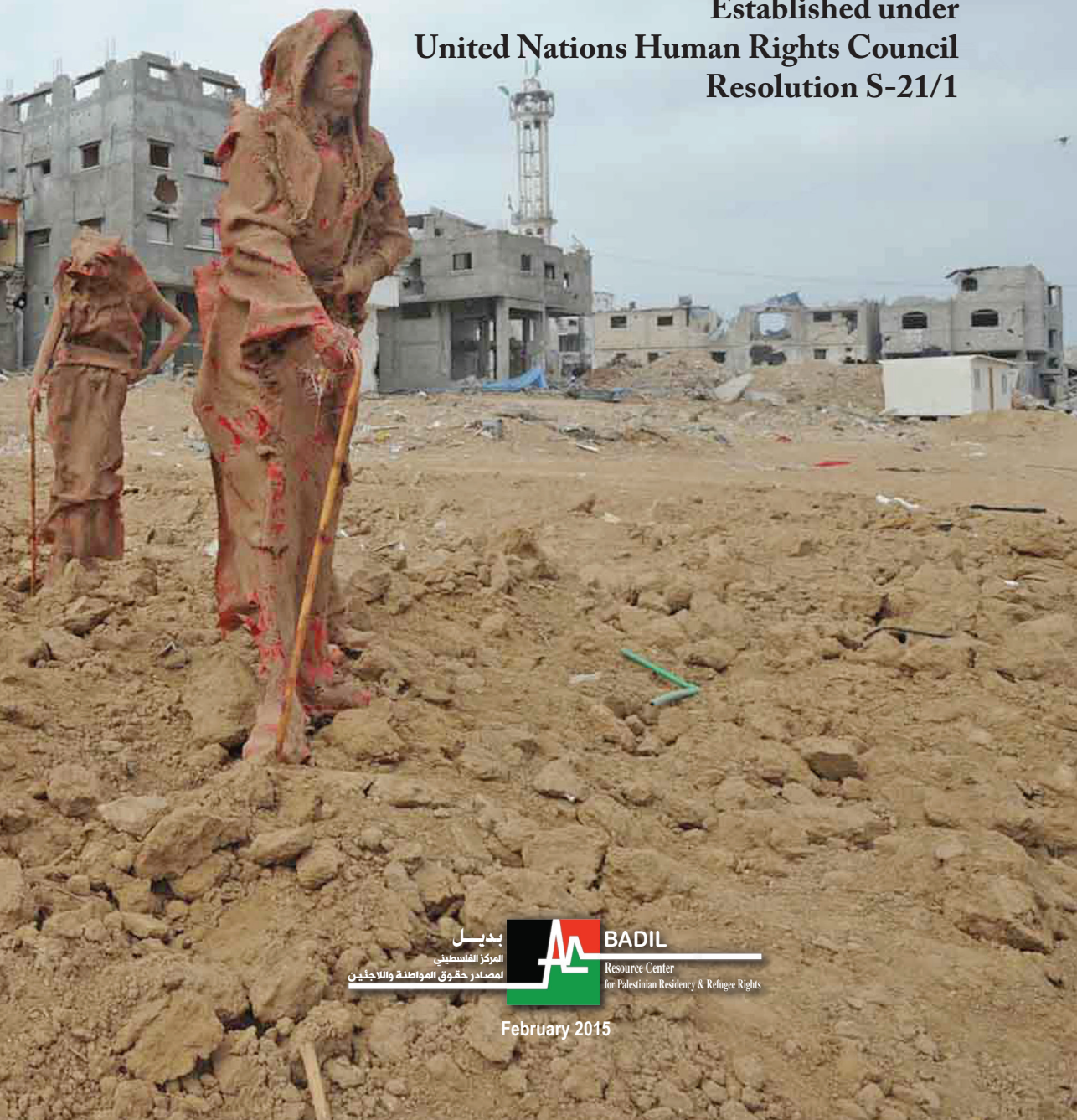


Displacement of Palestinians

as a War Crime

Information for the Consideration of
the Commission of Inquiry,
Established under
United Nations Human Rights Council
Resolution S-21/1



بدیل
المركز الفلسطيني
لمصادر حقوق المواطنة واللاجئين



BADIL

Resource Center
for Palestinian Residency & Refugee Rights

February 2015

Displacement of Palestinians *as a War Crime*

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established under United Nations Human Rights Council Resolution S-21/1

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Cover photo: Clay sculptures to commemorate the victims Israel's war on Gaza Strip by Palestinian artist **Iyad Sabbah**

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About this Report

The creation of the Independent Commission of Inquiry on Gaza 2014, under United Nations Human Rights Council Resolution S-21/1, constitutes an important and welcome development for all who are serious about the delivery of justice to Palestinian residents of the occupied Palestinian territory (oPt), and to those who seek accountability for perpetrators of international crimes. These two central tenets of international legal systems have been conspicuously absent in the face of an historical pattern of Israeli-perpetrated rights abuses dating back to the violence of the Nakba and, accordingly, BADIL pledges its full support to the Commission in the performance of its mandate.

Specifically, in the following report - presented in-person to the Commission of Inquiry in January 2015, and to be followed up at the March 2015 session of the United Nations Human Rights Council - BADIL draws attention to the widespread, mass forced displacement of Palestinians by Israel, and the crime of forcible transfer. This devastating crime is inextricably linked to a multitude of fundamental human rights, including the right to life; health; adequate housing; sustenance; freedom of movement, and freedom from discrimination. Yet, despite its status as one of the most heinous acts within a situation of international armed conflict, it is a crime which, in the case of Israel and Palestine, has received scant attention from the international community.

In the following report, the forcible transfer of Palestinians inside the oPt is explored through two separate case studies: Operation ‘Protective Edge’ in the Gaza Strip; and the planned forced relocation of Palestinian Bedouin communities in the central West Bank. These two examples are not isolated processes, but rather the latest manifestations of a systematic policy of forced displacement of Palestinians by Israel; a policy which has led directly to the world’s longest unsolved refugee crisis, and the continued displacement of 7.4 million Palestinians, representing 66 per cent of the global Palestinian population.

The foundations of this report are provided by field research conducted by BADIL in both the Gaza Strip and the West Bank. BADIL takes this opportunity both to express its sincere gratitude for the courage shown by all who shared their experiences, and to reiterate its unconditional commitment to protect the human rights of Palestinians wherever they may be. This protection can only be achieved through real, effective change on the ground, and it is the pursuit of this change that characterizes BADIL’s mission. Until such a time as the forced displacement of Palestinians ceases, and a just and durable solution to the ‘Palestinian refugee problem’ is implemented, this work will continue.

1.

BADIL Overview

BADIL Resource Center for Palestinian Residency and Refugee Rights, located in Bethlehem in the occupied West Bank, is an independent, human rights non-profit organization which works to defend and promote the rights of Palestinian refugees and internally displaced persons (IDPs). Our vision, mission, programs and relationships are defined by our Palestinian identity and the principles of international humanitarian and human rights law. We seek to advance the individual and collective rights of the Palestinian people on this basis.

BADIL has special consultative status with UN ECOSOC, a framework partnership agreement with UNHCR, and is a member of Palestinian Human Rights Organisations Council (PHROC), BDS Campaign National Committee, HIC-Habitat International Coalition (Cairo), CRIN-Child Rights Information Network (UK), ICVA-International Council of Voluntary Agencies (Geneva), ECCP- European Coordination Committees and Associations for Palestine, OPGAI-Occupied Palestine and Syrian Golan Heights Advocacy Initiative, and PNGO-Palestinian NGO Network.

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2.

Introduction

BADIL Resource Center for Palestinian Residency and Refugee Rights condemns in the strongest possible terms Israel's refusal to permit access of the Commission of Inquiry to the occupied Palestinian territory (oPt). This refusal is not an isolated incident, but rather the latest event in what has become a pattern of Israeli non-compliance regarding independent investigations into grave human rights abuses within the oPt.¹ It is, therefore, BADIL's position that Israel's refusal to cooperate should not hinder international efforts to achieve full accountability for any violations of international humanitarian law and international human rights law committed inside the oPt. Accordingly, BADIL pledges its full support to the Commission of Inquiry in the performance of its mandate.

Israeli actions within the oPt during the Commission of Inquiry's stipulated time frame have been the subject of a wide range of accusations of serious rights abuses, though this advisory paper will focus solely on the issue of forced displacement, and, more specifically, the crime of forcible transfer. This devastating crime is inextricably linked to a multitude of fundamental human rights, including the right to life, health, adequate housing, sustenance, freedom of movement, and freedom from discrimination. Yet, despite its status as one of the most heinous acts within a situation of international armed conflict, it is a crime which, in the case of Israel and Palestine, has received little attention from the international community.

For instance, despite the Report of the United Nations Fact-Finding Mission on the Gaza Conflict² (also known as the *Goldstone Report*) highlighting Israeli actions during *Operation Cast Lead* which would naturally give rise to permanent forced displacement of Palestinians inside the Gaza Strip (the targeting of civilians,³ civilian objects⁴ and denying sustenance to the civilian population⁵), East Jerusalem (effecting 'silent transfer' of Palestinian communities⁶) and the West Bank (settlement expansion, land expropriation and the demolition of Palestinian

¹ Prominent examples include the denial of entry to the West Bank of the United Nations Fact Finding Mission on the Gaza Conflict following Operation Cast Lead in 2009, and the complete refusal – since 2007 - to allow access to Israel and the oPt by all Special Rapporteurs on the situation of human rights in the Palestinian territories – including the current incumbent, Makarim Wibisono, in September 2014.

² UN Human Rights Council, September 2009. Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48. Hereafter, 'Goldstone Report'. Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

³ Ibid. Section XI

⁴ Ibid. Section XIII

⁵ Ibid. Paras.913-937

⁶ Ibid. Paras.1535-1537

villages⁷), the specific crime of *forcible transfer* received no consideration. Nor were any of the perpetrators of these grave breaches of the Fourth Geneva Convention held accountable. The result was Palestinian victims being deprived of justice, and the relevance of international law being severely undermined.

The issue of Israeli-perpetrated forcible transfer of Palestinians in the occupied Palestinian territory is a real and present danger, and in the course of its research, BADIL has identified nine policies through which Israel pursues this policy.⁸ Though a full consideration of the implementation of these methods inside the oPt is beyond the scope of this advisory paper, Israeli-perpetrated forcible transfer will be explored through two separate case studies: Operation ‘*Protective Edge*’ in the Gaza Strip; and the planned forced relocation of Palestinian Bedouin communities in the central West Bank. Regarding the latter, BADIL notes the Commission’s stipulated mandate to “[...]investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory [...] in the context of the military operations conducted since 13 June 2014, whether before, during or after...”⁹ The forced relocation of Palestinian Bedouin should be considered as a military operation insofar as it is a plan clearly stated by Israel; operates within a ‘legal’ environment shaped by bodies within the Defense Ministry of Israel, and is ultimately executed on the ground by members of the Israeli military. Furthermore, the perpetration of a grievous international crime, and the numerous basic human rights abuses entailed within this crime, demand that it be considered as a matter of great priority by the present Mission.

It should also be emphasised that the two case studies presented in this document are not isolated processes, but rather the latest manifestations of a systematic policy of forced displacement of Palestinians by Israel. This policy finds its roots in the Nakba of 1948, and the net result is the world’s longest running refugee crisis, with the continued displacement of 7.4 million Palestinians, representing 66 per cent of the global Palestinian population.¹⁰ The root causes of this displacement must therefore be recognized and dealt with justly. The legal mechanisms for achieving this are already present. What is required is not a reinvention of the wheel, but the thorough and consistent *application* of these mechanisms. Until this is achieved, the forcible transfer of Palestinians will continue unchecked.

⁷ Ibid. Paras.1538-1539

⁸ BADIL, 2014. Forced Population Transfer : The Case of Palestine. Introduction. Available at: http://www.badil.org/phocadownload/Badil_docs/publications/wp15-introduction.pdf

⁹ UNGA, 23/07/14. Resolution S-21/1. Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem. Para.13

¹⁰ BADIL, 2012. Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012. Available at: <http://www.badil.org/en/press-releases/142-2012/3638-press-eng-53>

3.

Conceptualizing Forcible Population Transfer

1. In the context of international armed conflict, under Article 49 of the *Fourth Geneva Convention*¹¹ and Rule 129 of Customary International Law,¹² an occupying power is strictly prohibited from deporting and/or forcibly transferring the civilian population of an occupied territory.¹³ This provision is robust and unequivocal, prohibiting individual or mass forcible transfer regardless of motive, with contravention constituting a grave breach under Article 147 of the *Fourth Geneva Convention* (and thus also a war crime under the *Rome Statute* of the International Criminal Court¹⁴) as well as being addressed more widely in the latter under Article 8 (2)(b)(viii), which prohibits:

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;¹⁵

In this phrasing, “[t]he words ‘directly or indirectly’ are aimed at a situation where the occupying power does not actually organize the transfer of populations, but does not take effective measures to prevent this”.¹⁶ Accordingly, in order to satisfy a finding of the specific war crime of forcible transfer, the following material elements must be present:

- i. In the operating context of international armed conflict, there occur acts or omissions to forcibly remove civilians from their residence, or from areas where they were lawfully present, to a place outside of that area;
- ii. Involvement of protected persons (such as an occupied civilian population);
- iii. The removal being permanent in nature and not serving the security needs of the affected population, nor representing an imperative military necessity.

¹¹ International Committee of the Red Cross (ICRC), “Fourth Geneva Convention”, Article 49.

¹² International Committee of the Red Cross (ICRC), “Customary IHL - Rule 129. The Act of Displacement,” accessed July 24, 2014, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter38_rule129.

¹³ ‘Forcible transfer’ pertains to the forced displacement of individuals of communities within a de jure or de facto national border. Article 49 also covers situations of deportation, characterized by the forced displacement of individuals across such borders.

¹⁴ International Criminal Court, Rome Statute of the International Criminal Court, 1998, Article 8(2)(a)(vii)

¹⁵ International Criminal Court, Rome Statute of the International Criminal Court, 1998, Article 8(2)(b)(viii)

¹⁶ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (New York: Oxford University Press, 2010), 235.

2. Moreover, under the Rome Statute, when committed as part of a widespread or systematic attack against a civilian population, forcible transfer can also give rise to individual criminal responsibility as a crime against humanity.¹⁷ In this context, an ‘attack’ is formed of conduct causing physical or mental injury, as well as acts preparatory to such conduct. It is also distinct from the operating armed conflict at hand.¹⁸ “Widespread” refers to the large-scale nature of the attack, whilst “systematic” refers to the organized nature of the attack. The existence of a plan or policy behind the attack is relevant to proof of this element, but such existence of a plan or policy is not a distinct legal element of the crime.
3. In addition, Article 147 of the Fourth Geneva Convention also lists “the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” as a grave breach of the Fourth Geneva Convention. This is a crime which is commonly used to effect forcible transfer.
4. It is important to note that the *forcible* dimension in the term forcible displacement is interpreted broadly, and:

[...] is not restricted to physical force, but may include 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.¹⁹

5. The vital element is that the displacement in question be *involuntary*. That is to say that the “relevant persons had no real choice,”²⁰ and the bulk of case law which has developed understanding of scenarios which constitute such involuntary displacement derives from the International Criminal Tribunal for the former Yugoslavia (ICTY). In the *case of Simić et al*, it was deemed that “in assessing whether the displacement of a person was voluntary or not, [the Court] should look beyond formalities to all the circumstances surrounding the person’s displacement, to ascertain that person’s genuine intention.”²¹ As such, context is crucial in determining the extent to which the displacement of individuals or communities is ‘forced’. Specifically, the Simić ruling held that both the shelling of civilian objects and the issuing of orders to leave constituted intimidating acts which served to effectively deprive the civilian population of free will:

A lack of genuine choice may be inferred from, *inter alia*, threatening

¹⁷ International Criminal Court, Rome Statute of the International Criminal Court, 1998. Article 7(d)

¹⁸ ICTY, Prosecutor v Kunarac et al. Case number IT-96-23/1-A. Appeals Chamber Judgement, 2002, para.85

¹⁹ The Rome Statute Elements of Crimes, Article 6(e)

²⁰ ICTY, Prosecutor v Krnojelac. 2002. Case number IT-97-25-T. Trial Judgement, para. 475; Case number IT-97-25-A. Appeal Judgement, para.233

²¹ ICTY, Prosecutor v Simić et al, 2003. Case number IT-95-9-T. Trial Judgement, para.126

and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of – or the threat to commit – other crimes.²²

6. Context is also crucial in cases of so-called consent of the victim to leave, and such consent may be rendered “valueless” given the nature of the environment in which that ‘consent’ is given.²³ This logic was developed further in the case of Blagojević and Jokić:

Even in cases where those displaced may have wished – and in fact may have even requested – to be removed, this does not necessarily mean that they had or exercised a genuine choice. The trier of fact must consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims’ vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful.²⁴

7. Displacement resulting from the creation of a coercive living environment is also unlawful. In Krajišnik, the Court held that measures including “dismissals from employment, house searches, and the cutting off of water, electricity, and telephone services” all contributed to the intentional creation of an environment in which it was “practically impossible [for Muslims and Christians] to remain.”²⁵ Accordingly, genuine choice was absent from the decision-making process, and the court arrived at a finding of forcible transfer.
8. Concerning the question of what distance from their usual place of residence must an affected person be displaced in order to satisfy a finding of forcible transfer, in Simić, it was held that this requirement was met if the victim is prevented from effectively exercising their right to stay in their home and community, and their right not to be deprived of their property.²⁶
9. For a finding of forcible transfer to be reached, there must be demonstrable intention on behalf of the perpetrator. Article 30 of the Rome Statute provides that this requirement for intent can be satisfied through *dolus indirectus* – otherwise known as the ‘oblique intention’ – which is to say that the defendant was aware that, subsequent to their actions, the consequence (for example, forced displacement) would result in the ordinary course of events.²⁷ It should

²² Ibid., para.126

²³ ICTY, Prosecutor v. Krstić, 2001. Case number. IT-98-33-T, Trial Judgement, para.529

²⁴ ICTY, Prosecutor v. Blagojević, 2005. Case number IT-02-60, Trial Judgement, para.596

²⁵ ICTY, Prosecutor v. Krajišnik, 2006. Case number IT-00-39-T, Trial Judgement, para.729

²⁶ Simić, para.130

²⁷ International Criminal Court, Rome Statute of the International Criminal Court, Article 30(2)(b).

be noted that although the *actus reus* of forcible transfer requires a permanent displacement of the affected person(s), jurisprudence of the ICTY deems that there is no requirement to demonstrate that the *intention* of the perpetrator was to achieve permanent displacement.²⁸ It is sufficient that the perpetrator intended to forcibly displace the affected person(s), and that in their actions, the subsequent displacement was permanent in nature.

10. Article 30 also requires that the defendant have “knowledge”, defined as an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”²⁹ Specific to the war crime of forcible transfer, it is required that the perpetrator was aware of the factual circumstances that established both the protected status of those persons transferred,³⁰ and the existence of an armed conflict, in the context of which, said displacement took place.³¹ In addition, for a finding of forcible transfer as a crime against humanity, it is required that “[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”³²
11. Regarding punitive measures, the crime of forcible transfer invokes state responsibility. Article 29 of the Fourth Geneva Convention states that ‘The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.’ In relation to Article 29, Commentary on the Fourth Geneva Convention prepared by the International Committee of the Red Cross in 1958 considers that “...if the author of the act contrary to international law is an agent of the State, it is no longer his responsibility alone which is involved, but also that of the State, which must make good the damage and punish the offender.”³³ Hence, the agents of the Israeli state organs that have committed - or have ordered to be committed - actions which resulted in the forcible transfer of Palestinians must be held criminally responsible, and Israel itself bears primary responsibility to investigate those accused and to accordingly punish those found guilty of such crimes. This category is understood as “embracing everyone who is in the service of a Contracting Party, no matter in what way or in what capacity”.³⁴ In addition, any investigation into suspected violations committed during armed

²⁸ ICTY, Prosecutor v Stakic, 2006. Case number IT-97-24-A, Appeals Chamber Judgement, paras.307, 317

²⁹ International Criminal Court, Rome Statute of the International Criminal Court, Article 30(3)

³⁰ International Criminal Court (ICC), Elements of Crimes, Article 8(2)(a)(vii)-1(3)

³¹ Ibid, Article 8(2)(a)(vii)-1(5)

³² International Criminal Court (ICC), Elements of Crimes, Article 7(1)(d)(e)

³³ Published under the general editorship of Jean S. PICTET, The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War. International Committee of the Red Cross, Geneva, 1958, p.209.

³⁴ Ibid, pg.218

conflict must be fully independent and impartial,³⁵ analyze the entire operation/policy,³⁶ and be capable of identifying and prosecuting those responsible.³⁷

12. Should the primary duty bearer be unwilling or unable to meet these obligations, other bodies may assume responsibility. Classified as a grave breach of the Fourth Geneva Convention³⁸ and thus one of the most heinous classifications of war crime - High Contracting Parties are obligated to search for individuals alleged to have committed – or to have ordered to be committed – forcible transfer, and to initiate extradition proceedings to bring such persons before a court of law.³⁹ These proceedings may be brought in domestic courts under the doctrine of universal jurisdiction, or referred to the International Criminal Court (ICC), which can prosecute both war crimes and crimes against humanity. Alternatively, international tribunals can be formed under the auspices of the UN Security Council, as was the case in both the former Yugoslavia and Rwanda, or ‘hybrid’ legal avenues for prosecuting mass crimes may be pursued, such as the ‘internationalized’ courts - consisting of international participants and the affected state participants - used in both Sierra Leone and Cambodia. The unique circumstances and context of each allegation should determine the appropriate avenue to be taken, but, what is crucial is that in the event of evidence of the perpetration of international crimes, cases must be promptly and effectively tried by a legitimate judicial body.

³⁵ Findlay v. the United Kingdom, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §73; R. v. Genereux, 1. S.C.R. 259, [1992]; Bati v. Turkey, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004,

³⁶ Ergi v. Turkey, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §84.

³⁷ Hugh Jordan v. the United Kingdom, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §107; McCann and Others v. the United Kingdom, European Court of Human Rights, Application No. 18984/91, 27 September 1995; For a substantial analysis of investigations, see, supra n. 3, PCHR’s report: ‘Genuinely Unwilling: An Update’, p.19-25.

³⁸ International Committee of the Red Cross (ICRC), “Fourth Geneva Convention”, Article 49. 146

³⁹ ICRC Commentary to the Fourth Geneva Convention (n54) 589

4.

Case Study 1: Operation ‘Protective Edge’

4.1. Context

13. As a result of operation ‘*Protective Edge*’ - the 50-day Israeli military assault on the Gaza Strip in the summer of 2014 - at least 2,133 Palestinians were killed,⁴⁰ 108,000 Palestinians had their homes either destroyed or severely damaged,⁴¹ and the already crippled civilian infrastructure of this besieged territory suffered further extensive damage. At the peak of the assault, half a million Palestinians were internally displaced inside the Gaza Strip,⁴² accounting for 28 per cent of its total population. This figure included 293,000 people taking shelter in UNRWA schools, 49,000 in government schools, and 170,000 with host families and “in informal shelters such as empty buildings, churches or mosques”.⁴³ As of October 2014, over 100,000 remained displaced, with an estimated 47,000 residing with host families and 57,000 in collective shelters.⁴⁴
14. This case study will systematically outline those methods deployed by Israel inside the Gaza Strip which directly resulted in the forcible transfer of Palestinian civilians. Specifically, it makes the case that Israel’s mass displacement of Palestinian residents of the Gaza Strip – pursued through a range of practices which in themselves represent direct contraventions of international humanitarian law – should not be viewed as an unfortunate byproduct of military action, but as an entirely intentional act and one accorded no legal justification.
15. The *de jure* applicability of the Fourth Geneva Convention to the oPt enjoys – despite protestations by Israel – wide ranging international consensus. For instance, this applicability is recognized by all other State Parties to the Geneva Conventions, all UN bodies (including the General Assembly, Security Council, Economic and Social Council, and the Commission on Human Rights), the International Committee of the Red Cross, as well as international non-

⁴⁰ OCHA (oPt), 27/08/14. Gaza Initial Rapid Assessment. Hereafter ‘OCHA Initial Rapid Assessment’. pg.4. Available at: http://reliefweb.int/sites/reliefweb.int/files/resources/Gaza_MIRA_report_9September.pdf

⁴¹ OCHA (oPt). 04/09/14. Gaza Emergency. Situation Report. Hereafter ‘OCHA September Situation Report’, pg.1. Available at: http://www.ochaopt.org/documents/ocha_opt_sitrep_04_09_2014.pdf, pg.1

⁴² OCHA (oPt). 28/08/14. Gaza Emergency. Situation Report, Hereafter ‘OCHA August Situation Report’, pg.2. Available at: http://www.ochaopt.org/documents/ocha_opt_sitrep_28_08_2014.pdf

⁴³ OCHA Initial Rapid Assessment’, pg.5

⁴⁴ OCHA (oPt), September 2014. Humanitarian Bulletin: Monthly Report, September 2014. Hereafter ‘OCHA Humanitarian Bulletin’. pg.8. Available at: http://reliefweb.int/sites/reliefweb.int/files/resources/ocha_opt_the_humanitarian_monitor_2014_10_27_english.pdf

governmental organizations.⁴⁵ This position was reinforced by the International Court of Justice in its Advisory Opinion of July 9, 2004, which held that the Convention is applicable “*in any territory occupied in the course of the conflict by one of the contracting parties.*”⁴⁶ The position that Israel occupies the Gaza Strip is one based upon a number of factors, including control of land and maritime borders (including to a significant degree the Rafah crossing to Egypt, under the terms of the *Agreement on Movement and Access*⁴⁷), complete control of the airspace of the Gaza Strip, and its ability to launch military incursions into the territory at will. There can, therefore, be no doubt either to the applicability of international humanitarian law (IHL) in the context of Israeli actions regarding the Gaza Strip – and, accordingly, the status of Palestinians living under Israeli occupation as a ‘protected population’ for the purposes of IHL – or to Israel being in possession of the requisite knowledge of the operating context as demanded by the Rome Statute.

16. The findings presented below are the result of desk-based research conducted during and following *Protective Edge*, and field research commissioned by BADIL and conducted in the Gaza Strip during the months of September, October and November 2014. Two field research teams – consisting of seven professional researchers in total, focusing on the North and East of the Gaza Strip respectively - interviewed more than 130 victims of forced displacement, and collected photographic evidence of their flight and the destruction inflicted during Israel’s armed assault. The testimonies collected are currently being analyzed and translated by BADIL, and it is anticipated that a full catalogue of their content will be made available in Spring 2015. As such, this report draws upon selected extracts of statements given,⁴⁸ and should thus be considered as instructive rather a comprehensive account of those testimonies collected.
17. In raising the question of forcible transfer in the context of *Protective Edge*, a number of key themes must be explored. Firstly, the nature of Israel-perpetrated forced displacement of Palestinians inside the Gaza Strip during the period in question must be considered against the material elements of the crime of forcible transfer. Secondly, the question of ‘intention’ on behalf of Israel must be raised, and finally, the potential defenses of civilian security and military imperative must be considered in turn.

⁴⁵ Harvard Program on Humanitarian Policy and Conflict Research, July 2004. Policy Brief: Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory, pg.6. Available at: <http://web.stanford.edu/group/scai/images/harvardreview.pdf>

⁴⁶ International Court of Justice. 2004. Legal Consequences of a Wall in the Occupied Palestinian Territory (Request for advisory opinion): Summary of the Advisory Opinion of 9 July 2004, Pg.8. Available at: <http://www.icj-cij.org/docket/files/131/1677.pdf>

⁴⁷ Goldstone Report, para.278

⁴⁸ Further details, clarification and/or raw files for any of the included testimony can be provided on request

4.2. Targeting of Civilians and Civilian Objects

18. *Protective Edge* resulted in Palestinian death and injury on a huge scale. Of those 2,133 Palestinians so far recorded as having been killed by Israeli military action, “1,489 are believed to be civilians, including 500 children (187 girls and 313 boys), 257 women”,⁴⁹ whilst 282 are deemed to be members of armed groups and 362 could not be identified.⁵⁰ During this same period, over 11,000 Palestinians were injured (including 3,374 children, 2,088 women and 410 elderly) by Israeli military action.⁵¹ Review of satellite damage-mapping conducted by the UN reveals that Israeli attacks were spread widely across the Gaza Strip,⁵² and it is thought that during *Protective Edge*, 20,000 tons of explosives were dropped by Israel inside the Strip’s borders.⁵³
19. Such huge loss of life and infliction of serious injury amongst and upon a protected civilian population was a direct result of unlawful Israeli warfare practices, including the active targeting of civilian homes. To this end, Amnesty International has identified 8 specific cases where such Israeli attacks occurred when Israel “knew or should have known [that there were] civilians inside”.⁵⁴ In these cases, at least 111 individuals - including at least 104 civilians - lost their lives, with many others injured.⁵⁵ The targeting of civilian residences, and the concomitant death and injury inflicted upon Palestinians, were evident in testimonies provided to BADIL:

[On 19 July] My sister in-law was with her brother, her two daughters and [her brother’s children]. She was baking; making bread, in their room. They didn’t make suspicious moves.

Interviewer: And that was at what time?

Interviewee: That was between 10 and 11 in the morning [...] My brother [was cleaning] the windows of the other room. There was no resistance, nobody made suspicious moves, nobody looked through the windows. We were just unarmed civilians. Suddenly the

⁴⁹ OCHA Initial Rapid Assessment, pg.2

⁵⁰ Ibid., pg.2

⁵¹ Ibid., pg.2

⁵² UNITAR, 18/09/2014. Satellite based damage assessment of Gaza Strip, Occupied Palestinian Territory. Product ID: 2065. Available at: http://unosat-maps.web.cern.ch/unosat-maps/PS/CE20140715PSE/UNOSAT_A0_Portrait_Overview_Map_Gaza_Strip_20140827_v5.pdf

⁵³ Head of Gaza’s bomb disposal unit, cited in Channel 4 News, 20/08/14. Gaza: wife and infant son of Hamas commander killed. Available at: <http://blogs.channel4.com/miller-on-foreign-affairs/gaza-wife-infant-son-hamas-commander-killed-strikes/1221>

⁵⁴ Amnesty International, 05/11/14. Families under the Rubble: Israeli Attacks on Inhabited Homes. Hereafter ‘Amnesty International’. Available at: <http://www.amnesty.org/en/library/asset/MDE15/032/2014/en/613926df-68c4-47bb-b587-00975f014e4b/mde150322014en.pdf>.

⁵⁵ Ibid., pg.8

missile hit the children [in the other room]. [...] My brother just heard a “tic”. It didn’t sound like a huge explosion, it was more like fireworks. When my brother went out the room [that was not hit] it was dusty. [Among the rubble,] he uncovered his wife, there was no head. He uncovered his son’s [body] and he had no eyes. He uncovered [the body of his] brother-in-law’s little daughter and there was no head. There was no head and no arms. Then he moved to the other daughter, it was the same. His brother-in-law, Mahmoud, his stomach had a lot of holes.

[Another person adds] His intestine was out.

Husam Jamil Mohammad az-Zuwaidi, 39 (M), Beit Hanoun

20. Israel has attempted to justify targeted attacks on civilian residences during *Protective Edge* on the basis that these dwellings belong to members of militant groups in the Gaza Strip.⁵⁶ The Jerusalem Post quoted an anonymous senior Israeli security source as stating “[t]here’s not a single Hamas brigade commander that has a home to go back to,”⁵⁷ and such attacks appear a clear continuation of the policy deployed during *Operation Cast Lead*. This policy was outlined at that time by Major General Dan Harel:

We have set a high goal which we are aiming for. We are hitting not only terrorists and launchers, but also the whole Hamas government and all its wings. [...] We are hitting government buildings, production factories, security wings and more. We are demanding governmental responsibility from Hamas and are not making distinctions between the various wings. After this operation there will not be one Hamas building left standing in Gaza...⁵⁸

21. However, under international law, Israel’s respective labeling of certain persons and objects as terrorists and terror infrastructure does not, in itself, render them as legitimate military targets.⁵⁹ For an individual to become a legitimate target of war, they must be playing a direct role in hostilities. Mere membership of a

⁵⁶ IDF Spokesperson’s Twitter, 09/07/14. “Since the IDF Operation against Hamas Began, We Targeted 11 Houses of Senior Hamas Members in Gaza,” Available at: <https://twitter.com/IDFSpokesperson/status/486852057567997952>.

⁵⁷ The Times of Israel, 10/07/14. In two days, Israeli bombing in Gaza exceeds all 2012 assault. Available at: <http://www.timesofisrael.com/in-two-days-israeli-bombing-in-gaza-exceeds-all-2012-assault/>

⁵⁸ Goldstone Report, para.1212

⁵⁹ Human Rights Watch, 03/08/14. Q&A: 2014 Hostilities between Israel and Hamas. Hereafter ‘Human Rights Watch Q&A’. Available at: <http://www.hrw.org/news/2014/08/03/qa-2014-hostilities-between-israel-and-hamas>.

militant group does not satisfy this requirement, and Israel’s targeting of such individuals on this basis alone⁶⁰ represents a clear breach of Rule 1 of Customary International Humanitarian Law. Similarly, for an object to be lawfully targeted in the course of international armed conflict, Rule 8 of Customary International Humanitarian Law demands that these objects, by their nature, location, purpose or use, make an effective contribution to military action, and that their partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. As such, the targeting of residential dwellings which serve no military purpose is entirely unlawful, and though Israel claims these structures were used as ‘command centers’, no supporting evidence has been presented. Furthermore, the devastating nature of Israel’s targeting of civilian residences during *Protective Edge* was compounded by the fact that many households were “swollen by the presence of family members who had fled from unsafe areas to seek safety with relatives who appeared to be living in more secure parts of Gaza.”⁶¹

22. Even if such persons and objects could be reasonably considered as legitimate military targets, Israel’s attacks inside the Gaza Strip have often been conducted by way of imprecise weaponry which fails to comply with principles of proportionality and distinction. One example is the use of “heavy artillery not designed for precision use”,⁶² as deployed by Israel in a strike on Jabaliya refugee camp.⁶³ According to United Nations officials, shrapnel collected from the site had codes matching 155-millimeter artillery shells used in previous attacks.⁶⁴ Artillery allows for no distinction to be made between civilians and combatants, nor between civilian and military objects, and as Human Rights Watch investigator, Bill Van Esveld, explains, “[h]eavy artillery shelling into a populated area would be inherently indiscriminate”.⁶⁵ This was the case with Israel’s shelling of the *Bastat Market* – during a four-hour ceasefire – on 30 July, which killed 30 civilians.⁶⁶

⁶⁰ Jonathan Russo, 15/07/14. The Fatal Label: Reducing Hamas in Gaza to ‘Terrorists’, The Huffington Post Available at: http://www.huffingtonpost.com/jonathan-russo/the-fatal-label-reducing-_b_5584814.html.

⁶¹ Amnesty International, pg.8

⁶² The New York Times, 03/08/14. Questions of Weapons and Warnings in Past Barrage on a Gaza Shelter. Available at: http://www.nytimes.com/2014/08/04/world/middleeast/international-scrutiny-after-israeli-barrage-strike-in-jabaliya-where-united-nations-school-shelters-palestinians-in-gaza.html?_r=0.

⁶³ Ibid.

⁶⁴ Artillery is a “statistics weapons”, not a “precision weapon”; they are “generally fired from up to 25 miles [about 40 kilometers] away and considered effective if it hits within 50 yards [about 45 meters] of its target”. Ibid.

⁶⁵ Ibid.

⁶⁶ Al-Haq, 09.08.14. Briefing Note IV: Unlawful Targeting of Journalists and Media Buildings. Available at: <http://www.alhaq.org/advocacy/topics/gaza/841-briefing-note-iv-unlawful-targeting-of-journalists-and-media-buildings>

23. The threat posed by such indiscriminate actions conducted inside the Gaza Strip is further increased by a high population density, and also the notably high proportion of the population made up by children aged under 14 – standing at 43.5 per cent.⁶⁷ Importantly, it should be noted that Israel does possess precision weapons;⁶⁸ however, these have apparently not been used in many investigated strikes against densely populated areas,⁶⁹ causing an unjustifiable number of civilian casualties and vast damage to property. As supported by the ruling of ICTY in Simić, displacement of Palestinians resulting from Israel’s shelling of civilians and civilian objects inside the Gaza Strip can be considered ‘forced’ insofar as such practices deprived the displaced of genuine choice.

So, there was shelling everywhere around and we felt that it was going to get harder. So we went to our relatives in this direction. [...] The shelling was just around us [...] We were afraid for the children, and for ourselves, of course. We left with nothing with us. All our clothes and everything were left in the house. Everything was destroyed under the [rubble of the] house. We ended up with nothing.

Yousef Ibrahim al-Jurf, 48 (M), Abasan

24. According to Amnesty International, of 8 instances explored of targeted attacks on residential dwellings, “34 apartments and neighbouring houses, home to more than 150 people, were destroyed or badly damaged”.⁷⁰ Neighbourhoods such as Shuja’iyya,⁷¹ Beit Hanoun⁷² and Beit Safiyya suffered widespread destruction of civilian objects. Regarding the former, Ban Ki-moon labelled Israel’s attack as “an atrocious action”,⁷³ whilst in the latter, local residents “estimated 36

⁶⁷ New Scientist, 01/08/14. The reasons why Gaza’s population is so young. Available at: http://www.newscientist.com/article/dn25993-the-reasons-why-gazas-population-is-so-young.html#_VKwDnHvN5So

⁶⁸ Human Rights Watch, 22/07/14. Gaza: Airstrike Deaths Raise Concerns on Ground Offensive. Available at: <http://www.hrw.org/news/2014/07/22/gaza-airstrike-deaths-raise-concerns-ground-offensive>

⁶⁹ See Human Rights Watch, 15/07/14. Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians. Available: <http://www.hrw.org/news/2014/07/15/israelpalestine-unlawful-israeli-airstrikes-kill-civilians>, and Human Rights Watch, 22/07/14. Gaza: Airstrike Deaths Raise Concerns on Ground Offensive. Available at: <http://www.hrw.org/news/2014/07/22/gaza-airstrike-deaths-raise-concerns-ground-offensive>

⁷⁰ Amnesty International. pg.8

⁷¹ Barnard, Kershner. 20/07/14. Neighborhood Ravaged on Deadliest Day So Far for Both Sides in Gaza. The New York Times. Available at: <http://www.nytimes.com/2014/07/21/world/middleeast/gaza-israel.html?action=click&contentCollection=Middle%20East&module=RelatedCoverage®ion=Marginalia&pgtype=article>

⁷² See Appendices D; E; F. See also UNITAR, 28/07/14. Damage Assessment in Beit Hanun, Gaza Strip, Product ID: 2038 – Occupied Palestinian Territory. Available at: http://unosat-maps.web.cern.ch/unosat-maps/PS/CE20140715PSE/UNOSAT_A3_BeitHaun_20140725_Portrait.pdf

⁷³ Withnall, 21/07/14. Israel-Gaza conflict: John Kerry flies to Middle East to urge ceasefire as crisis deepens. The Independent. Available at: <http://www.independent.co.uk/news/world/middle-east/israelgaza-conflict-john-kerry-flies-to-middle-east-to-urge-ceasefire-as-crisis-deepens-9617757.html>

homes, or some 90 per cent of buildings in the area, were irreparably damaged by Israel's military during the ground invasion.⁷⁴ More widely, according to OCHA, across the Gaza Strip during *Protective Edge* “an estimated 18,000 housing units [were] either destroyed or severely damaged, leaving more than 108,000 people homeless”.⁷⁵ This number corresponded to 13 per cent of Gaza's housing stock;⁷⁶ however, more recent estimates “indicate that 29 per cent of Gaza's total housing stock has been affected” by the conflict,⁷⁷ amounting to roughly 40,000 housing units.

We fled when Israel launched its invasion on Gaza [...] We tried to come back to our home during a ceasefire, but we found it completely destroyed by the Israeli military. [We] have been living here in a nylon tent ever since [...] Cars were upside down and burned out. Houses were flattened and still smoking for days, and most our animals, sheep and cows, were dead and strewn across the fields.⁷⁸

Abu Rashad Safiyya, 22 (M), Beit Safiyya

The following extract is taken from the writings of American journalist, Dan Cohen, based in the Gaza Strip during *Protective Edge*:

I met Saleem al Qasas, 27, sitting in a plastic chair and watching crews continue clearing the rubble. In the middle of the night, al Qasas told me, his neighbor received a phone call from the Israeli military threatening to bomb the neighboring Basha Tower. His family and thousands of others fled to hide behind buildings only a few blocks away. After waiting for hours, at around 4 am, a massive bombardment hit the tower and instantly collapsed it into a burning pile of concrete and mangled rebar. The neighboring three-story building that housed the al Qasas family sustained heavy damage. Balconies were blown off and the outer wall that faced the building has four-meter blast holes [...] “We have to find new apartments,” said al Qasas. “It's unsafe to live in these ones [...] All of the buildings around here are damaged like that.”⁷⁹

⁷⁴ Al Jazeera, 15/12/14. Displaced Gazans struggle to rebuild. Hereafter ‘Al Jazeera’. Available at: <http://www.aljazeera.com/news/middleeast/2014/12/displaced-gazans-struggle-rebuild-201412139957986683.html>

⁷⁵ OCHA Initial Rapid Assessment, pg.1

⁷⁶ Ibid., pg.16.

⁷⁷ OCHA Humanitarian Bulletin, pg.8

⁷⁸ Al Jazeera

⁷⁹ Cohen, 13/10/14. In the last days of ‘Operation Protective Edge’ Israel focused on its final goal – the destruction of Gaza's professional class. Hereafter ‘Cohen’. Available at: <http://mondoweiss.net/2014/10/protective-destruction-professional>

25. In addition to residential dwellings, other civilian objects were also targeted by Israeli weaponry. As of 4 September 2014, 450,000 Palestinians inside the Gaza Strip were unable to access municipal water supplies due to infrastructure damage,⁸⁰ whilst the only power plant in the territory ceased operation following an Israeli airstrike on 29 July. According to OCHA, “[n]ecessary repairs and maintenance could not take place due to hostilities and, in several instances, the direct targeting of personnel: at least 14 electricity, water and waste water technicians employed by local utilities were killed by Israeli attacks and at least ten others were injured.⁸¹ 17 out of 32 hospitals were damaged during the conflict, with 6 closed down as a result. Out of 97 primary health centers monitored for damage and closures by UN bodies, four were completely destroyed, while 45 sustained damage. In addition, 16 ambulances were damaged.⁸² 26 schools were completely destroyed, while 122 sustained damage.⁸³ Commercial sites and industrial facilities were also hit: at least 419 businesses and workshops were damaged, of which 128 were completely destroyed,⁸⁴ whilst according to the UN Food and Agriculture Organization, \$450m of damage was inflicted upon Palestinian agricultural infrastructure inside the Gaza Strip.⁸⁵

26. In its targeting of both civilian populations and the physical infrastructure that supports the existence of such populations, Israel is clearly and materially contributing to an unlivable environment, characterized by a lack of fundamental human rights, including those of personal safety, basic health, shelter and sustenance. In this regard, Israel’s actions inside the Gaza Strip during *Protective Edge* are entirely consistent with the Dahiya Doctrine, deployed in previous Israeli military operations - including the 2006 Lebanon War and *Cast Lead* - and summarized by the *Goldstone Report* as “*the application of disproportionate force and the causing of great damage and destruction to civilian property and infrastructure, and suffering to civilian populations.*”⁸⁶ As such, genuine choice is removed from the decision-making process, with civilians having little option but to leave their ordinary places of residence. The alternative is the threat of death or serious injury to themselves or their family members, or remaining within an impossible living environment.

⁸⁰ OCHA (oPt). 04/09/14. Gaza Emergency. Situation Report., pg.1. Available at: http://www.ochaopt.org/documents/ocha_opt_sitrep_04_09_2014.pdf

⁸¹ OCHA August Situation Report, pg.2

⁸² OCHA Initial Rapid Assessment’, pg.14

⁸³ Ibid., pg.15

⁸⁴ Ibid., pg.17

⁸⁵ Beer. 28.08.14. Gaza conflict causes \$450m damage to agri infrastrucutre. Available at: <http://www.foodnavigator.com/Regions/Middle-East/Gaza-conflict-causes-450m-damage-to-agri-infrastructure>

⁸⁶ Para.62

4.3. Unlawful Warnings

27. The above statistics and testimony paint a clear picture of the process of physical devastation and human suffering to which the Gaza Strip was subjected during *Protective Edge*, as well as the subsequent contribution of these factors to the forced displacement of Palestinians. However, consideration of Israel's use of attack 'warnings' also suggests a psychological dimension to this displacement. Though the effective use of warnings constitutes a central tenet of customary IHL,⁸⁷ resulting in forcible displacement which can be justified under the need to ensure the security of protected populations, the evidence suggests that ineffective and – at times – lethal warning methods were deployed by Israel inside the Gaza Strip during *Protective Edge*. Such warnings are, in themselves, unlawful, as is any resulting displacement, with the affected population deprived of genuine choice. In such cases, Israeli warnings can be considered as a means of effecting forcible transfer.

28. Certain Israeli warning practices were ineffective insofar as they did not feature clear instructions, or presented confusing information:

Lots of leaflets were dropped on our neighborhood, they demanded that we leave our house, [but] it did not contain any directions where to go or which way we had to take.

'Aliya Abu Harbeed, 34 (F), Beit Hanoun

They were dropping leaflets telling us to hide in Deir al-Balah, but we were in Deir al-Balah.

Suleiman Mansour al-'Amour, 55 (M), Deir al-Balah

During the ceasefire, we went back home and found the house destroyed. No warning, nothing. They dropped leaflets a long time ago. Nobody heeds [them]. We do not take it seriously. They did not call our mobiles or anything like this.

Zaki Yussef al-Qarrah, 56 (M), Khuza'a

As established in the Goldstone Report, generic warnings or those lacking in specific information, "[lack] credibility and clarity, and [generate] fear and uncertainty."⁸⁸ The Mission took the view that such 'warnings' could "not be considered generally effective."⁸⁹

⁸⁷ International Committee of the Red Cross (ICRC), "Customary IHL - Rule 20. Advance Warning," accessed July 22, 2014, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5_rule20.

⁸⁸ The Goldstone Report. Para.531

⁸⁹ Ibid. Para.531

29. During *Protective Edge*, Israel utilized the practice of ‘roof-knocking’. This entails the firing of non-explosive “warning” missiles at the roofs of those buildings which, ostensibly, are to be targeted with explosive ordinance, so as to force those inside to leave. It is a practice previously identified by the United Nations as illegal on the basis that it poses a direct threat to civilians.⁹⁰ As such, it injects a demonstrable physical threat into a concept intended to protect key humanitarian principles. According to Amnesty International, “there is no way that firing a missile at a civilian home can constitute an effective ‘warning’”.⁹¹

[...] the shrapnel came through our zinc roof, they hit the neighbors with missiles [interviewee points at an adjacent house] - that one. They first hit with a drone missile; a warning missile. We left that night and we came back when the ceasefire took place, and we found the four-story building next to us completely destroyed, and you can see that our house is also destroyed. Interviewer: did you get a prior warning?

No, no warning at all.

Samira Barbakh, 61 (F), Rafah

My house is a three-story building with six apartments. They hit my son’s apartment in the third floor with a drone missile, then another missile hit the opposite apartment. We ran out the house. We all went to live with my sister in Bani-Suhaila.

Fadda Hamdan al-Najjar, 63 (F), Khuza’a

30. Other Israeli warning practices included phone calls, text messages and sound bombs. Such methods, though not posing a physical threat can, depending on their execution, instill psychological trauma and increase the number of IDPs. Such methods have been identified by Human Rights Watch as being used by Israel and “primarily intended to cause panic among residents or compel them to leave their homes for reason other than their safety”.⁹²

[O]n 15 July, during Ramadan, they dropped sound bombs on us and we ran away from our homes. That was at 10:30 in the morning.

Suleiman al-Looh, 53 (M), Deir al-Balah

⁹⁰ The Goldstone Report, in examining the roof-knocking practice, used during Operation Cast Lead concluded that such method “constitutes a form of attack against the civilians inhabiting the building”. Goldstone Report, para.37

⁹¹ Amnesty International. 11/07/14. Israel/Gaza: UN must impose arms embargo and mandate an international investigation as civilian death toll rises. Available at: <http://www.amnesty.org/en/news/israelgaza-un-must-impose-arms-embargo-and-mandate-international-investigation-civilian-death-t>

⁹² Human Rights Watch Q&A

They started dropping leaflets and sending us threatening messages on our mobile phones.

Rakan al-Jurf, 26 (M), ‘Abasan al-Jadida

31. Of particular concern is Israeli use of fake warnings – where families were falsely notified that their homes would be attacked. This practice was recorded by Palestinian human rights organizations during *Protective Edge*⁹³, and is prohibited under Rule 2 of Customary International Humanitarian Law, which deems the use of violence aimed at spreading terror amongst the civilian population as inherently unlawful.⁹⁴ As well as acting as a coercive force to displace Palestinians, the confusion created by such ‘warnings’ also contributed to a reluctance amongst many Palestinian residents of the Gaza Strip to act upon these and other warnings received, or to delay their flight.

[...] many people received the recorded message and nothing happened to them, I have a friend whose house was hit with a [drone warning] missile, and got messages, and his house wasn’t hit. He is living in the Faloujah Area. This is why we didn’t take the SMS and recorded messages so seriously. Some people were warned, and they evacuated their homes for a month. Every few days [the house] was hit by a warning missile, the war finished and the house wasn’t destroyed.

Mohammad al-Za’aneen, 60 (M), Khuza’a

I received recorded messages on my land line demanding the evacuation of Beit Hanoun, and we ignored them.

Jihad Khalil Najm, 48 (M), Beit Hanoun

Five days after [the beginning of the Israeli assault], airplanes dropped leaflets demanding us to evacuate Beit Hanoun and go towards the middle of Gaza. We did not obey at the beginning, then we received SMS on our cellphones demanding us to leave our home towards the middle of Gaza, but we did not leave until the first day of ground attack.

Sharif Hamza al-Masri, 35 (M), Beit Hanoun

32. Given the continued presence of Palestinians in areas intended for attack by Israel, issuing of advance warnings of attacks to at-risk civilian population inside

⁹³ Al-Haq, 24/07/14. Why Israel’s Legal Justification for ‘Operation Protective Edge’ Is Wrong. Mondoweiss. Available at: <http://mondoweiss.net/2014/07/justifications-operation-protective>

⁹⁴ International Committee of the Red Cross (ICRC), “Customary IHL - Rule 2. Violence Aimed at Spreading Terror among the Civilian Population,” accessed August 10, 2014, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule2; International Committee of the Red Cross (ICRC), “Fourth Geneva Convention”, Article 33.

the Gaza Strip “does not make an otherwise unlawful attack lawful”.⁹⁵ In other terms, the issuing of warnings does not absolve Israel from its legal obligation to abide by the principles of distinction and proportionality in its subsequent actions. Nor should those Palestinians who opted to leave their homes despite having received no warnings, nor having had their homes partially or completely destroyed, be considered to have left under their own free will, given the highly coercive operating circumstances created by Israeli actions.⁹⁶

33. In addition, certain Israeli ‘warnings’, in their wording, constituted an outright ultimatum and in doing so, stripped the recipient of free choice. For instance, the text of leaflets dropped into the Shuja’iya and az-Zaitoun neighborhoods from Israeli aircraft read:

Whoever disregards these instructions and fails to evacuate immediately endangers their own lives, as well as those of their families.⁹⁷

A similar warning was also featured in leaflets dropped over the Beit Lahiya neighborhoods.⁹⁸ Such wording clearly fails to envisage the possibility of cancelling an attack in the event of civilians choosing not to leave, constituting a threat to civilians of deliberate harm if they choose not to heed such warnings. As noted previously, the issuing of warnings does not in any way absolve an attacker from their responsibility to conduct subsequent attacks in full compliance with IHL. Otherwise, “warring parties could use warnings to cause forced displacement, threatening civilians with deliberate harm if they did not heed them”,⁹⁹ and this appears to be precisely what took place during *Protective Edge*. In the delivery of this ultimatum, Israel is shifting the burden of blame for civilian casualties from the aggressor to the victims themselves, deeming that - in their continued presence inside areas targeted for attack following the issuing of a warning – civilians are at fault for any subsequent injury or death inflicted upon them. Such wording should be considered in light of the aforementioned Simić judgement; specifically in relation to threatening and intimidating acts satisfying the ‘forcible’ element in the crime of forcible transfer.

34. What becomes clear, then, is that Israel’s use of warnings in specific cases during *Protective Edge* was ineffective, and at times, entirely unlawful. Such methods, rather than serving the interests of the civilian population’s security, instead entailed violence and/or the widespread fear and uncertainty. Such warnings also operated in the context of widespread awareness inside the Gaza Strip of

⁹⁵ Human Rights Watch, 16/07/14. Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians. Available at: <http://www.hrw.org/news/2014/07/15/israelpalestine-unlawful-israeli-airstrikes-kill-civilians>

⁹⁶ ICTY, Prosecutor v Krnojelac. 2002. Case number IT-97-25-A. Appeal Judgement, para.229

⁹⁷ See Appendix BA

⁹⁸ See Appendix B

⁹⁹ Human Rights Watch, “Q&A: 2014 Hostilities between Israel and Hamas.”

indiscriminate and disproportionate Israeli warfare practices. Accordingly, such warnings constituted a powerful method of forcibly displacing a significant proportion of this protected population.

4.4. Israeli Targeting of the Displaced During and Post-Flight

35. According to testimonies collected by BADIL – and supported by the independent findings of other human rights organizations¹⁰⁰ – Palestinians in the Gaza Strip were also actively targeted during the process of flight itself:

After we left Khuza'a [on 24 July, in our second attempt to flee], we reached 'Abasan. We felt that we reached a safe place. But we were surprised with a drone missile which hit one of the groups leaving. Three [of the people fleeing] got killed; three of our relatives from Khuza'a – and another three from 'Abasan. [this happened] in front of our eyes.

Kifah Qdaih, 32 (M), Khuza'a

36. Furthermore, the very buildings designated by humanitarian organizations as shelters for the displaced – home to some 300,000 displaced Palestinians at the peak of hostilities¹⁰¹ – were also targeted by Israel. These included 7 separate shellings of UNRWA schools which left 46 Palestinians dead and over 300 wounded.¹⁰²

The drone was close. Only five minutes later it struck the school. All of us in the classroom, we fell on each other. Immediately, I stood up, by the window, and I saw all the martyrs laying down in the middle of the street. [...] I started looking for my children. One of them, he had just left out. I started screaming "Where is Akram? Where is Akram?" They told me "Here's Akram, don't worry, he wasn't at the school". [...] When I saw the martyrs, I told myself that it was not safe at the school. But where to go? The foreigners came and the school was full. They told us not to worry, to stay and not to leave.

Entisar Abdul'al, 50 (F), ash-Shuhada (Rafah)

¹⁰⁰ See, for example, Human Rights Watch, 04/08/14 Gaza: Israeli Soldiers Shoot and Kill Fleeing Civilians. Available at: <http://www.hrw.org/news/2014/08/04/gaza-israeli-soldiers-shoot-and-kill-fleeing-civilians>; see also The Telegraph, 05/08/14. Gaza Conflict: Israel Accused of Targeting Fleeing Families in Ceasefire. Available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/gaza/11014934/Gaza-conflict-Israel-accused-of-targeting-fleeing-families-in-ceasefire.html>.

¹⁰¹ OCHA, October 2014. Humanitarian Bulletin. Monthly Report. Available at: http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2014_11_26_english.pdf

¹⁰² Guardian, 08/08/14. Gaza crisis: a closer look at Israeli strikes on UNRWA schools. Available at: <http://www.theguardian.com/world/2014/aug/08/sp-gaza-israeli-strikes-unrwa-schools>

Al-Mazra School was hit twice. Two missiles hit the third floor towards the bathrooms and the stairs. They were all destroyed. When we evacuated the school, they told us that the missile [hit the school by] mistake. We called the Red Cross and the Red Crescent, they told us that the missile was a mistake. We went back again, [then] they hit with a missile for the [...] second time. We went outside. We started going up and down the stairs three times. But in the end they made us go back. They told us it was safe. The Red Cross and the Red Crescent told us it was a mistaken missile. [But] it wasn't safe there.

Ruwaida al-Loah, 35 (F), Deir al-Balah

[W]e were evacuated from al-Foqa school to Qlaibo school, in Tal az-Za'tar camp [...] it was so scary at the school, the shelling around us, it was so scary for me, what about the children?! We were able to see the missiles hit in front of us, some children wet themselves, I expected we could die at any moment.

Jihad Khalil Najm, 48 (M), Beit Hanoun

They ran away from the shelling and airstrikes, [...] they are running here to come to a safe place, but there is no such thing!

Saleem al Qasas, 27 (M), Gaza City¹⁰³

4.5. Permanency of Displacement

37. The previous paragraphs outline some of the means through which Israel removed any appreciable choice from the decision-making of Palestinian residents of the Gaza Strip as to whether to leave their usual place of residence. However, to support a finding of forcible transfer, this forced displacement must be permanent in nature. Given the relatively short period since the conclusion of *Protective Edge*, the question of permanency is one which will naturally become clearer over time. However, a consideration of previous Israeli military assaults on the Gaza Strip supports the view that, for the thousands of Palestinians displaced during *Protective Edge*, their displacement is one with no obvious end in sight.

38. During the Israeli "Operation Cast Lead", from 27 December 2008 to 18 January 2009, it is thought that 38 per cent of Palestinians inside the Gaza Strip had been displaced from their homes at some point in the attack, which amounted to over

half million people.¹⁰⁴ Two years after the conflict, 21,000 Palestinians remained displaced,¹⁰⁵ and only 13.3 per cent of the families whose homes were totally destroyed or damaged had been able to rebuild them.¹⁰⁶ Similarly, by late 2012, another wave of mass internal displacement befell Palestinian residents of the Gaza Strip in the context of Israel's *Operation 'Pillar of Defense'*. During the period of hostilities, tens of thousands of Palestinians are believed to have faced internal displacement.¹⁰⁷ Following the conclusion of the Israeli air assault, OCHA recorded approximately 3,000 people still displaced due to the loss or the severe damage of their homes,¹⁰⁸ and approximately 450 houses had been totally destroyed or severely damaged.¹⁰⁹ In 2013, UN records showed some 12,500 people in the Gaza Strip remained displaced as a result of previous Israeli military operations.¹¹⁰

39. Testimonies collected by BADIL show a clear pattern of displacement which predates recent Israeli military assaults, and reveal individuals and families being subjected to multiple phases of forced displacement.

We were displaced in 1967, I was a little kid. [Israel] blew up our home. I am suffering since 1967 until now. As we also fled our homes in 2008, we were arrested - me and my son - they invaded the area and arrested all men. They took us for 24 hours, they forced us to take off our clothes and kept us freezing [...] We were displaced in 1967, 2008, 2012, and this time. Where to go?! We want to die in our homes. My house now is destroyed, and I am afraid if I rebuild it, [Israelis] will come again and destroy it. We want an end to all of this, they want to live in peace, and we want to live in peace.

Slaiman al-'Amoer, 55 (M), Deir al-Balah

We were displaced during all previous wars. We live on the borders and whenever there is an invasion or even a rumor about an expected Israeli invasion, we leave our home. I can't risk our lives; many people get killed while sleeping. We were also displaced in 1948, 1967, 2008, and 2012.

Ashraf Abu Muhareb, 34 (M), Deir al-Balah/alSalqa

¹⁰⁴ OCHA (oPt), January 2009. The Humanitarian Monitor: January 2009, pg.3. Available at: http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_2009_01_15_english.pdf

¹⁰⁵ Al Mezan, 27/12/2010. Ongoing Displacement: Gaza's Displaced Two Years after the War, pg.2. Available at: <http://www.mezan.org/upload/11208.pdf>.

¹⁰⁶ Ibid., pg.5

¹⁰⁷ OCHA (oPt), 19/12/12. The Monthly Humanitarian Monitor: October-November 2012. pg.6. Available at: http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2012_12_18_english.pdf

¹⁰⁸ Ibid., pg.2

¹⁰⁹ Ibid., pg.6

¹¹⁰ OCHA (oPt), 2013. Occupied Palestinian Territories: Forced Displacement Overview. Available at: <http://www.ochaopt.org/content.aspx?id=1010137>

They bulldozed the [surroundings of] my house three times [i.e., in the wars of 2008/2009, 2012 and 2014]. It's enough that they displaced us the first time, the second time and the third time, and they bulldozed us the first time, the second time and the third time, and this last time the whole house was [brought] down; but with God's will we will remain steadfast, until God makes it easier. What can we do?

Abdul Samad al-Masri, 51 (M), Deir al-Balah

40. The key factor prohibiting the repair and rebuilding of Palestinian homes and infrastructure damaged or destroyed by Israeli military actions - and thus ensuring the permanence of displacement - is the blockade, intensified by Israel in 2007 and which prevents desperately needed building materials from reaching the Gaza Strip.¹¹¹ This prohibits realization of the IHL principle that “[p]ersons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased”.¹¹² By curbing the reconstruction of the Gaza Strip, Israel grossly undermines the right of displaced persons “to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist”.¹¹³
41. In addition, the fear of unexploded munitions also serves as a significant factor in preventing Palestinians from returning to their homes in the Gaza Strip, and with each subsequent military assault, the risk and associated fear increases.¹¹⁴ A report issued by OCHA on 28 August 2014 stated:

Explosive Remnants of War (ERW) are a major protection concern and poses risk to those returning to their homes and for repair and reconstruction. ERW are strewn throughout the Gaza Strip, contaminating homes, gardens, roads and streets, fields, agricultural lands, abandoned shelters and schools. Numerous kinds of ERW have been identified, including non-exploded tank shells, missiles, aircraft bombs, rockets, bullets, shrapnel, fuses, gas canisters and flechettes.¹¹⁵

¹¹¹ Al Jazeera; and Cohen, 03/12/14. Living in the aftermath: Palestinians in Gaza struggle under the siege to rebuild. Mondoweiss. Available at: <http://mondoweiss.net/2014/12/aftermath-palestinians-struggle>

¹¹² International Committee of the Red Cross (ICRC), “Fourth Geneva Convention”, Article 49; see also International Committee of the Red Cross (ICRC), “Customary IHL - Rule 132. Return of Displaced Persons,” accessed July 23, 2014, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter38_rule132.

¹¹³ International Committee of the Red Cross (ICRC), “Customary IHL - Rule 132. Return of Displaced Persons.”

¹¹⁴ Tharoor, 13/08/14. Tragic deaths in Gaza are a reminder of a world full of unexploded bombs. The Washington Post. Available at: <http://www.washingtonpost.com/blogs/worldviews/wp/2014/08/13/tragic-deaths-in-gaza-are-a-reminder-of-a-world-full-of-unexploded-bombs/>

¹¹⁵ OCHA August Situation Report, pg.2

The report continues:

[I]t is estimated that some 108,000 people will remain displaced long-term due to the destruction of, or severe damage to, their homes. According to preliminary findings from the Initial Rapid Assessment,, carried out by humanitarian actors through OCHA coordination. other factors which may delay the return of IDPs are the pervasive presence of ERW, lack of belief in a permanent ceasefire, lack of availability of basic services, and the destruction of livelihoods as a result of hostilities.¹¹⁶

4.6. Intention

42. For guidance on the intended purpose of Israeli actions during *Protective Edge*, once more, the findings of the Goldstone Report are instructive:

The expected impact, and the Mission believes primary purpose [of Operation Cast Lead], was to bring about a situation in which the civilian population would find life so intolerable that they would leave (if that were possible) or turn Hamas out of office, as well as to collectively punish the civilian population.¹¹⁷

The report also concluded that Cast Lead was:

[A] deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.¹¹⁸

Given the similar/identical warfare practices deployed by Israel during *Protective Edge*, there is no reason to believe that such motives were not also operating during this most recent assault. However, as already highlighted, for the purpose of prosecuting the crime of forcible transfer it is not necessary to ascertain direct intent (*dolus directus*). Instead, for such purposes oblique intent (*dolus indirectus*), is sufficient.

43. Regarding oblique intent, there can be no question that the forced displacement of Palestinian residents of the Gaza Strip was a consequence which would result in the ordinary course of events following those practices in which Israel willfully engaged. This would satisfy the mental element for a finding of forcible transfer.

¹¹⁶ Ibid, pg.2

¹¹⁷ Goldstone Report, para.1208

¹¹⁸ Ibid., para.1893

The widespread death and injury inflicted upon the Palestinian civilian population by way of warfare practices which failed to comply with the central requirements of distinction and proportionality; the mass destruction of – and damage to – Palestinian civilian objects and infrastructure; and the deployment of misleading, violent and fake warning methods, can all be expected to force members of a protected population to leave their usual places of residence.

44. Furthermore, consideration of recent Israeli assaults on the Gaza Strip strongly supports the conclusion that, prior to the commencement of *Protective Edge*, Israel was in full possession of the requisite level of awareness in relation to the likely outcomes of its actions. Specifically, Israel would have been acutely aware of the mass forced displacement caused by similar/identical warfare practices deployed during both *Cast Lead* and *Pillar of Defense*. As such, any argument asserting that those who planned, organized and conducted the military operations which produced the forced displacement of Palestinians inside the Gaza Strip during *Protective Edge* could not have reasonably foreseen such consequences is one which finds little support in fact.

4.7. Absence of Legal Justifications

45. Having considered Israeli actions during *Protective Edge* in light of the material elements of the crime of forcible transfer, the question must be asked as to whether Israel's forced displacement of Palestinian residents of the Gaza Strip can be regarded as an evacuation conducted either to ensure the security of the civilian population, or for reasons of military necessity. Regarding the former, 'security of the population' pertains to scenarios in which "an area is in danger as a result of military operations or is liable to be subjected to intense bombing",¹¹⁹ or where an evacuation is required for "humanitarian reasons".¹²⁰
46. It must firstly be noted that the term 'evacuation' refers to a *temporary* period of displacement. Accordingly, and in light of the aforementioned permanent nature of displacement that Israel has inflicted upon Palestinians inside the Gaza Strip, this a term which cannot be applied to the case in point. This being so, it is still useful to consider Israeli actions during *Protective Edge* through the respective lenses of humanitarian action and military necessity.
47. That Israel's forced displacement of Palestinians cannot be claimed to have protected the civilian population from the effects of warfare, or to have been conducted for humanitarian reasons is self-evident. In its targeting of civilians and civilian property, its disproportionate use of weaponry and its deployment of unlawful warning methods, Israel forced vast numbers of Palestinians from their

¹¹⁹ Jean Pictet, Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, vol. 4 (International Committee of the Red Cross (ICRC), 1958), 280.

¹²⁰ ICTY, "Prosecutor v. Blagojević & Jokić, 17/01/05. Case no. IT-02-60-T, Trial Judgement, para.600

homes. In many instances where Israel served notice of its intention to bomb or shell an area, no reference was made to humanitarian concerns, but instead the order to leave was clearly and exclusively on the grounds of an imminent Israeli attack. Furthermore, the ‘humanitarian’ argument is undermined by Israel’s failure to designate ‘no-fire’ zones, to which Palestinians could flee and be guaranteed safety. To the contrary, a number of humanitarian shelters (including UNRWA schools) were specifically targeted by the Israeli military. For instance, prior to Israel’s shelling of the Jabaliya Elementary Girls School on 30 July - which killed 21 displaced Palestinians and injured more than 100 – UNRWA had informed Israel of the school’s status and coordinates as a humanitarian shelter no less than 17 times.¹²¹ Also, in its targeting of infrastructure which supports fundamental aspects of human life, including power stations, hospitals and agricultural land, Israel is not upholding humanitarian principles, but rather creating an environment of humanitarian catastrophe.

48. Concerning the notion of military necessity, “evacuation is only permitted in such cases when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate”.¹²² Those circumstances which constitute ‘necessity’ in such contexts are heavily debated, but what is clear is that the defense of military necessity is only available when “the principles of distinction, proportionality, and precautions are observed.”¹²³ As has already been demonstrated, such principles were disregarded by Israel in its execution of *Protective Edge*, and therefore the defense of military necessity is one unavailable to Israel in its perpetration of mass forced displacement inside the Gaza Strip.

4.8. Summary of Case Study 1

49. Viewed in the context of recent history, *Protective Edge* represents a continuation of an Israeli policy of forcible transfer of Palestinians in the Gaza Strip, conducted by way of regular and hugely destructive military assaults. It is a policy which has resulted in the forced displacement of tens of thousands of Palestinians, and created acute suffering on a vast scale. Through the widespread use of violence against civilians and the destruction of civilian property and infrastructure, as well as through ineffective and unlawful ‘warnings’, Israel has knowingly and intentionally deprived Palestinians of genuine choice in their decision to leave their usual places of residence.

¹²¹ Sengupta, 30/07/14. Israel-Gaza Conflict: UN accuses Israel of possible war crimes after shelling of Gaza schools kills 19. The Independent. Available at: <http://www.independent.co.uk/news/world/middle-east/israelgaza-conflict-un-accuses-israel-of-possible-war-crime-after-shelling-of-one-of-its-schools-kills-19-9638765.html>

¹²² Pictet, Commentary on the Fourth Geneva Convention, 4:280.

¹²³ Mayorga, August 2013. Policy Brief. Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations. Harvard University. Program on Humanitarian Policy and Conflict Research, pg.4. Available at: <http://www.hpcrresearch.org/sites/default/files/publications/081213%20ARBITRATING%20WAR%20%28final%29.pdf>

50. Though the presence of one coercive factor is in itself sufficient to satisfy a finding of forcible transfer, it appears that during *Protective Edge*, a combination of physical and psychological factors operated to create an overwhelmingly oppressive environment for Palestinians. Simultaneously, through its prolonged blockade of the Gaza Strip, Israel prevents displaced Palestinians from repairing destroyed and damaged property, which - in conjunction with the fear of unexploded ordinance - creates a scenario in which the displaced are permanently prohibited from returning to their homes.¹²⁴ In addition to constituting one of the most heinous form of war crime, the scope and historical pattern of those Israeli attacks which have led to forcible transfer of Palestinians inside the Gaza Strip raises the question of Israeli-perpetrated crimes against humanity.

5.

Case Study 2: Palestinian Bedouin Communities in Area C

5.1. Context

51. The second case study, based on desk-based research as well as field work conducted by BADIL staff and facilitated by UNRWA and the Jahalin Association, focuses on Palestinian Jahalin Bedouin communities in Area C, inside the central West Bank. As with Case Study 1, it explores Israeli forcible transfer of Palestinians within the oPt, though it is implemented through different means. Here, Israel has framed plans to achieve forcible transfer as a lawful process, conducted for the benefit of the affected communities. These plans are currently at an advanced stage within the Israeli court system.
52. The story of Jahalin Bedouin presence in the area known by the international community as 'E1'¹²⁵ – a parcel of land measuring roughly 12km² and situated between Jerusalem and the Israeli settlement/colony of Ma'ale Adumim - began in 1948, when the violence of the Nakba caused this Palestinian tribe to flee their territories in the Tal 'Arad region of the Naqab desert, becoming widely spread across the Gaza Strip, Jordan and the West Bank. By late 1951, the majority of Jahalin who entered the West Bank had registered with UNRWA as refugees, and today, more than 85 per cent of the Bedouin in E1 hold this status.¹²⁶ These communities opted to roam rural areas of the West Bank so as to continue their traditional way of life. Yet, with the Israel's occupation of the West Bank in 1967, the territory available to all Palestinian Bedouin communities was cut drastically through expropriations of land for Israel's 'military purposes' and the construction of settlements/colonies. As a result, many Jahalin decided to settle in kinship groups along the Jerusalem periphery in the central West Bank.

5.2. Legal Landscape and the Discriminatory Permit System

53. Under the Oslo II Accords, signed in 1995, the West Bank was divided into Areas A, B and C. Under this agreement, full administrative and security responsibility for Area C (accounting for more than 60 per cent of the West Bank and now home to an estimated 300,000 Palestinians¹²⁷) was allocated to the Israeli state.

¹²⁵ 'E1' is the Israeli moniker assigned to the Palestinian area of Bab al-Shams. BADIL does not endorse the use of 'E1', but will use the term in this paper for sake of clarity.

¹²⁶ OCHA (oPt), 2014. Area C Vulnerability Profile, hereafter 'Area C Vulnerability Profile', pg.4. Available at: http://www.ochaopt.org/documents/ocha_opt_fact_sheet_5_3_2014_en_.pdf

¹²⁷ OCHA, 05/03/14. Press Release: New figures indicate an estimate 300,000 Palestinians reside in Area C of the West Bank. Available at: <http://unispal.un.org/UNISPAL.NSF/0/631759DA3D5C06F785257C92004A3236>

This allocation was made on a temporary basis, with Israel to act as custodian whilst final status negotiations between Israeli and Palestinian delegations took place. However, this relinquishing of authority remains unrealized and Israel has instead deeply entrenched its control over the area.

54. A primary vehicle used to effect this control is the combination of zoning and planning policy; a system considered “one of the most influential mechanisms affecting the map of the West Bank”.¹²⁸ Within Area C, Israel has implemented a legal framework which – through designations of ‘state’ lands; closed military zones; areas under the jurisdiction of Israeli colonies; areas of existing and planned road networks and land reserved for the route of the Annexation Wall – prohibits Palestinian construction on 70 per cent of the land.
55. For the remaining 30 per cent of land in Area C where Palestinian construction is theoretically permitted, the applicable planning law is established by the *Jordanian Towns, Villages, and Building Planning Law No. 79 of 1966*, which requires the existence of a detailed and dedicated planning scheme before construction can take place. Shortly after Israel’s occupation of the West Bank in 1967, the *Israeli Military Order Concerning Towns, Villages and Buildings Planning Law (Judea & Samaria) No. 418 of 1971* was introduced, removing all Palestinian representation from the planning process by way of annulment of Local Planning Committees. Instead, this responsibility was transferred to the Israeli Civil Administration’s Local Planning and Licensing Sub-Committee.
56. Similarly, the responsibility for the issuing of building permits lies with the Secondary Planning Committee, which is also part of the Civil Administration. Through a broad interpretation of Jordanian law, the types of structures for which a building permit is required is extensive, including both permanent and non-permanent structures, and also covering repairs of those structures already in place. Furthermore, the application process for a permit is both cost-prohibitive and has an extremely low success rate. For instance, between 2008 and 2012, 97.7 per cent of building permit applications in Area C submitted by Palestinians were rejected by Israel.¹²⁹ Palestinians therefore have little option but to build ‘illegally’ under Israeli law, and the vast number of Palestinian Bedouin structures have demolition orders pending against them. According to UNRWA, in the period of Jan-Sept 2013, 446 Palestinian structures were demolished in Area C by Israeli forces.¹³⁰

¹²⁸ Lein, May 2002. *Land Grab: Israel’s Settlement Policy in the West Bank*. Jerusalem. B’Tselem - The Israeli Information Center for Human Rights in the Occupied Territories, pg.70. Available at: http://www.btselem.org/download/200205_land_grab_eng.pdf

¹²⁹ Civil Administration’s response to B’Tselem. Quoted in B’Tselem, 2013, *Acting the Land Lord: Israel’s Policy in Area C, the West Bank*. Available at http://www.btselem.org/download/201306_area_c_report_eng.pdf

¹³⁰ UNRWA. *Demolitions in 2013*. Available at: <http://www.unrwa.org/demolition-watch/demolitions-2013>

57. Donor-funded structures find no immunity from this Israeli-implemented permit system, a fact demonstrated in April 2014 with the destruction by Israel - by way of *Seizure-of-Goods orders under Military Order no. 378* - of 18 emergency residential structures which had been provided to Palestinian Bedouin communities in Jabal al-Baba by the European Union-funded humanitarian division, ECHO.¹³¹ Demolition/removal of donor-funded structures is an increasingly common phenomenon, rising by 54 per cent in 2013 compared to 2012.¹³² In 2013, more than 20 per cent of the 565 structures demolished by Israel in Area C were donor-funded.¹³³
58. Such practices are in direct contravention of international humanitarian law which demands that, in circumstances where a primary duty bearer is unable or unwilling to abide by its obligations towards a protected population, full access by humanitarian organizations must be permitted. Such access cannot be refused on arbitrary or unlawful grounds. Not only has Israel clearly and comprehensively failed to comply with these obligations, but the provision of emergency structures by humanitarian organizations has also been met with official complaints from the Israeli government, issued to those organizations' parent state through diplomatic channels.¹³⁴ Moreover, there have been calls to entirely prohibit humanitarian organizations who fail to comply with the aforementioned discriminatory building permit regime from working within the West Bank generally.¹³⁵
59. As such, complete control of the planning and construction process – from the conception of policy to its realization and enforcement on the ground – is retained by the occupying power; a situation in direct contravention of Article 43 of the Hague Regulations¹³⁶ and Article 64¹³⁷ of the Fourth Geneva Convention.¹³⁸ These provisions prohibit the introduction of new legislation or the amendment of existing legislation in occupied territory unless strict stipulations are met. Accordingly, such actions are only permitted if they serve to restore/maintain

¹³¹ Applied Research Institute – Jerusalem. April 2014. Report on the Israeli Colonization Activities in the West Bank & the Gaza Strip. Volume 189, April 2014 Issue. Available at: http://www.arij.org/files/arijadmin/April_2014.pdf

¹³² OCHA (oPt), 2014. *Fragmented Lives: Humanitarian Overview 2013*, pg.73. Available at: <http://unispal.un.org/UNISPAL.NSF/0/43B4D427B63C369B85257CB300585957>

¹³³ Ibid

¹³⁴ Mordechai Yogev (Chairman of Judea and Samaria Region Subcommittee of the Foreign Affairs and Defense Committee). Minutes of the meeting of the Judea and Samaria Region Subcommittee of the Foreign Affairs and Defense Committee, 27.04.14

¹³⁵ MK Orit Struck. Minutes of the meeting of the Judea and Samaria Region Subcommittee of the Foreign Affairs and Defense Committee, 27.04.14

¹³⁶ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

¹³⁷ Though some scholars consider the application of Art 64 limited to penal legislation only, this is an argument compellingly refuted by Sassoli, and does not represent the view of the ICRC under the ICRC Commentary

¹³⁸ Art. 64, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

public order; if they contribute to the genuine security of the occupation forces; if they assist the occupant in fulfilling obligations under IHL and/or IHRL; or if such actions enhance the civil life and wellbeing of the protected population during prolonged occupation. The displacement of Palestinian Bedouin communities against their will from inside the 'E1' corridor cannot objectively be said to satisfy the requirements for any of these exceptions.

5.3. Forcible Transfer

60. For years, Israel has continuously sought to remove the roughly 3,000 Bedouin who reside in E1¹³⁹ and replace them with its own citizens. In three waves between 1997 and 2007, over 150 Bedouin families were evicted and relocated to al-Jabal; a site adjacent to the Abu Dis garbage dump and its many associated health risks.¹⁴⁰ Bedouins who remain face a range of direct challenges to their enjoyment of basic human rights. As well as the aforementioned prevalence of demolition orders, just half of these communities have been connected to the public water network, whilst none have been connected to the public electricity network. Access to crucial grazing land is made increasingly problematic by the route of the Annexation and Separation Wall and the expanding boundaries of settlements/colonies,¹⁴¹ and this expansion also brings with it harassment and threats of violence from settlers/colonizers. The cumulative result is an often desperate living environment, and a clear breach of the right to adequate housing, enshrined within the International Covenant on Economic, Social and Cultural Rights (to which Israel is a signatory).

61. Israel's intention to replace Palestinian inhabitants of E1 with its own citizens is starkly laid out in plan 420/4; the 'E1 master plan' which received approval in 1999. This master plan is split into separate detailed plans. Of these, three (a water reservoir,¹⁴² industrial zone¹⁴³ and police station¹⁴⁴) have already been deposited for public review and subsequently approved by the planning committee, with the police station already constructed. Three other detailed plans – 420/4/3, 420/4/7 and 420/4/10 – pertain to a total of almost 3,700 housing units, and over 2,000 hotel rooms, but have not yet received formal approval, largely on account of vocal international opposition. Following a successful Palestinian bid in 2012 to be admitted as a UN observer state, however, Israel government sought to push forward with these outstanding plans,¹⁴⁵ and the Civil Administration subsequently

¹³⁹ Area C Vulnerability Profile

¹⁴⁰ Hale, 20/03/13. Experts probe reach of toxins from West Bank landfill. Ma'an News Agency. Available at: <http://www.maannews.net/eng/ViewDetails.aspx?ID=573286>

¹⁴¹ Area C Vulnerability Profile

¹⁴² Plan 420/4/1

¹⁴³ Plan 420/4/2

¹⁴⁴ Plan 420/4/9

¹⁴⁵ Following this announcement, the governments of the UK, France, Sweden, Spain and Denmark called in respective Israeli ambassadors to make formal complaints

opened up the plans for filing of objections.¹⁴⁶ In addition, the Israeli Minister for Construction and Housing, Uri Ariel – himself a resident of a settlement/colony inside the Adumim Bloc – stated on record that building inside E1 is both an Israeli “right and obligation”,¹⁴⁷ whilst the office of Prime Minister Benjamin Netanyahu responded to international criticism to the E1 plans by declaring that construction here represented an Israeli “vital interest”.¹⁴⁸

62. This “vital interest” refers to the merging of Ma’ale Adumim and Jerusalem, resulting in the latter becoming surrounded by a bank of Israeli Jewish settlements/colonies. This would effectively sever the West Bank in two and thus end any remaining hope of a geographically contiguous Palestinian state based on 1967 borders.

5.4. Impact of Forcible Transfer on Palestinian Bedouin Communities

63. Israel intends to remove all Palestinian communities still remaining inside E1 and relocate them to three urban townships: the first at the existing al Jabal site, and the two largest - Nuweimeh North and Armonot Hashmonaim – to be built near Jericho in the Jordan Valley. Such attempts – despite being conducted entirely against the will of those being displaced – are framed by the Israeli authorities as being for the benefit of Bedouin communities; relieving them from poverty.¹⁴⁹ To the contrary, however, this relocation of traditionally nomadic and pastoral Bedouin communities to cramped townships in the Jordan Valley would represent a devastating blow to the cultural practices of these populations, severing links to “fundamental elements in their economic, commercial and social universe”.¹⁵⁰

64. From an economic perspective, though many Bedouin families are now using wage-labor as a source of income, pastoral farming still represents a keystone of such communities, and any transfer to an urban setting would necessitate the sale of valuable livestock due to a lack of space and grazing. In addition, farming skills honed over centuries would be immediately rendered useless – particularly amongst women – and unemployment across the community as a whole is likely to rise significantly. In interviews with BADIL, members of

¹⁴⁶ B’tselem, 2013. The E1 plan and its implications for human rights in the West Bank (available at: http://www.btselem.org/settlements/20121202_e1_human_rights_ramifications)

¹⁴⁷ Hoffman, Apr 2013. Livni’s Party Angered by E1 Building Plans. Available at: <http://www.jpost.com/Diplomacy-and-Politics/Livni-party-angered-by-E1-building-plans-310095>

¹⁴⁸ BBC, Dec 2012. Israeli Settlements: Netanyahu defies outcry over E1. Available at: <http://www.bbc.com/news/world-middle-east-20585706>

¹⁴⁹ Greenwood, May 2012. Bedouin land and culture threatened by Israel’s plans for resettlement. Available at: <http://www.theguardian.com/global-development/2012/may/09/bedouin-land-culture-israel-resettlement>

¹⁵⁰ Chatty, 1986. From Camel to Truck: The Bedouin in the Modern World. Vantage Press New York, p.30

Bedouin communities inside E1 reiterated the negative impact that this planned relocation would have on their future economic prospects:

We want the desert life. In Nuweimeh, there would be many issues for us: bad economy, lack of education, nowhere for our animals.

Another resident commented:

You can't just put us in a town. What would our role be in a future Palestinian society? You cannot just change from a shepherd to a lawyer or an engineer.

65. Forcing previously disparate groups to live in close proximity to one another would also have severely negative social implications; greatly increasing the risk of internal conflict between families and factions. Similarly, the physical use of space inside existing Bedouin communities is geared towards the promotion of two key tenets of Bedouin culture: privacy for women and the preserving of family honor. The spatial layout of these townships would make little allowance for these important factors, further promoting inter-family conflict, and potentially leading to the isolation of Bedouin women who would be limited in their movement in the presence of males from other families on account of strict social protocol. This could confine “the boundaries of a [Bedouin] woman’s ‘safe’ spaces to the four walls of her house, rather than to the geographical boundaries of her community as it used to be”.¹⁵¹

5.5. Ineffective and Absent Procedural Safeguards

66. Such is the gravity and range of issues posed by Israel’s intended relocation of Palestinian Bedouin, the matter was specifically raised by the UN Human Rights Committee as a point of great concern during Israel’s fourth universal periodic review.¹⁵² Crucial procedural safeguards – found within the International Covenant on Economic, Social and Cultural Rights as well as Article 8 of the United Nations Declaration on the Rights of Indigenous People – which are intended to protect individuals and communities from arbitrary displacement and its many concomitant ill-effects are, in the case of the Israeli-implemented legal system in Area C, either unfit for purpose or entirely absent.
67. One such safeguard is that those at risk of displacement should have access to appropriate and effective legal mechanisms. In the case of Palestinians residing in E1, such access is limited by cost considerations, the cases being heard in courts

¹⁵¹ BIMKOM & UNRWA. *Al Jabal: a study on the transfer of Bedouin Palestine Refugees*, pg.33. Available at: <http://www.unrwa.org/userfiles/2013052935643.pdf>

¹⁵² United Nations Human Rights Committee. *Concluding Observations on the Fourth Periodic Report of Israel (Advance Unedited Version)*, para.9

in Israel – to which these communities must seek special permission in order to gain physical access – and with proceedings being conducted in Hebrew. Despite these difficulties, some Bedouin communities have challenged the legality of the relocation process in the Israeli courts. Yet this has achieved only a temporary reprieve in the form of existing demolition orders being stayed in anticipation of the creation of the resettlement sites. According to the Coordinating Office of Government Activities in the Territories (COGAT) – an organ of the Israeli military – once the resettlement plans are finalized and building plots allocated, all unrecognized construction “will be dealt with in accordance with the [Israeli] law”.¹⁵³

68. This outcome reveals an inherent bias of the law conceived and applied by Israel within Area C. It is a bias which favors the occupying power and its citizens, and is reflected in the multiple petitions filed with Israeli courts by the settler/colonist movement, demanding that existing demolition orders against Bedouin structures be executed without delay. This creates a scenario whereby individuals whose very presence in the West Bank constitutes a war crime are able to utilize the existing legal system to further their own interests at the expense of the protected occupied population.
69. Furthermore, checks on the arbitrary displacement of Bedouin in E1 which *have* been recommended by the Israeli judicial system have been disregarded by the Israeli Civil Administration (pseudonym for the Israeli Military Administration in the 1967 occupied Palestinian territory). Despite the Israeli Supreme Court’s recommendation that the affected Bedouin communities be fully consulted during the conception of the relocation plans, neither the Jerusalem Bedouin Cooperative Committee nor individual Mukhtars (village leaders) were engaged as part of this process. In addition, some Bedouin communities report that they were informed of their planned relocation through verbal means only, creating uncertainty and depriving them of key information pertaining to their rights and the process to follow.
70. Another key protective legal concept which has been entirely disregarded by the relocation process is that of rationality. In early 2014, the Israeli NGO, BIMKOM, following an extensive consultation process with all 23 Jahalin communities, submitted principle plans for alternative relocation sites for Bedouin in the central West Bank, yet these plans have so far been ignored by Israel. This *de facto* rejection, absent of any clear and lucid explanation, removes a crucial procedural safeguard and encourages the arbitrary exercise of power.

5.6. Summary of Case Study 2

71. Should Israel continue with its plans to relocate Palestinians from the central

¹⁵³ Hass, 16/09/14. Israeli government plans to forcibly relocate 12,500 Bedouin. Haaretz. Available at: <http://www.haaretz.com/news/national/.premium-1.615986>

West Bank, such actions would be clearly consistent with a finding of forcible population transfer. This is explicitly reflected in the language of the UNRWA Commissioner, General Pierre Krahenbuhl,¹⁵⁴ and that of UN Secretary General, Ban Ki-Moon.¹⁵⁵ The ‘forcible’ aspect of this displacement arises from two separate but intrinsically linked procedures: the creation of a highly coercive ‘push’ factor in the form of a deeply oppressive living environment, and the intended permanent relocation of a protected population to sites not of their own choosing. As such, Bedouin communities are deprived of any appreciable genuine choice, and in conjunction these two procedures would deal a devastating blow to the protected communities concerned.

72. Both of these procedures are framed by Israel as being fully compliant with international legal norms and standards, yet such assertions find little support in an objective consideration of the facts. In the context of military occupation, any forcible transfer of the occupied population (as well as any associated confiscation and/or destruction of property) – regardless of motive – by the occupying power represents a clear and grave breach of international humanitarian law. Israel’s insistence that the planned relocation will serve to improve the quality of life of those Bedouin communities affected is a view utterly refuted by the Bedouin themselves.
73. Instead, the true underpinning motivation for the forcible transfer of the resident Bedouin population is unequivocally and unapologetically outlined in both the E1 master plan and statements from key members of the Israeli government, including Prime Minister Netanyahu himself. In clear and grave breach of the Fourth Geneva Convention, Palestinian land has been expropriated by Israel and is to be reallocated for the purpose of settlement/colony construction and expansion.
74. This process has been pursued through Israel’s implementation of a legal system geared towards the protection of its own strategic interests. Local legislation is subject to cynical interpretation or widespread change through a web of Military Orders – introduced in clear and direct contravention of IHL – whilst key procedural safeguards intended to protect communities from forced displacement are disregarded by Israel or are entirely absent. These mechanisms for land expropriation and forcible population transfer are made possible through Israel’s unfettered administrative control of Area C. This unchecked domination of the land has allowed the occupying power to strengthen its grip on Palestinian territory through the creation of facts on the ground, effecting a gradual transition from the temporary custodian role envisaged for Israel in the drafting of the Oslo Agreements, to that of *de facto* sovereign power.

¹⁵⁴ Al Jazeera, 22/09/14. UN warns Israel against relocating Bedouins. Available at: <http://www.aljazeera.com/news/middleeast/2014/09/un-warns-israel-against-relocating-bedouins-201492118213997830.html>

¹⁵⁵ Secretary-General’s remarks to Security Council briefing on the Situation in the Middle East [as delivered], 21/10/14. Available at: <http://www.un.org/sg/statements/index.asp?nid=8120>

6.

Conclusion and Recommendations

75. A thorough consideration of the facts on the ground reveals that Israel is demonstrably responsible for the mass forced displacement of Palestinians within the 1967 occupied Palestinian territory; a process which naturally curtails a wide range of fundamental human rights, including – but not restricted to – the right to life, self-determination, sustenance and adequate housing. However, in specific cases the available evidence also indicates that Israel’s actions towards Palestinians satisfy the requisite criteria for a finding of forcible transfer. This policy of forcible transfer is starkly revealed in acts committed during the period of the Commission’s mandate, but also as an historical pattern, and in those acts clearly intended for the immediate future.
76. As such, the respective case studies of *Operation Protective Edge* and Bedouin communities in the central West Bank are just two examples of a continuous process of forcible transfer of Palestinians (and the often concomitant implantation of Israeli Jewish citizens into that land from which Palestinians have been removed) which can be traced back to 1948 and the Nakba. This pattern of grossly discriminatory practices against Palestinians must be addressed as a matter of the utmost urgency. Failure to do so not only deprives thousands of victims from obtaining the justice to which they are entitled under international law, but also sets a hugely dangerous precedent whereby states – and individuals acting on behalf of states – are free to perpetrate grievous rights violations with complete impunity.
77. As has been outlined above, the primary responsibility for investigating allegations of Israeli-perpetrated war crimes and crimes against humanity lies with the Israeli state. Indeed, in the aftermath of *Protective Edge* Israel has initiated 13 separate criminal investigations, with a total of 85 incidents being under “various stages of review”.¹⁵⁶ However, consideration of the outcomes of similar investigative processes deployed previously by Israel calls into question their utility as a tool for the delivery of justice.
78. Such investigations have been undermined on the key grounds of independence/impartiality, with the investigative function residing with the parent body of those to be investigated: the Israeli military. Also, only a small proportion of serious allegations made result in an investigation. For instance, of 490 complaints of criminal behavior by Israel (representing 1,046 Palestinian victims) submitted by Palestinian Center for Human Rights (PCHR) to the Israeli Military Prosecutor

¹⁵⁶ The Jewish Daily Forward. 07/12/14. IDF Opens Criminal Investigations Into Gaza Operation Killings. Available at: <http://forward.com/articles/210474/idf-opens-criminal-investigations-into-gaza-operat/>

following the conclusion of Cast Lead, just 44 responses have so far been received, most of which merely served to notify PCHR that the submission in question had been received.¹⁵⁷ Those investigations which were initiated focused on allegations of offences of individual soldiers, rather than taking an holistic view of the wider operation/policy. In turn, those further up the chain of command – in both military and political spheres – have been protected from scrutiny, whilst those charges brought against individuals fall far short in reflecting the gravity of the allegations made. Five years after Cast Lead, a total of four indictments have been issued by the Israeli Military Prosecutor in relation to the actions of members of the Israeli military during *Cast Lead*, consisting of:

- One soldier being convicted of the theft of a credit card (looting), and sentenced to seven and a half months imprisonment;
- Two soldiers were convicted in relation to the use of a nine year old boy as a human shield, with each given a three-month suspended sentence;
- One soldier was convicted of ‘misuse of a firearm’ in relation to the shooting of a group of unarmed civilians who were carrying white flags, resulting in the death of two women, and was sentenced to 45 days imprisonment.¹⁵⁸

79. There can, therefore, be little confidence in Israel adequately complying with its legal obligation to effectively investigate and, where appropriate, punish those Israelis accused of international crimes. In response to a request for assistance from the Israeli Military Advocate General in relations to the events of *Protective Edge*, the Israeli human rights body, B’Tselem, issued the following statement:

B’Tselem has decided [...] not to assist the Military Advocate General (MAG) Corps in any matter concerning such investigations [...] We have adopted this position in light of our experience with previous military actions in Gaza, which shows that investigations led by the MAG Corps do not promote accountability among persons responsible for such violations or reveal the truth.¹⁵⁹

80. In light of these failings of internal Israeli investigative mechanisms, it is the responsibility of other key actors to intervene if those responsible for the perpetration of war crimes and crimes against humanity during the Mission’s mandate are to be held fully accountable under international law.

¹⁵⁷ PCHR. March 2013. *An Illusion of Justice: An Update of Genuinely Unwilling*, pg.13. Available at: <http://www.pchrgaza.org/files/2013/An%20illusion%20of%20Justice.pdf>

¹⁵⁸ Ibid. pg.14/15

¹⁵⁹ B’Tselem, Letter to the Military Advocate General dating from 4 September 2014, “Re: Investigation of incidents that took place during recent military action in Gaza: July-August 2014”. Available at: http://www.btselem.org/download/201400904_15390_letter_to_mag_corps_regarding_protective_edge_investigations_eng.pdf

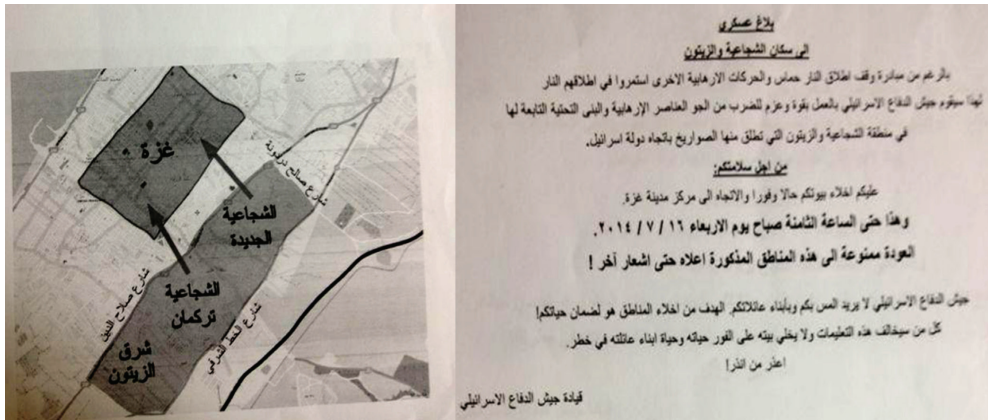
81. Accordingly, BADIL makes the following recommendations to the Commission of Inquiry:
- a. Review Israeli practices during Operation Protective Edge in the context of forcible transfer; both as a war crime and as a crime against humanity; that is to say committed as part of a widespread or systematic attack against the Palestinian population of the Gaza Strip;
 - b. Review those Israeli practices during Operation Protective Edge which contributed to forced displacement of Palestinians in the context of international human rights law, and see them as a continuation of a colonization project which began in 1947;
 - c. Join other UN bodies in highlighting that Israel's intended relocation of Palestinian Bedouin in the central West Bank amounts to the war crime and crime against humanity of forcible transfer;
 - d. Join other UN bodies and the international community in highlighting Israel's continued settlement/colony-building project as a grave breach of the Fourth Geneva Convention;
 - e. Highlight – and call for the address of – the illegality of Israel's unjustified amendment and manipulation of the applicable legal system inside Area C of the West Bank;
 - f. Highlight the discriminatory nature of the permit system implemented and enforced by Israel in regards to Palestinians residing in Area C of the West Bank;
 - g. Call for the immediate cessation of Israeli interference with the work of humanitarian agencies, and remind Israel of its responsibilities in this regard as stipulated under international humanitarian law;
 - h. Emphasize individual and state accountability for the perpetration of war crimes and crimes against humanity, to be pursued through existing international bodies, including special tribunals, regional bodies, and the doctrine of universal jurisdiction;
 - i. Highlight the responsibility of UN agencies to challenge Israeli illegal policies, and to establish effective mechanisms/measures to ensure the protection of displaced Palestinians. This includes the facilitating of Palestinian access to just and effective legal remedies, in contrast to the existing reliance on a discriminatory and unlawful Israeli-implemented legal system.

- j. Call upon United Nations Security Council to implement targeted sanctions against those responsible for war crimes and crimes against humanity.

7. Appendices

Appendix A: Military Notice to the people of Shuja'iya and az-Zaitoun

Source: IDF Spokesperson's Twitter, 20/07/14. "Many Days Ago, We Dropped This Arabic Flyer Warning Residents of Shuja'iya to Evacuate." Available at: <https://twitter.com/IDFSpokesperson/status/490811849718259712/photo/1>.



Appendix B: Military Notice to the people of Beit Lahiya

Source: BADIL Field Research Team



Appendix C: Damage to Civilian Objects in Beit Lahiya

Source: BADIL Field Research Team. 29 October 2014



Appendix D: Damage to Civilian Objects in Beit Hanoun

Source: BADIL Field Research Team. 26 October 2014



Appendix E: Damage to Civilian Objects in Beit Hanoun

Source: BADIL Field Research Team. 2 November 2014





“We fled when Israel launched its invasion on Gaza [...] We tried to come back to our home during a ceasefire, but we found it completely destroyed by the Israeli military. [We] have been living here in a nylon tent ever since [...] Cars were upside down and burned out. Houses were flattened and still smoking for days, and most our animals, sheep and cows, were dead and strewn across the fields.”

**Abu Rashad Safiyya,
22, Beit Safiyya**