per annum GDP growth in Gaza and West Bank under Israeli control); Arie Arnon and others, *The Palestinian Economy: Between Imposed Integration and Voluntary Separation* (Brill 1997) 21 (noting that in the first three decades after the Six Day War, the Palestinian economy grew faster than Israel's).

settlers today constitute an absolute majority in Northern Cyprus. By contrast, Israeli civilians constitute perhaps 10 per cent of the total population of the territories.

In occupied Cyprus, the influx of settlers has been accompanied by the significant net emigration of protected persons. This exacerbates the demographic effect of transfer, and is part of the paradigmatic case where violations of Article 49(6) of the Fourth Geneva Convention helped to effectuate de facto Article 49(1) breaches.[83] In the West Bank, by contrast, the population of protected persons has grown rapidly under occupation. In terms of the annual influx of settlers, the Cypriot situation is apparently more grave even in absolute numbers. Turkish settlers move into Northern Cyprus at a rate of roughly 5,000 a year, and in some of the more recent years for which data is available (2005–09) have come at more than two[84] or three times that rate – sometimes as many as 18,000 a year.[85] Yet there has been no suggestion in the international community that the Turkish settlement activity is a particularly grave crime worthy of the Court's attention.

Aside from the alleged transfers in the territory of ICC member states, one might consider the Moroccan conduct in occupied Western Sahara, where again an absolute majority of the current inhabitants are Moroccan settlers who have migrated there since the takeover of the territory in 1975.[86] This may be of particular relevance to the ICC as Western Sahara is now also considering emulating the Palestinian turn to the GA for non-member state status.[87] All of these examples suggest that if there is a gravity spectrum for 'transfer', Israel's policies do not put it at the top of the world's gravest violators. Indeed, from the complete absence of any discussion by academics, NGOs or world leaders about an ICC situation regarding Turkish, Moroccan, Russian[88] or Armenian settlement activity – which are cited as significant obstacles to peace within their respective conflicts – one might conclude that there is an implicit confirmation that the international community concurs with the analysis here and places such offences well at the bottom of the ICC's gravity spectrum.

---

[83] This was the case with the paradigmatic problem of German settlement in Eastern Europe and subsequent situations around the world.

[84] Ahmet Atasoy, 'Population Geography of the Turkish Republic of Northern Cyprus', (2011) 16(8) *Mustafa Kemal University Journal of Social Sciences Institute* 29, 38.

[85] Ambassador Ronald Schlicher, 'Turkish Cypriot Census Debate Focuses on Natives Versus "Settlers"', 18 May 2007, http://www.wikileaks.org/plusd/cables/07NICOSIA434_a.html.

[86] See, generally, Jacob Mundy, 'Moroccan Settlers in Western Sahara: Colonists or Fifth Column?' (2012) 15 *Arab World Geographer* 95.

[87] Reda Shannouf, 'Western Sahara May Also Request UN Observer Status', *Al-Monitor*, 4 December 2012, http://www.al-monitor.com/pulse/politics/2012/12/western-sahara-un-observer-status.html.

[88] 'С 1993 года по 2013 год госкомитетом РА по репатриации зарегистрировано 7 365 человек' ('From 1993 to 2013 the State Committee for Repatriation Registered 7,365 People'), *Apsnypress*, 6 August 2013, http://apsnypress.info/news/9702.html. See also Natia Kuprashvili and Nizfa Arshba, 'Abkhazia Takes in Ethnic Kin from Syria', *Institute for War & Peace Reporting*, 29 August 2013, http://iwpr.net/report-news/abkhazia-takes-ethnic-kin-syria.

7. CAN SETTLEMENTS EVER SATISFY GRAVITY?

Some might argue that the gravity argument proves too much. If deportation and transfer, because of the absence of death, physical injury and individual victims, do not constitute a particularly 'grave' crime, one might worry that it would effectively render moot Article 8(2)(b)(viii) of the ICC Statute. Presumably, its inclusion in the Statute means that there should be some circumstances under which the crime would be admissible.

The first response is to note that while rendering the provision nugatory is problematic, merely giving it a narrow application is entirely consistent with the practice of international criminal tribunals and the ICC itself. Not once since the drafting of the Fourth Geneva Convention has anyone been prosecuted for this offence. The gravity requirement is intended to be an additional jurisdictional limitation, beyond the definition of particular serious crimes. So it would be difficult to argue that applying the gravity requirement of the ICC Statute unduly cuts back on international humanitarian law in practice.

Moreover, the definition of crimes of inherently different levels of severity (from genocide to property offences), coupled with an independent gravity requirement, necessarily means it will be much harder to establish situational gravity based purely on the less severe offences. One can also argue narrowly that Israeli policies do not meet the gravity criterion because the transferred population does not constitute a sufficient percentage of the occupied area's population without, in principle, precluding situational gravity based solely on such charges.

Another response is that that claims of situational gravity based primarily on Article 8(2)(b)(viii) violations might indeed be quite unusual and difficult to make. However, the transfer of an occupying power's population into a territory is often, and perhaps typically, accompanied with a concomitant expulsion of protected persons – as in Cyprus, Georgia, Nagorno-Karabakh, and elsewhere. Such expulsion violates Article 8(2)(a)(vii) and is a 'grave breach' violation enshrined in Article 49(1) of the Fourth Geneva Convention, Article 49(6) of which is a derivative non-grave offshoot of Article 49(1). Indeed, the paradigmatic case of settlements, the German colonisation of Poland and the Ukraine in the Second World War, involved the classic one-two punch of expulsion of the protected population followed by the importation of settlers. Thus, violations of other prohibitions of Article 49 of the Fourth Geneva Convention might magnify the gravity of violations of Article 8(2)(b)(viii) of the ICC Statute.[89]

Indeed, the fact that the novel crime of transfer into occupied territory was made part of Article 49 of the Fourth Geneva Convention, rather than a stand-alone offence, suggests that the drafters understood these as being two sides of a common process.[90] In practical terms,

[89] This would help to explain the absence of any international organisation or NGO calls for the OTP to investigate Turkey's continued settlement activity in Cyprus, because the invasion and its associated *jus in bello* crimes and art 49(1) expulsions precede the creation of the Court.

[90] This differs from Lauterpacht's much criticised argument that a violation of art 49(6) occurs only when the transfer displaces protected persons: see Hersch Lauterpacht (ed), *International Law: A Treatise: Dispute, War and Neutrality*, vol 2 (7th edn, Longmans 1952) 452; Herbert J Hansell, 'International Law and Israeli Settlement Policy', *Foundation for Middle East Peace*, 21 April 1978, http://www.fmep.org/resources/

the expulsion–transfer combination is much more likely to threaten the protected population's separate existence as a race. Thus, taking the gravity requirement seriously does not render the offence a dead letter in the ICC Statute.

Indeed, in the future, situational gravity will rarely turn primarily on Article 8(2)(b)(viii) because the underlying armed conflict could itself raise sufficient gravity questions. For example, the ICC has opened a preliminary examination concerning crimes in the Russo-Georgian war of 2008. While the investigation does not currently include Article 8(2)(b)(viii) charges, it could be broadened to include such issues if the settlement efforts of the Russian occupation regime continue. Such issues would only have to satisfy the gravity criterion for individual defendants, not for the situation. In the case of Israel, the underlying armed conflict is severed from the subsequent transfer by the Court's non-retroactivity principle.

Finally, the notion of a crime in the ICC Statute that does not typically meet the gravity criteria unless committed with other offences is not anomalous. For example, incitement to genocide in situations where no genocide occurs is formally a serious international crime, but in practice it is not one that rises to the level of gravity to warrant international proceedings. Incitement is a separate and complete offence under the Genocide Convention that is entirely freestanding from the commission of genocide,[91] just as transfer is formally independent of expulsion in the Fourth Geneva Convention.[92] Individuals have been prosecuted for incitement without taking part in the subsequent genocide. However, despite some well-known ongoing examples of pre-genocidal incitement, 'no international court has ever brought an incitement prosecution in the absence of a subsequent genocide or other directly related large-scale atrocity'.[93] Such conduct, while entirely within the letter of the prohibition, is in practice treated as less grave.[94]

reference/u.s.-state-department-legal-adviser-herbert-hansell-letter-re-international-law-and-israeli-settlement-policy. Lauterpacht's legal conclusion was premised on the factual observation that art 49 violations tend to go together. One need not agree with the legal conclusion that art 49(6) violations cannot exist *simpliciter* to recognise that the fact that they often arise alongside art 49(1) violations means that the gravity argument suggested here would not effectively read the settlements crime out of the ICC's jurisdiction.

[91] See Kai Ambos, *Treatise on International Criminal Law: Foundations and General Part*, vol 1 (Oxford University Press 2013) 257 (observing that art 25(3)(e) of the ICC Statute is both 'an autonomous offence of endangerment' and an 'inchoate crime with reference to genocide as the main offence').

[92] Convention on the Prevention and Punishment of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277, art 3(c). Under the ICC Statute, incitement is a mode of participation in the crime of genocide: see ICC Statute (n 2) art 25(3)(e).

[93] Gregory S Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework' (2008) 98 *Journal of Criminal Law & Criminology* 853, 907.

[94] See Marko Milanović, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553, 572, n 95 ('It is of course quite unlikely that the responsibility of either a state or an individual would be invoked if no genocide had in fact occurred').

8. SOCIAL ALARM

Many will find any discussion of gravity in the context of settlements surprising: they are widely considered one of the greatest outrages in the world. Yet most would admit that as bad as they are, settlements are not as bad as the killing of civilians, mass rape or sending children to die. One can speak of degrees of gravity, and indeed the ICC Statute requires us to do so. The question thus becomes a technical one: what is the cut off imposed by Article 17 of the Statute, a cut off which necessarily leaves out very serious international crimes?

The widespread international condemnation of Israeli settlements as illegal and an obstacle to peace does nothing to establish their gravity under Article 17(d) because the particular international 'social alarm' caused by a crime is not part of the gravity calculus. Some commentators have argued for taking into account the 'social alarm' caused by an alleged crime in measuring gravity.[95] Social alarm refers to the level of concern of the international community. The explicit purpose of such a qualitative factor is to make it easier to establish jurisdiction over crimes committed by Western states.[96]

By any measure – GA resolutions, UN Human Rights Council agenda items or international activism – few issues command attention as much as Israel's settlements. However, this also shows the danger of referring to concern: social alarm may mask bias or hostility. It turns admissibility into a popularity contest. Certainly if international criminal law were the television programme 'Survivor', Israel would be voted off the island. Perversely, if social alarm, as measured by, say, Human Rights Council resolutions, was central to gravity, Israeli settlements would qualify – but few other situations would. Indeed, the ICC's case selection demonstrates that it has not taken account of 'social concern'. International society, as reflected in GA pronouncements, has often been entirely unconcerned about some of the African conflicts that the Court has dealt with.

In any event, 'social alarm' of this kind is not part of the gravity determination. First, 'social alarm', whatever it means, has been rejected by the Appeals Chamber as a measure of gravity on the ground that 'social alarm' has no basis in the ICC Statute and would politicise determinations by relying on 'subjective and contingent reactions to crimes rather than upon their objective gravity'.[97] Similarly, the subjective nature of such an inquiry has been sharply criticised by other commentators.[98] The international community may be unconcerned about crimes in 'remote' corners of the world, or by powerful states that cannot be stopped.

Second, the 'social alarm' test, even if it were adopted as a factor in the assessment of gravity, applies at a greater level of generality. The question is not concern about Israeli settlements, but rather about the crime of transfer as a worldwide phenomenon. In *Lubanga*, the only ruling in

[95] Heller (n 40).
[96] ibid.
[97] *Situation in the DRC* (n 74) [72].
[98] See, for example, Mark Osiel, 'How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of "Situational Gravity"', *Hague Justice Portal*, 5 March 2009, 4–5, http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Osiel_ICC_EN.pdf; Mohamed M El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 35, 45.

which the PTC has mentioned 'social alarm', it did not refer to the concern about the particular factual situation – the Congo – but rather the particular crimes (the use of child soldiers).[99] By this standard, transfer clearly does not cause social alarm. It has taken place in numerous other contexts – such as Western Sahara, Northern Cyprus, Lebanon, Cambodia, Russian-occupied Georgian territories and the Nagorno-Karabakh region – without much or any international condemnation. Indeed, social alarm has focused almost solely on Israeli violations, suggesting that the offence in general is not alarming. Thus, under the *Lubanga* model, the specific international condemnation of Israeli settlements would be irrelevant when considering their gravity as a war crime under Article 17.

9. CONCLUSION

The ICC was created to deal with situations of mass atrocity and conduct that shocks the conscience of mankind. In addition to having its jurisdiction limited to particular defined crimes, the Court is further limited by the requirement that particular situations and cases be particularly grave. The gravity requirement by definition means that some situations, despite being extremely serious, will not meet the test.

The crimes within the ICC's jurisdiction vary greatly in severity. Overlaying the gravity requirement onto this underlying variance means that some crimes – such as genocide – will more readily satisfy the gravity test than others. The transfer norm, which is a non-grave war crime with no direct victims and the commission of which in the circumstances in question does not involve violence, is thus particularly tenuous from a gravity perspective. The failure of gravity in the Israeli case is made particularly clear given both the goals of the Court – preventing mass atrocities – and the transfer prohibition itself.

This does not mean the Court could never prosecute for 'deportation or transfer'. Such crimes may cross the gravity threshold either in themselves, because they fundamentally change the demographic composition of the occupied territory (as in Northern Cyprus, for example) or because they occur alongside other grave crimes in an international armed conflict.

[99] See ICC, *Situation in the Democratic Republic of the Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-01/07, Pre-Trial Chamber I, 10 February 2006, [47]. This also implies that there are types of crime that, while within the ICC's jurisdiction, do not cause social alarm.