

30 June 2012

## **Expert Opinion**

### **On the prohibition of forcible transfer in Susya Village**

I the undersigned was requested by Rabbis for Human Rights to provide an expert opinion regarding the legality of execution of demolition orders for the Susya Village buildings, due to its forbidden outcomes, i.e., the expected forcible transfer of the civil population. This opinion is based on the provisions of the international law. I am providing this opinion without remuneration.

#### **Background**

As background to my opinion, I shall note the merits of the facts pertaining to the matter as they were provided to me: In 1986, the residents of Susya were deported from their private lands in ancient Susya, following their expropriated for "public needs", without being offered an alternative residence. They settled on their lands located approximately 500 meters from their village. In 1991 they were deported from that location as well, regarding which it was later claimed, that the deportation was performed due to enforcement of planning and building laws. Consequently, they settled on their agricultural lands, which are until today their place of residence. During 2001 all their houses were demolished for the third time and it was again claimed in respect to this deportation that it was performed due to enforcement of planning and building laws. The residents attempted throughout the years to settle the issue of building permits in the village area by submitting building permit applications etc. On 12 June 2012 notices were distributed regarding the right to submit a demurrer prior to the execution of the demolition of 70 structures in the village which include 24 residential buildings, 21 structures serving as sheep pens and chicken coops, five structures for two solar electricity systems, five outdoor stoves (taboons) which are used as baking stoves for whole families, six latrines, three warehouses, one clinic, one cultural center, one grocery store, one churn and two water cisterns. If these structures are demolished, around 20 structures, which constitute approximately 20 percent of the village houses today (who are also under demolition danger) shall remain in the village. Therefore, the implication of the demolition will be the actual deletion of an entire village including its residential houses, its public institutions, the facilities necessary for its survival on its location, and the sources of livelihood of its residents. As has happened in the past, demolishing the village's structures will force its residents to wander across the area until they find alternative residential locations and sources of livelihood. This time, there is much doubt whether they will be indeed successful to accomplish that, as there is no land which they own left where they are permitted to pitch their tents and rebuild their homes.

#### **The legal aspects**

1. The area in which the residents of Susya village are located is an area under belligerent occupation on which the rules of international law regarding belligerent occupation apply, including the Hague Regulations of 1907 (hereinafter – Hague Regulations), the Fourth Geneva Convention regarding protection of civilians during wartime of 1949 (hereinafter – Geneva Convention), and the First Additional Protocol to the Geneva Convention of 1977 (hereinafter – the Protocol). Israel is not a party to the Hague Regulations, but they are recognized as customary law and therefore bind Israel and also apply in its domestic law. Israel is a party to the Geneva Convention. Article 49 of the Geneva Convention in which my opinion shall focus is accepted among states and by the international jurisprudence as reflecting customary law and therefore it also applies in the Israeli domestic law. Israel is not a party to the Protocol but the provisions discussed in my Opinion are accepted as reflecting customary law and therefore they apply in the Israeli law.

For specification of states consistent practice and rulings of the national and international courts see: International Committee of the Red Cross (ICRC), Practice Relating to Rule 129. The Act of Displacement [http://www.icrc.org/customary-ih/eng/docs/v2\\_rul\\_rule129](http://www.icrc.org/customary-ih/eng/docs/v2_rul_rule129).

#### **A. General**

1. Article 49 (1) of the Geneva Convention sets forth:

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

As previously stated the above article reflects a customary law which binds the Respondents and which overrides the instructions of the military commander in case of conflict.

Not only is the prohibition itself customary, but the sanction for its violation, which is a penal sanction is customary as well. Violation of Article 49 (1) constitutes a grave breach of the Geneva Convention (as noted in Article 147 of the Geneva Convention) which means a "war crime", and the Statute of the International Criminal Court (hereinafter – ICC) includes this grave breach among the "war crimes" which are within the jurisdiction of the ICC.

This means that anyone who performs an act in an area under belligerent occupation, which result is forcible transfer or deportation is personally responsible for the commission of a war crime.

According to the document defining the elements of the offence for purpose of activating the jurisdiction of the ICC, the elements of the crime of forcible transfer or deportation of protected persons include:

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1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements of Crime, Article 8 (2) (a) (vii)-1, War crime of unlawful deportation and transfer, available at <http://www1.umn.edu/humanrts/instate/iccelementsofcrimes.html>

There is no requirement that the person intended to cause the transfer or deportation, it is sufficient that he was aware that this is an expected outcome of his action. Article 30 of the ICC Constitution sets forth:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
    - (a) In relation to conduct, that person means to engage in the conduct;
    - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
  3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "Knowingly" shall be construed accordingly.
2. Section 49 (1) of the Convention relates to any transfer of protected population from wherever it is located, whether the issue is a transfer inside the occupied territory, or deportation outside that territory. This clearly arises from the travaux preparatoire of the Geneva Convention.

See Final Record of the Diplomatic Conference of Geneva of 1949, Vol. IIa (1949), p. 827:

[T]he Committee have [sic] decided on a wording which prohibits individual or mass forcible removals as well as deportations of protected persons from occupied territory to any other country.

The unimportance of the distinction between transfer within the occupied territory and deportation beyond the boundaries of the territory was discussed by the International Criminal Tribunal for the former Yugoslavia (ICTY), which stated:

521. Both deportation and forcible transfer relates to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.

522. However, this distinction has no bearing on the condemnation of such practices in international humanitarian law. Article 2(g) of the Statute, Articles 49 and 147 of the Geneva Convention concerning the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), Article 85 (4) (a) of Additional Protocol I, Article 18 of the ILC Draft Code and Article 7 (1) (d) of the Statute of the International Criminal Court all condemn deportation or forcible transfer of protected persons. Article 17 of Protocol II likewise condemns the "displacement" of civilians.

523. In this regard, the Trial Chamber Notes that any forced displacement is by definition a traumatic experience which involves abandoning one's home, losing property and being displaced under duress to another location.

ICTY, Prosecutor v. Radislav Krstic, IT-98-33-T, Trial Chamber, Judgment, (2001) (Footnotes omitted).

3. The prohibition is absolute and has no exception save those which are included in Article 49 (2) and which were intended, at the time of hostilities in the area, to protect the displaced persons themselves, or for imperative military needs, which too are limited by the temporariness of the transfer and the right of the displaced to return immediately upon termination of the hostilities in the area.

As determined by the commentator of the International Committee of the Red Cross: The prohibition is absolute and allows no exceptions.

See ICRC commentary, available at <http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument>

The significance of the absolute prohibition is that in a situation which is not an actual state of combat, considerations and constraints which are not connected to the security of the displaced protected civilians, or

imperative military needs, cannot serve as basis to "balance" vis-à-vis the absolute right of the protected civilians to remain where they are.

The absoluteness of the prohibition stems from the dark history of Second World War, where the phenomena of deportation for various reasons were prevalent. As the ICRC commentator states:

These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service. The thought of the physical and mental suffering endured by these "displaced persons", among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.

See ICRC commentary, available at

<http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument>

4. The terms "forcible transfer or deportation" in Article 49 of the Convention should be construed broadly, in order to fulfill the purpose of the Convention, which is the protection of protected persons; and in light of the ability of the occupying army to adversely use different rationales and take diversified indirect measures by manner that causes the protected persons to leave their location.
5. Accordingly it was set forth that the transfer is "forcible" even when it is not accompanied by the exercise of direct physical force on protected persons with the purpose to cause their departure. Creating the circumstances which indirectly cause the departure of protected persons shall be considered as prohibited transfer.

See the consistent ruling of the ICTY on this issue:

475. "Forced" is not to be interpreted in a restrictive manner, such as being limited to physical force. It may include the "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment". The essential element is that the displacement be involuntary in nature, where the relevant persons had no real choice.

ICTY, PROSECUTOR v. MILORAD KRNOJELAC, Trial Chamber, Judgment, IT-97-25-T (2002) (footnotes omitted).

Additionally:

519. Transfers motivated by an individual's own genuine wish to leave, are lawful. In determining whether a transfer is based on an individual's [sic] "own wish" the Chamber is assisted by Article 31 of the Geneva Convention IV. It provides for a general prohibition of physical and

moral coercion covering pressure that is direct or indirect, obvious or hidden and further holds that this prohibition "applies in so far as the other provisions of the Conventions do not implicitly or explicitly authorise a resort to coercion". The jurisprudence of the Tribunal also supports that the term 'forcible' should not be restricted to physical coercion. [...] The determination as to whether a transferred person had a "real choice" has to be made in the context of all relevant circumstances on a case by case basis. Forcible transfer is the movement of individuals under duress from where they reside to a place that is not of their choosing.

ICTY, PROSECUTOR v. NALETILIC and Vinko MARTINOVIC, IT-98-34-T, Trial Chamber, Judgment (2003) (footnotes omitted).

And also:

281. The term "forced", when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse or power against such person or persons or another person, or by taking advantage of a coercive environment.

ICTY, PROSECUTOR v. Milomir Stakic, Case No. IT-97-24-T, Appeals Chamber, Judgment (2006) (footnotes omitted).

In another case the Trial Chamber mentions actions such as discharge from workplace, house searches and disconnection of the houses from water, electric power and telephone line as part of the move to create severe living conditions for the residents, which were intended to cause the people to leave their home, which amounts to forcible transfer as previously mentioned:

ICTY, PROSECUTOR v. Momčilo Krajišnik Case No. IT-00-39-T, Trial Chamber I, Judgment (2006), Para. 729.

6. In addition to violation of the provisions of Article 49 (1) of the Geneva Convention, the planned demolition of structures is also prohibited by itself. It is contrary to the customary provision that is included in Article 54 of the Protocol that prohibits demolition or damage to structures that are indispensable for the survival of the protected civilian population:

1. Starvation of civilians as a method of warfare is prohibited. 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

The foregoing Article 54 constitutes a private case to the general rule prohibiting demolition of civilian structures in the occupied territory, which is anchored in Article 53 of the Fourth Geneva Convention:

Art. 53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

See on this issue my opinion regarding the demolition of structure which are indispensable for the survival of the protected civilian population due to the absence of a building permit, which was submitted in the scope of HCJ 5667/11 **The Council of Dirat Rafiya Village et al v. the Minister of Defense et al** <http://rhr.org.il/heb/wp-content/uploads/eyal-ben-benishti.pdf> as well as the opinion of Sassoli and Boutruche Expert Opinion on International Humanitarian Law Requiring of the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding area C of the West Bank by Dr. Theo Boutruche and Prof. Marco Sassoli (hereinafter: "**Sassoli Opinion**"), that was submitted in the scope of HCJ 5667/11 **The council of Dirat Rafiya Village et al v. the Minister of Defense et al** <http://rhr.org.il/heb/wp-content/uploads/62394311-Expert-Opinion-FINAL-1-February-2011.pdf>.

7. The demolition of facilities which are indispensable for protection of the population and without providing it with an alternative protection is contrary to the general duty that is imposed on the Respondents to care for the needs of the protected population under the provisions of Article 43 of the Hague Regulations and the various instructions of the Geneva Convention dealing in assuring the security and welfare of the protected residents in an area under belligerent occupation. This duty also stems from human rights law, which applies in belligerent occupation as well.

See on this issue my opinion hereinabove mentioned as well as my book – Eyal Benvenisti, *The International Law of Occupation* 12 – 15 (2<sup>nd</sup> Ed., 2012).

**b. Applying the law on the facts of the case**

1. The meaning of executing the demolition orders as discussed this Opinion is an actual "transfer" according to its meaning in Article 49 (1) of the Geneva Convention. Despite the fact that this time it is not transfer or deportation through the use of direct force, the aforementioned Article prohibits "transfer" or "deportation" directly or indirectly, of individuals or groups of protected residents. Indirect transfer or deportation are performed in this case by creating the physical conditions that oblige the protected persons to leave the location where they are against their will.

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This will be the actual situation following the execution of the demolition orders: pursuant the planned demolition of structures, there will be no way to survive in the area of the village without shelter and other facilities that ensure the sustenance and livelihood of the residents. The destruction of all the structures in the village is the de-facto forcible transfer of more than 200 men, woman and children.

2. The transfer is "forcible" in the meaning of Article 49 (1) hereinabove since the residents of a village reside on land that belongs to them. They are not interested in abandoning the lands of their village and in any event have no place to go.
3. In addition to the indirect transfer, the demolition of structures in the village as hereinabove described constitutes demolition of structures which are indispensable for survival of the village residents, which is also prohibited, as provided in Article 6 hereinabove.
4. Of course, logic requires that the prohibition on transfer or deportation shall not apply on evacuation from a location where the protected people settled of their own free will following the beginning of the belligerent occupation and contrary to the local law as applying in the area. That, as long as the evacuation process itself is lawful according to the domestic law and the provisions of the international humanitarian law and human rights law. This condition is not fulfilled in the current case. In addition to the afore described, one should take into consideration that the exercise of planning and building laws by the planning institutions of the civil administration in area C in general and in this case especially, is performed while violating the international humanitarian law and the human rights law.

On that issue see:

Eyal Benvenisti, *The International Law of Occupation* 214, 247 (2nd Ed., 2012):

Order No. 418 concerning Towns, Villages, and Building Planning Law from 1971 flattened the hierarchical system of the Jordanian building planning law and transferred the authorities of the district planning committees to the central planning council. The latter, manned by appointees of the military commander, among them Jewish settlers, would allow no formal input by the Palestinian inhabitants. This had adverse effects on the possibility of Palestinians obtaining building permits, and turned the permit system into a disciplinary tool of applicants or those many whose frustration with the system prompted them to build without a permit, granting or denying building permits according to the applicants' willingness to cooperate.

[...]

In principle, the standard practice of occupants should involve the occupied population as much as possible in the administration especially

as the occupation lingers on. The long term occupant is required to provide for and pay ample attention to the input of the occupied community regarding the management of the latter's country.

(Also see the Sassoli Opinion and my opinion previously mentioned in Article 6 hereinabove).

5. **Therefore, my conclusion is that the execution of the demolition orders means in fact the issuance of a deportation order to the residents of the village. This move shall constitute a violation of Article 49 (1) of the Geneva Convention, and will also impose personal criminal liability on those responsible thereof. It shall additionally constitute a violation of the rule prohibiting demolition or damage to structures which are indispensable for the survival of the protected civilian population as well as violation of the duty to ensure the needs of the protected population are provided and human rights law that applies in the area such as the right to family, to adequate standard of living including the right for adequate housing.**

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