



**Palestinian Human Rights Organizations & Victims’  
Communication to the International Criminal Court  
Pursuant to Article 15 of the Rome Statute  
Requesting Investigation and Prosecution of  
High-level Israeli Officials for  
Crimes Against Humanity  
and War Crimes,  
Committed in Gaza, Palestine in the course of  
“Operation Protective Edge”**

**Situation of Palestine: Operation Protective Edge**

**CONFIDENTIAL**

**Submitted By:**

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**November 2015**

*“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”*

- *Preamble to the Rome Statute of the*
  - *International Criminal Court*



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## **Submitting Organizations**

**Al-Haq** is an independent Palestinian non-governmental human rights organization based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organization has special consultative status with the United Nations Economic and Social Council. Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable.

**Al Mezan Center for Human Rights** is located in Gaza. The Al Mezan Center for Human Rights promotes respect and protection for human rights in the Occupied Palestinian Territories (OPT), with a focus on economic, social and cultural rights. The organization's guiding principles include equal human worth and equal respect for all human rights, including individual and collective rights, as enshrined in international law and jurisprudence. Al Mezan monitors and documents human rights violations, coordinates awareness and capacity building programs in Gaza, provides legal aid and representation, participates in legal review, and conducts research and analysis.

**Aldameer Association for Human Rights** is an independent and unaffiliated NGO that defends human rights and aims to ensure the development of the principles of internationally recognized human right standards and values in the Gaza Strip. Al Dameer is guided by these principles as well as accountability and rule of law, transparency, tolerance, empowerment, participation and inclusion, equality, equity, non-discrimination and attention to vulnerable groups.

**Palestinian Centre for Human Rights (PCHR)** is a non-governmental organization based in the Gaza City. The center is a non-profit company, dedicated to protecting human rights, promoting the rule of law and upholding democratic principles in the Occupied Palestinian Territory. The organization holds Special Consultative Status with the Economic and Social Council of the United Nations. The work of the center is conducted through documentation and investigation of human rights violations, provision of legal aid and counseling, as well as preparation of research articles relevant to such issues as the human rights situation and rule of law.

## I. Introduction

1. Al-Haq, Al Mezan, Aldameer and the Palestinian Centre for Human Rights (“Palestinian Human Rights Organizations”) make this submission pursuant to Article 15(2) of the Rome Statute of the International Criminal Court (“Court” or “ICC”) on behalf of themselves and Palestinian victims of crimes against humanity and war crimes. Through this initial communication, the Palestinian Human Rights Organizations seek to assist the Office of the Prosecutor in establishing that a reasonable basis exists for finding that crimes falling within the jurisdiction of the Court were committed since 13 June 2014 on the territory of Palestine, a State Party, in order to submit a request for authorization of an investigation to the Pre-Trial Chamber.

2. The crimes alleged in this submission have been committed by high-level Israeli military and civilian officials in the Gaza Strip during “Operation Protective Edge” (7 July – 26 August 2014). The Palestinian Human Rights Organizations call upon the Prosecutor to **open an investigation pursuant to Article 15(3) of the ICC Statute into crimes against humanity**, including but not limited to murder, persecution, torture and other inhumane acts, and **war crimes**, including but not limited to wilful killing, intentional attacks on civilian persons and objects and extensive destruction not justified by military necessity.

3. The State of Palestine acceded to the ICC Statute on 2 January 2015 and lodged a declaration under Article 12(3) of the ICC Statute on 1 January 2015 accepting jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”<sup>1</sup> On 1 April 2015, Palestine became the 123<sup>rd</sup> State Party to the ICC.

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<sup>1</sup> Declaration Accepting the Jurisdiction of the International Criminal Court, Mahmoud Abbas, President of the State of Palestine, 31 Dec. 2014, available at [http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf). On 6 January 2015, the United Nations Secretary General, acting in his capacity as depositary for the Rome Statute, accepted Palestine’s accession to the Rome Statute. United Nations, Depositary Notification, Ref: C.N.13.2015.TREATIES-XVIII.10, 6 Jan. 2015, available at <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>. On 7 January, the Registrar of the ICC informed President Abbas of Palestine of his acceptance of the Article 12(3) declaration. Letter from Herman von Hebel (Registrar) to Mahmoud Abbas President of the State of Palestine, Ref: 2015/IOR/3496/HvH, 7 Jan. 2015, available at <http://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf>.

4. On 16 January 2015, the Prosecutor of the ICC, Mrs. Fatou Bensouda, opened a preliminary examination into the situation of Palestine.<sup>2</sup> The preliminary examination is currently listed as being in Phase 2,<sup>3</sup> *i.e.*, determining whether the preconditions for the exercise of jurisdiction under Article 12 of the Statute are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject matter jurisdiction of the Court (temporal, material, and either territorial or personal jurisdiction).

5. This communication is made to assist the Prosecutor in determining whether any crimes within the jurisdiction of the Court have been committed that warrant the opening of an investigation.<sup>4</sup> Based on their on-the-ground investigations, the Palestinian Human Rights Organizations provide herein an illustrative overview of incidents that occurred in the Gaza Strip in the course of Operation Protective Edge, and a legal analysis indicating the crimes the Organizations believe have been committed. The information set forth herein is based on first-hand evidence collection carried out in real-time during the assault on Gaza by trained staff of the Palestinian Human Rights Organizations. All incidents presented herein have been documented, and are accompanied by powers of attorney, relevant affidavits, and other information such as death certificates, medical reports, site maps, photographic evidence, or site sketches as appropriate.<sup>5</sup> For each incident, at least two sworn affidavits are on file. The Organizations emphasize that **the incidents and supporting evidence included herein is purely illustrative and is not intended to be exhaustive.**

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<sup>2</sup> See “Press Releases: The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine,” ICC-OTP-201501160PR1083, 16 Jan. 2015, available at

[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx). A preliminary examination is a “process of examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute.”

<sup>3</sup> “Office of the Prosecutor: Report on Preliminary Examination Activities (2015),” 12 Nov. 2015, available at

[https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/reports/Pages/default.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/reports/Pages/default.aspx); see also “Office of the Prosecutor: Preliminary Examinations,” available at

[http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx).

<sup>4</sup> ICC Statute, Art. 15(2).

<sup>5</sup> With respect to documentation, for example, PCHR has prepared 244 legal files on behalf of 1,076 victims. These include 373 affidavits, 455 death certificates, and 746 medical reports.



6. More than 1,540 civilians<sup>6</sup> were killed during the 51-day Israeli operation in Gaza. Thousands more were wounded and hundreds of thousands were displaced. Civilian homes, medical facilities, educational institutions – including UN schools converted into makeshift shelters for displaced persons – electricity, water and sewage infrastructure, and religious buildings were all attacked by Israeli forces, causing the partial or total destruction of civilian objects central to civilian life.<sup>7</sup> In total, 8,377 houses were completely destroyed, and 23,597 partially damaged, affecting a total of 250,918 permanent residents.

7. The Israeli military offensive took place in the context of the prolonged belligerent occupation of the Gaza Strip, and the now eight-year long land, sea and air closure of the Gaza Strip. This closure denies a number of fundamental human rights, including the right to freedom of movement. During the offensive this meant that civilians could not seek safety and refuge outside the Gaza Strip.<sup>8</sup>

8. As set forth below in detail, the underlying criminal acts were committed on a widespread or systematic basis in the course of an attack directed against a civilian population pursuant to or in furtherance of a State policy to commit the attack, and as such constitute crimes against humanity under the ICC Statute.<sup>9</sup> Moreover, numerous war crimes under the Statute were committed as part of a plan or policy *and* as part of the large-scale commission of such crimes, in the context of an armed conflict and belligerent occupation.

9. Based on their own investigations and a legal assessment under the framework of the ICC Statute, the Palestinian Human Rights Organizations assert that an investigation must be

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<sup>6</sup> For the purposes of this communication, the Palestinian Human Rights Organizations exclude from the term “civilians” persons linked with any armed resistance groups, without prejudice to the determination of such persons’ status under international humanitarian law.

<sup>7</sup> See *infra* Sec. IV. See also Al Haq, *Divide and Conquer - A Legal Analysis of Israel’s 2014 offensive against the Gaza Strip*, Feb. 2015, available at <http://www.alhaq.org/publications/publications-index/item/divide-and-conquer> (hereinafter “Divide and Conquer”); UN Human Rights Council, “Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1,” 22 June 2015, UN Doc A/HRC/29/CRP.4, available at <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx> (hereinafter “2015 UN Commission of Inquiry Report”).

<sup>8</sup> The area of Gaza available to Palestinian civilians was reduced by 44% over the course of the conflict, See UN Office for the Coordination of Humanitarian Affairs (UN OCHA), “Occupied Palestinian Territory: Gaza Emergency Situation Report,” 22 July 2014, available at [http://www.ochaopt.org/documents/ocha\\_opt\\_sitrep\\_23\\_07\\_2014.pdf](http://www.ochaopt.org/documents/ocha_opt_sitrep_23_07_2014.pdf).

<sup>9</sup> Indeed, the Palestinian Human Rights Organizations maintain that the crimes were committed on both a widespread and a systematic basis – beyond what is required under the Rome Statute for crimes against humanity.

opened and respectfully request that the Prosecutor proceed expeditiously and seek authorization for an investigation as soon as practicable.

10. In addition, the Palestinian Human Rights Organizations urge the Prosecutor and her staff to travel to the Gaza Strip, where they can meet with victims, visit sites of mass-destruction, including in Al-Shuja'iyya, Rafah, Beit Hanoun, and Khuza'a, and observe first-hand the effects of the armed conflict and continued closure on the daily lives of Palestinians in Gaza and their enjoyment of fundamental rights, such as freedom of movement, and the right to an adequate standard of living, including the right to housing. The Palestinian Human Rights Organizations stand ready to discuss continued cooperation with the Office of the Prosecutor, including with respect to the preparation of a mission to Palestine, connecting the Office of the Prosecutor with victims and witnesses, and discussing prepared legal files. The Palestinian Human Rights Organizations assure the Prosecutor that travelling to Gaza more than one year after Operation Protective Edge will not prove futile; more than 100,000 Palestinians remain displaced in Gaza.<sup>10</sup> To-date only one destroyed home has been rebuilt and the UNDP has predicted that it will take approximately 30 years to rebuild Gaza to its 2014 pre-war status. This delay in rebuilding and reconstruction must not be accompanied by a further delay in justice.

11. The Palestinian Human Rights Organizations assert that the incidents presented herein are not inadmissible under Article 17 of the Statute. There are currently no ongoing investigations or prosecutions addressing the conduct that forms the basis of crimes committed as part of a widespread or systematic attack against a civilian population, as covered by Article 7 of the ICC Statute, or as part of a plan or policy or as part of the large-scale commission of war crimes, as set forth in Article 8 of the ICC Statute. **Palestine is unable and Israel is unwilling.**

12. The International Criminal Court was established because "the most serious crimes of concern to the international community as a whole must not go unpunished" and it stands as the embodiment of the international community's determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."<sup>11</sup> For too long, Palestinians of Gaza have only known impunity for the perpetrators of the serious violations of international law inflicted upon them. With this communication, the

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<sup>10</sup> UN OCHA, "The Gaza Strip: Internal Displacement in the Context of the 2014 Hostilities," 20 July 2015, available at

[http://www.ochaopt.org/documents/ocha\\_opt\\_gaza\\_idps\\_factsheet\\_july\\_2015\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_gaza_idps_factsheet_july_2015_english.pdf).

<sup>11</sup> ICC Statute, Preamble.

Prosecutor is asked to break the cycle of impunity and take the necessary step towards accountability by opening an investigation.

## **II. Contextual and factual background: The Israeli occupation of Palestine and the closure of the Gaza Strip**

13. The alleged war crimes and crimes against humanity committed in the Gaza Strip during Operation Protective Edge cannot be considered in isolation from the overall context of both the ongoing Israeli occupation of Palestine and the closure of the Gaza Strip.<sup>12</sup> These factors are essential to an analysis of the contextual elements of the relevant crimes under the ICC Statute. As discussed below the closure policy forms part of the attack on the civilian population, and it, along with related policies – including restrictions on movement to, from, and within Occupied Palestine – are indicative of Israel’s effective control. Accordingly, the facts and alleged crimes that took place during the 51 day military operation in 2014 must necessarily be assessed within the exceptionally strict conditions of closure imposed by Israel on Gaza, and cannot be isolated from the overall context of the Israeli occupation of Palestine.

14. The Palestinian Human Rights Organizations highlight that this is the third Israeli offensive against Gaza since late 2008. The prior military attacks, “Operation Cast Lead” in December 2008-January 2009 and “Operation Pillar of Defense” in November 2012 resulted in 1,589 dead, 6,256 injured, and the destruction of 3838 housing units and critical civilian infrastructure including medical facilities, health clinics and educational facilities.<sup>13</sup> In 2009, a 452-page Fact-Finding Report commissioned by the United Nations Human Rights Council,

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<sup>12</sup> In relation to the closure of Gaza, See 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 24: “The impact of the hostilities in Gaza cannot be assessed separately from the blockade imposed by Israel.” The same conclusion was also expressed by the 2009 UN Fact Finding Mission Report, describing the 2009 Israeli military hostilities as “the culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade.” UN Human Rights Council, “Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict,” 25 Sept. 2009, UN Doc A/HRC/12/48, available at [http://www.unrol.org/files/UNFFMGC\\_Report.pdf](http://www.unrol.org/files/UNFFMGC_Report.pdf) (hereinafter “2009 UN Fact Finding Mission Report”) at ¶ 311 ff.

<sup>13</sup> See Palestinian Centre for Human Rights, *Targeted Civilians: A PCHR Report on the Israeli Military Offensive against the Gaza Strip (27 December 2008-18 January 2009)*, 21 Oct. 2009, available at [http://www.pchrgaza.org/files/Reports/English/pdf\\_spec/gaza%20war%20report.pdf](http://www.pchrgaza.org/files/Reports/English/pdf_spec/gaza%20war%20report.pdf); Institute for Middle East Understanding, “Operation Cast Lead,” available at <http://imeu.org/article/operation-cast-lead>; Caabu, “Humanitarian Factsheet: From ‘Cast Lead’ to ‘Pillar of Defense,’” available at <http://www.caabu.org/what-we-do/gaza/factsheet-humanitarian-situation-cast-lead-pillar-defense>.

commonly known as the “Goldstone Report,”<sup>14</sup> found that serious war crimes and breaches of international humanitarian law had been committed and called for, *inter alia*, the Security Council to require Israel to take steps to launch independent investigations into the alleged crimes committed and report back on these investigations within six months,<sup>15</sup> while also advising that pursuit of accountability under the principle of universal jurisdiction was appropriate.<sup>16</sup> However, there were no domestic prosecutions for war crimes or crimes against humanity. Indeed, Israel failed to conduct effective investigations and prosecutions. In total four low level soldiers were convicted of crimes committed during Operation Cast Lead.<sup>17</sup>

15. The lack of appropriate prosecutions – and the utter lack of any accountability – comes despite Palestinian civilians’ willingness to turn to the courts of their Occupier, Israel, for justice. After Operation “Cast Lead,” the Palestinian Centre for Human Rights, for example, filed 490 cases on behalf of 1,046 civilian victims. In four years, the Palestinian Centre for Human Rights received only 44 responses.<sup>18</sup> Section IX below discusses the

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<sup>14</sup> 2009 UN Fact Finding Mission Report, *supra* n. 12.

<sup>15</sup> *Id.* at ¶ 1969(a).

<sup>16</sup> See *id.* at ¶ 1857:

In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards and establish judicial accountability over its military actions in the Occupied Palestinian Territory, and until such a time as clarity is achieved as to whether the International Criminal Court will exercise jurisdiction over alleged crimes committed in the Occupied Palestinian Territory, including in Gaza, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of grave breach provisions of the Geneva Convention of 1949, prevent impunity and promote international accountability.

<sup>17</sup> One individual was convicted of the theft of a credit card (looting) and served seven and a half months in prison; two individuals were convicted in relation to the use of a 9-year old boy as a human shield, and each given a three month suspended sentence. This was not prosecuted as a war crime, but rather as ‘inappropriate behaviour’ and ‘overstepping authority’; one individual 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 men. They were sentenced to 45 days imprisonment. See PCHR, *An Illusion of Justice: An Update of Genuinely Unwilling*, March 2013, available at <http://www.pchrgaza.org/files/2013/An%20illusion%20of%20Justice.pdf>; Human Rights Watch, *Turning a Blind Eye: Impunity for Laws-of-War Violations during the Gaza War*, April 2010, available at <https://www.hrw.org/report/2010/04/11/turning-blind-eye/impunity-laws-war-violations-during-gaza-war>.

<sup>18</sup> Nineteen responses indicated that the relevant complaint had been received, 21 responses indicated that the relevant complaints are under review, 3 responses indicated that the relevant case was closed, and 1 response indicated a soldier had been charged. See, for example, PCHR, *Genuinely Unwilling: An Update on The Failure of Israel’s Investigative and Judicial System to Comply with the Requirements of International Law, with particular regard to the Crimes Committed during the Offensive on the Gaza Strip (27 December 2008-18 January 2009)*, Aug. 2010, available at <http://www.pchrgaza.org/files/2010/Genuinely%20Unwilling%20-%20An%20Update.pdf>.

current situation vis-à-vis investigations by Israel's Military Advocate General (MAG) and addresses the denial of criminal and civil remedies to Palestinian victims.

### A. The Israeli Occupation of Palestine

16. In 1967, as an outcome of the Six-Day War, Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip.<sup>19</sup> Israel's belligerent occupation of the Gaza Strip, and its status as an Occupying Power, has been recognized by the international community as articulated by the General Assembly and affirmed by, *inter alia*, the International Court of Justice, the International Committee of the Red Cross (ICRC) and United Nations human rights mechanisms.<sup>20</sup> In 2012 the President of the ICRC stated that "[w]hile the shape and degree of this military occupation have varied, Israel has continuously maintained effective control" over the Gaza Strip.<sup>21</sup> No international organization or other relevant body at the

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<sup>19</sup> See, for example, UN Security Council (UNSC) Resolution 242, (22 Nov. 1967) UN Doc S/RES/242.

<sup>20</sup> See UN General Assembly (UNGA) Resolution 64/92, Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories (19 Jan. 2010) UN Doc A/Res/64/92; UNGA Resolution 64/94, Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem (19 Jan. 2010) UN Doc A/Res/64/94, (UNGA Resolutions to be read jointly); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, ICJ 136, ¶¶ 78, 101; Peter Maurer, *Challenges to International Humanitarian Law: Israel's Occupation Policy*, International Review of the Red Cross, Vol. 94, Number 888, p. 1504-1506; UN Human Rights Committee, "Concluding Observations on Israel," 21 Nov. 2014, UN Doc CCPR/C/ISR/CO/4; UN, Department of Public Information, *Statement by the Special Advisers of the Secretary-General on the Prevention of Genocide, Mr. Adama Dieng, and on the Responsibility to Protect, Ms. Jennifer Welsh, on the Situation in Israel and in the Palestinian Occupied Territory of Gaza Strip*, 24 July 2010, available at [www.un.org/en/preventgenocide/adviser/pdf/24.07.2014%20Special%20Advisers'%20Statement%20on%20the%20situation%20in%20Israel%20and%20the%20occupied%20Gaza%20strip.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/24.07.2014%20Special%20Advisers'%20Statement%20on%20the%20situation%20in%20Israel%20and%20the%20occupied%20Gaza%20strip.pdf); UN Human Rights Council, "Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967," 13 Jan. 2014, UN Doc A/HRC/25/67; 2009 UN Fact Finding Mission Report, *supra* n. 12 at ¶ 276; 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 30.

<sup>21</sup> Peter Maurer, *supra* n. 20 at p. 1504-1505. For authority on the "effective control" test, see Trial Chamber, *Prosecutor v. Duško Tadić*, ICTY, Case No. IT-94-1-T (7 May 1997) para. 580; *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 Dec. 2005, ICJ 168, ¶¶ 172, 175-176; The Office of the Prosecutor: *Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report*, 6 Nov. 2014 (hereinafter "OTP Flotilla Report"), at ¶ 24; 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 26 ("The commission agrees that the exercise of the 'effective control' test is the correct standard to use in determining whether a State is the occupying power over a given territory . . .").

international level has found that Israel's "disengagement" from the Gaza Strip in 2005 affects its status as an Occupying Power.<sup>22</sup>

17. Israel's effective control of the Gaza Strip is evidenced by, first, Israel's capacity to deploy ground troops to Gaza, including during Operation Protective Edge. Indeed, it has explicitly reserved the right to do so where necessary.<sup>23</sup> Second, Israel controls the borders and access to Gaza, as well as *inter alia* Gaza's airspace, maritime areas, telecommunications, water, electricity, sewage networks, population registry, monetary market and customs.<sup>24</sup>

18. In 2012 the United Nations General Assembly accorded Palestine "non-member Observer status" at the United Nations.<sup>25</sup> This circumstance, the recognition of the "State of Palestine" by an increasing number of States, and Palestine's inclusion in international bodies,<sup>26</sup> do not affect Palestine's status as occupied territory, and do not alter the international legal obligations imposed on Israel as the Occupying Power. In particular, Israel

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<sup>22</sup> See UN Economic and Social Council, Commission on Human Rights, "Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Special Rapporteur of the Commission on Human Rights," 7 Dec. 2004, UN Doc E/CN.4/2005/29, ¶ 19; 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 26. Indeed, the OTP has recognized that "Israel reserved its right to re-enter the Gaza Strip on the basis of military necessity and maintained control over the air and maritime space as well as borders of the Gaza Strip," citing Israel's Ministry of Foreign Affairs, "The Cabinet Resolution Regarding the Revised Disengagement Plan," 6 June 2004. OTP Flotilla Report, *supra* n. 21 ¶ 25. The OTP recognizes that "the prevalent view within the international community is that Israel remains an occupying power in Gaza despite the 2005 disengagement" and concluded "there is a reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement." *Id.* at ¶¶ 27, 29.

<sup>23</sup> 2009 UN Fact Finding Mission Report, *supra* n. 12 at ¶ 187; OTP Flotilla Report, *supra* n. 21 at ¶ 28; 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶¶ 27, 30 (citations omitted); see Prime Minister of Israel's Office, *The Cabinet Resolution Regarding the Disengagement Plan*, 6 June 2004, available at

[www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx](http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx) ¶ 3(1)(3): "The State of Israel reserves its fundamental right of self-defense, both preventative and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip."

<sup>24</sup> 2009 UN Fact Finding Report, *supra* n. 12 at ¶¶ 277-78; 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 29. See also OTP Flotilla Report, *supra* n. 21 at ¶ 27. The report cited indicia of control including control of border crossing, territorial sea and airspace: "periodic military incursions"; enforcement of "no-go areas" within Gaza; regulation of monetary markets and control of taxes and customs duties.

<sup>25</sup> UN General Assembly resolution 67/19, 4 Dec. 2012, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19).

<sup>26</sup> See UN General Assembly, "General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations," 29 Nov. 2012, Press Release GA/11317 available at <http://www.un.org/press/en/2012/ga11317.doc.htm>; See also, Palestine's membership of UNESCO available at <http://www.unesco.org/new/en/unesco/worldwide/arab-states/palestine/>.



must respect the rights of the occupied population of Palestine, who are recognized as ‘protected persons’ under international law.<sup>27</sup>

## **B. The Closure of the Gaza Strip**

19. Operation Protective Edge took place within the context of a land, sea, and airspace closure of the Gaza Strip that denies freedom of movement, and violates a number of other fundamental human rights. Israel has imposed an absolute closure on the Gaza Strip since June 2007, following the Hamas takeover of the Gaza Strip.<sup>28</sup> With limited exceptions, Palestinian residents of the Gaza Strip are prevented from leaving Gaza. Israel has also imposed a ban on exports, and imports have been reduced to limited items in quantities dramatically insufficient to fulfil the needs of the 1.8 million people of Gaza.<sup>29</sup>

20. Israel controls the five border crossings between its territory and the Gaza Strip. These are: Erez (Beit Hanoun) crossing (for pedestrian traffic); Karem Shalom (Karm Abu Salem) crossing (for all authorized goods/ humanitarian aid); Nahal Oz (El Shij’ia) crossing (for industrial fuel/gas), which was closed in 2010; Karni (Al-Mentar) crossing (a conveyor belt for grains), which was shut down in 2011; and Sufa (Sofa) crossing (for humanitarian goods/ construction materials), which was closed in 2008.<sup>30</sup> The sixth border crossing is Rafah crossing (primarily for pedestrian traffic), which is located between the Gaza Strip and Egypt. The Rafah border has been opened only infrequently since 2011 and, particularly since 2013, permission to enter or leave through Rafah is tightly restricted.<sup>31</sup>

21. The Gaza Strip is approximately 360 km<sup>2</sup> bordering the Mediterranean Sea to the

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<sup>27</sup> See, for example, Conference of High Contracting Parties to the Fourth Geneva Convention Declaration, 17 Dec. 2014, paras. 4-5, available at [https://www.eda.admin.ch/content/dam/EDA-Event/GVA%20Convention/CHCP-Declaration\\_EN.pdf](https://www.eda.admin.ch/content/dam/EDA-Event/GVA%20Convention/CHCP-Declaration_EN.pdf).

<sup>28</sup> PCHR, *The Illegal Closure of the Gaza Strip: Collective Punishment of the Civilian Population*, 10 Dec. 2010, p 49, available at [www.pchrgaza.org/files/2010/Illegal%20Closur.pdf](http://www.pchrgaza.org/files/2010/Illegal%20Closur.pdf). See UN OCHA, “The Gaza Strip: The Humanitarian Impact of Movement Restrictions on People and Goods,” July 2013, ¶ 1, available at [http://unispal.un.org/pdfs/OCHA\\_GazaRestrictions.pdf](http://unispal.un.org/pdfs/OCHA_GazaRestrictions.pdf).

<sup>29</sup> See, for example, PCHR, *The Illegal Closure of Gaza*, at 14; See State of Palestine: Palestinian Central Bureau of Statistics, 7 Oct. 2014, available at [www.pcbs.gov.ps/site/512/default.aspx?tabID=512&lang=en&ItemID=1165&mid=3172&wversion=Staging](http://www.pcbs.gov.ps/site/512/default.aspx?tabID=512&lang=en&ItemID=1165&mid=3172&wversion=Staging).

<sup>30</sup> See Department of Licensing and Consumer Affairs, *OPT Road Network Additional Information*, available at [dlca.logcluster.org/download/attachments/854459/OPT%20Road%20Network%20Additional%20Information.docx?version=1](http://dlca.logcluster.org/download/attachments/854459/OPT%20Road%20Network%20Additional%20Information.docx?version=1).

<sup>31</sup> See PCHR, *State of the Gaza Strip’s Border Crossings 1-31 May 2015*, available at [www.pchrgaza.org/files/2015/closure\\_reportmay2015-Eng.pdf](http://www.pchrgaza.org/files/2015/closure_reportmay2015-Eng.pdf).

west, Egypt to the south, and Israel to the north and east.<sup>32</sup> At the time of the 2014 offensive the population of the Gaza Strip was estimated at 1.76 million, with a population density of 4,822 persons per km<sup>2</sup>.<sup>33</sup> Due to its geographical position and the ongoing occupation, Gaza is overwhelmingly dependent on Israel for essential life services, including food, water, electricity and trade.<sup>34</sup> Israel also retains control over civil administrative aspects, such as the population registry and permits to enter and leave the Gaza Strip.<sup>35</sup>

22. By imposing the closure Israel has manufactured a chronic humanitarian crisis in the Gaza Strip. As stated by the UN Flotilla Fact-Finding Report, *before* the 2014 offensive, the situation in the Gaza Strip was “deplorable,” “unsustainable” and “totally intolerable and unacceptable in the 21<sup>st</sup> Century.”<sup>36</sup> The Report clarified that the closure is “unlawful and cannot be sustained in law. This is so regardless of the grounds on which it is sought to justify the legality of the blockade.”<sup>37</sup> Israel has consistently failed to open Gaza’s borders, in violation of Security Council Resolution 1860 (2009), impeding the passage of essential materials.

23. “Operation Cast Lead” (27 December 2008 - 18 January 2009) and “Operation Pillar of Defense” (14-21 November 2012) caused the extensive destruction of civilian infrastructure, exacerbating the humanitarian crisis caused by the closure.<sup>38</sup> The situation in the Gaza Strip has been dramatically worsened in the aftermath of Operation Protective Edge.

24. Israel has also established a “buffer zone” along its borders with the Gaza Strip. The buffer zone is established on the territory of Gaza, where Israel targets Palestinians in or close

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<sup>32</sup> See UN OCHA, Map of Gaza, Annex.

<sup>33</sup> State of Palestine, Palestinian Central Bureau of Statistics, 7 Oct. 2014.

<sup>34</sup> UN OCHA, “2015 Humanitarian Needs Overview,” November 2014, pp. 2-4, 12, available at [www.ochaopt.org/documents/hno2015\\_factsheet\\_final\\_november\\_2014.pdf](http://www.ochaopt.org/documents/hno2015_factsheet_final_november_2014.pdf).

<sup>35</sup> See Migration Policy Centre, “*Migration Facts for Palestine*,” April 2013, available at [www.migrationpolicycentre.eu/docs/fact\\_sheets/Factsheet%20Palestine.pdf](http://www.migrationpolicycentre.eu/docs/fact_sheets/Factsheet%20Palestine.pdf).

<sup>36</sup> UN Human Rights Council, “Report of the International Fact-Finding Mission to Investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance,” A/HRC/15/21, 27 Sept. 2010, (hereinafter “2010 UN Flotilla Fact Finding Mission Report”) at ¶ 275.

<sup>37</sup> *Id.* at ¶ 261.

<sup>38</sup> See, for example, 2009 UN Fact Finding Mission Report, *supra* n. 12, ¶¶ 913 – 1031; 1217 – 1335; UN OCHA, “Occupied Palestinian Territory: Escalation in Hostilities: Gaza and Southern Israel: Situation Report,” 22 Nov. 2012, available at [www.ochaopt.org/documents/ocha\\_opt\\_sitrep\\_escalation\\_in\\_hostilities\\_gaza\\_southern\\_israel\\_20121122.pdf](http://www.ochaopt.org/documents/ocha_opt_sitrep_escalation_in_hostilities_gaza_southern_israel_20121122.pdf); UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council Resolutions S-9/1 and S-12/1: Addendum,” 6 Mar. 2013, UN Doc A/HRC/22/35/Add.1, ¶¶ 16-22, 25-31.



to the buffer zone.<sup>39</sup> The borders of the buffer zone are constantly changing, with Israel unilaterally expanding the zone in recent years.<sup>40</sup> At the time of the 2014 military offensive, the United Nations estimated that the buffer zone encroached 3 kilometers into Gaza along the full length of the Israeli border, encompassing 44% of the territory.<sup>41</sup> Israel's denial of access to productive land in Gaza has further exacerbated the problems caused by the closure.

25. Israel justifies its closure policy on the basis of military considerations and national security. However, restrictions on the movement of persons and goods are in fact aimed at the population as a whole, thereby constituting a method of punishing civilians for the 2007 election results that brought Hamas to power.<sup>42</sup> The UN Secretary General, among others, has described this as collective punishment against the population of Gaza.<sup>43</sup> In a rare public statement, the International Committee of the Red Cross stated that:

The whole of Gaza's civilian population is being punished for acts for which they bear no responsibility. The closure therefore constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law.<sup>44</sup>

26. It is against this backdrop of prolonged closure and military occupation that the information contained herein regarding the alleged crimes committed during Operation Protective Edge must be read.

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<sup>39</sup> Al-Haq, *Shifting Paradigms – Israel's enforcement of the Buffer Zone in the Gaza Strip*, June 2011, available at <http://www.alhaq.org/publications/publications-index/item/shifting-paradigms-israel-s-enforcement-of-the-buffer-zone-in-the-gaza-strip>.

<sup>40</sup> PCHR, *The Buffer Zone in the Gaza Strip*, 1 Apr. 2012, available at [www.pchrgaza.org/portal/en/index.php?option=com\\_content&view=article&id=8415:the-buffer-zone-in-the-gaza-strip-&catid=56:fact-sheets-&Itemid=18](http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=8415:the-buffer-zone-in-the-gaza-strip-&catid=56:fact-sheets-&Itemid=18).

<sup>41</sup> UN OCHA, "Occupied Palestinian Territory: Gaza Emergency Situation Report," 22 July 2014, available at [www.ochaopt.org/documents/ocha\\_opt\\_sitrep\\_23\\_07\\_2014.pdf](http://www.ochaopt.org/documents/ocha_opt_sitrep_23_07_2014.pdf).

<sup>42</sup> See Israeli Ministry of Foreign Affairs, "Security Cabinet Declares Gaza Hostile Territory," 19 Sept. 2007, available at

[www.mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territory%2019-sep-2007.aspx](http://www.mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territory%2019-sep-2007.aspx); Gisha, *Gaza Closure Defined: Collective Punishment*, Dec. 2008, pp. 2-3, available at

[www.gisha.org/userfiles/file/publications/GazaClosureDefinedEng.pdf](http://www.gisha.org/userfiles/file/publications/GazaClosureDefinedEng.pdf). See also 2010 UN Flotilla Fact Finding Mission Report, *supra* n. 36.

<sup>43</sup> See Report of the Secretary General, "Human rights situation in the Occupied Palestinian Territory, including East Jerusalem," (2015) UN Doc A/HRC/28/45, ¶ 70; 2009 UN Fact Finding Mission Report, *supra* n. 12, ¶ 74; 2010 UN Flotilla Fact Finding Mission Report, *supra* n. 36, ¶ 54; International Federation for Human Rights (FIDH), *Trapped and Punished: The Gaza Civilian Population under Operation Protective Edge*, Oct. 2014, p. 64, available at [https://www.fidh.org/IMG/pdf/report\\_gaza\\_fidh\\_march\\_2015.pdf](https://www.fidh.org/IMG/pdf/report_gaza_fidh_march_2015.pdf).

<sup>44</sup> ICRC, "Gaza Closure: Not Another Year!" *ICRC News Release*, 10/103, 14 June 2010.

### **III. Methodology**

27. This section describes how the Organizations collected and verified information pertaining to incidents occurring during Operation Protective Edge. At the start of the offensive the four Palestinian Human Rights Organizations decided to collaborate and coordinate their documentation of the incidents occurring during Operation Protective Edge, in order to increase efficiency in response to the high number of incidents and to avoid duplication of efforts. The mechanics of this cooperation were worked out over a number of subsequent meetings.

28. The staff and volunteers from the four Organizations worked as a team, and were organized by their role – either as part of the field units or the legal units.<sup>45</sup> The field units were in charge of the general documentation of all incidents. This documentation was intended to establish a comprehensive overview of all incidents occurring during the offensive, and to form the basis of analysis utilized for publication purposes. The legal units were in charge of collecting evidence required for the preparation of legal files that would then be used to seek justice and reparation for victims of the offensive. Additionally, thematic units within each Organizations performed additional analysis on the underlying documentation.<sup>46</sup> There was coordination between (1) the field units and other thematic departments within each organization, (2) the field units of the different Organizations, and (3) the legal units of the different Organizations.

29. The Palestinian Human Rights Organizations allocated specific areas of the Gaza Strip to different Organizations. These Organizations were in charge of the documentation of incidents and the collection of evidence in their respective areas. PCHR was in charge of the coordination of documentation work in the central and southern part of the Gaza Strip, and Al Mezan was in charge of the coordination of documentation work in the northern part of the Gaza Strip and Gaza City. The field officers from Aldameer and Al-Haq were part of the overall team of field officers working in the field.

30. The Palestinian Human Rights Organizations have established longstanding relationships with external partners and Organizations in order to enhance the training and expertise of staff and volunteers in documentation.

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<sup>45</sup> The training of the volunteers is discussed in paragraph 37 below.

<sup>46</sup> For instance, thematic units focused on women's rights, economic, social and cultural rights, and so on.

31. There were a total of 15 staff field officers deployed by the Palestinian Human Rights Organizations during Operation Protective Edge: five from PCHR, two from Al-Haq, three from Aldameer, and five from Al Mezan. There was a total of approximately 76 trained field volunteers who assisted the field units: ten from Al-Haq, ten from Aldameer, 28 from PCHR, and 28 from Al Mezan.

32. Ten lawyers were deployed by the Palestinian Human Rights Organizations during Operation Protective Edge: six from PCHR, and four from Al Mezan. PCHR also had six volunteer lawyers and Al Mezan had six to ten volunteer lawyers who assisted at various times during the offensive.

**A. Field Unit: General Documentation of All Incidents**

33. The role of the field units was to record and document all incidents during Operation Protective Edge. In order to facilitate further analysis and reporting the field units also followed up on recorded incidents by transferring them to other departments, depending on the nature of the incident. During Operation Protective Edge, field officers from the Palestinian Human Rights Organizations were present in the field 24 hours a day, for the entire 51 days.

34. The field units are primarily concerned with incidents involving civilians, but documented all incidents during Operation Protective Edge, including the killing of members of Palestinian armed resistance groups, detention, and raids of homes of civilians who allegedly have a family member involved in Palestinian armed resistance groups.

35. In order to determine whether an individual was a civilian or a member of a Palestinian armed resistance group, the field units conducted interviews and investigations. For example, individuals were classified as members of Palestinian armed resistance groups if: they were dressed in military uniform, were carrying military equipment, were known to the community as belonging to an armed resistance group, or took a continuous role in hostilities. This initial status classification could be updated following further investigation after the hostilities have ended, or if new information comes to light.

**i. Field work expertise and experience**

36. All the field officers have the necessary expertise and experience required to undertake the field work conducted during Operation Protective Edge. As a pre-requisite to the job, all field officers have university degree qualifications in a subject area relevant to

field work, such as journalism. Training is conducted both internally and externally to ensure that field officers are well prepared for the process of documentation, and have knowledge of relevant human rights issues that are applicable in the course of their work. Many of the field officers have worked in the field for many years, resulting in significant accumulated experience within and across the Organizations.

37. Volunteers recruited by the Palestinian Human Rights Organizations also have prior training in international humanitarian law and particularly in documentation work. The supervision by the principal staff field officers ensures consistency and quality of the field documentation work, across both staff and volunteers.

## **ii. Process of documentation and key considerations**

38. Field officers undertake a four stage documentation process: (1) obtaining knowledge of an incident, (2) going to the site of the incident, (3) documentation of the incident, and (4) processing of the incident documentation. This section will elaborate on each of these stages.

39. *Obtaining knowledge of an incident:* Field officers come to know about incidents through a variety of channels. The field officers' primary source of information is the network of contacts that they have built over time. This network consists of people whom the field officers have met and interacted with through their presence in a particular area, and from training they have received. Field officers are also notified about incidents through their professional contacts. Field officers may also be in the area at the time of an incident, and witness it personally.

40. *Going to the site of an incident:* Field officers prepare and bring essential equipment with them when they go to the site of an incident. This includes the following:

- Mobile phone for communication;
- Camera for taking photographs of the site and of evidence;
- Note taking equipment;
- Documentation file, including template forms to record all information pertaining to the incident.

41. A common system for documentation was created by Al Mezan to ensure consistency in the way incidents were documented and to facilitate the compilation of data. This was adopted by the four Palestinian Human Rights Organizations. This system included unified form templates for different types of incidents, such as killings, injuries, and detention. These

form templates included, but are not limited to: information on the person affected by the incident, details of the incident including the weapons or ammunition used, the exact time these weapons were discharged, the exact location of the incident (the geographical area and street), and the name and owner of the building where the incident occurred. Al Mezan also oversaw the process of data entry.

42. Field officers then proceeded to the site of the incident, usually working alone. At times both field officers and lawyers travelled together to the scene of an incident. In these situations the field officers continued to conduct separate, independent documentation as their documentation follows a different protocol.

43. *Documentation of the incident:* There are three main types of information that field officers collected: (1) accounts of the incident (from eye witnesses or secondary witnesses' statements), (2) information about victims, and (3) visual evidence of the site of the incident. Field officers went through a series of steps to collect all information and fill in the form templates to register a record of the incident in the database.

44. On arriving at an incident field officers first attempted to identify and locate potential eyewitnesses. Field officers approached eyewitness and informed them of their affiliation to the Palestinian Human Rights Organizations. The field officer then sought consent from eyewitnesses for naming them in the statement and for making the statement public; individuals can choose to remain anonymous with respect to the public reporting of the incident. The field officers made it clear that the Palestinian Human Rights Organizations cannot guarantee their safety or protect them from any repercussions should they agree to disclose their identity in a public statement.

45. If the field officer took the statement of a victim of the incident, the field officer routinely provided his/her contact details to the victim and invited them to the office so that a legal file could be prepared by the legal unit. If the victims of the incident were killed, the field officer approached the family to collect all the personal details of the victim, verifying this information by asking for the personal identification card of the victim and taking a copy of it. The field officer also obtained a personal photograph of the deceased victim where possible. The personal details and photograph of the victim were attached to the form template for the incident, and filed with the rest of the documentation material. The field officers then obtained medical reports from the hospital corresponding to the recorded injuries and deaths from the incident, whenever possible.

46. If there were no eyewitnesses present at the time of the incident, the field officers made personal observations and notes of the site of the incident. The outcome reports of these incidents stated that there were no eyewitnesses to the incident, and that the claims of the Israeli Military Spokesperson as to the events of the incident cannot be verified.

47. Sometimes contradicting witness statements are given with respect to an incident. Such contradictions are later addressed when the information is passed on to the relevant department for follow-up.

48. The field officers also fully photo-documented the sites. Photographic and video documentation was filed with the documentation material.

49. If the field officer arrived at the site of an incident after the incident has occurred, the field officer gathered any available information from others who were on the scene earlier and had managed to obtain footage or photo-evidence of the incident while it was occurring, including media contacts. Testimonies and evidence obtained from the media are also signed, and their identities are disclosed in published reports only if they consent.

50. *Processing the documentation:* A documentation file containing all information collected is complete when it has the following: (1) a completed form detailing the incident using the correct template for the incident, statements collected, photo-documentation, and (2) a report written by the field officer. The completed documentation file was submitted to the head of field research at each organization, who then transferred these files to other relevant department(s), including the legal units if appropriate, for further analysis and reporting. For example, at PCHR, there are departments dealing with different thematic issues, such as democratic development, economic and social rights, women's rights, who received the relevant files and followed up with an appropriate course of action. These departments decided if a press statement, report or position paper should be published or other actions should be taken.

51. After Operation Protective Edge ended, the field units of the Palestinian Human Rights Organizations compiled all the information that was collected by the field officers. This compilation process took a period of two and a half months. Following that, the field units also recruited ten volunteers to assist with processing the information into statistical data. This process of analyzing the data took a period of six months and was completed under the supervision of the head of field research at PCHR and Al Mezan. Statistical data

demonstrated the various types of destruction and losses that happened as a result of Operation Protective Edge. This included the following:

- Number of victims killed;
- Number of wounded;<sup>47</sup>
- Number of women and children amongst the wounded;<sup>48</sup>
- Number of houses completely destroyed;
- Number of houses partially demolished or destroyed;
- Number of houses with minor damage;
- Size of cultural land bulldozed or destroyed.

52. The Palestinian Human Rights Organizations worked together throughout the process, in order to verify the initial documentation work, and ensure that the final information gathered was accurate.

## **B. Legal unit: documentation of evidence to prepare legal files**

### **i. Role of the Legal Unit**

53. The legal units are responsible for gathering evidence essential to the preparation of legal complaints. These legal complaints are submitted to the Israeli Military Advocate General (MAG) in the form of investigation requests (criminal complaints) as this constitutes the primary legal recourse victims have to bring perpetrators to justice. After Operation Protective Edge, Israel established the Fact Finding Assessment Mechanism (FFAM), comprised of general staff of the Israeli Army, responsible for reviewing complaints received. Lawyers from PCHR and Al Mezan provided the FFAM with evidence relevant to requested cases, and the FFAM then carried out preliminary assessments based on the information provided in comparison with the registry of activities of the Israeli Army. See *infra* Sec. IX (B). The FFAM forwards its recommendations to MAG for his decision on whether or not criminal investigations are to be initiated.

54. Additionally, the legal units also take charge of submitting civil complaints about incidents to the Israeli Ministry of Defence to request reparations. These submissions follow

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<sup>47</sup> The overall figures of wounded civilians are based on statistics collected by the Palestinian Ministry for Health.

<sup>48</sup> Although initial figures on wounded civilians were based on information collected by the Palestinian Ministry for Health, additional investigations were conducted by the Palestinian Human Rights Organizations in relation to reports of wounded women and children.

a set template of required information that must be submitted within 60 days of the occurrence of an incident. This civil complaint includes the time and place of the incident, effects of the incident, how many victims were able to get to hospitals and how they got there (by ambulance, car, carried by others, or on foot), names and identification details of eyewitnesses, whether the organization will use the information to file a complaint for criminal investigation, and whether testimonies will be presented before the civil court as required.

55. At PCHR, lawyers in the legal units must exercise an even higher level of precision and scrutiny than the field unit in the process of gathering evidence for the legal files. As such, even if the legal units and field units are responding to the same incidents at the same time, they have parallel and independent processes in documenting the incident. All evidence that goes into the legal files is collected only by the lawyers, and any relevant information that the field unit collects is used only for research. Al Mezan's lawyers and field workers, who are highly experienced and trained, work together on preparing legal files. The field work unit's documentation serves as the starting point for further investigations and gathering of evidence. At Al Mezan, case-files are approved by both the legal unit and the field work unit, and then are submitted to MAG.

56. The legal units undertake extensive efforts to verify the situation at the time of the incident. These include interviews with witnesses and community members and on the ground investigations to determine whether active hostilities were occurring; were individuals wearing military uniform, armed or engaged in fighting; whether locations that were attacked were used for military purposes; monitoring of statements made by Israeli authorities and Palestinian armed resistance groups; and additional documentation, such as hospital registrations, video or photographic evidence.

## **ii. Legal expertise and experience**

57. The legal unit from PCHR had the lead role amongst the Palestinian Human Rights Organizations in gathering evidence and preparing the legal files and statements to be submitted to the Israeli authorities in the context of Operation Protective Edge. It worked in collaboration with the legal unit at Al Mezan in Gaza; both units have been working jointly on several files. The legal units at PCHR and Al Mezan are composed of trained and experienced lawyers, who have accumulated expertise in legal interventions in similar situations, such as during Operation Cast Lead in 2008 and Operation Pillar of Defence in



2012. PCHR and Al Mezan also contributed to the investigation of international crimes in Occupied Palestine by providing information and files to entities such as the 2009 United Nations Fact Finding Mission on the Gaza Conflict, the Independent Fact-Finding Committee on Gaza to the League of Arab States, and the 2014 Commission of Inquiry on the Gaza conflict.

58. The volunteer lawyers who assist staff lawyers in emergency situations undergo continuous training in legal documentation and building legal files. In particular, they are trained in aspects of international law relevant to the areas of work, such as international humanitarian law and international criminal law. Additionally, constant engagement between Al Mezan and PCHR's lawyers and international experts in this field, such as through meetings and conferences, has enabled them to draw from international expertise and has improved the capacity of the lawyers to produce high quality legal work.

59. Training is also conducted by international experts to improve the legal unit's work in areas such as gathering evidence, examining sites of incidents, and handling of physical evidence such as fragments or shrapnel from weapons (how to collect, store and present them).. Trainings have also been conducted using material from prior cases, which ensures that the lessons are practical and relevant.

### **iii. Process of collecting evidence and key considerations**

60. The legal units undertook a five stage documentation process: (1) obtaining knowledge of the incident, (2) allocating work, (3) obtaining access to the site of incidents, (4) gathering evidence, and (5) follow-up on the case.

61. *Knowledge of the incident:* Lawyers are typically informed of an incident and its precise location either through coordination with the field units or on the basis of their own contacts.

62. *Allocation of work:* At PCHR, once the precise location of the incident was determined, a team of lawyers were split into two areas of work. One of the lawyers was deployed to respond to the site of the incident, and another lawyer was deployed to the nearest hospital (depending on the location of the incident) where victims would likely be taken to. At Al Mezan, a field worker who is assigned to the area of the incident supports the effort by securing access to witnesses and deploying to hospitals. Since there are only a few hospitals in the Gaza Strip and these hospitals are limited to providing medical assistance

only to their catchment area, the lawyers and field workers were able to determine which hospital to go to.

63. *Access to the site of incidents:* Gaining access to the site of an incident as early as possible is crucial to gathering accurate evidence. This was facilitated through constant engagement with the Palestinian Police, in order to gain access to incident areas that were secured for security reasons, for instance to protect against further civilian casualty. The lawyers carry formal identification and communicate with the security forces to inform them of the Palestinian Human Rights Organizations' work and the necessity of gaining access to the site of incidents despite the risk of delayed explosions or subsequent attacks.

64. *Gathering evidence:* There are several types of evidence that the lawyers gathered, including: witness testimonies, visual evidence of the destruction, detailed information about the site of the incident, physical evidence of the destruction, and precise information about the situation at the time of the incident.

65. Witness testimonies are used for the legal files that lawyers prepare, as well for complaints to the Israeli MAG (criminal complaints) and for the incident statements submitted to the Israeli Ministry of Defence (civil complaints). Lawyers first identified eyewitnesses in order to secure witness testimonies. This is done at both the site of the incident and at the hospitals. The lawyer approached anyone who witnessed or was involved in the incident, or accompanied the wounded from the site of the incident to the hospital. This includes the wounded at the hospital, family members of the deceased victims (who are often the primary eyewitnesses), neighbours, ambulance drivers, ambulance officers, doctors, and members of the press or reporters.

66. The lawyer interviewing witnesses informed them of the legal procedures involved in giving a statement including an explanation of the possible legal penalties of providing false statements to ensure that witnesses understood the importance of providing truthful accounts. Signed testimonies with releases were obtained from witnesses so that affidavits could be submitted in support of complaints and potential cases to relevant authorities. Witness testimonies were examined carefully from different angles to ensure accuracy in recoding. A credibility assessment is also made. This could be done, for example, by comparing the witness testimony to details such as the weather, visibility, time, lighting of the area of the incident, the exact location the witness was in, and the field of vision of the witness.

67. Lawyers specifically confirm how any visual documentation was captured, and under what circumstances it was obtained. Similar to witnesses, signed affidavits were obtained to confirm the source of the evidence and its authenticity.

68. If a wounded victim was interviewed, the lawyer followed up to find out if the victim in question was recovering or if he or she had died from the injuries sustained. If the victim was recovering, the lawyer proceeded to verify the victim's testimony at the hospital. Verification of the injuries sustained and their consequences is made through meetings with doctors and the collection of medical reports. When available, medical reports, or judicial examination reports (which determine the way a person has been wounded, the type of injury and the details of the injury) are obtained and added to the legal files.

69. If the victim is deceased, either at the site of incident or at the hospital, the lawyer proceeded to obtain forensic reports (which provide the name of the victim, the details and result of the injury sustained) from the hospital. These are verified with the records of the Civil Registry to ensure that witness testimonies attesting to death of victims are in accordance with the factual reality, to ensure that the deceased was alive at the time of the incident, and to safeguard against falsifying of information or identities.

70. In certain situations where victims were seriously wounded they may have needed to be transported out of the Gaza Strip for medical treatment. In these cases, the lawyers assisted in attempting to secure the necessary permits for access through the checkpoints and where possible facilitated transportation of the seriously wounded to hospitals in the West Bank, Israel or further abroad. The lawyers subsequently followed up on these cases to collect the victims' testimonies, usually upon their return to the Gaza Strip. In these instances, the lawyers cooperated with the:

- Palestinian Ministry of Health to provide necessary medical reports with urgency;
- Ministry of Civilian Affairs to register the request on fast track to expedite the process, and to deliver supporting documentation such as medical reports and photographs to the Israeli Humane Centre in charge of processing requests;
- Israeli Human Centre to confirm receipt of request and to stress necessity and urgency of the request;
- Ambulance Centre for transportation.

71. In addition to the above, PCHR and Al Mezan also employ lawyers inside Israel who can plead before the Israeli courts. These lawyers visited detainees arrested during hostilities or when their homes were raided. These detainees are key witnesses to the incidents and their testimonies constituted a central and critical aspect of the legal files prepared by the lawyers for submission to the Israeli MAG. The lawyers documented information relating to the circumstances in which these detainees were arrested, transported, detained, and how they were treated whilst in detention. Since all detainees from the Gaza Strip were kept at a single detention centre in the city of Majdal (Ashkelon), the lawyers were able to follow up on all of these cases.

72. In addition to collecting witness testimonies the lawyers also gathered visual evidence of the incident by taking photographs of the location of the incident and photo-documenting the site of the incident. This included taking photographs of the following:

- The entire site of the incident;
- Remains of bodies;
- Explosives or any weapon that landed on the site;
- Traces and impact of the destruction;
- If houses were struck, the interior of the houses affected.

73. Maps were also drawn that include sketches by the lawyers of the interior and exterior of buildings, the location of entrances, exits and any openings of buildings. Al Mezan deployed two GPS devices and took precise coordinates for the locations of the documented cases.

74. Physical evidence of the incident was also gathered, including weapons, munitions, and shrapnel or weapon fragments. These were later analysed in consultation with weapons experts to determine the type of weapon, its origin, whether it is a Palestinian or Israeli make, who discharged it, what type of weapon it was fired from, and its direction. In documenting the site of the incident, particular attention was also paid to the direction of the rubble to determine the penetration angle of the explosives. This analysis is important as it may facilitate the identification of the party to the conflict that discharged the weapon, and assist in correctly attributing responsibility for the attacks.

75. The two organizations, and PCHR in particular, have extensive experience in gathering such evidence and have also engaged with the Palestinian Police Force to use the expertise of the explosive experts and the explosives engineering department in analysing

physical evidence. International military and explosives experts are also consulted, by providing them with all the evidence gathered, particularly the visual evidence obtained through photo-documenting the site of the incident. The Explosives Unit at the Palestinian Police Force provided reports with expert opinion as to the weapons used in the cases referred to them by the two organizations.

76. During Operation Protective Edge, teams of lawyers were in the field 24 hours a day.

77. *Follow-up on the case:* If necessary, the lawyers returned to the site of the incident, or to specific witnesses, in order to gather additional information, material or evidence.

78. After case files are submitted to the Israeli authorities, witnesses are sometimes called on to present their testimonies. PCHR and Al Mezan's lawyers have ongoing engagement with the Israeli Military Police, who are in charge of requesting witnesses to appear, interrogating them and obtaining their testimony. The Israeli Military Police communicate with PCHR and/or Al Mezan to produce the witnesses whose testimonies have been submitted. The legal units follow up with the following when witnesses are requested:

- Obtaining guarantees from the Israeli authorities that witnesses will not be arrested or detained;
- Requesting that lawyers accompany the witnesses when they attend hearings and provide testimonies;
- Securing their entry and exit from the Israeli-controlled Erez Crossing.
- Coordinate their safe passage through the Palestinian checkpoint at the Palestinian side of the Erez Crossing.

#### **IV. Illustrative Factual Overview of Incidents Occurring During Operation Protective Edge**

79. Israeli forces launched a massive military offensive on the Gaza Strip on 7 July 2014. The operation was codenamed “Protective Edge”. Phase 1 of the Operation involved the bombardment of the Gaza Strip, using land-based artillery, airstrikes, and naval boats. On 17 July 2014, Phase 2 began with a ground invasion of the Gaza Strip. The Operation came to an end on 27 August 2014 when a ceasefire was agreed between Hamas and Israel.

80. This section is intended to provide an illustrative factual overview of incidents occurring during Operation Protective Edge. **All of the facts presented are based on the documentation conducted by the Palestinian Human Rights Organizations and are supported by appropriate evidence.** As noted in the previous section, documentation

primarily focused on incidents involving civilians. Unless otherwise stated, the incidents presented herein concern situations in which members of Palestinian armed groups **were not involved** and in which armed activities **were not** occurring in the vicinity at the time of the incident.

81. This submission is not intended to be exhaustive. The exclusion of certain incidents should not be understood as indicating that crimes falling within the Court's jurisdiction were not committed.

82. According to the joint field documentation collected by and on file with the Palestinian Human Rights Organizations, the 51-day-long Israeli military operation resulted in the **killing** of 2,217 Palestinians, including 674 Palestinians with links to the armed resistance and **1,543 civilians**: civilians accounted for nearly 70% of the overall death toll. The **civilian casualties** included 556 children, and 293 women. The Palestinian Human Rights Organizations also documented the injury of 1442 women and 2647 children.<sup>49</sup>

83. Operation Protective Edge caused the **extensive destruction of civilian property**. Entire neighborhoods, like Khuza'a, Al-Shuja'iyya, and Rafah were left in ruins. Over the course of the Operation, Israeli forces completely destroyed 8,377 houses,<sup>50</sup> and partially destroyed 23,597.<sup>51</sup> This destruction affected 250,918 residents in total, including 67,448 women, and 124,678 children. This destruction came on top of 5,000 housing units from previous military operations that have not been rebuilt.

84. Israeli forces also caused extensive destruction to **civilian objects**, many of which contribute to the survival and well-being of the civilian population. For example:

- 11,164,664 m<sup>2</sup> of agricultural land was damaged, directly affecting 33,848 individuals;<sup>52</sup>
- 109 industrial institutions were completely destroyed, and 116 partially damaged;
- 693 commercial entities were completely destroyed, and 885 partially damaged;
- 111 water wells were completely destroyed, and 21 partially damaged;
- 9 water treatment stations were destroyed;

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<sup>49</sup> This is a non-exhaustive number of injured Palestinians.

<sup>50</sup> Affecting 60,612 people, including 16,522 women and 30,835 children.

<sup>51</sup> Affecting 190,306 people, including 50,926 women and 93,843 children.

<sup>52</sup> The indirect effect of damage caused to agricultural land, such as reduced availability of food, higher prices, and economic impact are more difficult to quantify.

- 18 entities related to the production and distribution of power in the Gaza Strip were completely destroyed, and the main power plant in the Gaza Strip was partially damaged;
- 64 mosques were completely destroyed, and 128 partially damaged. 1 church was partially damaged;
- 1 bank was completely destroyed, and 3 partially damaged;
- 30 NGO or civil society buildings were completely destroyed, and 49 partially damaged;
- 15 police stations were completely destroyed, and 7 partially damaged;
- 1 sports club was completely destroyed, and 6 partially damaged.

85. The **education sector** was severely affected. 7 schools were completely destroyed, and 58 were partially damaged. 8 kindergartens were completely destroyed, and 44 partially damaged, 1 university faculty was completely destroyed, and 5 partially damaged.

86. The Operation also caused extensive destruction to the **health sector**. 1 hospital was completely destroyed, and 10 partially damaged. 6 health clinics were completely destroyed, and 17 partially damaged.<sup>53</sup>

87. The military operation caused the largest **displacement** in the Gaza Strip since 1967. At the height of the offensive more than 500,000 Palestinians were displaced.<sup>54</sup>

#### A. Al-Shuja'iyya

88. Al-Shuja'iyya is a densely populated neighborhood located in the eastern part of Gaza city. Prior to the offensive it was home to approximately 92,000 Palestinians. It was the scene of intense fighting between Israeli forces and members of Palestinian armed resistance groups. The attack on Al-Shuja'iyya began at approximately 05:00 on 17 July 2014, as part of the initiation of the broader ground offensive. Israeli forces escalation of the attack on Al-Shuja'iyya was reportedly initiated following the alleged capture, or attempted capture, of an Israeli armored personnel carrier by members of Palestinian armed resistance groups.

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<sup>53</sup> Al-Haq, Al-Mezan, Aldameer, PCHR, "أرقام في العدوان" على 2014 آب 26 حتى تموز 7 من الفترة" خلال وممتلكاتهم بالمدنيين لحقت التي المادية والخسائر الضحايا حصيلة يوثق تقرير ("Protective Edge in Numbers", translation forthcoming), 1 Sept. 2015, available at <http://mezan.org/uploads/files/1448195636861.pdf>.

<sup>54</sup> UN OCHA, "Facts and Figures," 15 Oct. 2014, available at <http://www.ochaopt.org/content.aspx?id=1010361>

89. It is believed that five battalions of the Golani Brigade were involved in the operations in Al-Shuja'iyya. These are:

- 12<sup>th</sup> Barak Battalion
- 13<sup>th</sup> Gideon Battalion
- 51<sup>st</sup> HaBok'im HaRishon Battalion
- 621<sup>st</sup> Egoz Reconnaissance Unit
- A reconnaissance Battalion, including Orev Company, Engineering Company, Reconnaissance Company

90. The commander of the Golani Brigade, Ghassan Alian, was injured during the ground operation. The commander of the 621<sup>st</sup> Egoz Reconnaissance Unit was also replaced due to injury.

91. In Al-Shuja'iyya and Al Tofah neighborhoods, a total of 1,949 houses were completely destroyed, and 5,414 partially destroyed.<sup>55</sup>

92. The assault on Al-Shuja'iyya also resulted in substantial damage to three governmental schools, an UNRWA school, and a school belonging to the Ministry of Religious Endowments. A number of medical units were also completely destroyed, including Al-Wafaa Hospital, a center for the care of the elderly, a clinic, and three ambulances.

93. The assault also resulted in the destruction of 15 factories and a number of commercial shops, the destruction of five mosques, and partial damage to a further seven mosques.

94. The Palestinian Human Rights Organizations documented heavy losses among Palestinian families. In a number of incidents entire families were killed.

95. An example is the case of the Al-Helw family. At approximately 03:00 on Monday, 21 July, Israeli forces hit the Al-Helw family household. The Al-Helw home was a residential house in Al Nazzaz Street on the residential Eastern side of al-Shuja'iyya neighborhood a few kilometers away from the border. The house was directly hit by a missile thought to be fired from an Israeli military aircraft. At the moment of the incident, all eleven members of the Al-Helw family were in the house. They were all killed. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

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<sup>55</sup> Protective Edge in Numbers, *supra* n 53 (available in Arabic).



96. The eleven members of the Al-Helw family who were killed included four women and four children. They are: Gehad Mahmoud Al-Helw (born 1955), Seham Atta Selim Al-Helw (born 1957), Mohamed Gehad Mahmoud Al-Helw (born 1985), Ahmed Gehad Mahmoud Al-Helw (born 1987), Asmaaa Gehad Mahmoud Al-Helw (born 1990), Tahrir Gehad Mahmoud Al-Helw (born 1994), Naziah Gehad Mahmoud Al-Helw (born 1999), Hedaya Mahmoud Al-Helw (born 1989), Maram Ahmed Gehad Al-Helw (born 2012), Karam Ahmed Gehad Al-Helw (born 2014) and Karim Ahmed Gehad Al-Helw (born 2014). The Israeli military did not communicate a warning before the house was hit. Following a PCHR complaint requesting the opening of a criminal investigation into the incident the MAG's response stated that a member of the family "wanted" by the IDF was inside the house at the moment of the attack. There is no information on which member of the family this could have been. Moreover, there is no one left alive in the family to confirm or refute such claims.

97. On Sunday 20 July 2014, at approximately 06:45 a shell hit the Northern part of Al Mansoura Street in al-Shuja'iyya neighborhood.<sup>56</sup> This first shell resulted in one member of the Ayyad family, Osama Ribhi Ayyad (born 1983), being killed in front of his house. Shortly after, two other shells hit the same street. The second and third shell fell four meters apart from each other in the northern part of Al Mansoura Street. The second shell killed: Mohamed Rami Ayyad (born 2012), Mohamed Ashraf Ayyad (born 2008), Ghada Sobhi Ayyad (born 2003), Sherin Fathi Ayyad (born 1996) Mona Abdel Rahman Ayyad (1972), Hala Sobhi Ayyad (born 1989) Feda' Rafiq Ayyad (born 1990), Nermin Rafiq Ayyad (born 1994), Rami Fathi Othman Ayyad (1983). The third shell killed Ahmed Sami Ayyad (born 1987) and wounded seven other members of the Ayyad family, including three children, three men and a woman. These are: Mohamed Sobhi Ayyad (born 2005), Nisreen Fathi Ayyad (born 1999), Diana Sobhi Ayyad (born 1998), Ayman Wael Ayyad (born 1995), Noha Akram Ayyad (born 1984), Ahmed Fathi Ayyad (born 1991) and Moaeem Ahmed Ayyad (born 1969). They were all killed at a distance ranging from 15 to 70 meters from their homes. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

98. On the same day, 20 July, the Al Jammal family suffered losses under similar circumstances.<sup>57</sup> At 06:00 three shells directly hit the Al Jammal family house, which is a residential building located on El Beltaji Street off the main Baghdad Street in the residential

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<sup>56</sup> See also 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶¶ 267-271.

<sup>57</sup> See also *id.* at ¶ 272.

part of al-Shuja'iyya neighbourhood. As a result, four members of the family were killed and seven others were injured. Those killed are: Shaker Ahmed al Jammal (born 1969), Marah Shaker al Jammal (born 2003), Hussein Soufian al Jammal (born 2004) and Othman Raed al Jammal (born 2004). The seven injured members of the family are: Fouad Rebhi al Jammal (born 1977), Salama Rebhi al Jammal (born 1986), Yamen Sufian al Jammal (born 2012), Jamila Hassan al Jammal (born 1968), Amna Shaker al Jammal (born 1994), Rania Shaker al Jammal (born 1999) and Yehia Shaker Shaker al Jammal (born 2006). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

99. Under similar circumstances on 20 July 2014 at 06:00 shells hit the house of al Sheikh Khalil family, while the family members were inside it.<sup>58</sup> The first shell hit the roof of the house. Members of the family then headed from the third floor of the building towards the ground floor seeking safety. On their way towards the ground floor another shell hit the first floor of the building and a missile hit the ground floor. As the ambulance arrived in front of the house, another shell struck the ambulance, killing one medical personnel. Furthermore, three other shells fell around the circumference of the house. As a result, seven members of the Sheikh Khalil family were killed and two were injured. Those killed are: Samia Hamed El Sheikh Khalil (born 2010), Heba Hamed el Sheikh Khalil (born 1999), Jawaher Soliman Habib (born 1978), Ayda Mohammed El Sheikh Khalil (born 1969), Monna Suliman El Sheikh Khalil (born 1965), Adila Suliman Al Sheikh Khalial (born 1947), and Abdel Rahman Mohammed El Sheikh Khalil (born 1962). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

100. On the same day, 20 July, a humanitarian ceasefire commenced at 13:30. This ceasefire was initiated in coordination with the ICRC and was scheduled to last until 15:00. The purpose of the ceasefire was to remove bodies and evacuate the wounded and remaining civilians who could not escape during the shelling in al-Shuja'iyya. At 14:35 Salem Shamaly, together with a small group of international volunteers from the International Solidarity Movement (ISM), headed towards Al-Tawfeeq Street off the main Baghdad Street in order to check on his family and others wounded or trapped. Salem Shamaly was shot once by a sniper while the group was walking through the destroyed area. As he was lying on the

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<sup>58</sup> See also *id.*

ground, he was shot two more times and died.<sup>59</sup> Only six days later, on 26 July during a subsequent ceasefire, could Shamaly's remains be evacuated from the area.

101. Intermittent fighting continued in the following days and weeks.<sup>60</sup> Most notably, on 30 July 2014 at 17:00, during a one sided humanitarian ceasefire declared by Israel, which was scheduled from 15:00-19:00, Israeli forces fired shells at a group of residents and houses in the local market of al-Shuja'iyya. The local market is located in a residential area on the western border of Salah El Din Street, which separates Gaza City from al-Shuja'iyya neighborhood. Until this incident, this area had been unaffected by fighting, shelling or other forms of hostilities. Because of the ceasefire, many people had rushed to the market to purchase necessities, and there were a significant number of people on the streets.

102. At 17:00 a shell hit the Al Silik family home located in the area of the local market. At the moment the building was hit by the first shell, the grandfather and six children were playing on the rooftop of the building. They were all killed. Two minutes later the first floor of the building was hit by another shell. Two minutes later, the third floor of the building was hit by another shell. A further shell hit the fence of the neighboring building, followed by two shells hitting the neighboring building on the eastern side of Al Silik house, killing one doctor and injuring others in their home. Furthermore, two shells hit an olive oil factory in the vicinity. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

103. Following the first wave of shells, around 200-300 people including civilians, medical personnel, ambulances, a fire truck and journalists, rushed to the area in order to evacuate the bodies and the wounded and control the fires. 20 minutes later, eleven shells were fired. As a direct consequence of the shells hitting the market area 178 persons, including 32 children, 14 women, a journalist and three paramedics, were wounded and an ambulance was damaged.

104. The first shell killed: Abdelkareem Hussein Al Silik (born 1944), Lina Alaa Al Silik (born 2006), Omnia Mohammed Al Silik (born 2006), Malak Jalal Al Silik (born 2007), Ola Jalal Al Silik (born 2005), Abdelazeez Mohammed Al Silik (born 2011), Abdelhalem Mohammed Al Silik (born 2009), and Layan Nael Al Silik (born 2011).

105. The subsequent shells killed 23 others: Rami Fathi Rayan (born 1988), Abdelrazeq Ibrahim Al Beltaji (born 1956), Haitham Mahfouz Keshko (born 1988), Alaa Mohammed

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<sup>59</sup> See also *id.* at ¶ 280. Video available at <https://www.youtube.com/watch?v=AN2KIj-Vtg>.

<sup>60</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 281.

Rajab (born 1998), Mahmoud Mohammed Rajab (born 1994), Moaaz Khaled Tayeh (born 1995), Saady Saady Faraj (born 1993), Ahed Zyad Al Gharabli (born 1990), Mohammed Mousa Fouda (born 1996), Shareef Mahmoud Toutah (born 1992), Ahed Abedraboh Al Dahdouh (born 1983), Hamdi Saady Abu Zour (born 1965), Motaz Basam Diab (born 1996), Alaa Abdelkareem Al Silik (born 1970), Mostafa Khaled Al Silik (born 1996), Sameh Mohammed Al Erian (born 1985), Alaa Wael Eliwa (born 1992), Loae Fayez Al Arqan (born 1987), Mohammed Nouraldeem Al Deeri (born 1992), Rami Kamal Daher (born 1981), Mohammed Majed Daher (born 1987), Rajab Hasan Humed (born 1959), and Abdelkareem Wael Shammali (born 1998).

106. The U.N. Commission of Inquiry determined that on this occasion Israeli forces used high explosive 120 mm mortars. The area was then held under the control of the Israeli forces until 5 August, when people were allowed to clear the place and assess the actual damage.<sup>61</sup> PCHR submitted a request for a criminal investigation into the market incident to the Israeli MAG. The MAG found that the actions of Israeli forces did not constitute misconduct and did not open a criminal investigation into the case.<sup>62</sup>

## **B. Rafah**

107. On 1 August 2014, Israeli forces declared a 72-hour humanitarian truce, scheduled to start at 08:00. A significant number of displaced Palestinian families took advantage of the ceasefire to return to their homes. This day became known as ‘Black Friday’.

108. At 09:30, Israeli forces initiated a large scale bombardment targeting the eastern parts of Rafah, and in particular: Al-Shouka village, Al-Tanour neighbourhood, Al-Jenaina neighbourhood, and areas of Zare’a Al-Mashrou’a. The bombardment included air strikes and artillery attacks. It is reported that the bombardment was initiated following the suspected capture of an Israeli soldier (Hadar Golden) by members of Palestinian armed resistance groups. The use of extensive force in response to the suspected capture of a soldier is referred to as the Hannibal Directive. As a result of the declared humanitarian truce a significant number of people were present and moving at the time the Hannibal Directive was implemented.

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<sup>61</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶¶ 375-381.

<sup>62</sup> PCHR letter to the Israeli Military Attorney General and response from the latter are available upon request. See also, 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 385.

109. Documentation conducted by the Palestinian Human Rights Organizations indicates that the Israeli soldier Hadar Golden was captured near Al-Shouka village to the northeast of Rafah. The precise location is an agricultural area, 1,700 metres west of the border with Israel, 700 metres northeast of the populated Al-Shouka village, 1,500 metres northeast of the populated Al-Mashro'a and Al-Tanour villages, 2,000 metres from Al-Jenaina neighbourhood, 2,600 metres from Yousif Al-Najjar hospital, and 4,500 metres from the centre of Rafah city.

110. Documentation conducted by the Palestinian Human Rights Organizations indicates that the application of the Hannibal Directive in eastern Rafah resulted in the deaths of 35 civilians, among them 12 children, 12 women, and 11 men. In addition, one fighter was killed in Al-Shouka village at approximately 10:30. Hundreds of civilians were wounded.

111. In total more than 109 civilians were killed on 1 August in Rafah.

112. During the course of Operation Protective Edge, 768 houses in eastern Rafah were completely destroyed, and 1,575 partially damaged.

**i. The Hannibal Directive: Factual Overview**

113. The following factual overview relates to the application of the Hannibal Directive in eastern Rafah on 1 August 2014.

114. At approximately 10:00, a bomb struck the Ghnaim family house in Al-Tanour, near to Al-Shafea'e mosque. Two people were killed, Ibrahim Mustafa Ghnaim (born 1952) and his daughter-in-law, Noha Jamal Ghnaim (born 1995). Three people were injured: Shareefa Ibrahim Ghnaim (born 1984), Ghader Ibrahim Ghnaim (born 1978), and Sabah Yusuf Ghnaim (born 1965). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

115. At approximately 10:20, an Israeli missile struck the house of Ahmed Abu Sha'er in Al-Mashrou'a. The attack killed Mohammed Abu Sha'er (born 1997). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

116. At approximately 10:30, a bomb struck the Abu Shawareb family house near Al-Balbaisi crossroad, in the west of Al-Tanour. At the time, a significant number of people were in the street fleeing the bombardment. 16 people were killed in the attack: Mohammed Anas Arafat (born 2014), Harbi Shiakh Aeid (born 1951), Mohammed Shiakh Aeid (born

1977), Azeeza Mahmoud Al-Mahmoum (born 1964), Iqzaiya Hamad Al Mahmoum (born 1978), Itaf Hamad Al Mahmoum (born 1984), Wafaa Salim Al Mahmoum (born 1989), Hani Salim Al Mahmoum (born 1991), Ibtisam Hamad Al Mahmoum (born 1996), Asmaa Salim Al Mahmoum (born 1996), Yehya Salem Al Mahmoum (born 2001), Bessan Mustafa Al Mahmoum (born 2005), Heba Mustafa Al Mahmoum (born 2007), Anas Ibrahim Hammad (born 2010), Doa'a Mustafa Al Mahmoum ((born 2010), Obada Mustafa Al Mahmoum (born 2014). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

117. At approximately 10:30, a bomb believed to be fired from an Israeli drone, struck members of the Al-Namla family as they were fleeing the area. The incident occurred near a crossroads beside the Sameer Juda carpentry shop. The attack killed Yosef Al-Namla (born 1989), Walaa Al-Namla (born 1990), and Anghan Sharief Al-Namla (born 2003). Six other family members were wounded, including four children and a woman. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

118. At approximately 10:30, a bomb struck the Abu Jazzar family home in Al-Mashrou'a. Mousa Abu Jazzar (born 1974), and his wife Yousra Abu Jazzar (born 1971) were killed. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

119. At approximately 10:30, a missile believed to be fired from an Israeli drone struck a group of individuals in Al-Jenaina. The attack occurred in A'yed Al-Balbaisi street, near to the Lafi family home. Osama Hussain Lafi (born 2003), Imad Aldeen Ahmed (born 1997), Mohammed Khaled El-Aloul (born 1994), and Na'el Khalid El-Aloul (born 1990) were killed. Osama's father, Hussain (born 1951) and brother, Mahmoud (born 1998) were also injured. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

120. At approximately 10:30, a shell struck a group of individual fleeing in Al-Orouba Square. Yihya Lafie (born 1991) was killed. His mother was wounded. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

121. At approximately 10:30, a shell struck to the west of Al-Orouba Square. Sami Shaikh Al-Eed (born 1971) was killed. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

122. At approximately 11:00, a bomb struck Al-Orouba Square, killing Salama Al-Zamli (born 1967). A subsequent shell, which struck immediately afterwards, killed Salama's wife, Amna Al-Zamli (born 1973). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

123. At the same time, Israeli airplanes targeted a number of civilian homes in Al-Tanour, near to Al-Belbaisi crossroads. Rana Fathi Al-Arja (born 1990) who was fleeing the area, was killed. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

## **ii. The Hannibal Directive**

124. Following the capture of two Israeli soldiers in southern Lebanon in 1986, the Head of the Northern Command of the Israeli forces reportedly devised the "Hannibal Directive." Although the directive does not *expressly* permit the intentional killing of the detainee, it reportedly obliges Israeli soldiers to risk the detainee's life in an attempt to thwart his abduction. In 2009, the Hannibal Directive was further elaborated upon by Brigadier-General Moti Baruch:

...no soldier is to be captured, and that is an unambiguous message. In the end, an incident like this is first and foremost an encounter with the enemy; you must think about the enemy before the captured soldier.<sup>63</sup>

125. The Hannibal Directive has reportedly been modified several times, but its content remains classified.<sup>64</sup> The Office of Attorney General of the Israeli Ministry of Justice interprets the doctrine as follows:

military activity to prevent an abduction after it has occurred (such as an act to rescue abductees) almost always involves a risk to the abductee's life, and yet, we are not of the opinion that Israeli or International Law prohibits taking action

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<sup>63</sup> Pfeffer, A., "The Hannibal Directive: Why Israel risks the life of the soldier being rescued," *Haaretz* (3 Aug. 2014), available at <http://www.haaretz.com/israel-news/.premium-1.608693>.

<sup>64</sup> The State of Israel, *The 2014 Gaza Conflict, Factual and Legal Aspects*, May 2015, available at <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>, para. 335.

to foil an abduction, even under circumstances where such actions might place the abductee's life at risk.<sup>65</sup>

126. The rationale behind the Directive is that a captured soldier is considered to be a danger for the nation because it would represent an instrument of substantial leverage in case of negotiations between armed groups and Israel.<sup>66</sup> The Directive is motivated by political considerations, and not military necessity or humanitarian concerns. It is reported that the Hannibal Directive may permit the killing of the captured soldier rather than risking prolonged detention.<sup>67</sup> According to leaked Israeli army communications records, the Hannibal Directive was implemented in Rafah during the 2014 attack after the disappearance of Lieutenant Hadar Goldin.<sup>68</sup> As reported by the Commission of Inquiry, the commander from the Orev Unit of the Givati Brigade explained that, “[i]n such an event you do all to prevent the country from experiencing another turmoil as it underwent in the Gilad Shalit affair.”<sup>69</sup>

### C. Beit Hanoun

127. Beit Hanoun is bordered to the north and east by Israel. Israeli forces entered Beit Hanoun as part of the broader ground offensive, and were present in the area from 17 July 2014 until 26 August 2014. A significant proportion of the civilian population fled Beit Hanoun. Israeli forces had a significant presence in Beit Hanoun, with units located approximately 700 meters to the northwest of the Agriculture School and 300 meters to the northwest of Beit Hanoun Mixed School “A” and “D”. During the course of the incursion into Beit Hanoun, significant damage was caused to civilian properties in Abou Owuda and Al-Kafarna areas.

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<sup>65</sup> Ministry of Justice of The State of Israel, Office of The Attorney General, “Reply to Inquiry regarding the Hannibal Directive and its Implementation in Highly Populated Areas,” 18 Mar. 2015, available at

<http://index.justice.gov.il/Units/InternationalAgreements/HumanRightsAndForeignRelations/Faq/The%20Hannibal%20Directive%20and%20its%20Implementation%20in%20Highly%20Populated%20Areas.pdf>, page 1-2. See also, Pfeffer, A., “The Hannibal Directive: Why Israel risks the life of the soldier being rescued”, *Haaretz* (3 Aug. 2014).

<sup>66</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 358.

<sup>67</sup> See *id.* at ¶ 360.

<sup>68</sup> Zitun, Y., ‘Hannibal Directive: Exclusive tapes reveal details of IDF's Black Friday,’ *Ynet News* (31 Dec. 2014) available at <http://www.ynetnews.com/articles/0,7340,L-4609436,00.html>. See also Action On Armed Violence, *Under Fire – Israel's Artillery Policies Scrutinised*, Dec. 2014, available at <https://aoav.org.uk/wp-content/uploads/2015/03/AOAV-Under-Fire-Israelis-artillery-policies-scrutinised.pdf> (hereinafter “*Under Fire*”) at 19.

<sup>69</sup> Zitun, Y., “Golani Commanders from the Rafah Battle – Our conscience is clear,” *Ynet News* (24 Sept. 2015) at: <http://www.ynet.co.il/articles/0,7340,L-4568410,00.html>.



128. In total, 1,250 houses were completely destroyed, and 2,901 partially damaged.

129. The Palestinian Human Rights Organizations gathered the following information about killings in Beit Hanoun.

130. On 8 July at 23:30, one Israeli missile was fired at a courtyard between two residential houses in Beit Hanoun belonging to the Hamad family. The houses are located on Al Madakha Street, 100 meters away from the Eastern side of Al Sekka Street in Beit Hanoun. A number of members of the Hamad family were standing in the courtyard when the missile struck. Six of the family members were killed during the strike, including Hafeth Muhammad Hamad (born 1977), Suha Hamad Hamad (born 1982), Ibrahim Mohammad Hamad (born 1979), Rasmya Khalil Mohammad Hamad (born 1946), Mahdi Mohammad Hamad (born 1974) and Dina Mahdi Mohammad Hamad (born 1993). Four others were injured, including Fenan Mahdi Hamad (born 2008), Nour el Din Hamad (born 2008) Yanis Mahdi Hamad (born 1994), and Mohamed Mahdi Hamad (born 1996). The house was severely damaged and five nearby houses were also affected. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

131. Following a complaint by PCHR, the Israeli MAG responded by stating that Israeli investigations revealed that among the six killed, the strike was targeting Hafeth Muhammad Hammad, who, the Israeli response alleges, is a senior militant leader in the armed group “Jihad al Islam” and is in charge of the north Gaza and has a rank equivalent to a General. Investigations conducted by the Palestinian Human Rights Organizations indicate that Hafeth Muhammad Hammad was a senior member of the Palestinian armed resistance. At the time of the attack the area was calm.

132. At 11:15 on 9 July 2014, two missiles struck a group of individuals from the Hamdan and Al-Masri families on a family visit as they were standing in front of their residence on agricultural land in Beit Hanoun. On the day, Sahar Al-Masri and her children were visiting her sister. The latter is married to Zaher Hamdan, who is the owner of the house and land that were hit by the two missiles. The family members were standing by a tree in front of the house at the moment of the strike. The first missile fell next to Sahar al Masri and her children, killing Sahar Hassan al-Masri (born 1975), her 14-year-old son Muhammad Ibrahim al-Masri (born 2000), her 16-year-old daughter Aseel Ibrahim al Masri (born 1998), and her nephew Amjad Zaher Hamdan (born 1990). In addition, Shaimaa Ibrahim el Masri (born 2010) was severely injured. Approximately one minute later, the second missile struck two

meters away from the first, injuring Qaher Moussa Hamdan (born 1972). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

133. On 19 July 2014, at 10:30, shells hit a residential house located 400 meters from the Eastern border of Beit Hanoun in an area called Bourat Abu Ghazala. The house had four floors, with one residential apartment in each floor belonging to members of the al-Zweidi family. The shell hit the fourth floor of the building – the apartment where Khaled Jameel al-Zweidi and his family used to live. The shell killed five members of the family, including two children. These are: Dalia al-Zweidi (born 1976) Mohamed Khaled al-Zweidi (born 1994), Mahmoud Abdel Hamid al-Zweidi (born 1988), Ro'ya Mahmoud al-Zweidi (born 2008), Nagham Mahmoud al-Zweidi (born 2012). Eyewitnesses confirm that no warning had been communicated to the owners of the house before it was hit. Furthermore, the immediate area had not witnessed any military activity before this incident and no hostilities had taken place there. None of the individuals were armed.

134. On 22 July at 11:55, a number of shells were fired at Beit Hanoun. One of those shells hit the house of Rami Adel Ikhriwat. Rami's wife, Suha Ikhriwat (born 1991), who was pregnant, and her daughter Muna (born 2012) were killed. Suha's 5-year-old son Fadi was injured. Doctors failed to save the life of the unborn baby. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

135. At 13:30 on 24 July a missile believed to be fired by an Israeli drone hit a group of children who were returning to their evacuated houses in Al-Qarman street, Beit Hanoun. As a result Muhammad Jihad Mater (born 2002), Amna Jihad Matar (born 2003), and Dua' Abu Oda (born 1997) were killed. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

136. On 20 July, Israeli forces seized control over Boret Jamil al-Shawa, a residential neighbourhood in Beit Hanoun. Among the residential buildings in the area was the three-floor house belonging to the Wahdan family. Israeli forces raided and seized control of the house. At the time there were 15 persons inside including three women, three children, and nine men. According to eyewitness Amin Zaki Wahdan, the Israeli forces collected everyone's ID cards and mobile phones and placed all 15 in one room. Three hours later, seven of the 15, including Amin Zaki Wahdan, were arrested and transported in an armored personnel carrier to Erez crossing, where they were detained and interrogated for three days.

The rest were kept in the house. On 25 July at 19:00 Israeli soldiers withdrew from the house and instructed the eight remaining members of the family to remain inside it. Three hours later Zaki Wahdan called his son Amin Zaki Wahdan and informed him of the soldiers' withdrawal from the house. On 26 July, between 06:00 and 07:00 a.m. explosives were used to destroy most buildings in the Boret Jamil al-Shawa area including that of the Wahdan family. In the incident caught on video,<sup>70</sup> the house was blown up with explosives while its residents were still inside. Investigations indicate that the explosives were planted by Israeli ground forces. There were no hostilities in the vicinity at the time, and none of the individuals were armed. Israeli forces' ability to plant explosives is indicative of a high level of control.

137. At 08:00, Amin Zaki Wahdan arrived to the neighborhood after a declared ceasefire and found 10 buildings completely destroyed, including his own. Most of the other houses had been evacuated. Attempts to manually find the bodies buried under the rubble failed. Only on 4 August, during another ceasefire, which lasted three days, medical personnel succeeded in recovering remains of the eight bodies of the Wahdan family members from under the rubble. They are: Zaki Abdel Rahman Wahdan (born 1945), Soad Ismail Wahdan (born 1947), Baghdad Wahdan (born 1963) Hammoud Wahdan (born 1991), Zeinab Wahdan (born 1987) Ahmed Hatem Wahdan (born 2000), Hussein Hatem Wahdan (born 2005) and Ghina Youssef Bashir Saqr (born 2012).

138. In a separate incident other members of the Wahdan family suffered further losses. On 3 August 2014, at 00:45 Israeli missiles hit a number of buildings in the Jabalyia camp, in the Northern part of the Gaza Strip. Among the buildings hit was a residential house belonging to Mounir Youssef Abu Al-Qomsan, an acquaintance of the Wahdan family. Members of the Wahdan family were seeking refuge in his house, which is located near al-Khulafa' al-Rashideen Mosque in the Jabaliyya Camp. Two missiles hit the rooftop of the one-floor house. One of the two missiles exploded in the roof of the house. Its explosion and the resulting shrapnel killed four and injured eleven others from the Wahdan family. Those who were killed are: Hatem Zaki Wahdan (born 1962), Sanyoura Diab Wahdan (born 1992), Jamila Wahdan (born 1986) and Nour el Hoda Bahgat Wahdan (born 2010). Those who were injured are: Khadija Wahdan (born 1986), Afaf Wahdan (born 1972), Asmaa Wahdan (born 1981), Ali Zaki Wahdan (born 1979), Mosa'ab Wahdan (born 2009), Omar Wahdan (born 2011), Mohamed Wahdan (born 2013), Raya Bahgat Wahdan (born 2013), Mohamed Amin Wahdan (born 2006), Genat Amin Wahdan (2 born 012) and Fathiyya Daoud Abdel Aziz

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<sup>70</sup> The video is on file with the Organizations.

Wahdan (born 1959). No warning was communicated to the Wahdan family or to their neighbors before the missiles were fired. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

139. On 25 July 2014, Israeli ground forces had seized complete control over the North and East of Beit Hanoun, including Al Masreyeen Street, which is a residential street off Beit Hanoun Main Road. Israeli troops were present on the ground. At 16:15, an ambulance of the Palestinian Red Crescent Society (PRCS) coordinated with the ICRC and was granted permission from the Israeli authorities to enter the area, which had been shelled, in order to evacuate the wounded. The information communicated to the ICRC and the Israeli authorities included details of the ambulance, including the make of the vehicle, its license plates, the number of people inside it, their identities and the direction of the ambulance. When it reached the specified area a shell struck the centre left of the ambulance, killing a paramedic, A'ed Al Burai (born 1985) and leaving two other paramedics wounded. Following the hit, Israeli soldiers shot live bullets at the ambulance, which resulted in the two remaining injured paramedics escaping the site towards a hospital, leaving behind the body of A'ed Al Borai lying next to the ambulance. The ambulance then caught fire and burnt. Only on the following day, during a humanitarian ceasefire that started at 08:00 am, were PRCS teams able to go back to the site and recover Borai's body, which was completely burnt and partially amputated. Following these events, the PRCS withdrew its station in Beit Hanoun, further leaving the population without humanitarian assistance.<sup>71</sup> The ICRC condemned the attack on medical personnel.<sup>72</sup>

140. Two additional ambulances tried to reach the site to evacuate the wounded from the original incident and the paramedic's body. As soon as the ambulances reached the area, they came under heavy fire. The first ambulance received ten bullets and the driver, Rami Khamis Al Haj Ali, (born 1982), was injured and the ambulance was partially damaged.

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<sup>71</sup> Al Mezan, Lawyers for Palestinian Human Rights, MAP, *Complaint submitted to the United Nations (Commission of Inquiry and Special Rapporteurs) concerning destruction and damage to medical infrastructure, and loss of life and injury to civilians and medical personnel, in Gaza, during Israel's military operation between 7 July 2014 and 26 August 2014*, Feb. 2015, para. 21 available at <http://lphr.charitywebdesigns.co.uk/wp-content/uploads/2015/02/Complaint-Submission-Final-Al-Mezan-LPHR-MAP.pdf>.

<sup>72</sup> ICRC, "Gaza: ICRC condemns the killing of a red crescent volunteer," *icrcblog*, 26 July 2014, available at <http://blogs.icrc.org/ilot/2014/07/26/gaza-icrc-condemns-the-killing-of-a-red-crescent-volunteer/>.

#### **D. Khuza'a**

141. Khuza'a is a village located to the west of Khan Yunis. Its population is estimated at 11,000 persons. Khuza'a is located close to the border between the Gaza Strip and Israel. On Tuesday, 22 July 2014, at approximately 22:00, Israeli forces began a large scale bombardment of Khuza'a. At the same time, Israeli airstrikes targeted the main street linking Khuza'a and Abasan al-Kabira. Following this initial bombardment, Israeli Special Forces invaded Khuza'a and others were air dropped onto the roofs of residential houses. Concurrently, Israeli tanks and armored vehicles moved into Khuza'a from its southern and northeastern sides, reaching the western entrance of Khuza'a, where the main street linking Khuza'a and Abasan al-Kabira is located. This maneuver established a full military cordon around Khuza'a. Extensive airstrikes and artillery strikes targeted Khuza'a throughout the night of 22 July. On 23 July, at approximately 04:00, Israeli tanks moved into the town itself. The ground operation in Khuza'a lasted until 1 August 2014.

142. During Operation Protective Edge 360 houses in Khuza'a were completely destroyed, and 944 partially damaged.

143. It is believed that five battalions of the Givati Infantry Brigade were involved in the operations in Khuza'a. These are:

- 424<sup>th</sup> "Shaked"/"Almond" Infantry Battalion
- 432<sup>nd</sup> "Tzabar"/"Cactus" Infantry Battalion
- 435<sup>th</sup> "Rotem"/"Furze" Infantry Battalion
- 846<sup>th</sup> "Shualey Shimshon"/"Samson's Foxes" Special Troops Battalion

144. The following support companies are also believed to have been involved:

- "Dikla"/"Palm" Anti-Tank Company
- "Dolev"/"Plane tree" Engineer Company
- Sayeret Givati Reconnaissance Company
- 845<sup>th</sup> "Rimon"/"Pomegranate" Special Operations Unit (Desert Commando)
- "Maor"/"Source of light" Signal Company

145. Due to the fear caused by the ongoing shelling, thousands of people in Khuza'a evacuated their houses at 09:30 on 23 July and marched together holding white flags in order to exit the town. Among the group were members of the Rejeila family including Ibrahim Rejeila, his son Bilal Ibrahim Rejeila and his daughter Ghadir Ibrahim Rejeila. Ghadir was

mentally and physically disabled and was pushed in a wheelchair by her brother. The crowd gathered at Al-Rejaylat Street and walked towards the entrance of Khuza'a to the west heading towards Khan Yunis. At approximately 12:00, when they were by Al-Khazan (Arabic for "Water Tank"), 70 meters away from Khuza'a's exit into Khan Yunis, one tank fired a shell that landed next to the crowd. Instantly, Israeli forces fired live ammunition using machineguns, directed at the crowd. The crowd dispersed, and started running back into Khuza'a, carrying eleven people injured by bullets. Among the injured was Bilal Rejeila, who received three bullets and consequently abandoned his sister Ghadir on her wheelchair. After the crowd dispersed over 200 people sought shelter in a health clinic on Abu Rejaila St. Those injured included: Bilal Rejeila (born 1990), Mohamed Rejeila (born 1959), Fatma Rejeila (born 1962) Samia Abu Daqqa (born 1964) Khaled Abu Rejeila (born 1967), Gamal abu Rejeila (born 1970), Tayseer Qdeih (born 1972), Marwa Qarra (born 1982), Hussein Abu Rejeila (born 1995) Yazan Abu Rjeila (born 2010) Yasser Abu Rjela (born 2013), Karam Safwat Mohamed Abul Dakka (born 2004). After a few attempts by her father to find Ghadir, remains of her burnt body could only be recovered from the site on 1 August 2014, after Israeli forces exited the area.

146. On the same day, Wednesday 23 July 2014, right after the villagers turned back and ran into Khuza'a to escape Israeli live ammunition, some of them, including all the injured, sought shelter in a clinic on Khaled ibn El Walid Street, belonging to Dr. Kamal Qdeih (born 1974). Dr. Qdeih had been trying to exit Khuza'a with the group. Khuza'a was under the complete control of Israeli forces. Soldiers and snipers were stationed inside buildings and houses surrounding the clinic. At around 17:00, two missiles were fired at the clinic, one of them landing on the water tank. The second missile killed Dr. Qdeih's brother, Ahmed Mohamed Kamel Qdeih (born 1991) as he was standing by the water tank. Dr. Qdeih himself was injured by shrapnel along with 52 others, including 19 women and 17 children. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed. Immediately after, everyone evacuated the clinic and about 200 people went to hide in the basement of a neighboring house until they were able to leave to Khan Yunis on the next day. On 25 July the body of Ahmed Mohamed Kamel Qdeih, the doctor's brother, was recovered with the coordination of the ICRC.

147. Another group of individuals were attacked when trying to flee the area, while they were holding white flags.<sup>73</sup> In particular, according to the Palestinian Human Rights Organizations' investigations, Israeli forces killed a Palestinian civilian in Khuza'a on Wednesday, 24 July. Documentation indicates that a group of besieged residents of about 80 persons decided to leave the town at approximately 06:30 on Wednesday. They came out carrying white flags and walked to Abu Radwan Street west of Khuza'a because the Israeli forces were stationed at the town's main entrance. When approaching al-Qarra neighborhood at the southern entrance of Khuza'a, they were surprised by a large number of Israeli tanks and soldiers. One of the soldiers ordered them to take off their clothes and lie on the ground. One of the soldiers made a gesture that was understood as a request to talk. Muhammad Ahmed al-Najjar (born 1958) tried to stand up to say that he understood Hebrew. Before he managed to stand straight, one of the soldiers opened fire at him hitting him in the upper part of his body. Muhammad fell to the ground. At approximately 08:00 am, one of the soldiers ordered them to leave the town. The residents walked till they reached al-Shawafin intersection in Abbasan village. They were carrying Muhammad Ahmed al-Najjar who died of his injury.

148. On 25 July 2014, the eighth day of the ground operation and the 18<sup>th</sup> day of the overall military operation, at 13:10, Israeli soldiers seized control over the house of Mohammed Tawfiq Qdeih (born 1950) located on Abu Rejeila Street in Khuza'a. An Israeli bulldozer demolished the entrance of the house as the soldiers were entering. When Mohamed Tawfiq Qdeih heard them storming in, he was hiding in the basement with 20 members of his extended family. He then called on the soldiers loudly in Arabic, Hebrew and English stating that everyone in the basement was civilian and unarmed and that there are women and children among them. One soldier instructed Mohamed Tawfiq Qdeih to go up the stairs, so he did and the rest of the family followed him. He went up the stairs holding a white cloth in his right hand and a Qur'an in his left. When he was one meter away from the soldiers, one soldier shot him in the heart and he fell on the floor. His children and the rest of the family watched and were forbidden by the soldiers to help Mohamed Tawfiq Qdeih. He had no relation to armed groups nor was he involved in any hostilities.

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<sup>73</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶¶ 314-15.

**i. Examples of the “Neighbor Procedure”/Use of Human Shields**

149. Immediately after the incident in which Mohamed Tawfiq Qdeih was killed (referred to in paragraph 148 above), Israeli soldiers handcuffed and blindfolded the 4 male members of the Qdeih family and interrogated them in the storeroom. During the interrogation the men indicated that Mohammed’s brother, Ramadan Qdeih, was in the next house with his 7 family members. Ramadan is a lawyer and university professor. The Israeli forces brought Ramadan and his family into the house. The soldiers gathered all the men now in the house and placed them by different windows on the first floor of the house. The Israeli soldiers took up firing positions behind the family members, and shot over their shoulders. Ramadan Tawfiq Qdeih reported that they were placed here by the soldiers to be used as human shields.<sup>74</sup> According to Alaa Abdel Aziz Tawfiq Qdeih, Mohamed’s nephew, who was placed by one of the windows, the soldiers were shooting in the direction of several nearby houses, despite the two families informing the soldiers that there were only civilians in the houses. This situation lasted for four hours until one soldier instructed everyone in the house to leave towards Khan Yunis within five minutes, specifying the route the families should take. On 28 July, through coordination with the ICRC Mohamed Tawfiq Qdeih’s body was recovered. The Palestinian Centre for Human Rights has submitted a complaint to the Israeli MAG and the latter has requested supplementary details of the incident.

150. On 23 July, Israeli soldiers captured a 16-year-old boy, Ahmad Abu Raida, at a Khuza’a checkpoint. He was interrogated and detained for five days. During the period of his detention, he was forced to open doors, inspect houses, turn on lights within rooms, open fridges and similar devices within homes, in order to test whether they were connected to explosives. The boy was finally released on 27 July.<sup>75</sup> The technique of forcing Palestinians to open doors and inspect houses, turn on lights and undertake similar tasks is called the “neighbor procedure”. Defence for Children International Palestine documented the use of at least seven Palestinian children as human shields in Gaza.<sup>76</sup> Data collected during and after

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<sup>74</sup> Video testimony of Ramadan Muhammad Qadeeh available at <http://www.euromid.org/en/article/597>.

<sup>75</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7, at ¶ 321. See also, Defence for Children International Palestine, *Operation Protective Edge – A War Waged on Gaza’s Children*, pp 83-85, available at [https://d3n8a8pro7vhmx.cloudfront.net/dcipalestine/pages/530/attachments/original/1436292897/OPE\\_A\\_War\\_Waged\\_on\\_Children.pdf?1436292897](https://d3n8a8pro7vhmx.cloudfront.net/dcipalestine/pages/530/attachments/original/1436292897/OPE_A_War_Waged_on_Children.pdf?1436292897). (hereinafter *A War Waged on Gaza’s Children*).

<sup>76</sup> DCI Palestine, *Operation Protective Edge – A War Waged on Gaza’s Children*. See also, Lappin, Y., “2 soldiers convicted of using boy as human shield” *Jerusalem Post* (10 Apr. 2010) available at <http://www.jpost.com/Israel/2-soldiers-convicted-of-using-boy-as-human-shield>.



Operation Protective Edge demonstrates that Israeli forces still routinely use the neighbor procedure.<sup>77</sup>

## **E. Attacks on schools used as shelters for displaced persons**

### **i. Beit Hanoun's Co-Educational Schools A and D**

151. During the ground incursion Israeli forces advanced into Beit Hanoun and were stationed around the areas of Abu Ouda and Al Kafarna, at a distance of 300 meters from the UNRWA Co-Educational School A and D. Israeli forces were in complete control of the areas where they were stationed. Israeli forces fired significant numbers of artillery shells from these areas towards the western and southern parts of the Gaza Strip.

152. Following the ground invasion of 17 July, leaflets distributed by Israeli forces instructed civilians in Beit Hanoun to leave their homes. On 24 July, between 200 and 700 displaced persons were sheltering in the UNRWA compound.<sup>78</sup> UNRWA had given the schools coordinates to the Israeli authorities on 12 occasions, and on 23 July had confirmed that the school was being used as a Designated Emergency Shelter.<sup>79</sup>

153. On the morning of 24 July, Israeli authorities reportedly called upon UNRWA to evacuate the school as an attack was imminent. As a result of the security situation, UNRWA requested a time slot from Israeli force in which to conduct a safe evacuation.<sup>80</sup>

154. At 14:55, while displaced persons were in the school-yard awaiting buses to transport them to safer shelters, Israeli forces fired four shells at Beit Hanoun's Co-Educational School A and D. The first shell hit the school-yard. Two consecutive shells struck two rooms on the first and second floors of the eastern building, setting them on fire. The fourth shell hit the northern fence of the school. As a result of the strike and the shrapnel, 13 displaced persons were killed including six children and four women. Those killed were identified as Mariam Shaiboub Ahmed al-Shinbari (born 2001) and her brothers Abed Rabbuh (born 1998) and Ali (born 2004); Abed Rabbuh Jamal Ayyoub al-Shinbari (born 1997); Suha Abed Rabbuh Muhammad Misleh (born 2013); Muhammad Akram Abdel Aziz al-Kafarnah (born 1998) who suffers hearing disabilities; Fatma Muhammad Ayyoub al-Shinbari (born 1967) and

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<sup>77</sup> B'Tselem, *Human shields – Legal background*, 1 Jan. 2015, available at [http://www.btselem.org/human\\_shields/legal\\_background](http://www.btselem.org/human_shields/legal_background).

<sup>78</sup> Human Rights Watch, "Israel: In-Depth Look at Gaza School Attacks," 11 Sept. 2014, available at <https://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks>.

<sup>79</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7, at ¶ 426.

<sup>80</sup> *Id.* at ¶ 427.

Falasteen Hussein Hasan al-Shinbari (born 1974); Bilal Ahmed Tawfiq al-Shinbari (born 1992); Awad Abdel Magied Hassan Abu Odeh (born 1974); Hassan Abdullah Mustafa al-Athamneh (born 1955); Aisha Suleiman Silmi al-Shinbari (born 1937) and Ekram Ahmed Tawfiq al-Shinbari (born 1991). In addition, 93 people including 55 children and 31 women were injured in the incident. Nidal Shaiboub Ahmed al-Shinbari - one of the victims, who lost nine of his family members – recalled that he himself was wounded and had to run while carrying his brother towards the nearest hospital following the strike. In his affidavit, he recalls witnessing his sister arriving with amputated legs to the hospital. Nidal lost his mother, stepmother, sister, two brothers and four other members of the Al-Shinbari family. He moved later with his surviving brothers to al-Amal Orphanage, which was open to shelter the displaced.

155. There was no fighting or Palestinian armed resistance group activity reported in the area at the time of the attack.

## **ii. UNRWA Elementary School Jabaliya - 30 July**

156. Jabaliya UNRWA Elementary School, also known as Abu Hussein School, is located in Block 7 of Jabaliya Refugee Camp in the northern part of the Gaza Strip. The school is located approximately 5.4 km away from the eastern border with Israel and 4.4km from the northern border with Israel. It had been designated by UNRWA as a shelter for internally displaced persons (IDPs) and its coordinates had been communicated to the Israeli military.<sup>81</sup> At the time of the attack, it hosted approximately 3,000 IDPs, who had left their houses due to warnings received from the Israeli military.

157. On 30 July 2014 at approximately 04:50, seven shells were fired at UNRWA Elementary School Jabaliya A & B and its surroundings.<sup>82</sup> At the moment of the attack some displaced persons were returning from Al Fajr prayers in Anouar Aziz Mosque close to the school. Others were sleeping. The first two shells fell across from the school to the southwest. Additional shells fell in the street near to the school's gate, hitting Room 1 and the school's restrooms. Two more shells hit Rooms 18 and 22 in the northern section of the school. Most

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<sup>81</sup> *Id.* at ¶ 434.

<sup>82</sup> The Commission of Inquiry found that Israeli forces issued no warning before the attack and used “a barrage of four 155 MM high explosive (HE) projectiles, an artillery indirect fire weapon.” 2015 UN Commission of Inquiry Report, *supra* n. 7, at ¶¶ 434 and 437. According to Action on Armed Violence, at least ten 155mm artillery shells hit the school and its surroundings. See *Under Fire*, *supra* n. 68, p. 18.

of the casualties documented were as the result of shelling of Room 1.<sup>83</sup> The shelling resulted in 20 deaths. Moreover, 101 others were injured. No warning was communicated to the school prior to the incident. This school was the sixth shelter hit by the Israeli forces during the offensive of 2014.<sup>84</sup> At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

158. The twenty killed are: Abdeljaleel Jihad Abdeldaim (born 1993), Basem Khaled al-Najjar (born 1972), Louay Talal Alfieri (born 1980), Mohammed Mousa Ghibin (born 1982), Osama Mohammed Sahwil (born 1997), Ramadan Khader Salman (born 1990), Alaa Khader Salman (born 1997), Said Mustafa Abu Jlala (born 1968), Bilal Medhat Al-Amoudi (born 1988), Medhat Ahmad al-Amoudi (born 1961), Essam Jaber Al-Khatib (born 1987), Ibrahim Mohamed Salman (born 1973), Adel Abdullah Qamar (born 1963), Abdullah Medhat Al-Amoudi (born 1995), Rami Mohammed Barakat (born 1977), Jihad Arafat Abdel Dayem (born 1966), Muhammad Harb Ghibin (born 1987), Taisir Hassan Hammad (born 1958), Ehab Mohamed Sahwil (born 1999), Shahir Ahmed Al-Najjar (born 1960).

### **iii. UNRWA Preparatory School “A” in Rafah**

159. On 3 August, at approximately 10:40, a missile was fired at 'Omar Bin al-Khattab near al-Najma Square in al-Shaboura Refugee Camp of Rafah. The missile exploded about 8 meters away from the gate of Rafah UNRWA Preparatory School “A”, which served as a shelter for displaced persons. Approximately 3,000 internally displaced persons were sheltering at the school at the time of the attack.<sup>85</sup> Fourteen Palestinians, including nine children were killed as a result of the attack. Eleven people, including eight children, died immediately in the attack: Aya Mohammed Abu Rejel (born 2010), Munther Mohammed Abu Rejel (born 2008), Saqer Bassam al-Kashef (born 2007), Tariq Ziad Abu Khatla (born 2005), 'Omer Tariq Abu al-Roos (born 1998); Hazem 'Abdul Basset Abu Hilal (born 1989), the guard of the school; a volunteer in the shelter; two street vendors Ahmed Khaled Abu Harba (born 2000), and Yousef Akram al-Eskafi (15). Ahmed Kamal al-Nahhal (born 1989) and Ismail Sameer Shallouf (born 1997), were both killed in the proximity of the school gate. The two had left to get water, and were killed as they returned. Additionally, 27 persons,

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<sup>83</sup> Aerial maps and sketches of the school and adjacent areas are available upon request to PCHR.

<sup>84</sup> Hubbard, B. and Rudoren, J., “Questions of Weapons and Warnings in Past Barrage on a Gaza Shelter,” *New York Times* (3 Aug. 2014) 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>

<sup>85</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7, at ¶ 440.

including five children, were wounded. Five victims succumbed to their wounds at a later stage: Nadia Fawzi Hussein Abu Hamad (born 1988), Izz al-Deen Walid Muhammad Abu Sneima (born 2002), Jamal Abdel Rahman Hamza Abu Libda (born 1964), and Midhat Fayiz Muhammad Ghaiyad (born 1984). At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

## **F. Attacks on hospitals**

### **i. Shuhada' Al Aqsa Hospital in Deir Al Balah**

160. On 21 July, at approximately 14:30 Israeli tanks fired four shells at the Shuhada' Al Aqsa Hospital in Deir Al Balah. The hospital is located approximately 5 km away from the buffer zone, in an area that is regularly subject to Israeli ground invasions. As a result, three individuals who were inside the hospital were killed; one of them was a child. They are: Khaled Awad Bayoumi (born 1979) who was receiving medical treatment at the surgical unit of the hospital; 'Alaa' Abdalmajeed Abu Dahrouj (born 1998) and Zakariyya Ibrahim Shakshak (born 1988), who were both visiting patients. Approximately 12 people, most of them patients, were injured, in addition to paramedics, medical staff and visitors. At the time of the attack there were no hostilities occurring in the immediate vicinity, and none of the individuals were armed.

### **ii. Beit Hanoun Hospital**

161. On Tuesday 22 July, Israeli tanks fired shells at the garden of Beit Hanoun Hospital in Beit Hanoun. The governmental hospital of Beit Hanoun, located in the middle of the city, was attacked several times, until it had to be evacuated on 27 July. Documentation gathered by the Palestinian Human Rights Organizations indicates that members of Palestinian armed resistance groups did not conduct operations in the vicinity of the hospital, and were not present in the hospital. On 18 July, a missile struck the third floor of the hospital, where the management section and the children's department are. No injuries were reported, but the damage caused to the building hindered technical and administrative work in the hospital. On 22 July, at 02:30 several shells struck the garden of the hospital, injuring one, Bilal Mohammed Ahmed Al Seba' (born 1988), who sustained shrapnel to the neck and the chest. The shells also caused damage to the buildings. At approximately 08:10-08:30, shells struck the hospital again, causing a fire at the main entrance of the administrative building. A shell

fell also in front of the Emergency section ('ER').<sup>86</sup> On 23 July at 14:30 and on 24 July at 06:45 several shells struck again the garden of Beit Hanoun Governmental Hospital, causing further damage to the building.

162. On 25 July at 23:00, 15 shells struck Beit Hanoun Hospital for several hours, damaging the upper floor, particularly the Women's Unit and the Children's Intensive Care Unit. At least 15 shells were fired at the eastern side of the hospital. On average a shell struck the hospital every three minutes. Some shells struck the women surgery section and the children section on the second floor and the men surgery section on the third floor. Shells hit the hospital grounds, breaking the windows in the hospital reception, the Emergency Unit and the Medical Laboratories. At the moment of the attack, around 200 people, including staff, visitors, journalists and families that sought shelter in the hospital, were inside the building. At this point the Palestinian Ministry of Health started coordinating with the ICRC in order to evacuate the hospital. At about 01:20 on Saturday 26 July, Israeli forces shelled the hospital again, damaging the reception, the Emergency Unit and the mortuary. The shelling continued until 07:30 on Saturday, 26 July. Between 26 and 27 July the Palestinian Ministry of Health evacuated Beit Hanoun governmental hospital and closed it.

163. Additionally, another hospital in the area, the Balsam Hospital in the North of the Gaza Strip, was evacuated as a result of shelling by Israeli forces. In particular, on 23 July, at 15:10 two shells struck the second floor of the Balsam Hospital, causing damage to the surgical unit. The hospital was therefore evacuated.<sup>87</sup>

### **iii. Al Wafa Hospital**

164. Al Wafa Rehabilitation hospital is located 1.4 km away from the eastern borders between Israel and Gaza. The hospital was struck three different times, on 11, 15 and 17 July, before being closed on 17 July as a result of intense shelling by Israeli forces. On 17 July at 16:30, hospital staff received a phone call from the Israeli Military instructing them to

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<sup>86</sup> According to the World Health Organization (WHO), the hospital was damaged a second time on July 22 and a child in the paediatric section was injured. The hospital lost water supply, forcing the administration to evacuate one of the buildings and to transfer staff to another hospital building. Furthermore, the access road to the hospital became unsafe and this disrupted medical operations and limited patient access. World Health Organization, "Situation Report #4: Occupied Palestinian Territory," 23 July 2014, available at

[http://www.who.int/hac/crises/international/wbgs/sitreps/opt\\_health\\_situation\\_report\\_23july2014.pdf](http://www.who.int/hac/crises/international/wbgs/sitreps/opt_health_situation_report_23july2014.pdf).

<sup>87</sup> World Health Organization, "Situation Report #4: Occupied Palestinian Territory," 23 July 2014, available at

[http://www.who.int/hac/crises/international/wbgs/sitreps/opt\\_health\\_situation\\_report\\_23july2014.pdf](http://www.who.int/hac/crises/international/wbgs/sitreps/opt_health_situation_report_23july2014.pdf)

evacuate the hospital within ten minutes. As the hospital was being evacuated, ten shells were fired at the northern building of the hospital, resulting in severe damage in the second, third and fourth floors of the building as well as a fire. This attack is reported as occurring within five minutes of the initial warning. The shelling also led to a power cut leaving the building completely dark. Eventually, the hospital was evacuated in the dark, under constant shelling. Medical equipment could not be evacuated in the dark and under the time pressure. Witnesses in the hospital did not report any activity by members of Palestinian armed resistance groups.<sup>88</sup>

165. On 23 July at 13:30, F16 jets completely destroyed the three buildings of the hospital, including all the medical equipment inside. The Director of Al-Wafa hospital, Dr. Alashi explained to the UN and the WHO that the hospital contained USD 7,000,000 worth of equipment and two safes that could not be moved during the evacuation.

#### **iv. Other hospital incidents**

166. On July 12, at 04:42, Israeli airstrikes hit the building of Palestine Care Society for people with disabilities, which is located east of Beit Lahia sport club in the Northern Gaza Strip. As a result, two disabled women, Soha Mosbah Ahmad Abu Saada (born 1975) and Ola Hassan Mohammed Wishahi (born 1983), were killed. A further three disabled persons and a care worker were seriously wounded.<sup>89</sup> The wounded are Ahmad Kamel EL-A'awar (born 1996), Mai Nahed Nemer Hamada (born 1995), Sally Naim Saqer (born 1993), and the nurse is Salwa Darwish Ahmad Abu Alqomsan (born 1961). They sustained shrapnel wounds in different parts of their body. The Society's building was completely destroyed as a result of the attack; the building of the Palestinian Association for Development and Heritage Protection were damaged, as well as five other houses in the neighborhood. At the time of the attack the facility was hosting only five patients, while the other 14 had left because of the weekend.

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<sup>88</sup> See also 2015 UN Commission of Inquiry Report, *supra* n. 7, at ¶ 477. The Commission of Inquiry indicated that it could not exclude that, following its evacuation, the hospital might have been used for military purposes.

<sup>89</sup> These statistics were also confirmed by the United Nations Relief and Works Agency (UNRWA). See UNRWA Gaza Situation Report 13 July 2014, <http://www.unrwa.org/newsroom/emergency-reports/gaza-situation-report-5>; See also, Al Mezan, Lawyers for Palestinian Human Rights and MAP, *No more impunity: Gaza's Health Sector Under Attack*, 2014, p 12, available at <https://www.map-uk.org/downloads/no-more-impunity--gazas-health-sector-under-attack.pdf>.

## **G. Attacks on High-Rise Civilian Buildings**

### **i. Al Zafer residential Tower**

167. Al Zafer residential Tower is located on the southern part of El Raml neighborhood, on Safad Street off Gameat al Dowal Al Arabiyya Street in Gaza City. The tower is 5.5 km away from the eastern borders where hostilities were taking place. The tower included eleven residential floors, containing 42 residential apartments normally inhabited by approximately 240 people (40 families). The U.N. Commission of Inquiry reported that at the time of the attack, approximately 400 people were in the building, as a result of internal displacement from other parts of the Gaza Strip due to the on-going military offensive.<sup>90</sup> On 23 August at 18:30, one of the residents of the tower received a phone call from a man who introduced himself as “Mousa” from the Israeli military. The caller asked the resident to urgently inform all other residents to evacuate the building within 15 minutes. Most of the residents received similar phone calls. The tower was swiftly evacuated. Twenty-five minutes after the call a missile struck the roof of the tower. Immediately after, F16 jets fired missiles on the tower completely destroying it. The building collapsed into rubble in less than a minute and surrounding buildings sustained extensive damage.<sup>91</sup>

### **ii. The Italian complex**

168. The Italian Complex is located to the East of Al Nasr street between Amin Al Husseini Street to its South and Khaled Al Hassan Street to its North in Gaza City, 5.5 km away from the eastern borders. On 25 August, at 22:55 one of the residents in Tower 3 of the Italian Complex received a phone call from someone who introduced himself as a member of the Israeli military. Residents started to rush out of the tower. At 23:00 another resident of Tower 3 received another phone call from a man who introduced himself as Ibrahim from the Israeli military and instructed the residents to move 300 meters away from the building. The man further gave specific instructions not to return after the first or second missile. He added that a strong explosion would take place at 23:20.

169. At 23:30 at least two missiles were fired on the top floor of the tower. At 23:36 a bomb was dropped on the tower causing a massive explosion, followed by another bomb, again causing a significant explosion. At 00:05 of 26 August, two other bombs were dropped

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<sup>90</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 210.

<sup>91</sup> A video shows the bombing and the rapidity in which the multi-story building was completely destroyed, available at <https://www.youtube.com/watch?t=81&v=gAHFJjWnsOI>.

on the tower. At 01:30 two more bombs were dropped, only one of them exploding. All parts of the tower were destroyed except for its North Eastern side. The incident follows two incidents involving attacks on specific apartments in the tower. On 30 July at 08:00 ‘Ahed Zaqout, who was a journalist and a physical trainer was sleeping in his apartment on the tenth floor when it was struck by a missile, killing him in his bed. Later that afternoon, another apartment belonging to Derar Abu Sisi was hit.

### **iii. Al-Basha Tower Building**

170. At around 03:55, on Tuesday 26 August, Israeli war planes launched three missiles against the 13-floor al-Basha tower building, located in the middle of Gaza City on the corners of Al Galaa and Gamal Abdel Nasser Street. The tower consisted of 16 floors, which are occupied by a number of civil society organizations, charity organizations, private companies, medical clinics, engineering offices and media offices. In addition the tower had a basement and a ground floor containing 8 commercial shops and two additional apartments. On 26 August, the security guard of the tower received a phone call from a man who introduced himself as “Mousa from the Israeli Military”. The latter instructed the security guard to evacuate the building of all its residents within the next ten minutes. When the building was evacuated, F16 jets fired bombs on the tower causing significant explosions. The whole building was completely destroyed including all equipment in it. Adjacent buildings were affected as well.

## **H. The ‘Dahiya Doctrine’**

171. The “Dahiya Doctrine” is a tactic reportedly involving the use of deliberately disproportionate force as a deterrent strategy. The doctrine is believed to involve the use of overwhelming force against military and civilian objects and infrastructure for the purpose of influencing the civilian population.<sup>92</sup> It is named after the Dahiya quarter of Beirut, which was subject to intense attack by Israeli forces during 2006.

172. In March 2008, Gadi Eizenkot, then-Commander of the Northern Command and current Chief of Staff of the Israeli Defense Forces, made the following statements:

- What happened in the Dahiya quarter of Beirut will happen in every village from which Israel is fired upon;

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<sup>92</sup> See, Harel, A., “IDF Plans to Use Disproportionate Force in Next War,” *Haaretz* (5 Oct. 2008) available at <http://www.haaretz.com/print-edition/news/analysis-idf-plans-to-use-disproportionate-force-in-next-war-1.254954>.



- Disproportionate force will be applied to cause great damage and destruction. The villages are not regarded as civilian villages but as military bases;
- This tactic is not a recommendation, it is an approved plan.<sup>93</sup>

173. The 2009 UN Fact-Finding Mission on the Gaza Conflict stated that:

The tactics used by the Israeli armed forces in the Gaza offensive are consistent with previous practices, most recently during the Lebanon war in 2006. A concept known as the Dahiya doctrine emerged then, involving the application of disproportionate force and the causing of great damage and destruction to civilian property and infrastructure, and suffering to civilian populations. The Mission concludes from a review of the facts on the ground that it witnessed for itself what was prescribed as the best strategy [the Dahiya doctrine] appears to have been precisely what was put into practice.<sup>94</sup>

174. The Palestinian Human Rights Organizations documentation indicates that the Dahiya Doctrine was implemented during Operation Protective Edge. In particular, the destruction of Beit Hanoun and Khuza'a are indicative of this tactic, as is the extensive targeting of civilian objects and civilian infrastructure.

## V. The Prosecutor's *Proprio Motu* Powers to Open an Investigation

175. It is recalled that the Prosecutor has already initiated a preliminary examination into the situation in Palestine, and the examination is ongoing.

176. Article 15 of the Rome Statute allows the Prosecutor to initiate an investigation upon her own initiative "on the basis of information of crimes within the jurisdiction of the Court."<sup>95</sup> Article 53(1)(a)-(c) of the Statute establishes the legal framework for evaluating whether to initiate an investigation. It provides that the Prosecutor shall consider: *jurisdiction* (temporal, material, and either territorial or personal jurisdiction); *admissibility* (complementarity and gravity); and the *interests of justice* – a consideration which is, notably, set forth in the negative.

177. The standard of proof for proceeding with an investigation into a situation under the Statute is "reasonable basis." The "reasonable basis to believe" test is "the lowest evidentiary

<sup>93</sup> J. Nasr, "Israel warns Hezbollah war would invite destruction," *Reuters* (10 Mar, 2008) available at <http://www.reuters.com/article/2008/10/03/uk-israel-lebanon-hezbollah-idUKTRE4923I020081003#ShyFYQg88zhOK6Ui>.97.

<sup>94</sup> 2009 UN Fact Finding Mission Report, *supra* n. 12 at ¶ 62.

<sup>95</sup> ICC Statute, Art. 15 (1). The State of Palestine has not made a referral to the Prosecutor pursuant to Article 14.

standard provided for in the Statute,”<sup>96</sup> which is “logical” because at this initial stage, the criminal responsibility of an individual “is not at stake.”<sup>97</sup> Under this standard, the conclusion reached need only be “a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available.”<sup>98</sup> While the lowest evidentiary standard, the “reasonable grounds to believe” standard remains sufficient to guard against “unwarranted, frivolous, or politically motivated investigations that could have a negative effect on [the Court’s] credibility.”<sup>99</sup>

178. If the Prosecutor concludes that there is a “reasonable basis” to proceed with an investigation, she shall submit a request to the pre-trial chamber for authorization of an investigation, and victims “may make representations” to the pre-trial chamber.<sup>100</sup> To successfully move to initiate an investigation, the Prosecutor must make a preliminary showing of: “(i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”<sup>101</sup>

179. As demonstrated by the factual background set out above and in the Annexed materials and, as the analysis below of the subject-matter jurisdiction, jurisdiction *ratione temporis*, and *ratione loci* establishes,<sup>102</sup> a “reasonable basis to proceed” with an investigation into Israeli action in Gaza exists, in so far as there clearly “exists a sensible or reasonable

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<sup>96</sup> Pre-Trial Chamber, *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the “Authorization of an Investigation into the Situation in the Republic of Kenya,” 31 Mar. 2010, para. 27 (hereinafter “Kenya Authorization to Investigate Decision”).

<sup>97</sup> *Id.* at para. 29.

<sup>98</sup> *See id.* at para. 33, referring to Appeals Chamber, *Situation on Darfur, Sudan*, ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,” 3 Feb. 2010, para. 33. *See also id.*, para. 35 (hereinafter “Al Bashir Arrest Warrant Decision”); Pre-Trial Chamber I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic And the Kingdom of Cambodia*, ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, 16 July 2015, para. 13 (hereinafter “Comoros PTC Decision”).

<sup>99</sup> *See Kenya Authorization to Investigate Decision*, para. 32. *See also Situation in the Republic of Côte d’Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, ICC-02/11, 3 October 2011, para. 21 (hereinafter “Côte d’Ivoire Authorization to Investigate Decision”).

<sup>100</sup> ICC Statute, Art. 15 (3).

<sup>101</sup> *Kenya Authorization to Investigate Decision*, paras. 188-89.

<sup>102</sup> *See, e.g., Kenya Authorization to Investigate Decision*, para. 39; *Al Bashir Arrest Warrant Decision*, para. 36.

justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed.”<sup>103</sup>

180. There is also a reasonable basis for determining, at this stage, that the situation would be admissible under Article 17, as elaborated upon below in regards to both complementarity and gravity. At this stage of the proceedings, it is important to consider that the admissibility assessment refers to the admissibility “of one or more potential cases within the context of a situation.”<sup>104</sup> Neither the potential targets of the investigation (i.e., high-level Israeli military and political officials) nor the potential crimes (i.e., crimes against humanity and war crimes) are currently under investigation or prosecution in Israel.<sup>105</sup> As the Appeals Chamber has held, in such circumstances, the case (or situation) is admissible.<sup>106</sup>

181. Accordingly, the Prosecutor is urged to submit a request to the pre-trial chamber to proceed with an investigation into crimes committed in the context of the 2014 Israeli military offensive in the occupied Gaza Strip.

## **VI. Legal Analysis of Alleged War Crimes and Crimes Against Humanity**

182. The Palestinian Human Rights Organizations set forth below the suggested legal characterization of the incidents described herein that should guide the ongoing preliminary examination and form the basis for an application to open an investigation and serve as the framework for future cases, taking into account the requirements of the Rome Statute and the jurisprudence of the Court.

183. The Palestinian Human Rights Organizations urge the Prosecutor to frame the scope of her investigation so as to include crimes under both Article 7 of the Statute, i.e., crimes

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<sup>103</sup> Kenya Authorization to Investigate Decision, para. 35.

<sup>104</sup> *Id.* at para. 48.

<sup>105</sup> Sec. IX (B) *infra*. See also Kenya Authorization to Investigate Decision, para. 53, quoting Appeals Chamber, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-1497 OA 8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 Sept. 2009, para. 78 (hereinafter “*Katanga* Appeal Judgment”): “in the case of inaction, the question of unwillingness or inability does not arise; inaction on the part of the State having jurisdiction (that is, the fact that a State in not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to Article 17 (1)(d) of the Statute.”

<sup>106</sup> See Kenya Authorization to Investigate Decision, para. 53, quoting *Katanga* Appeal Judgment, para. 78: “in the case of inaction, the question of unwillingness or inability does not arise; inaction on the part of the State having jurisdiction (that is, the fact that a State in not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to Article 17 (1)(d) of the Statute.”

against humanity, and Article 8 of the Statute, i.e, war crimes.<sup>107</sup> Only investigation and prosecution of both class of crimes will capture the full scope and seriousness of the crimes committed in the course of the Israeli military offensive on the occupied Gaza Strip through July and August 2014 – the impact of which is ongoing.

184. It is recalled that the legal characterizations set forth at the stage of commencement of an investigation is without prejudice to any later submission to (or finding by) the Chamber, in the context of a different stage of the proceedings,<sup>108</sup> and does not foreclose additional submissions on these and other acts or incidents related to potential crimes committed by Israeli officials in the context of the Israeli military offensive committed in the context of a prolonged military occupation.<sup>109</sup> Moreover, at this early stage of the proceedings, it is appropriate to present crimes in the alternative.<sup>110</sup>

#### **A. Legal Requirements for Crimes Against Humanity under Article 7 of the ICC Statute**

185. In accordance with Article 5 of the Rome Statute, the Palestinian Human Rights Organizations submit that there exists a reasonable basis to believe that the conduct in question constitutes crimes of humanity within the jurisdiction of the Court – *inter alia*, murder, torture, persecution against any identifiable group on political, racial, national, ethnic, cultural and/or religious grounds, and other inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health.

186. Crimes against humanity are among the most serious crimes that can be committed and have been recognized as such by the international community. “Crimes *against humanity* in the end offend against and offend a transcendent good, the value of the human being in the moral code, a value that cannot be compromised.”<sup>111</sup> Crimes against humanity are

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<sup>107</sup> The crimes that the Palestinian Human Rights Organizations identify for investigation in the context of Operation Protective Edge set forth below should not be understood as constituting the full set of crimes that fall within the investigation of all aspects of Situation of Palestine.

<sup>108</sup> See *Côte d'Ivoire* Authorization to Investigate Decision, para. 25; *Kenya* Authorization to Investigate Decision, para. 74.

<sup>109</sup> See *Kenya* Authorization to Investigate Decision, para. 75. See also *Côte d'Ivoire* Authorization to Investigate Decision, paras. 36-38.

<sup>110</sup> Pre-trial chambers have allowed crimes to be charged in the alternative at the stage of confirmation of the charges. See, e.g., *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-186 Decision on the confirmation of charges against Charles Blé Goudé, 11 Dec. 2014, para. 121 (confirming charge of other inhumane acts and attempted murder with the alternative qualification proposed by the Prosecutor).

<sup>111</sup> *B. et al.*, Case, 4 May 1948, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol. 1 (1950) 3, quoted in A. Cassese, *Crimes Against Humanity*, p. 355, in THE

“characterized by strong element of cruelty and a particularly odious quality which make them intolerable to the conscience of the international community.”<sup>112</sup> As the Special Rapporteur on crimes against humanity recently opined, these crimes constitute “an attack not just upon the immediate victims, but also against all humanity, and hence the entire community of humankind has an interest in [their] punishment.”<sup>113</sup>

187. “[C]rimes against humanity involve the following contextual elements: (i) an attack directed against any civilian populations; (ii) a State or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus exists between the individual act and the attack; and (v) knowledge of the attack.”<sup>114</sup>

188. Notably, the pre-trial chamber has found it premature to address the knowledge element at the stage of considering a request to authorize an investigation pursuant to Article 15: “the requirement of knowledge cannot be adequately addressed at this stage, given that the individual perpetrators will only be definitely identified if the investigation is authorized.”<sup>115</sup>

189. There is a reasonable basis to believe that crimes against humanity were committed against Palestinian civilians by Israeli officials in the course of a widespread or systematic attack pursuant to or in furtherance of a policy of by senior military and civilian officials of the State of Israel to commit such an attack: each element of crimes against humanity is satisfied in relation to the violations at issue. Indeed, it is by examining the harms committed against Palestinian civilians by Israeli officials through the lens of crimes against humanity that the full scale and nature of the crimes can be both understood and adequately addressed.<sup>116</sup>

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ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. 1A, A. Cassese, P. Gaeta and J. Jones (Eds.), Oxford University Press: 2002.

<sup>112</sup> A. Cassese, *Crimes Against Humanity*, p. 363.

<sup>113</sup> International Law Commission, First report on crimes against humanity, Sean D. Murphy, Special Rapporteur, A/CN.4/680, 17 Feb. 2015, para. 27.

<sup>114</sup> See *Côte d’Ivoire* Authorization to Investigate Decision, para. 29:

<sup>115</sup> *Id.* at para. 29. See also *Kenya* Authorization to Investigate Decision, para. 79.

<sup>116</sup> See, e.g., *Prosecutor v. Duško Tadić*, IT-94-1-A, 15 July 1999, Judgement, para. 286 (hereinafter “*Tadić* Appeal Judgement”) (“those who drafted the [ICTY] Statute deliberately included both classes of crimes, thereby illustrating their intention that those war crimes, which in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly”).

**i. The Conduct in Question Constitutes a “Widespread of Systematic Attack Directed Against any Civilian Population”**

*Attack directed against any civilian population*

190. Article 7(2)(a) of the ICC Statute defines “*attack directed against any civilian population*” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>117</sup> “Attack” does not necessarily equate with “military attack,”<sup>118</sup> and “refers more generally to a campaign or operation conducted against the civilian population.”<sup>119</sup> In this case, the attack comprised the military offensive by Israel and the acts of violence committed during the course of that offensive, in the context of a prolonged belligerent occupation. The Palestinian Human Rights Organizations submit that “attack” could be read in this case beyond the military offensive *per se*, to include acts of violence arising from or in the context of *inter alia* the closure of Gaza and the concomitant restrictions on the freedom of movement for Palestinian civilians and hardships and harms flowing from the restrictions of people and goods in and out of Gaza, which arise out of the existence of the occupation.

191. Regarding “any civilian population,” the term “*civilian*” means those who are not members of armed forces or other legitimate combatants.<sup>120</sup> International law requires that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a

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<sup>117</sup> See Trial Chamber II, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 Mar. 2014, para. 1097 (hereinafter “*Katanga Trial Judgment*”).

<sup>118</sup> See *Elements of Crimes: Article 7 Crimes Against Humanity*, Introduction, para. 3.

<sup>119</sup> R. Dixon, C.K. Hall, “Article 7,” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2d. ed., 2008, p. 124. See *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges, ICC-02/11-01/11-656, 12 June 2014, para. 209: “The expression ‘course of conduct’ already embodies a systematic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts. As already recognised by the jurisprudence of the Court, it implies the existence of a certain pattern as the ‘attack’ refers to a ‘campaign or operation carried out against the civilian population.’” See also *id.* at 210 (finding that “evidence relevant to providing the degree of planning, direction or organization” is relevant)

<sup>120</sup> Additional Protocol I provides: “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1)(2)(3) and (6) of the Third Convention and in Article 43 of this Protocol.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 50 (1). See also *Côte d’Ivoire Authorization to Investigate Decision*, para. 33; *Katanga Trial Judgment*, para. 801.

civilian.”<sup>121</sup> The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>122</sup>

192. The attack must have been directed at the *civilian population* “as a whole” and not “against randomly selected individuals.”<sup>123</sup> This does not mean, however, that the entire civilian population in the relevant area was targeted, but rather that “the civilian populations must have been the primary object of the attack and not just incidental victims.”<sup>124</sup> Notably, this requirement does not mean that an attack cannot also have a secondary military target or objective.<sup>125</sup> Among the factors to assess to determine whether the civilian population was the primary target of the attack include “the means and method used in the course of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.”<sup>126</sup> The potential civilian victims can be of any nationality, ethnicity or may possess other distinguishing features, including suspected perceived political affiliations.<sup>127</sup>

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<sup>121</sup> Additional Protocol I, Art. 50(1).

The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (May 2009, at p. 20) provides that the concept of “civilian” in international armed conflict is understood as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.” See *id.* at p. 26.

<sup>122</sup> See Additional Protocol I, Art. 50(3); *Katanga* Trial Judgement, para. 729:

“whilst the Chamber cannot rule out that on 24 February 2003, some inhabitants who were members of the self-defence group participated directly in the hostilities, or that some soldiers were dressed in civilian clothing, it considers that most of the inhabitants were readily identifiable as civilians who were not taking direct part in combat.”

See also *id.* at para. 1105 (“the population so targeted must be primarily composed of civilians – the presence of non-civilians in its midst has therefore no effect on its status of population”); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Appeal Judgment, 29 July 2004, para. 113 (“the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter the civilian characteristic”); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, 16. Nov. 1998, paras 244-77 (hereinafter “*Čelebići* Trial Chamber Judgment”).

<sup>123</sup> *Côte d’Ivoire* Authorization to Investigate Decision, para. 32.

<sup>124</sup> *Id.* at para. 33.

<sup>125</sup> See *Katanga* Trial Judgement, para. 1136; See also *id.* at para. 730 (“although Bogoro was a strategic military position, those who lived there also led civilian lives”).

<sup>126</sup> *Id.* at para. 1104, quoting *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23& IT-96-23/1-A, Judgment, 12 June 2002, para. 91 (hereinafter “*Kunarac* Appeal Judgment”).

<sup>127</sup> See, e.g., *Côte d’Ivoire* Authorization to Investigate Decision, para. 62. See also *id.* at paras. 24-25 (discussing Prosecutor’s submissions) and para. 41 (conclusions of the pre-trial chamber). Notably, while the attack has to be directed against a civilian population, not all victims of the underlying crimes qualified as crimes against humanity must be civilians; persons *hors de combat* can be victims

193. The Elements of Crimes states that “*policy*” is understood to mean when an organization “actively promote[s] or encourage[s]” the attack. Elements of a “policy” include: being thoroughly organized and follow a regular pattern; conducted in furtherance of a common policy involving public or private resources; implemented by groups who govern a specific territory or has the capability to commit a widespread or systematic attack against a civilian population; and it does not have to be explicitly formalized.<sup>128</sup> Indeed, the Trial Chamber in *Katanga* found that “[i]n most cases, the existence of such a State or organizational policy can therefore be inferred by discernment of, *inter alia*, repeated actions occurring according to the same sequence, or the existence or preparations or collective mobilisation orchestrated and coordinated by the State or organization.”<sup>129</sup>

194. The purpose behind the policy requirement is to ensure that spontaneous or isolated criminal acts or “crime sprees” are not improperly framed as crimes against humanity,<sup>130</sup> and indeed, reflects qualities of “widespread” or “systematic” such as the presence of a pattern or acts that are not isolated or sporadic in nature.<sup>131</sup> Relevant to this situation, in assessing the “policy” element of the attack against the Hema civilian population in the *Katanga* case, the Trial Chamber found it relevant that the combatants “called the Hema their ‘enemies’ as they were believed to be oppressors and potential invaders of their territory,” that the combatants “were driven by vengefulness arising from the previous attacks to which they had been subjected,” and that the combatants considered the opposing military force, the UPC, and the Hema, as an ethnic group “their enemy – to them, the two were of the one ilk.”<sup>132</sup> In this situation, the “policy” in question is a State policy, namely that of the Israeli political and military leadership governing the planned, coordinated and organized conduct of Israeli forces against Palestinian civilians under occupation in Operation Protective Edge.

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of the crime. See Appeals Chamber, *Prosecutor v. Milan Martić*, IT-95-11-A, 8 October 2008, Judgement, para. 313.

<sup>128</sup> *Côte d’Ivoire* Authorization to Investigate Decision, para. 43. (“indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this particular criterion”).

<sup>129</sup> *Katanga* Trial Judgement, para. 1109. Notably, the Chamber further found that the policy “may therefore become clear to the perpetrators, as regards its modalities, only in the course of its implementation, such that definition of the overall policy is possible only *in retrospect*, once the acts have been committed and in the light of the overall operation or course of conduct pursued.” *Id.* at para. 1110.

<sup>130</sup> See, e.g., “[T]he policy element only requires that the acts of individuals alone, which are isolated, un-coordinated, and haphazard, be excluded.” R. Dixon, C.K. Hall, “Article 7,” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2d. ed., 2008, p. 236.

<sup>131</sup> See, e.g., *Kenya* Authorization to Investigate Decision, paras. 83-86.

<sup>132</sup> *Katanga* Trial Judgment, paras. 1143-44.



195. In this situation, the civilian population against whom the attack was directed by Israeli officials was the Palestinian civilian population of Gaza. The group was targeted not only because of its nationality or ethnicity, but in many cases also because of perceived political support for Hamas, the governing body in Gaza, or the armed groups engaged in resistance against Israeli occupation, as was the case in al-Shuja'iyya, for example.<sup>133</sup> The element of “attacks directed at any civilian population” was found satisfied at the Article 15 investigation-authorization stage for both Côte d’Ivoire and Kenya when civilians were singled out ethnic or political targets because of their memberships.<sup>134</sup>

196. Indeed, in some cases, as Israeli soldiers affirmed in the Breaking the Silence report, the civilian population was attacked because of vengeance. The Hannibal Directive is a policy that moves beyond legitimate force protection and disregards basic principles of the international humanitarian law, including obligations vis-à-vis civilians.<sup>135</sup> As discussed above, this policy was in effect in at least Rafah. As described above, and confirmed in the U.N. Commission of Inquiry report, in Rafah, essentially every moving vehicle or person became a potential target, with the most intensive fire reported over the first four hours.<sup>136</sup>

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<sup>133</sup> C.f., *Côte d’Ivoire* Authorization to Investigate Decision, paras. 102-105 (information exists of “systematic sweeps” of particular neighborhoods, resulting in the killing of individuals who appeared to be in hiding or attempting to flee, and pre-trial chamber satisfied that crimes were carried out “over a period of days and in a number of different villages” in a widespread and systematic manner).

<sup>134</sup> See, e.g., *Côte d’Ivoire* Authorization to Investigate Decision, para. 41 (civilians perceived to support the opposition and members of specific ethnic and religious communities in Abidjan and the western part of the country were targeted from 28 November 2010 onwards) and 95 (civilians perceived to support Gbagbo and from specific ethnic communities were the object of attacks in the western part of Côte d’Ivoire in March 2011).

<sup>135</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 57. (One of the witnesses recalled that “every time an Israeli soldier dies or is kidnapped, we feel the consequences”).

<sup>136</sup> See *supra* paras 107-123 (on Rafah) and 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 57. The Commission of Inquiry report further provides:

The commission examined several cases in which the people or groups of people targeted were civilians, at times children, who were not directly participating in the hostilities and did not represent any threat to the Israeli soldiers present in the area. For instance, Salem Shamaly, whose death was recorded on video, was shot several times while looking for a relative during a humanitarian pause, even after he had been felled by the first shot (A/HRC/28/80/Add.1, para. 43). The commission examined two other incidents in which civilians allegedly carrying white flags were targeted by soldiers in Khuza’a. The first case pertained to a large group of people, including children, who were attacked in front of a clinic while attempting to leave the village holding white flags. In the second case, a man in a house carrying a white flag was shot at point-blank range in front of some 30 other people, including women, children and elderly persons, who had sought shelter in the house. Directing attacks against civilians constitutes a violation of the principle of distinction and may amount to a war crime. These acts may also

197. The “attack directed against any civilian population” in this case satisfies the definition set forth in Article 7(2)(a) in so far as it constituted a course of conduct involving the multiple commission of acts referred to in Article 7(1)(a) (murder), (f) torture, (h) (persecution) and (k) other inhumane acts of the Rome Statute, against a civilian population, i.e., the Palestinian population of Gaza, pursuant to or in furtherance of a State policy, i.e., Israel, to commit such acts. The State or organizational (i.e., Israeli government and military) policy to commit such an attack was implemented by both a deliberate failure to take action in some respects and by organizational action in others. Like in the Situation of Côte d’Ivoire, for example, the incidents leading to the alleged crimes “share common features (in terms of their characteristics, nature, aims, targets and alleged perpetrators, as well as times and locations) with other acts forming part of the attack – thus satisfying the required nexus – and are to be also considered ‘as part of’ the relevant course of conduct.”<sup>137</sup> The pattern and practice of the Israeli military/government described in detail above in regard to, for example, bombing or shelling residential buildings in the middle night, bombing schools housing displaced civilians, and destroying vital civilian infrastructure, reflect a pattern and practice of action and inaction that facilitated, promoted or otherwise encouraged the attack.

#### *Widespread or Systematic*

198. It is currently established that the attack need be *either* widespread *or* systematic.<sup>138</sup> Moreover, it is the attack, and not the alleged individual acts, which must be widespread or systematic.<sup>139</sup>

199. To be considered “*widespread*,” the pre-trial chamber has found that the attack was understood as reflecting “the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”<sup>140</sup> “Widespread” refers to “both the large-scale nature of the attack

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constitute wilful killings. Such acts are also a violation of the right to life, as guaranteed by article 6 of the International Covenant on Civil and Political Rights. *Id.* at ¶¶ 59-60.

<sup>137</sup> *Côte d’Ivoire* Authorization to Investigate Decision, para. 212.

<sup>138</sup> The requirements that acts be widespread or systematic was agreed upon as the appropriate “threshold” in order to distinguish crimes against humanity from common or local crimes, and to bar sporadic acts from being considered crimes against humanity. *See, e.g.*, Darryl Robinson, *The Elements of Crimes Against Humanity*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE*, 57, 58 (Roy S. Lee ed., 2001).

<sup>139</sup> *Id.*

<sup>140</sup> *Kenya* Authorization to Investigate Decision, para. 95, citing Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 83 (hereinafter “Bemba Confirmation of Charges Decision”).

and the number of resulting victims,”<sup>141</sup> however the assessment of widespread “is not exclusively quantitative or geographical.”<sup>142</sup> It can be the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>143</sup> Notably, there is “no specific numerical threshold” that must be met for a “widespread” attack;<sup>144</sup> a case-by-case assessment of the size of the civilian population that was attacked must be made, and the “means, methods, resources and results of the attack” must be analyzed.<sup>145</sup>

200. The pre-trial chamber further found that the attack was *systematic* because it was “organized and followed a consistent pattern.”<sup>146</sup> A systematic attack further refers to the “improbability of their random occurrence,”<sup>147</sup> and can “often be expressed through a pattern of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”<sup>148</sup>

201. Pre-Trial Chamber III found that a reasonable basis to believe that an attack was carried out on a widespread and systematic basis after examining factors including the extended time period in which crimes were carried out (i.e., approximately six months), the geographical range of the alleged crimes (i.e., many neighborhoods in the capital, Abidjan and the west of the country), and the “high number of reported victims.”<sup>149</sup>

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<sup>141</sup> *Kenya Authorization to Investigate Decision*, para. 95.

<sup>142</sup> *Côte d’Ivoire Authorization to Investigate Decision*, para. 53.

<sup>143</sup> *Kenya Authorization to Investigate Decision*, *supra* n. 143 at para. 95 (citations omitted).

<sup>144</sup> First report on crimes against humanity, Sean D. Murphy, Special Rapporteur, A/CN.4/680, 17 Feb. 2015, para. 128.

<sup>145</sup> *Id.*, citing *Kunarac Appeal Judgment*, para. 95.

<sup>146</sup> *Id.*

<sup>147</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of the charges, 30 Sept. 2008, para. 394 (hereinafter “Katanga Confirmation of Charges Decision”) (citations omitted). See also *Kenya Authorization to Investigate Decision*, para. 96. (citations omitted) (qualification of “systematic” is understood to reflect the “organized nature of the acts of violence and the improbability of their random occurrence.”)

<sup>148</sup> *Kenya Authorization to Investigate Decision*, para. 96. See also *Katanga Trial Judgment*, para. 1113, finding that analysis of systematic:

“entails inquiry as to whether a series of repeated actions seeking to produce always the same effects on a civilian population was undertaken with consideration – identical acts or similarities in criminal practices, continual repetition of a same *modus operandi*, similar treatment meted out to victims or consistency in such treatment across a wide geographic area.”

<sup>149</sup> See *Côte d’Ivoire Authorization to Investigate Decision*, para. 62. The Prosecutor submitted that the violence included three main elements: raids by State security forces against neighborhoods that were perceived to be allied with a political opponent; excessive force to disperse protestors; and military roadblocks and checkpoints at which killings occurred. *Id.* at para. 55. See also *Kenya Authorization to Investigate Decision*, para. 131, finding that in a two-month period, reported that

202. The attacks set forth herein satisfy each factor. The attack encompasses a large number of victims: more than 2,100 people killed of whom at least 1,540 were civilians, more than 500,000 Palestinians rendered homeless or otherwise internally displaced, with violations occurring in neighborhoods, refugee camps and cities across the full span of the Gaza Strip, which caused severe trauma for all Palestinian civilians of Gaza. The entire civilian population of Gaza is impacted by the attacks on key infrastructure, including the attack on the power plant, water infrastructure and sanitation facilities. The civilian population as a whole has had their right to health compromised not only by the attacks on medical facilities but also because of the lack of clean water and basic functioning sanitation systems. Also, students' right to an education was infringed upon due to the destruction of 66 schools, 7 of which were completely destroyed. At the most elementary level, the on-going closure of Gaza denies the vast majority of the population its right to freedom of movement.

203. Furthermore, as demonstrated through the pattern the incidents, with the resulting civilian deaths, injuries and harms suffered, cannot be described as "random occurrences." The attacks follow a pattern: over the course of the 51-day offensive residential dwellings were bombed by large aerial weapons with highly destructive potential, at hours (i.e., the middle of the night) assuring a maximum civilian presence<sup>150</sup>; and 6 schools used as shelters for the internally displaced were bombed, resulting in the killing of 49 Palestinian civilians including 18 children. As the U.N. Commission of Inquiry concluded:

The commission's investigations also raise the issue of why the **political and military leadership** did not revise their policies or change their course of action, despite considerable information regarding massive death and destruction in Gaza, **which in turn raises questions as to potential violations of international humanitarian law and criminal law by these officials.**<sup>151</sup>

[...]

Indeed, **the fact that the political and military leadership did not change its course of action, despite considerable information regarding the massive degree**

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1,133-1,220 killed, 3,561 injured, approximately 350,000 displaced, and an increase in the number of rapes and other acts of sexual violence.

<sup>150</sup> In addition to the facts set forth above, see, for example, U.N. Commission of Inquiry, at paras 214-244; 416-419. OCHA determined that 142 Palestinian families had three or more members killed in the same incident due to the destruction of residential buildings; notably, this incidents spanned the entire length of the attack – from 8 July through 24 August, with such multi-family deaths occurring on more than half of the days of the operation. See OCHA, *Fragmented Lives Humanitarian Overview 2014* (March 2015), p.6, available at

[http://www.ochaopt.org/documents/annual\\_humanitarian\\_overview\\_2014\\_english\\_final.pdf](http://www.ochaopt.org/documents/annual_humanitarian_overview_2014_english_final.pdf).

<sup>151</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7, at ¶ 640 (emphasis added).

**of death and destruction in Gaza, raises questions about potential violations of international law by these officials [...].<sup>152</sup>**

**ii. Mental Element: Knowledge of the Attack**

204. At this stage of proceedings, the jurisprudence of the Court dictates that it is premature to address the mental element; until suspects and accused are identified in the course of investigations, individual intent that cannot be evaluated.<sup>153 154</sup>

**iii. The Individual Crimes**

205. The Palestinian Human Rights Organizations submit that a reasonable basis to believe that the crimes against humanity of murder, torture, persecution and other inhumane acts were committed by high-level Israeli officials in the course of operation “Protective Edge” which occurred in the context of a prolonged belligerent occupation, and respectfully urge the Prosecutor to investigate these crimes.

***Murder*<sup>155</sup>**

206. It must be established that a “perpetrator killed one or more persons,”<sup>156</sup> and did so by act or omission such that there is a “causal link” between the conduct of the accused and the result, for “murder,” as a crime against humanity, in addition to satisfying the contextual elements.<sup>157</sup> The Elements of Crimes confirms that “killing” is interchangeable with “caused death” for the purposes of establishing this crime.<sup>158</sup> The mental element is either intent (i.e.,

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<sup>152</sup> *Id.* at para. 672 (emphasis added).

<sup>153</sup> See *Kenya Authorization to Investigate Decision*, para. 79.

<sup>154</sup> In the context of crimes against humanity, the accused must have knowledge of the attack. ‘Knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Article 3, Rome Statute. Article 7 (2) of the Rome Statute clarified that this last element “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.” Article 7 (2), Elements of Crimes.

<sup>155</sup> It is permissible to bring charges for murder pursuant to Article 7(1)(a) and willful killing pursuant to Article 8(2)(a)(i) simultaneously. See *Katanga Confirmation of Charges Decision* para. 419.

<sup>156</sup> *Côte d’Ivoire Authorization to Investigate Decision*, para. 63.

<sup>157</sup> See *Katanga Trial Judgment*, para. 767. The ICTY has held that a standard of “substantial contribution” to death of a victim is sufficient to establish the *actus reus* of murder: See Trial Chamber II, *Prosecutor v. Radoslav Brdanin*, IT-99-36-T, Judgment, 1 Sept. 2004, para. 382: “The Prosecution need only prove beyond reasonable doubt that the accused’s conduct contributed substantially to the death of the victim.”

<sup>158</sup> Rome Statute, Elements of Crimes, n. 7.

person means to cause the consequence) or awareness that the consequence “will occur in the ordinary course of events.”<sup>159</sup>

207. At least 1,540 Palestinian civilians were killed in Gaza between 7 July – 26 August 2014 by Israeli military forces.<sup>160</sup> When seeking authorization to investigate murder as a crime against humanity in other situations, the Prosecutor informed the pre-trial chamber that the number of civilians killed by forces loyal to the president were between 700-1048,<sup>161</sup> and was more vague regarding the number of civilians killed by pro-Ouattara forces. The Prosecutor referred to “numerous civilians in dozens of villages and towns” in certain parts of Côte d’Ivoire and at least “hundreds of civilians” in a particular neighborhood over a two-day period,<sup>162</sup> and approximately 1,130-1,220 civilians in post-election violence in Kenya. The pre-trial chambers were satisfied that a reasonable basis existed to believe that murders were committed as crimes against humanity in all situations.<sup>163</sup>

208. That such a large number of civilians were killed in the small territory of Gaza in the course of a 51-day offensive belies any claim that these were isolated or random acts, but instead, the number of deaths, along with the similar methods and means of causing those deaths (i.e., dropping bombs on residential buildings in the middle of the night and shelling schools known to be housing IDPs), can satisfy the contextual elements for crimes against humanity – a widespread or systematic attack against any civilian population. None of the civilians whose deaths are described herein were taking any active part in hostilities; indeed, many of the civilians killed had taken refuge with relatives in their homes in an effort to escape the conflict or had sought shelter at an UNRWA school, but neither the status of UN facility or residential building was any guarantee of safety for a civilian, including the 556 children killed, in Gaza during Operation Protective Edge.

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<sup>159</sup> *Katanga* Trial Judgment, para. 774. See also, *id.* at para. 777 (“the person knows that his or her actions will necessarily bring about the consequence in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence”) and 781.

<sup>160</sup> Indeed, in addition to those purposes killed during Operation Protective Edge, a number of civilians have died in the year since the operation as a direct result of harms caused during the attack, including destruction of the power plant, damage or destruction of hospitals and other medical facilities, destruction of homes, as well as the on-going restrictions of freedom of movement, which have prohibited civilians from receiving the medical care necessary outside of Gaza.

<sup>161</sup> *Côte d’Ivoire* Authorization to Investigate Decision, para. 64. The civilians were killed by excessive force involving the use of live ammunition and heavy weaponry to disperse protestors; firing mortar rounds into neighborhoods known to be strongholds of the political opponent and at roadblocks set up by the police and militias. See *id.* at para. 65.

<sup>162</sup> *Côte d’Ivoire* Authorization to Investigate Decision, para. 106.

<sup>163</sup> *Id.* at paras. 67 and 108; *Kenya* Authorization to Investigate Decision.

209. Likewise, the means or method employed by the Israeli military to destroy residential buildings and towers, and schools serving as shelters, including using heavy bombs, can establish that the acts were carried out either with the intent to kill civilians or with awareness that death of civilians will occur.

### ***Persecution***

210. Persecution against an identifiable group, including on the basis of *inter alia* political, racial, national, ethnic, cultural and religious grounds,<sup>164</sup> “in connection with any act [in Article 7(1) of the Statute] or any crime within the jurisdiction of the Court” is recognized as a crime against humanity under the Rome Statute. Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>165</sup> Indeed, “discrimination is the essence of the crime of persecution.”<sup>166</sup> As was found in the *Tadić* case at the ICTY:

It is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds to constitute persecution under the Statute.<sup>167</sup>

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<sup>164</sup> Notably, the ICC Statute also recognizes persecution against an identifiable group on “other grounds that are universally recognized as impermissible under international law.” Art. 7(1)(h).

<sup>165</sup> Article 7(2)(g). The ICTY has defined “persecution” as “an act or omission which does the following: 1.[D]iscriminates in fact and which denies or infringes upon a fundamental right laid down in international or customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).” Trial Chamber II, *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Judgment, 15 Mar. 2002, para. 431 (hereinafter “*Krnojelac* Trial Judgment”). This definition has been consistently adopted at the ICTY. See e.g., Appeals Chamber, *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Judgment, 17 Sept. 2003, para. 185 (hereinafter “*Krnojelac* Appeal Judgment”); Appeals Chamber, *Prosecutor v. Miroslav Kvočka*, IT-98-30/1-A, Judgment, 28 Feb. 2005, para. 320 (hereinafter “*Kvočka*, Trial Judgment”); Appeals Chamber, *Prosecutor v. Vasiljević*, IT-98-32-A, Judgment, 25 Feb. 2004, para. 113. The ICTR has also applied the ICTY’s definition of persecution as set out in the *Krnojelac* Appeal Judgment. See Appeals Chamber, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR-99-52-A, Judgement, para. 985.

<sup>166</sup> Darryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference,” in Developments in International Law, 93 *American Journal of International Law* 43, 46 (1999).

<sup>167</sup> See Trial Chamber, *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 697 (hereinafter “*Tadić* Trial Judgment”). See also Commentary to the International Law Commission 1996 Draft code of Crimes Against Peace and Security of Mankind, Art. 18(11) available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf) (finding “persecution may take many forms with its common characteristic being the denial of human rights and fundamental freedoms to which every individual is entitled without distinction”).

211. The crime of persecution can encompass many acts, including those of a physical, economic or judicial character, which “violate an individual’s right to equal enjoyment of his basic rights.”<sup>168</sup> Acts which underlie a persecution claim “should be examined in their context and with consideration of their cumulative effect.”<sup>169</sup> Just as the Statute does not provide an exhaustive list of persecutory acts, courts have declined to construct such a list:

The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purpose of persecution. The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights...courts [require] flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.<sup>170</sup>

212. , The Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) are sources of guidance in identifying fundamental rights that are at risk and thus protected by enforcement of the crime of persecution.<sup>171</sup> The

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<sup>168</sup> *Tadić* Trial Judgment, para. 710. See also Trial Chamber, *Prosecutor v. Kupreškić*, IT-95-16-T, Judgment, 14 Jan. 2000, para. 568 (hereinafter “*Kupreškić* Trial Judgment”)(“It is clear that persecution may take diverse forms, and does not necessarily require a physical element.”).

<sup>169</sup> *Prosecutor v. Perišić*, IT-04-81-T, Judgment, 6 Sept. 2011, para. 119; *Kupreškić* Trial Judgment, para. 622. See also *Prosecutor v. Nahimana*, Judgment, ICTR-99-52-A, 28 Nov. 2007, para. 987 (the cumulative effect of the underlying acts and the context in which they take place are important to assessing their gravity); *The Prosecutor v. Radoslav Brdanin*, IT-99-36-A, Judgment, para. 294 (hereinafter “*Brdanin* Appeal Judgment”) (the cumulative effect of the denial of rights to employment, freedom of movement, proper judicial process and proper medical care is a denial of fundamental rights).

<sup>170</sup> *Kupreškić* Trial Judgment, para. 623. See *id.* at para. 622 (opining that “acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect”).

<sup>171</sup> *Id.* at para 621. The Trial Chamber found:

‘Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity [and accordingly defines] persecution as the gross or blatant denial, on discriminatory grounds of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 [of the ICTY Statute].’ (emphasis in original)

Israel ratified the ICCPR and ICESCR in 1991; Palestine acceded to the ICCPR and ICESCR in 2014. As the occupying power, Israel has to respect and protect the rights of persons in the Gaza Strip, and refrain from taking any action that would violate the rights of Palestinian civilians in the Gaza Strip. See, e.g., Conference of High Contracting Parties to the Fourth Geneva Convention: Statement, Geneva, 15 July 1999; See also ICJ, *Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 78



underlying acts that constitute persecution need not be considered a crime under international law.<sup>172</sup>

213. Among the fundamental rights protected by the UDHR, the ICCPR and the ICESCR that can be considered in the context of this situation are the right to freedom of movement,<sup>173</sup> right to education,<sup>174</sup> the right to self-determination,<sup>175</sup> the right to life,<sup>176</sup> the right to be free from torture,<sup>177</sup> freedom from discrimination and equal protection of the law,<sup>178</sup> the right to enjoyment of the highest attainable standard of physical and mental health,<sup>179</sup> and the right to an adequate standard of living including the right to adequate housing and the right to water.<sup>180</sup> For example, in relation to freedom of movement – which was curtailed for

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<sup>172</sup> See *Brdanin* Appeal Judgment para. 296.

<sup>173</sup> See UDHR, Art. 13; ICCPR, Art. 12(1). This right includes being “free to leave any country, including his own,” *Id.* 12(2), and cannot be restricted “except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” Art. 12(3) (emphasis added). As the General Comment on freedom of movement states:

“it is not sufficient that the restriction serve the permissible purpose; they must be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”

U.N. Human Rights Committee, General Comments adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 27 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 1 Nov. 1999, Para. 14.

The General Comment further provides that “[t]he application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination...it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin[...].” *Id.* at para 18.

<sup>174</sup> See UDHR, Art. 26; ICESCR, Art. 13(1).

<sup>175</sup> See ICCPR, Art. 1(1); ICESCR, Art. 1(1).

<sup>176</sup> See UDHR, Art. 3; ICCPR, Art. 6(1);

<sup>177</sup> See UDHR, Art. 5; ICCPR, Art. 7; Convention Against Torture.

<sup>178</sup> See UDHR, Art. 7; ICCPR, Art. 26;

<sup>179</sup> See UDHR, Art. 25; ICESCR, Art. 12. See also U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (The right to the highest attainable standard of health (art. 12 of ICESCR)), E/C.12/2000/4, 11 Aug. 2000, para. 11 (The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”)

<sup>180</sup> See UDHR, Art. 25; ICESCR, Art. 11. See Al Mezan and Lawyers for Palestinian Human Rights “Complaint concerning destruction and damage to family houses in the Gaza Strip with associated loss of life and injury to Palestinian residents, during Israel’s military operation between 7 July 2014 and August 26 2014,” 30 Sept. 2014, available at <http://lphr.org.uk/latest-news/lphr-al-mezan-submit-comprehensive-complaint-united-nations-concerning-large-scale-destruction-damage-family-homes->

Palestinian civilians not only because of the closure of Gaza but because of the declaration of “no-go” and extended “buffer zones” during the operation – the Human Rights Committee has found that “[l]iberty of movement is an indispensable condition for the free development of a person.”<sup>181</sup> It is also recalled that certain of these fundamental rights are reflected in other paragraphs of Article 7(1), including murder, torture and other inhumane acts, and can likewise constitute persecution when committed on an impermissible discriminatory basis.<sup>182</sup>

214. In addition to these fundamental rights, other acts which constitute crimes under the Statute can constitute persecution when committed on an impermissible discriminatory basis. The Palestinian Human Rights Organizations urge the Prosecutor to investigate when attacks against civilians or civilian objects, whether intentional or in violation of the principle of proportionality, were committed on a discriminatory basis, and thus constitute persecution. In this regard, it is recalled that the ICTY found that not only killing, detention and expulsion constituted persecution,<sup>183</sup> but also that attacks on property including homes,<sup>184</sup> attacks on villages,<sup>185</sup> “psychological abuses”<sup>186</sup> or “physical and mental injury,”<sup>187</sup> for example, can constitute acts of persecution.

215. In this situation, a reasonable basis to believe that persecution was committed in the course of the Israeli offensive and the Prosecutor should move to investigate this crime. Numerous underlying acts of persecution were committed, in connection with acts referred to

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gaza-strip-associated-profound-loss-life-injury/; ICESCR, General comment No. 4, The right to adequate housing (1991). See also, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (The right to water (arts. 11 and 12 of ICESCR)), E/C.12/2002/11, 20 Jan. 2003, para. 1 (“The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”).

<sup>181</sup> U.N. Human Rights Committee, General Comment No. 27, para. 1.

<sup>182</sup> See Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 Jan. 2012, paras. 271-73 (confirming charge of persecution based on underlying acts of killing and forcible displacement on the basis of perceived political affiliation).

<sup>183</sup> *Kupreškić* Trial Judgement, para 629.

<sup>184</sup> *Id.* at para 631. See also, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-382, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 271, 277 (*Muthaura*, Decision on the Confirmation of Charges) (holding that “acts of looting, burning and destruction of property” constituted predicate acts underlying the charge of Persecution under Article 7(1)(h); Pre-Trial Chamber, *The Prosecutor v. Ahmad Muhammad Harun and Ahmad Ali Abd-Al-Rahman*, ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 27 Apr. 2007, pgs. 6, 8, 10, 14 (issuing warrant for charges of persecution predicated in part upon “pillaging and destruction of property.”).

<sup>185</sup> See *Prosecutor v. Dario Kordić & Mario Čerkez* IT-95-14/2-T, Judgement 26 Feb. 2001, para. 198. (hereinafter “*Kordić* Trial Judgment”).

<sup>186</sup> *Kvočka* Trial Judgment, para. 190.

<sup>187</sup> *Kordić* Trial Judgment, para. 198.

in Article 7(1) or with other crimes under the jurisdiction of the Court. These underlying acts include murder and wilful killing of civilians, other inhumane acts, torture or inhuman treatment, willfully causing great suffering, destruction of civilian and otherwise protected property, as well as the denial of fundamental rights including the right to movement, education, health, and housing. All of the underlying acts were committed against Palestinian civilians *because* they are Palestinian, and thus constitutes persecution against an identifiable group on political, national, ethnic, and/or cultural grounds.

### ***Torture***

216. Torture, as a crime against humanity, requires that in addition to satisfying the contextual elements, “the perpetrator inflicted severe physical or mental pain or suffering upon one or more individuals who are under the custody or control of the perpetrator, and it is necessary that the pain or suffering did not arise only from, and was not inherent to, lawful sanctions.”<sup>188</sup> Mental harm is a “prevalent form of inflicting torture”<sup>189</sup> and can arise out of a myriad of circumstances, including those with no physical harm component. For example, trial chambers at the ICTY have found that the mental suffering “caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture,” as would “being forced to watch serious sexual attacks inflicted on a female acquaintance”<sup>190</sup> or the mental suffering caused by telling someone they would be executed or threatening to do so.<sup>191</sup> Individual instances of torture must not be examined in isolation: “if the mistreatment has occurred over a prolonged period of time, the Chamber would assess the severity of the treatment as a whole.”<sup>192</sup> Notably, “custody or control” is not limited to the context of detention or imprisonment, and “should be given broad reading;” it also entails circumstances where there are restrictions on liberty more

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<sup>188</sup> *Côte d’Ivoire* Authorization to Investigate Decision, para. 83. See Elements of Crimes, Article 7(1)(f).

<sup>189</sup> *Kvočka* Trial Judgment, para. 149.

<sup>190</sup> *Kvočka* Trial Judgment, para. 149, referencing *Furundžija* Trial Judgment, para. 267, in part.

<sup>191</sup> Trial Chamber, *Mladen Naletilić and Vinko Martinović*, IT-98-34-T, Judgment, 31 Mar. 2003, para. 367-68 (hereinafter “*Martinović* Trial Judgment”) In relation to the threat of death, the trial chamber took special notice of the young age of the child-victim and that he “must have been particularly vulnerable and scared by the beatings inflicted on him before he was brought to the interrogation and threatened with being killed.” See also Trial Chamber, *Prosecutor v. Radoslav Brđjanin*, IT-99-36-T, Judgment, at para. 511 (*Brđjanin*, Trial Judgment) (finding that forcing Bosnian Muslims “to collect the bodies of other members of the ethnic group, particularly those of their neighbours and friends, and bury them, in circumstances in which this took place, could not by cause severe pain and suffering”).

<sup>192</sup> Trial Chamber, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, IT-03-66-T, Judgment, 30 Nov. 2005, para. 237.

broadly, including by security forces.<sup>193</sup> It is recalled that Gaza (and thus the Palestinians in Gaza during the military offensive) was under the effective control of Israeli forces.

217. In relation to Gaza – and the civilian population who lived there and were trapped there, due to restrictions on their freedom of movement generally, and the sealing of neighborhoods in the course of the operation rendering the Palestinian residents under the full and total control of Israeli forces – can be found to be under the custody or control of Israeli forces for the purposes of the definition of torture. The Israeli forces subjected the Palestinian population to not only acts of severe physical harm as reflected in the thousands of Palestinians seriously injured in the course of the widespread or systematic attack, but also to acts of severe mental harm. The entire civilian population, but particularly children, experienced intense fear and terror that they or members of their family would be killed, as civilian death-tolls mounted, with accounts of displaced persons being killed when bombs fell on U.N. schools serving as shelters or children were killed by missiles while playing soccer. Many people witnessed the death of loved ones, and were confronted with the horror of the aftermath of strikes on homes: dismembered body parts, including multiple instances of unborn children being torn from the bodies – or rather, corpses - of pregnant women. In some instances, family members and neighbors were unable to search for or claim the bodies of the dead due to the threat of being killed by Israeli forces, leading to severe mental pain and anguish. Numerous cases of the use of “human shields” – Palestinians taken into the physical custody of Israeli forces, including apparently to discourage attacks on the forces by Palestinian armed resistance groups –documented by the U.N. Commission of Inquiry caused severe mental harm to the individuals held by the Israeli forces.<sup>194</sup> Accordingly, a reasonable basis to believe that torture as a crime against humanity was committed in this situation, warranting the opening of an investigation.

### ***Other Inhumane Acts***

218. Other inhumane acts constituting crimes against humanity require that the “perpetrator inflicted great suffering or serious injury to body or to mental or physical health

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<sup>193</sup> See *Triffterer Commentary*, Torture, p. 163, para. 105. See also 2009 UN Fact Finding Mission Report, *supra* n. 12, ¶ 1173.

<sup>194</sup> See 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶¶ 321, 323, 343-345. See also *id.* at ¶ 346 (“the manner in which the Israeli soldiers forced Palestinian civilians to stand in windows, enter houses/underground areas and/or perform dangerous tasks of a military nature, constitutes a violation of the prohibition against the use of human shields..[t]hat conduct, together with the physical and/or psychological violence to which the victims were subjected by the soldiers, constitutes ill-treatment and may amount to torture.”).

by way of an inhumane act' similar in character to those listed in Article 7(1) of the Statute.”<sup>195</sup>

219. The Court has clarified that an act is “similar in character” to other crimes in section 7(1)(a)-(j) when it has a similar “nature and gravity” to those crimes.<sup>196</sup> However, an act cannot simultaneously be an “other inhumane act” and also a crime under section 7(1)(a)-(j).<sup>197</sup>

220. To determine whether conduct is an “other inhumane act” under article 7(1)(k), the Court considers the factual circumstances in which it occurs, which the ICC has determined includes: “the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.”<sup>198</sup>

221. Among the acts which have been found to constitute “other inhumane acts” at the ICC are causing severe physical injuries,<sup>199</sup> the killing and maiming civilians in front of their family members,<sup>200</sup> and injuring persons by shelling a densely populated area,<sup>201</sup> or by wounding protestors.<sup>202</sup> For example, the Pre-Trial Chamber III found a reasonable basis to believe that other inhumane acts were committed when pro-Gbagbo forces “allegedly beat foreign residents with bricks, clubs and sticks.”<sup>203</sup> The Court has also suggested that property damage would qualify as an other inhumane act, if there were evidence the damage led to great suffering or injury to mental health.<sup>204</sup>

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<sup>195</sup> *Côte d'Ivoire* Authorization to Investigate Decision, para. 83.

<sup>196</sup> *Katanga*, Decision on the Confirmation of Charges, para. 451 (citing ICC Elements of Crimes n. 30).

<sup>197</sup> *Katanga*, Decision on the Confirmation of Charges, para. 452.

<sup>198</sup> *Katanga*, Decision on the Confirmation of Charges, para. 449. The ICTY examined the same set of circumstances for determining whether an act constitutes “other inhumane acts” for the purposes of international criminal law: “consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.” Appeals Chamber, *Prosecutor v. Mitin Vasiljević*, IT-98-32-A, 25 Feb. 2004, para. 165.

<sup>199</sup> *Kenya*, Decision on the Confirmation of Charges, paras. 272-73 (finding other inhumane acts in light of civilians suffering gunshot wounds, cuts and blunt force trauma);

<sup>200</sup> *Id.* at 277.

<sup>201</sup> *Prosecutor v. Laurent Koudou Gbagbo* ICC-02/11-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 Nov. 2011, para. 60-61.

<sup>202</sup> *Id.*

<sup>203</sup> *Côte d'Ivoire* Authorization to Investigate Decision, paras. 85-86.

<sup>204</sup> *Kenya*, Decision on the Confirmation of Charges para. 279.

222. The Court has recognized that other inhumane acts occur can be violations of basic or fundamental rights “drawn from the norms of international human rights law.”<sup>205</sup>

223. Although the Rome Statute contains certain limitations on “other inhumane acts” in relation to the ad-hoc tribunals and that,<sup>206</sup> the jurisprudence of the ICTY and ICTR remains instructive.<sup>207</sup> The ICTY and ICTR have recognized several examples of “other inhumane acts,” including the infliction of physical or mental suffering less severe than torture,<sup>208</sup> forcing civilians to dig trenches,<sup>209</sup> requiring prisoners to perform tasks on the front line that endangered them,<sup>210</sup> using persons as human shields,<sup>211</sup> conduct causing persons to experience serious mental harm by witnessing acts committed against others, particularly friends or family,<sup>212</sup> forced nudity,<sup>213</sup> and humiliation and harassment.<sup>214</sup>

224. Furthermore, the international tribunals have suggested that depriving a civilian population of the means for their survival is inhumane, and constitutes an “other inhumane act” against them. In *Prosecutor v. Kupreškić*, for example, the ICTY found that the “destruction of the livelihood of a certain population . . . may have the same inhumane consequences as a forced transfer or deportation.” As *Kupreškić* suggests, destroying the means of a peoples livelihood is inhumane in a sense similar to other portions of the Statute, for example Article 7(1)(d) of the Rome Statute, and fitting as an “other inhumane act”.

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<sup>205</sup> *Katanga*, Decision on the Confirmation of Charges, para. 448.

<sup>206</sup> *Id.* at paras. 450-55 (determining that the great suffering or serious injury occur by means of the inhumane act).

<sup>207</sup> See, e.g., *id.* at paras. 449, 456-57 (finding conduct to be an “other inhumane act” under the Rome Statute, pursuant to the ICTY case Trial Chamber, *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgement 3 Mar. 2000, para. 239 and analyzing the events in question under *Blaskic*).

<sup>208</sup> See, e.g., *Martinović*, Trial Judgment, para. 246 (noting cruel and inhumane treatment comprise the same conduct, both of which may be less than torture)

<sup>209</sup> See *Prosecutor v. Dario Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 39 n. 34 (*Kordić*, Appeal Judgment) (“Trench digging may under certain circumstances amount to cruel treatment . . . The Appeals Chamber in this case considers that the same applies for inhuman treatment.”).

<sup>210</sup> *Prosecutor v. Naletilic and Martinovic*, Trial Judgment, IT-98-34-T, 31 March 2003, paras. 279, 334 (finding the defendant was guilty of “other inhumane acts” for using prisoners to perform acts on the front line such as clearing bodies).

<sup>211</sup> *Prosecutor v. Kordić and Čerkez*, Trial Judgment, IT-95-14/2-T, 26 Feb. 2001, para. 256 (finding the use of persons as human shields is inhuman treatment)

<sup>212</sup> See Trial Chamber, *Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 153 (“The Chambers is in no doubt that” such conduct would be another inhumane act “when the perpetrator knew the act was likely to cause serious mental suffering and was reckless as to whether such suffering would result.”)

<sup>213</sup> Trial Chamber, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 Sept. 1998, para. 697 (finding defendant guilty of “other inhumane acts” for forcing a woman to sit naked in the mud, or to publically exercise or march nude).

<sup>214</sup> *Kvočka* Trial Judgment, para. 209.

Indictments under the ICTY have been issued for similar acts, characterizing the denial of necessities to those under the defendant's control as "other inhumane acts."<sup>215</sup> The Rome Statute states, under the section for war crimes, that one "serious violation[] of the laws and customs" of international humanitarian law is "depriving persons of objects indispensable for their survival [and] willfully impeding relief supplies."<sup>216</sup>

225. Finally, in order to constitute an "other inhumane act," the perpetrator must have the requisite mental culpability. Article 30 of the Statute requires that the perpetrator must intend to engage in the conduct in question, and be aware (or also intend) that the criminal consequences will likely result. Secondly, according to section 7(1)(k)(3) of the Elements of Crimes, the perpetrator must be aware of the factual circumstances that establish the character of the act, i.e. he or she must be aware of the facts that make the act similar to other crimes against humanity.<sup>217</sup>

226. In this situation, a reasonable basis to believe that other inhumane acts were in the course of the Israeli offensive and the Prosecutor should move to investigate these crimes. For example, Israel has in many ways deprived Palestinians of their means of subsistence, and of necessary services. The information gathered by the Palestinian Human Rights Organizations set forth above, in relation to the attacks committed in the course of "Operation Protective Edge" and in the context of the ongoing occupation and blockade, support opening an investigation into such deprivations, including through destroying fields and other means of sustaining a livelihood. Furthermore, the UN Commission of Inquiry found that, during the

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<sup>215</sup> See, e.g., *Prosecutor v. Dragan Nikolic*, IT-94-2-I, *Indictment*, 4 November 1994, para 24.1 (indictment for, *inter alia*, "participating in inhumane acts against more than 500 civilians . . . by endangering the health and welfare of detainees by providing inadequate food, . . . by providing living conditions failing to meet minimal basic standards, and by creating an atmosphere where detainees feared for their personal safety . . . as part of a widespread or systematic attack directed against a civilian population, an offense recognized [as an 'other inhumane act']"). That detaining a population and depriving them of their means of subsistence could constitute an inhumane act, expressed by the ICTY is hardly novel, and reaches back about as far as international criminal law itself. See, e.g., *The Charter and Judgement of the Nuremberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, UN Sales No. 1949.V.7, 1949, p. 67 ("The phrase 'and other inhumane acts' indicates that the list of explicitly named activities is not exhaustive. It could be asked, for instance, whether deprivation of means of sustenance might not be considered an 'inhumane act.'").

<sup>216</sup> Article 8(2)(b)(xxvi); Article 30.

<sup>217</sup> See *Katanga*, Decision on the Confirmation of Charges, para 455. See also Trial Chamber, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, 17 Jan. 2005, para. 628: "It is required that the perpetrator, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or that the perpetrator knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act."

offensive, the continued “blockade of Gaza by Israel . . . was strangling the economy in Gaza and imposed severe restrictions on the rights of the Palestinians.”<sup>218</sup> The Commission also found that Palestinians’ right to an adequate standard of living, and to food, work, health, water and sanitation (all of which the Palestinian Human Right Organizations have documented) had been challenged by the blockade and offensive, noting that almost the entire population of Gaza was also dependent on food aid during the conflict.<sup>219</sup> In this context the UN Commission of Inquiry found that international human rights law requires that Israel cease the blockade.<sup>220</sup>

227. There are also many reports that Israel has forced children to perform tasks on the front line that endangered them under its “neighbor policy,” namely proceeding before soldiers to open doors and devices in order to detonate bombs so that they would kill the children rather than Israeli soldiers.<sup>221</sup>

#### **iv. Nexus between Individual Acts and the Attack**

228. With regard to establishing a nexus between the acts and the attack at the investigations stage, the pre-trial chamber in the Kenya investigation determined that: “the issue of whether an act was committed as part of a widespread or systematic attack needs to be analyzed on a case-by-case basis with regard to each particular act. At the current stage of the proceedings, the Chamber merely considers the situation as a whole without focusing beyond what is necessary for the purpose of the present decision on specific criminal acts.”<sup>222</sup> All of the acts alleged herein were committed as part of the widespread or systematic attack on Palestinian civilians of Gaza in the context of operation “Protective Edge,” which was carried out during Israel’s prolonged belligerent occupation of *inter alia* Gaza. “The nature, aims and consequences”<sup>223</sup> of the acts follow the same pattern and were committed against the same type of victims; the acts set forth herein cannot be qualified as isolated or random acts.

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<sup>218</sup> 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 54.

<sup>219</sup> *Id.* at ¶¶ 587-88.

<sup>220</sup> *Id.* at ¶ 599.

<sup>221</sup> See Section IV(D)(i).

<sup>222</sup> Kenya Authorization to Investigate Decision, para 135.

<sup>223</sup> See *Katanga* Trial Judgment, para. 1124.



## **B. Legal Requirements for War Crimes under Article 8 of the ICC Statute**

229. In order to establish that a war crime under Article 8 of the ICC Statute has been committed, it must be demonstrated that:

i. the existence of an international armed conflict covered by the Geneva Conventions of 12 August 1949 or the laws and customs applicable in international armed conflict;

*or*

the existence of an armed conflict not of an international character covered by common Article 3 of the four Geneva Conventions of 12 August 1949 or the laws and customs applicable in armed conflicts not of an international character;

ii. relevant conduct as set out in Article 8(2)(a), (b), (c) or (e) of the ICC Statute;

iii. the conduct took place in the context of, and was associated with, the armed conflict; and

iv. the perpetrator had the requisite knowledge and intent.<sup>224</sup>

230. Of particular importance to this Situation, it is recalled that the Elements of Crimes makes clear that “[t]he term ‘international armed conflict’ includes military occupation.”<sup>225</sup> This provision accords with Common Article 2 of the 1949 Geneva Conventions, applicable to international armed conflicts, which provides:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

*The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.* (emphasis added).<sup>226</sup>

231. Because the occupation of Palestine, including Gaza, continues, the Geneva Conventions and Additional Protocol I continue to apply in the occupied Palestinian Territory, including Gaza. As the ICRC Commentary on Article 3 (“Beginning and end of application”) explains:

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<sup>224</sup> See Elements of Crimes.

<sup>225</sup> Elements of Crimes, Art. 8 (2)(a)(i)-no. 4, n. 34. It further states: “This footnote also applies to the corresponding element in each crime under Article 8 (2) (a).” See also *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgement pursuant to Article 74 of the Statute, 14 Mar. 2012, (hereinafter “*Lubanga Trial Judgment*”), n. 1651.

<sup>226</sup> See also Additional Protocol I, Art. 3 (provides that the application of the Geneva Conventions and Additional Protocol I shall cease “in the case of occupied territories, on the termination of the occupation.”).

The termination of occupation may occur a long time after the beginning of that occupation, and can come about in many ways, de facto or de jure, depending on whether it ends in the liberation of the territory or its incorporation in one or more States in accordance with the right of the people or peoples of that territory to self-determination. The occupation as such does not affect the legal status of the occupied territory, as confirmed by Article 4.<sup>227</sup>

232. The Trial Chamber in the *Lubanga* case affirmed that the existence of a military occupation accords the status of international armed conflict, for the purposes of war crimes under both Article 8(2)(a) and 8(2)(b) of the Statute.<sup>228</sup> As one leading scholar opined:

the relevant question is not what type of conflict exists between the State and the non-State group but what law applies to the acts of an occupying power within occupied territory. It is important to note that the law of occupation is not just about the relationship between two contending States and not just a means of indicating the temporary nature of the authority of the occupier vis-à-vis that of a territorial State. *The law of occupation is also a means of regulating what may well be the tense relationship between the occupying power and the persons within the occupied territory and a means of providing restraint with regard to how the occupier treats the local population. The tension between the occupier and the local population may well result in acts of hostilities but the fact that the local population has chosen to rise up in arms does not free the occupier from the restraints it otherwise has. Indeed it out to strengthen those restraints.* The law of occupation is no less necessary in those situations. (emphasis added).<sup>229</sup>

233. Notably, international law places “more onerous duties on an occupying power than on a party to an international armed conflict.”<sup>230</sup>

234. Israel ratified the four Geneva Conventions of 1949 in 1951. The State of Palestine acceded to the four Geneva Conventions of 1949 on 2 April 2014. Palestine acceded to Additional Protocol I on 2 April 2014. The Hague Regulations of 1907, the Geneva Conventions of 1949 and Additional Protocol I are considered to largely reflect customary international law.<sup>231</sup>

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<sup>227</sup> Commentary to Additional Protocol I, para. 156.

<sup>228</sup> *Lubanga* Trial Judgment, para. 542.

<sup>229</sup> Dapo Akande, “*Classification of Armed Conflicts: Relevant Legal Concepts*,” in Elizabeth Wilmhurst, INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 47.

<sup>230</sup> *Martinović*, Trial Judgment, para. 214.

<sup>231</sup> Article 4 of Additional Protocol I provides that the application of the Geneva Conventions and API “shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the question of the application of the Conventions and this Protocol shall affect the legal status of the territory in question.”

235. The Palestinian Human Rights Organizations submit that a number of war crimes were committed in the context of the ongoing belligerent occupation and in the course of the July-August 2014 Israeli military offensive in Gaza by Israeli forces, such that there exists a reasonable basis to believe that war crimes under Articles 8(2)(a) and (b) were committed in an international armed conflict and for which a reasonable basis to believe exists that senior Israeli military and government officials bear individual criminal responsibility.<sup>232</sup>

**i. The contextual element: Existence of an armed conflict, its character and nexus to the individual acts**

236. The term “armed conflict” is not defined in the Geneva Conventions or the ICC Statute. However, Article 8(2)(f) of the ICC Statute and ICC jurisprudence reflect the definition articulated by the ICTY Appeals Chamber in *Tadić*:

[...] an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>233</sup>

237. In terms of occupation, the Hague Regulations of 1907 provide that: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be

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<sup>232</sup> Should the Prosecutor determine that the hostilities in Gaza during July/August 2015 were committed in the course of a non-international armed conflict, the Palestinian Human Rights Organizations would urge the Prosecutor to investigate crimes committed under Article 8(2)(c) and 8(2)(e); the Palestinian Human Rights Organizations respectfully submit, however, that the widely held consensus that Gaza was occupied through the course of the offensive warrants the Prosecutor’s examination of grave breaches, at least, under 8(2)(a), even if the crimes that the Organizations put forward under Article 8(2)(b) are instead investigated under Article 8(2)(e).

<sup>233</sup> *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (hereinafter “*Tadić* Jurisdiction Decision”) See also *Lubanga* Trial Judgment, para. 533.

The ICRC Commentary on Common Article 2 of the 1949 Geneva Conventions is instructive: Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict last, or how much slaughter takes place. The respect due to the human person as such is not measured in the number of victims.

ICRC Commentary on Geneva Convention IV, p. 20. See *Bemba* confirmation of the charges decision, paras. 220-223.

exercised.”<sup>234</sup> The key element of a belligerent occupation is “effective control” over an area, which is defined as “sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.”<sup>235</sup>

238. Similarly, Trial Chamber I found in *Lubanga* that:

territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.<sup>236</sup>

239. The Pre-Trial Chamber in *Lubanga*, drawing on the *Tadić* decision and Common Article 2 to the 1949 Geneva Conventions, affirmed that occupation occurs in an armed conflict that is international in character, in finding that such a conflict exists:

if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance.<sup>237</sup>

240. From at least 7 July -26 August 2014, there existed a state of protracted violence between Israel and Palestinian armed resistance groups in Gaza, which occurred in the context of the ongoing belligerent occupation of the territory of the State of Palestine, including Gaza, which continues until today.<sup>238</sup> Israel controlled the means of entry and exit to Gaza, including by land and sea, and had the capacity to send troops into the area, as evidenced most markedly by its ground invasion of Gaza on 17 July 2014. Israel regularly moved its forces into the so-called “buffer zone” which falls outside the Green Line, in the territory of Gaza.<sup>239</sup>

241. Notably, “the application of the law of occupation as it effects ‘individuals’ as civilians protected under the Fourth Geneva Convention does not require that the occupying

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<sup>234</sup> Hague Regulations of 1907, Art. 42. The Hague Regulations reflect customary international law. See also Common Article 2 of the 1949 Geneva Conventions.

<sup>235</sup> *Martinović* Trial Judgment, para. 217. *Id.* (identifying guideline for “occupation” as “the occupying power has issued and enforced directions to the civilian population”). There is no requirement that an entire territory be occupied. *Id.* at para. 218. See also *Tadić* Appeal Judgment, para 137 (defining what constitutes overall control and when armed forces may be regarded as acting on behalf of a foreign power, thereby rendering an apparently internal conflict international);

<sup>236</sup> *Lubanga* Trial Judgment para. 542.

<sup>237</sup> Pre-Trial Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, 29 Jan. 2007, para. 209, relying on I.C.J., *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, I.C.J. Reports 2001, 19 Dec. 2005.

<sup>238</sup> See, e.g., 2015 UN Commission of Inquiry Report, *supra* n. 7.

<sup>239</sup> See, e.g., Al-Haq, *Shifting Paradigms – Israel’s enforcement of the Buffer Zone in the Gaza Strip*, *supra* n. 39.

power have actual authority... a state of occupation exists upon their falling into ‘the hands of the occupying power.’”<sup>240</sup>

242. It is a requirement of crimes under Article 8(2)(a) that the victims were “protected persons” under the relevant Geneva Convention. For the purposes of this submission, “protected persons” under the Fourth Geneva Convention includes persons “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.”<sup>241</sup> The Commentary to Geneva Convention IV, relating to Article 4 advises: “[t]he expression ‘in the hands of’ is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or ‘hands’ of the Occupying Power.”<sup>242</sup>

243. According to the Commentary to Geneva Convention IV, there are two types of protected persons: (i) enemy nationals and (ii) “the whole population” of occupied territories (excluding nationals of the Occupying Power).<sup>243</sup> The Trial Chamber in the *Martinović* case found “that the expression “in the hands of” a party or occupying power, as it appears in Article 4 of Geneva Convention IV, refers to persons finding themselves on the territory controlled by that party or occupying power.”<sup>244</sup>

244. With respect to the nexus between the conduct alleged and the armed conflict, it is a requirement that the conduct took place in the context of, and was associated with, the armed conflict.<sup>245</sup> The existence of an armed conflict nexus is established if the alleged crimes “were closely related to the hostilities.”<sup>246</sup>

245. All of the alleged crimes set forth herein were committed against Palestinian civilians living in the territory of Palestine, in Gaza, under effective control of the Israeli forces, and were closely related to the hostilities.

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<sup>240</sup> *Martinović* Trial Judgment, para. 221. See also, Commentary to Geneva Convention IV, p. 47. (“It is possible that this power will never actually be exercised over the protected person.”).

<sup>241</sup> Geneva Convention (IV), Art. 4.

<sup>242</sup> Commentary to Geneva Convention IV, p. 47.

<sup>243</sup> See Commentary to Geneva Convention IV, p. 46. *Martinović* Trial Judgment, para. 205.

<sup>244</sup> *Id.* at para. 208.

<sup>245</sup> *Tadić* Jurisdiction Decision, para 70.

<sup>246</sup> See *Martinović* Judgment, para. 180 (finding that the acts charged “were committed in the course, and as a consequence, of the armed conflict between the HVO and the ABiH” and that the victims were living within the relevant territory in the relevant period”).

## **ii. Threshold Considerations- Article 8(1) of the Statute**

246. Article 8(1) of the ICC Statute provides that:

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

247. Article 8(1) has been described as a “practical guideline” rather than a strict or determinative requirement.<sup>247</sup> The Appeals Chamber in the *Situation in the Democratic Republic of the Congo* found that the requirement in Article 8(1) is not absolute as it is qualified by the expression “in particular.”<sup>248</sup> Indeed, “[p]lan, policy, and scale are not elements of war crimes,” but can serve as a guide to the Prosecutor as to when to commence investigations.<sup>249</sup>

248. The Palestinian Human Rights Organizations recall that particularly at this early stage of a preliminary examination, it is important to distinguish between the analysis of whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, and the analysis of whether a crime is of sufficient “gravity” to justify further action by the Court. Whereas “gravity” is a formal requirement concerning the admissibility of a situation or case under Article 17, discussed below, the reference in Article 8(1) to war crimes “committed as part of a plan or policy or as part of a large scale commission,” forms a non-mandatory part of the contextual elements of war crimes under the ICC Statute.

249. During the time relevant to the acts set forth herein, Gaza was – and remains – subjected to belligerent military occupation by Israel.

## **iii. The Required Mental Element**

250. With respect to the mental elements of war crimes under the ICC Statute, Article 30 provides:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

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<sup>247</sup> *Bemba*, Confirmation of Charges Decision, para. 211. The Pre-Trial Chamber stated that this is “not a prerequisite for the Court to exercise jurisdiction over war crimes ...it rather serves as a practical guideline for the Court.”

<sup>248</sup> *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, article 58,” 13 July 2006, para. 70.

<sup>249</sup> Triffterer Commentary, p. 181.

251. In addition, for each war crime under Article 8 of the ICC Statute, the Elements of Crimes requires that the perpetrator was aware of the factual circumstances that established the existence of the armed conflict and the protected status of the victim(s).

#### **iv. The Individual Crimes**

#### **v. Crimes Against Persons**

##### ***Article 8(2)(a)(i), Wilful killing***

252. In accordance with Article 8(2)(a)(i) of the Rome Statute, the conduct in question constitutes the war crime of “willful killing” within the jurisdiction of the Court. The Elements of Crimes specify that willful killing occurs when (1) “the perpetrator killed one or more persons” and (2) “[s]uch person or persons were protected under one or more of the Geneva Conventions of 1949.”<sup>250</sup>

253. ICTY precedent, which the ICC has adopted,<sup>251</sup> establishes that the *actus reus* for “killing” is met whether the perpetrators conduct, through action or omission, “substantially contributed to the death of the victim.”<sup>252</sup> The *mens rea* for willful killing requires intent to cause “death or bodily injury”<sup>253</sup> and may be circumstantially inferred from the perpetrators conduct.<sup>254</sup>

254. As set forth above, protected persons include persons who, in the course of a military occupation, find themselves in the hands of the Occupying Power, which includes “the mere fact of being ...in occupied territory.”<sup>255</sup> It must only be shown that perpetrators knew “that the victim belonged to an adverse party to the conflict.”<sup>256</sup> This status may also be established when protected persons are determined to be “in the hands of” a party to the conflict, meaning when that individual is in the territory under the control of such a party.<sup>257</sup> In this regard, it is recalled that Israel has the status of Occupying Power vis-à-vis Gaza.

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<sup>250</sup> See also *Katanga*, Decision on the Confirmation of Charges, para 286.

<sup>251</sup> *Id.* para 296; *Čelebići* Trial Chamber Judgment, para. 424 and *Kordić* Trial Judgment para.229.

<sup>252</sup> *Brdjanin*, Trial Judgment para. 382.

<sup>253</sup> *Kordić*, Appeal Judgment) para. 36

<sup>254</sup> *Brdjanin*, Trial Judgment para. 387

<sup>255</sup> Commentary to Geneva Convention (IV), p. 47.

<sup>256</sup> Rome Statute, Elements of Crimes, Note 33.

<sup>257</sup> *Katanga*, Decision on the Confirmation of Charges, para 292

255. It must also be demonstrated that “the perpetrator was aware of the factual circumstances that established that protected status.”<sup>258</sup> However, this element does not require that perpetrators “evaluate the protective status” of victims, but only that they were aware of the circumstances that would grant them such status.<sup>259</sup> It is submitted that Israel was aware of the presence of civilians, including children, throughout Gaza, and in particular, in areas where they carried out bombings, shellings and other uses of force that can cause injury or death, and that Israel was aware of the civilian or protected nature of infrastructures that were wholly or partly destroyed through bombardment, including residences, schools, mosques and hospitals.

***Article 8(2)(a)(ii), Torture or inhuman treatment***

256. “Torture” as a grave breach means the intentional infliction of “severe physical or mental pain or suffering upon one or more” protected persons, as understood under the 1949 Geneva Conventions.<sup>260</sup> Permanent injury is not a requirement.<sup>261</sup> Torture under Article 8 of the ICC Statute must serve a specific purpose, although torture itself need not be the sole purpose of the action. Specifically, the infliction of such pain or suffering must be carried out with the intention of “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.”<sup>262</sup> Unlike Article 1 of the Torture Convention, there is no requirement that torture, as a war crime, be carried out “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>263</sup>

257. The grave breach of inhuman treatment is the intentional infliction of “severe physical or mental pain or suffering upon one or more persons.”<sup>264</sup> The scope of inhuman treatment is wide. In *Čelebići*, the ICTY Trial Chamber found that the crime of inhuman treatment went beyond the scope of torture and wilfully causing great suffering, to encompass crimes which “violate the basic principle of humane treatment, particularly the respect for human

<sup>258</sup> Rome Statute, Elements of Crimes, Note 32.

<sup>259</sup> *Katanga, Decision on the Confirmation of Charges*, para 297

<sup>260</sup> Elements of Crimes, Article 8(2)(a)(ii)-1.

<sup>261</sup> *Kvočka*, Trial Judgment para. 148.

<sup>262</sup> Elements of Crimes, Article 8 (2) (a) (ii) -1(2). See Article 8 (2) (c) (i)-4.

<sup>263</sup> International Committee of the Red Cross, Customary IHL Database, *Rule 90: Torture and Cruel, Inhuman or Degrading Treatment*, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule90](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90).

<sup>264</sup> Elements of Crimes, Article 8(2)(a)(ii)-2. Note that there is no requirement that the act be carried out for a specific purpose (as opposed to torture). See, e.g., *Čelebići* Trial Judgment para. 1040; ICRC Commentary to Geneva Convention IV, p. 599.



dignity.”<sup>265</sup> However, the threshold of suffering required for conduct to be deemed inhuman treatment is lower than for torture.<sup>266</sup>

258. In relation to this crime, the Palestinian Human Rights Organizations urge the Prosecutor to consider not only the severe physical pain that Palestinian civilians were subjected to, but also the profound mental harm they suffered – and continue to suffer – because of *inter alia* the nature of the attacks; the level of terror and fear they endured through 51 days of attacks during which their mindset was one of fear for themselves, their families and their children because of the believe, especially after attacks on UN shelters and hundreds of residential buildings, that there was “no safe place in Gaza,” and the horror of seeing loved ones killed and bodies mutilated in the course of bombardment and missile strikes on their homes, including, in a number of instances, the dismembered bodies of female pregnant family members and neighbors.

***Article 8(2)(a)(iii), Wilfully causing great suffering, or serious injury to body or health***

259. In accordance with Article 8(2)(a)(iii) of the Rome Statute, the crime of wilfully causing great suffering, *or* serious injury to body or health, is elaborated in the Elements of Crime as causing “great physical or mental pain or suffering to, *or* serious injury to body or health of, one or more persons.”<sup>267</sup> The elements of the crime are set out in the alternative.<sup>268</sup> For the purpose of proving serious mental health or physical injury, it is not necessary to show that the effects are permanent. “Moral suffering” has been found to fall within the mental component of “causing great suffering.”<sup>269</sup> Among the acts that constitute this crime are beatings, mistreatment including burning and forcing to drink urine, and acts that constitute a “serious affront to human dignity.”<sup>270</sup> As a grave breach of the 1949 Geneva Conventions, this crime must be committed against protected persons.

260. “Wilfully” has been found to include intent and recklessness, and excludes “mere negligence.”<sup>271</sup>

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<sup>265</sup> *Čelebići* Trial Judgment, para. 442.

<sup>266</sup> *Martinović*, Trial Judgment, para 246.

<sup>267</sup> Elements of Crimes, Art. 8(2)(a)(iii)(1). Emphasis added. See *Čelebići* Trial Judgment, para.511.

<sup>268</sup> See, e.g., *Čelebići* Trial Judgment, para. 506.

<sup>269</sup> *Id.* at para. 509.

<sup>270</sup> *Id.* at paras. 1018, 1026 and 1039.

<sup>271</sup> Trial Chamber, *Prosecutor v. Stanislav Galić*, IT-98-29-T, Judgement, 5 December 2003 para. 54 (hereinafter “*Galić*, Trial Judgement”); The Commentary to Article 85 of Additional Protocol I explains the term as follows:

261. There is a reasonable basis to believe that the crime of wilfully causing great suffering or serious injury to body or health was committed in the course of Operation “Protective Edge.” The Palestinian Human Rights Organizations have document myriad cases of physical injuries to Palestinian civilians, including disabled persons, elderly and children, and note that in numerous cases the injuries were exacerbated because of the type of weapon used. As discussed in the context of torture and cruel treatment, the mental harm inflicted on Palestinian civilians – *inter alia* because of the nature, length and unpredictability of the attacks, because of the inability to provide medical services to injuries loved ones or collect the bodies of the dead, because of the large number of casualties inflicted on single families, because of the nature of the physical injuries that many Palestinian suffered or witnessed, and because of the inability to resume “normal” life after the offensive ended due to extensive destruction and the ongoing closure – is profound. The severe harm due to the medical infrastructure, in particular, adversely affects the health of the population of Gaza.

***Article 8(2)(b)(i), Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities***

262. In accordance with Article 8(2)(b)(i) of the Rome Statute,<sup>272</sup> the conduct in question constitutes the war crime of “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” within the jurisdiction of the Court. The Elements of Crimes specify that this crime, which is derived from Article 85(3)(a) of Additional Protocol I in conjunction with Article 51(2) and (3),<sup>273</sup> occurs when:

- i) The perpetrator directed an attack.
- ii) The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.<sup>274</sup>

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*wilfully*: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', *viz.*, the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, *i.e.*, when a man acts without having his mind on the act or its consequences.

<sup>272</sup> It is recalled that pursuant to the chapeau to Article 8(b), all crimes under this provision arise out of and should be interpreted consistently “within the established framework of international law.”

<sup>273</sup> See H. von Hebel and D. Robinson, “Crimes within the Jurisdiction of the Court, in Roy S. Lee, Ed. *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 109.

<sup>274</sup> See *Galić* Trial Judgment, para. 47: defining civilian “as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict.”

In relation to the loss of protection for civilians who directly participate in hostilities, that phrase means “acts of war which by their nature or purpose are likely to cause actual harm to the

iii) The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.<sup>275</sup>

263. The Palestinian Human Rights Organizations recall that there is “an absolute prohibition on the targeting of civilians in customary international law and the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.”<sup>276</sup>

264. Relevant ICTY precedent establishes that any “acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities” are sufficient to establish the *actus reus*.<sup>277</sup> The ICC Pre-Trial Chamber reviewing the charges brought against Ntaganda elaborated upon what constitutes an “attack”:

in principle, any conduct, including shelling, sniping, murder, rape, pillage, attacks on protected objects and destruction of property, may constitute an act of violence for the purpose of the war crime of attacking civilians, provided that the perpetrator resorts to this conduct as a method of warfare and, thus, that there exists a sufficiently close link to the conduct of hostilities.<sup>278</sup> The Pre-Trial Chamber found relevant “whether superiors ordered or instructed subordinates to use this conduct in a military operation and whether the soldiers effectively resorted to this conduct in the field to take control

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personnel or material of the enemy armed forces, is suspended when are for such time as they directly participate in hostilities. See *Galić*, Trial Judgment, para. 48.

Moreover, the presence of “inhabitants who were members of the self-defence group [who] participated directly in hostilities” or “soldiers [who] were dressed in civilian clothing, does not negate the fact that “most of the inhabitants were readily identifiable as civilians who were not taking part in combat;” in assessing whether the crime has been committed, the status of each victim should be assessed. *Katanga*, Trial Judgment, para. 729-730.

<sup>275</sup> ICC Statute, Elements of Crimes

<sup>276</sup> *Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeal Judgement, 30 November 2006, para. 130 (internal citations omitted) (hereinafter “*Galić*, Appeal Judgment”) See Additional Protocol I, Art. 51(2). The *Galić* Trial Chamber explained elaborated:

The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives. In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice described the principle of distinction, along with the principle of protection of the civilian population, as “the cardinal principles contained in the texts constituting the fabric of humanitarian law” and stated that “States must never make civilians the object of attack [...]”. *Galić* Trial Judgment, para. 45 (emphasis in original; internal citations omitted).

<sup>277</sup> Trial Chamber, *Prosecutor v. Pavle Strugar*, ICTY IT-01-42-T, Judgment, 31 Jan. 2005, para. 283 (hereinafter “*Strugar* Trial Judgment”). See also *Ntaganda* Confirmation of Charges Decision, para. 45.

<sup>278</sup> Pre-Trial Chamber, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda 9 June 2014, para. 46 (hereinafter “*Ntaganda* Confirmation of Charges Decision”).

of a certain location.”<sup>279</sup>

265. Notably, attacking the civilian population does not need to be the sole aim of the attack; such attack can simultaneously have a military objective.<sup>280</sup> In the *Galić* case, adjudicating crimes arising out of the siege of Sarajevo, the Trial Chamber found that “certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of the attack.”<sup>281</sup> The Chamber further found that “attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians”<sup>282</sup> – a finding with the Appeals Chamber affirmed, holding that “a direct attack can be inferred from the indiscriminate character of the weapon used” and that “the indiscriminate character of an attack can assist [a trial chamber] in determining whether the attack was directed against the civilian population.”<sup>283</sup>

266. Likewise, “indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians.”<sup>284</sup>

267. The crime of intentionally directing an attack against a civilian population must be

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<sup>279</sup> *Id.*, para. 48.

<sup>280</sup> See *Katanga* Confirmation of Charges Decision, para. 273. The Pre-Trial Chamber explained:

In such a case, the crime is committed when an attack is launched against a village which has significant military value because of its strategic location and when the village contains two distinct targets:

- (i) the defending forces of the adverse or hostile party in control of the village (that is, when only the defeat of these forces would permit the attacking party to seize control of the village); and
- (ii) the civilian population of the village, if its allegiance is with the adverse or hostile party in control of the village thus leading the attacking forces to consider the “destruction” of that civilian population as the best method for securing control of the village once it has been seized.

<sup>281</sup> *Galić* Trial Judgment, para. 60. A determination should be made on a case-by-case basis, based on the evaluation of evidence, including factors such as:

distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight. See *id.* at para. 133.

<sup>282</sup> *Galić* Trial Judgment, para. 57, n. 101. For example, in the *Blaškić* case, the Trial Chamber “inferred from the arms used in an attack carried out against the town of Stari Vitez that the perpetrators of the attack had wanted to target Muslim civilians, since the same arms were difficult to guide accurately, their trajectory was ‘irregular’ and non-linear, thus being likely to hit non-military targets.” *Blaškić* Trial Judgment, paras. 501-502.

<sup>283</sup> *Galić* Appeal Judgment, para. 132.

<sup>284</sup> *Martić* Trial Judgment, para. 69, referring to *Galić* Appeal Judgment, para. 132.

distinguished, however, from the crime of launching a disproportionate attack against a military objective.<sup>285</sup>

268. The Trial Chamber's assessment of the charge of attacks against civilians in the *Katanga* case is instructive:

from the timing of the attacks and the means and methods used – encirclement of the village whilst its inhabitants were still asleep; use of machetes to strike them directly and at close range; shooting indiscriminately or directly at the villagers, whether during or after the fighting, in their homes, as they fled or when they had taken shelter in the Institute or in the bush; the civilian death toll, including 13 children, many women and elderly people – the Chamber finds beyond reasonable doubt that Ngiti combatants directly targeted the predominantly Hema civilian population of Bogoro on 24 February 2003.<sup>286</sup>

269. As for *mens rea*, the ICTY looked to Article 51(2) of Additional Protocol I,<sup>287</sup> and found that the perpetrator must act “wilfully,” which includes wrongful intent or recklessness, but does not include “mere negligence.”<sup>288</sup> In the *Katanga* case, the Pre-Trial Chamber explained in the decision on the confirmation of charges that Article 8(2)(b)(i) is “a crime of mere action, that does not require any factual consequences or any awareness of the perpetrators of the consequences of the attack.”<sup>289</sup>

270. The Palestinian Human Rights Organizations submit that a reasonable basis exists to believe that the crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities were committed in the course of the Israeli military offensive thereby warranting the opening of an investigation into this crime. Attacks on residential buildings – even when purportedly aimed at a member of a Palestinian armed resistance group (a claim that has not been properly established nor which includes support for a finding that an individual was directly participating in hostilities as understood under international humanitarian law so as to warrant losing civilian protection) –

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<sup>285</sup> See *Katanga* Confirm of Charges Decision, para. 274.

<sup>286</sup> *Katanga* Trial Judgment, para. 878. See also *id.* at para. 872 ((in assessing attack against civilians, noting “the village was attacked very early in the morning, when it was still dark and the villagers were still at home asleep, and the attackers arrived from all directions, making escape very difficult”).

<sup>287</sup> See Additional Protocol I, Art. 85(3)(a), specifying that “making the civilian population or individual civilians the object of attack” constitutes a grave breach of the Protocol “when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health.”

<sup>288</sup> See, e.g., *Galić* Appeal Judgment, para. 140. See also *Galić* Trial Judgment, para. 596 (finding that acts “were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness”). See also *id.* at paras. 54-55.

<sup>289</sup> *Katanga* Confirm of Charges Decision, para. 274, n. 374.

were done in a manner and method that raises legitimate questions of whom the intended target was, as the timing of attacks (often in the middle of the night or at times when a large number of children or women, in particular, were present), the weapons used which did not and could not distinguish between civilians purportedly taking part in hostilities and civilians who were not,, and the continual use of such tactics, with such deadly consequences and large civilian death counts over the course of 51 days without modification, demonstrates recklessness, at a minimum, if not wrongful intent.

***Article 8(2)(b)(iv), Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread severe damage to the natural environment clearly excessive to concrete overall military advantage anticipated***

271. Article 8(2)(b)(iv) of the Rome Statute relates to the prohibition on disproportionate attacks and attacks against the natural environment. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians *or* damage to civilian objects or widespread severe damage to the natural environment not justified by military necessity requires that *inter alia*:

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage *would be of such an extent as to be* clearly excessive in relation to the concrete and direct overall military advantage anticipated.
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated. [...]

272. The text of Article 8(2)(b)(iv), which draws on the principles in Article 51(5)(b) of Additional Protocol I, was drafted so as to reach “the most serious criminal conduct of concern to the international community, not mere errors of judgement by commanders in the field.”<sup>290</sup>

273. In terms of the second requirement, the Elements of Crimes explains “concrete and direct overall military advantage” as:

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<sup>290</sup> H. von Hebel and D. Robinson, *supra* n. 275, at 111.

a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict [i.e., attacks against civilians]. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.<sup>291</sup>

274. The foreseeability requirement was intended “to exclude advantages which are vague and, more importantly, to exclude reliance on *ex post facto* justifications.”<sup>292</sup> “Overall” was not understood as referring to long-term political advantages of “winning of a war *per se*.”<sup>293</sup>

275. With regard to the third requirement, the Elements of Crimes provide: “this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time.”<sup>294</sup> As Pre-Trial Chamber I found, “the awareness of the perpetrators is an objective element of the crime.”<sup>295</sup>

276. The ICC has not yet had the occasion to adjudicate this crime. It was addressed, however, in the context of the discussion on intentionally directing an attack against civilians. In the *Katanga and Chui* confirmation of charges decision, the Pre-Trial Chamber explained that “[t]he situation in which an attack is launched solely against a military objective, and in which the attackers are aware that such attack will *or may* cause incidental loss of life or injury to civilian persons or civilian objects, is labeled a ‘disproportionate attack’.”<sup>296</sup> The Pre-Trial Chamber determined that Article 8(2)(b)(iv) “is limited to punishing the very violation of the principle of proportionality.”<sup>297</sup>

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<sup>291</sup> Elements of Crimes, n. 36. (emphasis added). See also *Galić* Appeal Judgment, para. 190; Commentary on Additional Protocol I, Art. 51:

In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; moreover even after those conditions are fulfilled, the incidental losses and damage must not be excessive.

<sup>292</sup> K. Dormann, War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes, Max Planck Yearbook of United Nations Law, Vol. 7, 341-407, 386 (2003).

<sup>293</sup> *Id.*

<sup>294</sup> Elements of Crimes, n. 37.

<sup>295</sup> *Katanga* Confirmation of Charges Decision, para. 274, n. 374.

<sup>296</sup> *Id.* (emphasis added).

<sup>297</sup> *Id.*

277. It is recalled that the *only* lawful targets of an attack are military objectives. Military objectives are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>298</sup> The consideration of military necessity is premised on the object of the attack being a military objective. If the target of the attack is not a military objective, the analysis is ended and the attack is deemed unlawful.

278. Notably, indiscriminate attacks that do not distinguish between civilian and non-civilian objects, should also be considered to be directed at civilian objects: “indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.”<sup>299</sup> It is recalled that such attacks are expressly prohibited under Additional Protocol I.

279. The principle of proportionality is related to the principle of distinction. The ICTY has found that:

the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is ‘expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’ *If such casualties are expected to result, the attack should not be pursued.*”<sup>300</sup>

280. Critically, even when civilians have not been removed to the maximum extent feasible from the vicinity of military objectives, this failure “does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.”<sup>301</sup>

281. In addition to prohibiting disproportionate attacks on civilians or civilian objects, Article 8(2)(b)(iv) prohibits “widespread, long-term and severe damage” to the natural

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<sup>298</sup> Additional Protocol I, Art. 52(2).

<sup>299</sup> *Galić* Trial Judgment, para. 57.

<sup>300</sup> *Id.* at para. 58 (emphasis added).

<sup>301</sup> *Id.* at para. 61.



environment that is clearly excessive to the overall military objective anticipated.<sup>302</sup> Although the threshold is “quite high,”<sup>303</sup> the Statute codifies an important prohibition,<sup>304</sup> recognizing harm to the environment itself as well as the impact of such damage to the human population.

282. For the reasons explained in regard to Article 8(2)(b)(iv), the Palestinian Human Rights Organizations submit that a reasonable basis exists to believe that the crime of intentionally launching an attack in the knowledge it will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread severe damage to the natural environment not justified by military necessity was committed in the course of the Israeli military offensive thereby warranting the opening of an investigation into this crime.

283. The Palestinian Human Rights Organizations further submit that the severe damage to the natural environment, including the pollution of the water system and severe damage to, or poisoning of, the soil not justified by military necessity warrants investigation.

#### **vi. Crimes Against Property**

##### ***Article 8(2)(a)(iv), Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly***

284. In regard to the grave breach set forth as a war crime under Article 8(2)(a)(iv), the Elements of Crimes specify that this crime occurs when:

1. The perpetrator destroyed or appropriated certain property protected under the Geneva Conventions.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.<sup>305</sup>

285. Article 53 of Geneva Convention IV defines the protection of property in occupied territory:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public

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<sup>302</sup> See H. von Hebel and D. Robinson, *supra* n. 275, at 112 (damage to the environment constitute a war crime under the ICC Statute when “it has the character of widespread, long-term and severe damage *and* contravenes the proportionality principle.”).

<sup>303</sup> Triffterer, 197.

<sup>304</sup> See also Additional Protocol I, Art. 35(3).

<sup>305</sup> ICC Statute, Elements of Crimes

authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.<sup>306</sup>

286. Looking to Hague Convention IV and the Geneva Conventions,<sup>307</sup> the ICTY Appeals Chamber has held that abiding by the requirement of military necessity means “application of force” in excess of that required to “defeat the enemy” is prohibited.<sup>308</sup> Thus enforcement of this crime entails prohibition on any “on employing arms, projectiles, or material calculated to cause unnecessary suffering.”<sup>309</sup> Military necessity covers only conduct that is lawful; “a [c]onsequently, a rule of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question.”<sup>310</sup>

287. The ICTY also established that “extensive or wanton” destruction requires only that “a considerable number of objects were damaged or destroyed,” and “does not require destruction in its entirety of a city, town or village.”<sup>311</sup>

288. The Palestinian Human Rights Organizations submit that there is a reasonable basis for believing that the crime of extensive and wanton destruction of protected property not justified by military necessity was committed in the course of the Israeli offensive against Gaza. Entire neighborhoods were leveled, including residential buildings, as seen in Rafah, Al-Shuja’iyya, Beit Hanoun and Khuza’a. Overall, 8,377 residential buildings were completely destroyed, along with *inter alia* places of business and agricultural property.

***Article 8(2)(b)(ii), Intentionally directing attacks against civilian objects, that is, objects which are not military objectives***

289. In regard to the war crime set forth in Article 8(2)(b)(ii), the Elements of Crimes specify that this crime occurs when:

- i. The perpetrator directed an attack.
- ii. The object of the attack was civilian objects, that is, objects which are not military objectives.

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<sup>306</sup> The ICRC Commentary on this Article explains, “whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.” P. 302.

<sup>307</sup> See, e.g., Hague Regulations, Art. 23(g).

<sup>308</sup> *Kordić* Appeal Judgment, para. 686.

<sup>309</sup> *Id.*

<sup>310</sup> K. Dormann, War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes, Max Planck Yearbook of United Nations Law, Vol. 7, 341-407, 373 (2003).

<sup>311</sup> *Strugar* Trial Judgment, para. 294.

iii. The perpetrator intended such civilian objects to be the object of the attack.<sup>312</sup>

290. As set forth in Additional Protocol I, Article 52(1), and reflected in ICTY jurisprudence, “civilian property covers any property that could not be legitimately considered a military objective.”<sup>313</sup> Moreover, in cases of doubt as to the military nature of a target, objects in question should be presumed to be civilian in nature.<sup>314</sup>

291. The Palestinian Human Rights Organizations submit that a reasonable basis exists for investigation this crime. The widespread destruction throughout Gaza, in whole or in part, of residential property, hospitals, clinics, mosques, banks, schools, kindergartens, universities and faculties, and sports clubs as carried out over the course of Operation Protective Edge provides a basis for that belief.

#### ***Other crimes under Article 8 of the Statute***

292. The Palestinian Human Rights Organizations submit that there is a reasonable basis to believe that the following war crimes were committed in the course of operation “Protective Edge” and urge the Prosecutor to examine and seek leave to investigate:

- Article 8(2)(b)(iii), Intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance entitled to protection given to civilian objects
- Article 8(2)(b)(v), Attacking or bombarding towns, villages, dwellings or building which are not military objectives
- Article 8(2)(b)(ix), Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments and hospitals, provided they are not military objectives
- Article 8(2)(b)(xxv), Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable for survival, including willfully impeding relief supplies

The Palestinian Human Rights Organizations further submit that the mass displacement of civilians, and the resulting large number of internally displaced persons throughout the course of the offensive and beyond, warrants consideration of the commission of crimes under Article 8(2)(b)(viii).

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<sup>312</sup> Rome Statute, Elements of Crimes

<sup>313</sup> *Strugar* Trial Judgment, para. 282.

<sup>314</sup> See Additional Protocol I, Art. 52(3); *Galić* Trial Judgment, para. 51.

## **VII. Individual Criminal Responsibility of Israeli Military and Political Leaders**

293. The Palestinian Human Rights Organizations submit that there is a reasonable basis to investigating the individual criminal responsibility of senior Israeli civilian and military officials. The Organizations respectfully urge the Prosecutor to investigate whether legal liability attaches pursuant to Article 25(3)(a) of the Statute (commission, joint commission or commission through another person); Article 25(3)(b) of the Statute (ordering and encouragement); Article 25(3)(c) and (d) of the Statute (assistance to a group crime); as well as command responsibility for both civilian superiors and military commanders under Article 28 of the Statute.

294. Based on the foregoing, taking into account the structure of the Israeli government and military, the Palestinian Human Rights Organizations submit that a reasonable basis to believe that persons occupying the leadership civilian and military positions may be considered persons who can be considered to bear the greatest responsibility for the crimes and may bear individual criminal responsibility for their participation and role in the commission of crimes committed in the course of operation “Protective Edge” in the Gaza Strip.

## **VIII. JURISDICTION**

### **A. Jurisdiction of the ICC: The Situation Presented Satisfies the Preconditions for Jurisdiction**

295. As demonstrated by the factual background set out above, and the underlying materials upon which it relies, a reasonable basis to proceed with an investigation exists, and the Prosecutor is urged to submit a request to the pre-trial chamber to proceed with an investigation into crimes committed in the context of “Operation Protective Edge.”

296. The facts presented above demonstrate that crimes that fall within the jurisdiction of this Court have been – and indeed, are being – committed, in that the acts described herein fulfill the temporal requirements set forth in article 11 of the Statute; constitute a crimes against humanity under Article 7 of the Statute and war crimes under Article 8 of the Statute; and meets both the *ratione loci* and *ratione personae* jurisdictional requirements set forth in

Article 12 of the Statute in so far as the crimes have been committed on the territory of a State Party to the Statute and/or have been committed by a national of any such State.<sup>315</sup>

**i. Temporal Jurisdiction**

297. The acts set forth herein satisfy the requirements for establishing temporal jurisdiction over the crimes alleged in that the acts were committed after the date specified in the declaration lodged by the State of Palestine pursuant to Article 12(3) of the Statute, i.e., after 13 June 2014. To the extent that acts committed prior to 13 June 2014 are included in the factual background, they are included to provide context for the crimes<sup>316</sup> that are alleged to have occurred after the Israeli military operation “Protective Edge” commenced on 8 July 2014.

**ii. Territorial Jurisdiction**

298. The acts set forth herein satisfy the requirements for establishing territorial jurisdiction over the crimes alleged in that the acts were committed on territory recognized as falling within the boundaries and being an integral and constituent part of the State of Palestine.<sup>317</sup>

**iii. Material Jurisdiction: Crimes Against Humanity and War Crimes**

299. As set forth above in Section IV and VI, there is a reason basis for believing that crimes under Article 7 (crimes against humanity) and Article 8 (war crimes) were committed in the course of the military offensive launched by Israeli forces in July/August 2014, in the context of a prolonged belligerent occupation.

**IX. ADMISSIBILITY**

300. Due to the absence of national proceedings against those who bear the greatest responsibility for the crimes described herein, and in light of the suggested gravity of the acts committed, the cases that may potentially arise out of the investigation will be admissible. Moreover, there is no reason to believe that opening an investigation into the situation will

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<sup>315</sup> See, e.g., *Kenya Authorization to Investigate Decision*, para. 39; Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, para. 36.

<sup>316</sup> *Prosecutor v. Nahimana et al.*, Judgement, ICTR-99-52-A, 28 Nov. 2007, para. 315; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras. 98, 102; *Akayesu* Trial Judgment, paras. 78-129; *Prosecutor v. Haradinaj et al.*, Decision on Haradinaj’s appeal on scope of partial retrial, IT-04-84bis-AR73.1, 31 May 2011, paras. 39-40

<sup>317</sup> See, e.g., UNSC Res. 242, 338, and 1860.

not be in the interests of justice; the Palestinian Human Rights Organizations and the victims they represent firmly believe that an investigation, and subsequent prosecutions, will serve the interests of justice, in that it will break the cycle of impunity and serve as a deterrent to yet another attack on the civilian population of Gaza.

#### **A. Gravity (Article 17(1)(d) of the ICC Statute)**

301. Four factors are considered in assessing the question of gravity: (1) scale of the crimes; (2) nature of the crimes; (3) the manner of their commission; and (4) the impact on victims and families.<sup>318</sup> In relation to the fourth factor, it is recalled that “the victims’ representations will be of significant guidance for the Chamber’s assessment.”<sup>319</sup>

302. Various chambers have cautioned against setting an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court.<sup>320</sup>

303. The *scale of the crimes* may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).

304. The *nature of commission of the crimes* may be assessed in light of, *inter alia*, whether they were committed on a discriminatory basis, the level and manner of suffering, and who was targeted or harmed, including women, children or disabled persons.

305. The *manner of commission of the crimes* may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.

306. The *impact of crimes* may be assessed in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.

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<sup>318</sup> See OTP Policy Paper on Preliminary Examinations, pp. 15-16.

<sup>319</sup> Kenya Authorization to Investigate Decision, para. 62.

<sup>320</sup> See, e.g. Comoros PTC Decision.

307. The crimes committed in the context of the Israeli military offensive in Gaza are of sufficient gravity to warrant the Prosecution expending its limited resources to investigate and prosecute those individually criminally responsible for the commission of crimes falling within the jurisdiction of the Court.

308. In terms of the scale, the number of civilian victims and the destruction to civilian property over the course of 51-days in the small, closed and densely-populated territory of the Gaza Strip warrants the ICC's involvement.

309. In terms of the nature and manner of the crimes, the violations set forth herein involving the most serious harms and violation of fundamental rights were committed on a widespread and systematic basis, with a discriminatory element, causing suffering and severe loss including of children, women (including pregnant women) and disabled persons, and arose out of policies, acts and omissions involving the highest levels of the Israeli civilian and military structure.<sup>321</sup> The crimes committed involved attacks by air, sea and ground troops, and the use of heavy weaponry which were not altered over the course of the prolonged military offensive despite the large number of civilians, including children, being killed and seriously injured.

310. Finally, the impact of the crimes upon the Palestinian civilian victims has been profound. It is recalled that the military offensive was conducted in a territory – and against a civilian population – that has been largely closed off from the rest of the world by land, sea and air for more than eight years, and that all borders were closed during the course of the military operation. The civilian population of Gaza has endured two prior attacks by the Israeli military on its territory in the past five and a half years. The nature of the attacks and the locations targeted, including schools, hospitals, private homes and UN building housing displaced persons, exacerbated the feeling that there was no safe place in Gaza during the 51-day attack.

## **B. Complementarity (Article 17(2) and (3) of the ICC Statute)**

311. Article 17 (“Issues of admissibility”) of the Rome Statute provides:

1. (...) the Court shall determine that a case is **inadmissible** where:

(a) The case **is being investigated or prosecuted** by a State which has jurisdiction over it, **unless the State is unwilling or unable genuinely** to carry out the investigation or prosecution;

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<sup>321</sup> See, e.g., paras. 135, 146, 155, 167, and 262.

(b) The case **has been investigated** by a State which has jurisdiction over it and the State has **decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability** of the State genuinely to prosecute;

[...].

2. In order to determine **unwillingness** in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of **shielding the person** concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an **unjustified delay** in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are **not being conducted independently or impartially**, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

[...].

312. The principle of complementarity governs the relationship between the ICC and domestic jurisdictions. Under this principle domestic jurisdictions have primacy, meaning that cases will only be admissible before the ICC where domestic jurisdictions have been absent or failed.

313. The principle of complementarity is considered at both the preliminary examination and case stages. At the preliminary examination stage, admissibility is based on consideration of *potential cases* that would likely arise from an investigation into the situation.<sup>322</sup> Criteria defining a “potential case” include (i) the **groups of persons involved** that are likely to be the focus of an investigation for the purposes of shaping future case(s) and (ii) the **crimes** within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the

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<sup>322</sup> See Office of the Prosecutor Policy Paper on Preliminary Examinations, November 2013, available at [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf) (hereinafter, “OTP Policy Paper on Preliminary Examinations”) pp. 10-12 (citations omitted).



focus of an investigation.<sup>323</sup> These criteria are equivalent in substance to the “same person/same conduct” test employed in assessing admissibility in the context of a case.<sup>324</sup>

**i. The Existence – or Absence – of Action at the Domestic Level**

314. The first step in determining the question of complementarity is to ascertain whether any domestic action involving the groups of persons or crimes likely to be the focus of the investigation has been undertaken or is ongoing. Complementarity assessments are concerned with current, concrete facts as they exist at the time, and not hypothetical future cases that might arise.<sup>325</sup>

315. The ICC has made it clear that an absence of current or past domestic action is sufficient to render a situation or case admissible:

In considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. *It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.* It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the Statute.<sup>326</sup> (emphasis added)

316. As one leading commentator explained, Article 17 “expressly and unambiguously provides not a one-step test, but a two-step test.”<sup>327</sup> The first step is clear: Article 17 expressly requires national proceedings. If the first test is not passed then there is no need to conduct the second test: “the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (...) renders a case [directly] admissible before the Court.”<sup>328</sup>

317. Domestic action will only be capable of satisfying the complementarity test, and thereby rendering a situation or case inadmissible, if it covers the **same person** and

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<sup>323</sup> Kenya Authorization to Investigate Decision, paras. 50, 182 and 188; Côte d'Ivoire Authorization to Investigate Decision, paras. 190-91 and 202-04.

<sup>324</sup> See Kenya Authorization to Investigate Decision, para. 44-45, 48-40, 52. See also, OTP Policy Paper on Preliminary Examinations, p. 12, para. 48 (citations omitted).

<sup>325</sup> OTP Policy Paper on Preliminary Examinations, p. 12.

<sup>326</sup> *Id.*

<sup>327</sup> Daryl Robinson, *The 'Inaction' Controversy: Neglected Words and New Opportunities*, in Carsten Stahn and Mohamed El Zeidy, eds. *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 462 (Cambridge University Press, 2011).

<sup>328</sup> G. Boas et al., *INTERNATIONAL CRIMINAL PROCEDURE*, Vol. III 77 (Cambridge University Press, 2011).

substantially the **same conduct** as the ICC investigation.<sup>329</sup> That question is to be decided on a case by case basis, turning on the particular facts at hand.<sup>330</sup> There is no requirement that crimes under *international* law be investigated or charged. It is sufficient to investigate a person for, or charge a person with, a domestic offence that covers substantially the same conduct – and reflecting the same underlying incidents – as the relevant offence under the Rome Statute.<sup>331</sup>

318. As noted, the Palestinian Human Rights Organizations submit that the crimes that should be investigated include, *inter alia*, murder, persecution, torture and other inhumane acts as crimes against humanity, and a range of war crimes committed against civilians and civilian property. The persons alleged to be involved in the commission of these crimes occupy positions within the highest levels of Israeli civilian and military leadership.

## **ii. Application to the Situation of Palestine: Overview of Israeli Investigations for Operation Protective Edge**

319. In August 2014, soon after the offensive on Gaza began, the Israeli Military Advocate General (MAG) announced the creation of a General Staff Fact-Finding Assessment Mechanism (FFAM). This examination mechanism is intended to review only “exceptional incidents” that occurred during Operation Protective Edge. “Exceptional incidents examined by the FFAM are those incidents where the MAG has decided that additional information is required in order to determine whether there exists reasonable grounds for suspicion of a violation of the law which would justify a criminal investigation.”<sup>332</sup> The FFAM’s declared purpose is to enable the MAG to reach decisions over whether to open a criminal investigation, and to initiate a process of “lessons-learned” designed to mitigate the risk of exceptional incidents occurring in the future. The limited investigation of only those incidents deemed “exceptional” presupposes that criminal investigation is only merited when there is “reasonable suspicion that the strike was not carried out in accordance with the rules and

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<sup>329</sup> OTP Policy Paper on Preliminary Examinations, p. 12; See also, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” 30 Aug. 2011, paras. 1, 47.

<sup>330</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, 11 Oct. 2013, para. 66

<sup>331</sup> See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 4, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, paras. 72-75.

<sup>332</sup> IDF MAG Corps, “Operation Protective Edge: Examinations and Investigation,” 10 Sept. 2014, available at <http://www.mag.idf.il/163-6859-en/patzar.aspx>.

procedures applicable to the Israeli Defense Forces”.<sup>333</sup> As such, this mechanism does not address the underlying policies and rules applicable to the Operation as a whole.

320. Moreover, the number of criminal investigations undertaken is extremely low compared to the quantity of complaints filed on behalf of Palestinian residents, local media or non-governmental organizations. As of July 2015, Al Mezan and PCHR have submitted a total of 354 criminal complaints to the FFAM and the MAG involving 2,205 individuals who *inter alia* had lost family members, sustained injury or suffered a loss of property. As of 11 June 2015, the date of the MAG’s last public statement, allegations with regard to some 190 alleged “exceptional incidents” had been referred to the FFAM for examination. Of these, 105 were referred to the MAG for decision. The large majority were closed due to a lack of grounds for suspicion of criminal behavior. It is reported that the MAG “has opened 19 criminal investigations based on a reasonable suspicion of criminal misconduct”<sup>334</sup> – all of them involving only soldiers of lower ranks.<sup>335</sup>

321. While so far only approximately 20 cases have been criminally investigated, numerous cases have been closed without undertaking any criminal or disciplinary proceedings; no reliable information is available with respect to the exact number of cases currently undergoing criminal investigation.<sup>336</sup> The only official prosecution to-date took place in April 2015, when the Israeli military indicted three soldiers for looting 600 USD from a home in the al-Shuja'iyya neighborhood.<sup>337</sup>

322. While national proceedings do not necessarily have to reflect investigations and/or prosecutions under the exact legal definitions of the ICC (war crimes or crimes against humanity), they must nevertheless refer to similar acts.<sup>338</sup> Thus, although the Israeli criminal code lacks the criminalization of war crimes and crimes against humanity, it could in theory

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<sup>333</sup> Decisions of the IDF Military Advocate General regarding Exceptional Incidents during Operation “Protective Edge” – Update No. 3, MAG, 22 March 2015, <http://www.law.idf.il/163-7183-en/Patzar.aspx>.

<sup>334</sup> Israel: The 2014 Gaza Conflict, Factual and Legal Aspects, *supra* n. 64, paras. 411-412.

<sup>335</sup> *Id.*

<sup>336</sup> It appears that some of these investigations are still ongoing, while others have been completed with their findings having been submitted to the MAG for review, and a number have already been the subject of a decision by the MAG. Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation “Protective Edge” – Update No. 4, MAG, 11 June 2015, <http://www.law.idf.il/163-7353-en/Patzar.aspx>.

<sup>337</sup> Sobelman, B., “Israel indicts three soldiers for alleged crimes during Gaza war,” *LA Times*, 26 Apr. 2015, available at <http://www.latimes.com/world/middleeast/la-fg-israel-indicts-soldiers-gaza-war-20150426-story.html>.

<sup>338</sup> See *Kenya* Authorization to Investigate Decision, para. 44.

satisfy the complementarity principle if its domestic proceedings undertook to investigate and/or prosecute these acts as ordinary crimes. However, in order to discharge its burden of proof with regard to a situation of “inaction,” Israel must substantiate that it has understood the wording of Article 17 of the Rome Statute as a requirement for taking “concrete and progressive investigative steps,” and that the investigations and prosecutions it has initiated meet the conditions of the “same conduct/same person” test in ICC potential investigated cases.<sup>339</sup>

323. Israel’s national investigations have concentrated on “exceptional” cases and on the conduct and responsibility of low-ranking soldiers and commanders in the field, suspected of having breached their military orders,<sup>340</sup> *rather than on the military orders themselves*. As the UN Commission of Inquiry found, “[t]he commission is concerned about a number of procedural, structural and substantive shortcomings, which continue to compromise Israel’s ability to adequately fulfill its duty to investigate.”<sup>341</sup> The Commission of Inquiry further found that “the investigations process followed by the Israel Defense Forces focuses on possible individual criminal responsibility at the level of the soldier on the battlefield. Even where the behaviour of soldiers and low-ranking officers during hostilities has come into question, however, this has rarely resulted in criminal investigations.”<sup>342</sup>

324. Israel’s investigation into “exceptional incidents” committed mainly by low ranked soldiers in an individual manner in violation of orders, or as erroneous acts, do not correspond to the same person/same conduct of the potential ICC cases arising out of an examination or investigation of the actions of Israeli senior military and civilian officials during Operation Protective Edge. Accordingly, the Palestinian Human Rights Organizations submit that the complementarity analysis in this case is akin to that in Kenya where there were only “a limited number of proceedings for less serious offences in connection to the crimes”<sup>343</sup> at the time the Prosecutor sought – and was granted – authorization to initiate an investigation in Kenya.

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<sup>339</sup> *Gaddafi and Al-Senussi Situation in Libya*, ICC-01/11-01/11 Decision on the Admissibility of the Case against Abdullah Al-Senussi, 11 Oct. 2013, para. 66.

<sup>340</sup> B’Tselem, “Israeli authorities have proven they cannot investigate suspected violations of international humanitarian law by Israel in the Gaza Strip,” 5 Sept. 2014, available at [http://www.btselem.org/accountability/20140905\\_failure\\_to\\_investigate](http://www.btselem.org/accountability/20140905_failure_to_investigate).

<sup>341</sup> 2015 UN Commission of Inquiry, *supra* n. 7, para. 618.

<sup>342</sup> *Id.* at para. 72.

<sup>343</sup> See Request for authorization of an investigation pursuant to Article 15, *Situation in the Republic of Kenya*, Case No. ICC-01/09, 26 Nov. 2009, para. 54. The cases opened for what the Prosecutor

325. This conclusion ends the complementarity analysis. The first test is not passed, and so there is no need for the second test: an examination of Israel's unwillingness or inability to carry out the required investigations. For the sake of completeness, however, the Palestinian Human Rights Organizations will proceed to address certain aspects of the Israeli system that speak to the second admissibility factor.

### iii. Complementarity "Step Two": Unwilling or Unable

326. A state's unwillingness under the complementarity principle can be ascertained on the basis of *inter alia* a **lack of independence or impartiality** of the structures or practice of its investigative system.<sup>344</sup> In evaluating independence, the Prosecutor's Office examines indicators such as "the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes."<sup>345</sup> Impartiality may be assessed in light of the "connections between the suspected perpetrators and competent authorities responsible for investigation, prosecution or adjudication" and "sanctions, promotions or demotions...in relation to investigative, prosecutorial or judicial personnel concerned."<sup>346</sup> Additionally, indicators of unwillingness also include: "a focus on lower level perpetrators of the crimes at issue and a failure to investigate or prosecute leaders."<sup>347</sup>

327. The principal structural deficiency in Israel's investigative system results from (1) the centralization of authority in the hands of the MAG; and (2) the absence of adequate civilian judicial and/or administrative supervision over the military decision-making process.<sup>348</sup>

328. The subordination of the FFAM to the MAG's authority inherently undermines its independence and impartiality, because the MAG is the very authority that issued or authorized the orders that may be under investigation.<sup>349</sup> This structure creates a conflict of

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deemed "minor offences" included cases of theft, malicious damage, robbery with violence and possession of offensive weapon.

<sup>344</sup> ICC Statute, Art. 17 (2)(c).

<sup>345</sup> OTP Policy Paper on Preliminary Examinations, para. 53.

<sup>346</sup> *Id.*, para. 54.

<sup>347</sup> G. Boas et al., *International Criminal Procedure*, Volume III, Cambridge University Press, Cambridge, 2011, p. 78.

<sup>348</sup> For an overview of how the MAG operates as a centralized authority that exercises all three powers – legislative (defining the army's rules of conduct), executive (providing 'real time' legal counsel during military operations) and quasi-judicial (deciding on investigations and prosecutions), see Expert opinion of Prof. Eyal Benvenisti, "The duty of the State of Israel to investigate violations of the law of armed conflict," submitted on 13 April 2011 to the Turkel Commission, p. 25

<sup>349</sup> See 2015 UN Commission on Inquiry Report, *supra* n. 7 at ¶ 619: "The involvement of the MAG in policy discussions concerning the hostilities, and the role of MAG Corps legal advisors in decisions taken by the IDF during combat continue to raise questions about the MAG's ability to carry out

interest that makes it unfeasible, and indeed impossible, for the MAG to conduct a review of the legality of these orders or to guarantee accountability at the policy level.

329. Additionally, Israel's military is not subject to independent and impartial supervision of its actions by independent civilian authorities. In Israel, the civil authorities have delegated most of their responsibilities concerning Israel's obligations under international humanitarian law to the army itself,<sup>350</sup> and do not provide an effective and systematic review over the army's investigations and decisions. There are no reported cases in which the General State Attorney overruled the MAG's decision not to open a military investigation into a suspected violation of international humanitarian law.<sup>351</sup> Moreover, it remains highly questionable whether the Attorney General's supervision with regard to Operation Protective Edge can provide the necessary independent supervision over the legality of the State's policy decisions and the respective investigations. Like the MAG, the Attorney General participated in the process of the decision-making during the offensive.<sup>352</sup>

330. Moreover, although the Israeli High Court of Justice has residual competence to review the MAG's decisions, in practice the Court – whose role of review was initially intended only for exceptional cases – is an organ that does not conduct thorough routine supervision of the work of the system of military investigations. As explained by Adalah in early 2015, “to date, the [High Court of Justice] has never issued any order to the MAG to open a criminal investigation or to indict any individual regarding alleged suspicions of the commission of war crimes in Gaza.”<sup>353</sup>

331. Amongst the main deficiencies in the Court's practice of reviewing decisions over whether or not to open investigations for alleged crimes is the inadequacy of the procedure

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independent and impartial investigations, particularly with regard to cases where soldiers may be following commands authorized by the MAG (...), but nonetheless may be suspected of having violated international humanitarian law or international human rights law.”

<sup>350</sup> The military is exclusively entrusted by the State to define the rules on the conduct of hostilities, the guidelines for investigations, and the criteria for initiating prosecutions. Y. Shany, A. Cohen & I. Rosenzweig, “Response to the Military Advocate General's Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law,” submitted to the Turkel Commission, Feb. 2011 (hereinafter, “Shany, Cohen & Rosenzweig Response”) paras. 91-102, available at [http://www.idi.org.il/media/1810446/IDI\\_Response\\_for\\_Turkel\\_Commission\\_English.pdf](http://www.idi.org.il/media/1810446/IDI_Response_for_Turkel_Commission_English.pdf).

<sup>351</sup> See 2015 U.N. Commission of Experts Report, *supra* n. 7 at ¶ 641 (“no action is known to have been taken by ... the Attorney General, with respect to military and civilian leadership, to initiate investigations into the role of senior officials.”)

<sup>352</sup> *Id.* at ¶ 619; but see, OTP Policy Paper on Preliminary Examinations, paras. 53-54.

<sup>353</sup> *Adalah's Report to: The United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict*, 31 January 2015, p. 2 [http://www.adalah.org/uploads/2\\_Adalah-Submission-UN-COI-Gaza-2015.pdf](http://www.adalah.org/uploads/2_Adalah-Submission-UN-COI-Gaza-2015.pdf).

designed for the Court's review of State decisions concerning criminal investigations:

(1) The Israeli High Court of Justice does **not undertake its own fact-finding** but relies solely on affidavits submitted by the parties involved. In the *Thabit* case, the Court itself affirmed the view that it is not the suitable forum for such determinations.<sup>354</sup>

(2) The **protracted nature** of the Court's proceedings often creates a serious delay, which has an impact on the ability of establishing the facts required for a criminal trial. This delay also increases court fees, thereby augmenting the victims' financial burden.

(3) Constitutionally, the authorities have a **wide margin of appreciation** in deciding whether to open an investigation or to indict the alleged perpetrator. The Israeli High Court of Justice has only a limited scope of review over the MAG's and the Attorney General's decisions and in practice, has always deferred this task to the executive power.<sup>355</sup>

332. Additionally, it has been the practice that only if "absolute prohibitions of international law" are committed, can a criminal investigation be immediately opened.<sup>356</sup> These "absolute prohibitions" include, for examples, acts such as looting or the direct targeting of a civilian. However, cases where alleged excessive civilians deaths and damages were caused, have never reached a criminal investigation, as the *mens rea* was found not to reach the high intention threshold set by the investigative authorities. In fact, it has always been found at the examination phase that the incident was either a mistake – thus lacking the criminal intent – or proportionate, and therefore legal, when calculated in light of the anticipated military advantage.<sup>357</sup> Independent, objective review of such findings is essential.

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<sup>354</sup> The Court held that it "is not the suitable forum with the necessary means to examine the circumstances of the case in which the deceased was killed." H CJ 474/02 *Thabit v. Attorney General*, 30 Jan. 2011. See also: Shany, Cohen & Rosenzweig, paras. 95 et seq.

<sup>355</sup> See Deputy Chief Justice Rivlin in H CJ 5699/07, *Jane Doe (A) v. The Attorney General*, 26 Feb. 2008.

Additional factors include: the high threshold of "extremely unreasonable" as basis to review State decision (see H CJ 4550/94, *Anonymous v. Attorney-General et al.*, PD 49(5) 859, cited in H CJ 8794/03, *Yoav Hess et al. v. Judge Advocate General et al.*); and finding that "active operations" can negate the "public interest in the instigation of criminal proceedings, even if criminal liability is present" *Id.*

<sup>356</sup> See Report of the Turkel Commission.

<sup>357</sup> See for example the view of the Minister of Defence Ya'alon that crimes as looting and rape shall be investigated and prosecuted. However, the case of the killing of civilians as part of "collateral damage" that was considered before the attack, is not among these cases, where the act and its result may indicate a suspicious of war crimes. Israel Law Center, Transcript of the Defense Minister Moshe Ya'alon's Closing Address at "Towards a New Law of War," Dan Jerusalem Hotel, 5 May 2015. p. 4-6, <http://israelawcenter.org/wp-content/uploads/2015/01/Yaalon-Transcription-1-.pdf> .



### C. Interests of Justice

333. According to Article 53(1)(c) of the Rome Statute, if “there are substantial reasons to believe that an investigation would not serve the interests of justice”, even after taking into account the gravity of the crime and the interests of victims, the Prosecutor can exercise discretion to not proceed with investigation. This discretion is “highly exceptional”,<sup>358</sup> and there is a presumption in favor of investigation and prosecution.<sup>359</sup>

334. If the positive criteria of jurisdiction and admissibility are met, the Prosecutor is not required to establish that an investigation serves the interests of justice, but shall proceed with investigation unless there are specific circumstances that demonstrate that it is not in the interest of justice to do so. This requires an assessment of the context, guided by the object and purpose of the Statute, namely the prevention of serious crimes of concern to the international community through ending impunity.

335. The basis for not proceeding with investigation should take into account all the circumstances, and Article 53(2)(c) of the Statute provides a non-exhaustive list, including “the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”.

336. In the present case submitted before the ICC, there are no “substantial reasons to believe that an investigation would not serve the interests of justice”. On the contrary, there is a strong need for international criminal justice to be exercised since there is an absence of possibilities to access justice domestically, of which the lack of criminal and civil accountability has contributed to impunity.

337. The inadequacy of the previous investigations conducted by Israel in the context of Operation Cast Lead serves as an analogous precedent to support the present submission’s argument that there are strong grounds for the Prosecutor to initiate an investigation into the crimes committed by high level Israeli officials in the course of Operation Protective Edge. The manner in which investigations were conducted in the aftermath of Operation Cast Lead demonstrates the unwillingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. Not only was there a

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<sup>358</sup> OTP Policy Paper on Preliminary Examinations, November 2013, p. 17.

<sup>359</sup> International Criminal Court, Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, available at [http://icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf](http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf).



poor response rate to the complaints filed, the outcome of these cases failed to reflect the gravity of the alleged crimes.

338. PCHR submitted 490 complaints, on behalf of 1046 victims to the Israeli Military Prosecutor, requesting the opening of a criminal investigation, of which some cases involved allegations of serious violations of international humanitarian law. Four years after the offensive had concluded, PCHR had received only 44 responses (as of March 2013), which reflects a systematic denial of victims' right to access to justice. The responses are as follows:

- 19 responses indicating that the complaint had been received, that it will be reviewed, and PCHR will be informed of the outcome;
- 21 responses informing PCHR that the complaints are under review;
- 3 response indicating that the case was closed;
- 1 response indicating that a soldier had been charged.

339. There was a total of four indictments for crimes committed during Operation Cast Lead, for which did not reflect the gravity of the actual crimes committed by the soldiers, which is contrary to proper administration of justice for wrongdoing. The convictions are as follows:

- One individual was convicted of the theft of a credit card (looting), and served seven and a half months in prison;
- Two individuals were convicted in relation to the use of a 9-year-old boy as a human shield, and each given a three-month suspended sentence for "inappropriate behavior" and "overstepping authority", which is a much lighter offence than the use of human shields;
- One individual was convicted of 'misuse of a firearm' in relation to the shooting of a group of unarmed civilians who were carrying white flags, which resulted in the death of two women, and sentenced to 45 days of imprisonment. This was a much lighter charge than the grave breach of wilful killing.

340. Criminal investigations were launched primarily on the basis of outcomes derived from operational debriefings, which are not appropriate tools to conduct investigations of allegations of serious violations of human rights and humanitarian law and do not comply with required international legal standards.<sup>360</sup> Further, since investigations conducted were internal to the Israeli military authority, they are contrary to international standards of independence and impartiality. Despite the gravity of the allegations, investigations and prosecutions have been limited and not forthcoming, resulting in the delay and

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<sup>360</sup> 2009 UN Fact-Finding Mission Report, *supra* n. 12, p. 391.

ineffectiveness of the criminal justice system in providing judicial redress for Palestinian victims.

341. Aside from the lack of criminal accountability, there are also legal and procedural barriers to civil accountability that have hindered the ability of Palestinians to access justice and obtain compensation. Firstly, court guarantees are required for civil cases to proceed, but the financial obstacle that these fees impose are substantial. As of June 2011, a guarantee of NIS 30,000 (USD 8,000) is charged to each claimant (instead of each case prior to this decision).

342. Another significant barrier to accessing justice in civil cases is the legislative obstacles imposed by the introduction of Amendment No. 8 to the Israeli Civil Tort Law on Liability of the State. This amendment exempts the State of Israel from any liability arising from damages caused to a resident of an enemy territory during a “combat action”, which is in contravention of international legal standards concerning State responsibility and obligation to provide reparations.

343. Taking into account all the circumstances, including the consideration of gravity and the interest of victims, and the fulfilment of the positive requirements of jurisdiction and admissibility, there is no basis for “interest of justice” to be invoked as a countervailing consideration to not proceed with investigation. In fact, proceeding with investigation is consistent with the object and purpose of the Statute to end impunity and prevent serious crimes of concern to the international community, and discourage future breaches of international law by Israel.

## **X. Conclusions**

344. It is respectfully submitted that on the basis of the information and analysis set forth herein, there exists a reasonable basis for believing that crimes falling within the jurisdiction of the Court were committed in Gaza by Israeli civilian and military senior officials in the course of Operation “Protective Edge.” Accordingly, The Palestinian Human Rights Organizations request that the Prosecutor move to open such an investigation forthwith.

## **XI. Annex**