Expert Opinion on the Displacements of Bedouin Communities from the Central West Bank under International Humanitarian Law

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INTRODUCTION

This Expert Opinion was requested in the context of recent renewed efforts by the Israeli military, through its Civil Administration (Israeli Civil Administration, ICA), to remove the remaining Bedouin communities from their current location in the central West Bank occupied by Israel. As such it aims at answering a series of questions based primarily on international humanitarian law (IHL) as specified in the scope of the expert opinion and when relevant on other bodies of international law such as international human rights law. The undersigned are not experts on the Bedouin communities, nor on Israeli military orders, on Jordanian Law, on British mandate law or on Ottoman law. As far as this opinion refers to such matters, this is simply for the purpose of clarifying the factual assumptions based on which this legal opinion is given and on data and information from sources identified in the footnotes. Most importantly references would be made to Israeli military orders or pre-existing local laws only to determine their significance and value under international law when applying the relevant norms, notably IHL.

The undersigned cannot stress enough that, while this Expert Opinion has a very specific focus, it is to be considered in the broader perspective of the history of Palestine, in particular one marked by multiple and successive waves of displacement associated with certain practices and policies carried out by the Israeli authorities since 1948, and having far-reaching humanitarian, social and economic consequences affecting individuals, communities and the entire Palestinian people for that matter, including when Israeli citizens moved to the oPt as part of the development of settlements. In that regard, Bedouin communities were first displaced from their ancestral lands in the Negev desert in 1948/1949, and some Bedouin communities are

[1] The views expressed in this Expert Opinion are solely those of the authors and do not necessarily reflect those of the organizations and institutions the authors have worked for in the past or currently work for or of which they are part.

still being displaced from this area to this day.[2] Furthermore, of similar importance, is the fact that Bedouins are among the most vulnerable communities living in the Area C of the West Bank.[3]

From the outset the undersigned wish to highlight that various terms are being used when addressing the issue of displacement in the oPt in general and with regard to the Bedouins in particular. The terms used vary depending in part on the stakeholders involved, the causes of the displacement and on whether the issue is discussed through a legal, humanitarian or policy perspective. This difference in terminology must be clarified given the fact that under international law, displacement *per se* is not prohibited. It is important to highlight that within the context of the oPt, Israeli authorities often use the rather neutral term ***relocation*** which does neither imply that it is lawful or unlawful. Under international law on belligerent occupation within the IHL framework, ***forcible transfers and deportations*** of protected persons are prohibited. The meaning and scope of this prohibition will be discussed below. The term ***evacuation*** is also used to describe a particular situation envisaged under the international law of belligerent occupation. Furthermore, the provision of the GC IV defining 'Graves Breaches" (article 147) refers to ***unlawful deportation or transfer***. Under IHRL, the expression ***forced eviction*** is envisaged within the scope of the right to adequate housing and is defined by the Committee on Economic, Social and Cultural Rights as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".[4] While the term ***expulsion*** is at times used to refer to cases of displacement, it is commonly associated with a measure that implies crossing a border and the right not "to be expelled, by means either of an individual or of a

[2] The issue of the land appropriation by Israeli authorities in 1951 that forced Bedouins to leave is still pending before Israeli courts. In June 2014, the Israeli Supreme Court in an unprecedented decision insisted on the State to start a mediation process to reach a "fair solution" to the Bedouin land issue. See, The al-Uqbi Supreme Court Appeal for Araqib and Zkhiliqa Lands, 2 June 2014, available at: http://jahalin.org/wp-content/uploads/2012/01/supreme-court-al-uqbi-appeal-2-6-14-english.pdf

[3] OCHA, *Area C Vulnerability Profile*, March 2014, available at: http://www.ochaopt.org/documents/ocha_opt_fact_sheet_5_3_2014_En.pdf

[4] Committee on Economic, Social and Cultural Rights, *General Comment 7*: *Forced evictions, and the right to adequate housing*, 1997, U.N. Doc. E/1998/22, para. 4. The Committee itself noted that the prohibitions of forcible transfer and destruction of private property under IHL relate to the issue of forced evictions (para. 13).

collective measure, from the territory of the State of which he is a national".[5] Finally, other terms relate to the measures adopted by Israel, such as seizure orders that result in displacement. Such measures would also have to be reviewed under international norms to see if they amount to a prohibited act.

Given the complexity of the facts covered, a factual background is necessary to clarify the scope of this Expert Opinion.

FACTUAL BACKGROUND AND SCOPE OF THE EXPERT OPINION

This Expert Opinion primarily aims at determining whether the displacements, or some of them, of Bedouin communities by the ICA from the Jerusalem eastern periphery to other areas of the West Bank amount to forcible transfers prohibited under the international law of belligerent occupation. Despite its apparent narrow and limited scope, this question pertains to a range of intertwined factual and legal issues that must be clarified.

Firstly, this Expert Opinion relates to a broader pattern of polices and practices of displacement carried out by the ICA vis-à-vis Palestinian communities in the oPt and that continue to this day. Such policies and practices have been challenged before the Israeli Supreme Court (siting as High Court of Justice, HCJ)[6] and gave rise to a number of UN agencies and NGOs reports as well as analysis among experts and scholars.[7] Thus, although this Expert Opinion takes into account those previous studies, references and related arguments, it requires considering the peculiar situation of displaced Bedouin communities or those at risk of being displaced.

Bedouin people in the eastern periphery of Jerusalem, predominately from the Jahalin tribe, are Palestinian refugees (most of them registered as refugees with UNRWA), displaced from their ancestral lands in the Naqab area (Negev desert) in

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[5] See Article 3, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, and A. de Zayas, "Forced Population Transfer", *MPEPIL - online*, 2009, available at: http://opil.ouplaw.com/home/EPIL

[6] For an overview, see for example, D. Kretzmer, "The law of belligerent occupation in the Supreme Court of Israel", *IRRC*, 2012, No. 885, pp. 207-236.

[7] See for example, OCHA, *Displacement and Insecurity in Area C of the West Bank*, 2011, available at: http://www.ochaopt.org/documents/ocha_opt_area_c_report_august_2011_english.pdf; Human Rights Watch, *Separate and Unequal - Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories*, 2010, available at: http://www.hrw.org/node/95061; and HPCR, *The Legality of House Demolitions under International Humanitarian Law*, Briefing Paper, Harvard, 2004.

southern Israel in 1948/1949. Their traditional livelihood is based on a pastoralist economy requiring them to be mobile.[8] The undersigned wish to stress that these specific traditional and tribal characteristics cannot alter the classification of their relocation as forced transfer, but may affect the possible justification of those transfers by the absence of a right to stay in the places they were previously under local law. Furthermore they are relevant to address particular legal issues arising from the impact on Bedouin communities displaced towards centralized semi-urban settings and their new living conditions. They also raise fundamental anthropological questions that go way beyond legal considerations, but must influence the interpretation of the law.

Also of importance for the legal review is to view displacement as a process and not limited to the stand-alone act of people having to move from one place to another.[9] Similarly, and for legal purposes, the analysis of the displacement of Bedouin communities cannot be done in isolation. It requires considering the exact causes of the displacement, the manner in which it was carried out and its legal basis. Indeed this displacement is often closely associated with ICA policies and practices towards the Bedouins in the Jerusalem periphery including the repeated use of seizure orders, forced evictions, and house demolitions, affecting their social fabric that raise concerns under IHL. Furthermore, the living conditions of the Bedouins who have been displaced may also constitute violations of international obligations.

It is necessary to stress that the history of the displacement of Bedouin communities is characterized by different waves due to a complex set of reasons. In addition to the original displacement by the Israeli authorities from the Naqab area (Negev desert) in 1948/1949 from their ancestral lands and before settling in the eastern periphery of Jerusalem, Bedouin communities moved successively from mid-1951 onwards to areas East of Hebron and Bethlehem in an effort to maintain their traditions and livelihood, following the routes of open water resources, establishing seasonal migration patterns but also due to increasing constraints imposed by Israel after 1967. As reported in the 2013 UNRWA/Bimkom study, "with increasingly limited mobility, the Jahalin selected locations along their established migration

[8] UNRWA/Bimkom, *Al Jabal: A Study on the Transfer of Bedouin Palestine Refugees,* 2013, p. 10, available at: http://www.unrwa.org/userfiles/2013052935643.pdf

[9] For example, while covering a different scope, the UN *Guiding Principles on Internal Displacement* address various stages including prior to displacement, protection during the displacement and assistance to be provided to those displaced. See *Guiding Principles on Internal Displacement*, Report of the Representative of the Secretary General, 1998, E/CN.4/1998/53/Add.2.

routes in the Jerusalem periphery and settled permanently in their kinship groups, securing ad hoc land-use arrangements with local Palestinian landowners throughout the 1970s".[10] The most recent phase accounts for the waves of displacement of Bedouin communities from their homes in the Jerusalem periphery. While this phase began as early as 1975, when the ICA first allocated the land on which the tribes were living for the establishment of the Ma'ale Adummim settlement, the largest scale evictions of Bedouins in the Jerusalem periphery happened in three stages from 1997 to 2007[11] and saw the transfer of a total of over 150 families of the Jahalin tribe, to allow for the expansion of the Ma'ale Adummim settlement. In 2006 and 2011 new plans were announced by the ICA to relocate the remaining 23 rural communities as well as Bedouins living in the Ramallah and Jericho periphery also located in Area C.

This Expert Opinion will focus on this latest phase comprised of three waves in 1997, 1998 and 2007 and the new plans initiated in 2006 that are being put forward at the time of writing. The three different past waves of displacements of Bedouin communities from the eastern periphery of Jerusalem will be linked to the upcoming plans, taking into account their specific elements, including their rationale and purpose, the way they were carried out, and the conditions of resettlement to determine whether they amount to forcible transfer under IHL and potentially to other violations of human rights law. This review will also address the extent to which the policies and practices associated with those waves of displacement, such as the repeated use of seizure orders, forced evictions and house demolitions are relevant for qualifying those measures as forcible transfers. This Expert Opinion will then look into the current ICA plans for the relocation of the remaining Bedouin communities from the eastern periphery of Jerusalem and whether the ongoing efforts amount to forcible transfer under IHL. In doing so, the content and effect of the Israeli High Court of Justice's decisions will be analyzed to assess whether they reflect IHL obligations of the ICA. Additionally this will include determining whether the ICA is entitled under IHL to prevent or restrict access to humanitarian assistance for Bedouins affected by the destruction of structures as per its current practice. In light of the conclusions reached on the existence of forcible transfers, this opinion will address the classification of such acts as grave breaches of the Geneva Convention IV

[10] UNRWA/Bimkom, *op. cit*., p. 10. This report also specified that "such agreements ranged from simply securing the blessing of a land owner to reside on the land, to the payment of monthly rent or the sharing of any agricultural profits resulting from land use on a seasonal basis".
[11] Ibid., pp. 14-16

and its related legal implications. Finally, this Expert Opinion will address the extent of which third states and the Palestinian Authority have obligations in preventing further the displacement of the Bedouin communities.

To answer those questions this Expert Opinion is structured as follows: firstly due to the status of the area where the displacements are taking place, it is necessary to clarify the combination of the relevant bodies of norms applicable to the issues at stake; secondly it will then provide a thorough description of the definition, content and scope of the key relevant norms of international law to address the question of displacements and related practices and policies, notably the prohibition of forcible transfer under the international law of belligerent occupation to review the various past waves of displacement and upcoming plans by the ICA and will offer a legal conclusion for each issue.

I. RELEVANT APPLICABLE LAW

Due to the intricate legal and geographic fragmentation of the West Bank as well as the complex factual aspects of the displacements under review, it is critical to underline temporal and geographic elements when considering the phenomenon of displacement that, by definition, may occur over a certain period of time and entails a movement from a certain location to another. The current legal analysis relates to the circumstances of only specific waves of displacements of Bedouin communities living in the eastern periphery of Jerusalem.

A few clarifications are needed at this point to help determine the relevant legal frameworks. First some acts taken by the Israeli authorities to render the waves of displacement possible date back to 1993 and even the 1970s. Furthermore, the three waves of displacements being reviewed in this Expert Opinion have occurred outside the municipal boundaries of Jerusalem as defined by the Israeli authorities, but within the Area C, including al Jabal where Bedouins were relocated. While the ongoing plans also relate to the remaining Bedouin communities living in the eastern periphery of Jerusalem, in the Area C, in addition to al Jabal, two other locations are envisaged for their transfer, Nuweima and Fasayil, both being in the region of Jericho in Area C, adjacent to Area A, with the plans for Nuweima being the most likely as they were made public last week. According to the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, dividing the West Bank in three

types of areas, all civil powers and responsibilities in Areas A and B were transferred to the Palestinian Authority, whereas Area C is under exclusive Israeli control.[12] This latter area represents approximately over 60% of the West Bank with, as of January 2013, some 150,000 Palestinians currently living in this Area, in 542 communities, 281 of which are located entirely or mostly (50% or more of their built up area) in Area C.[13] It is however important to note that even prior to the 1995 arrangements, the acts taken by the Israeli authorities that may be relevant to address the 1997 and 1998 waves of transfers remain covered by the same set of rules under international law. Indeed the 1995 agreements did not fundamentally change the status of Israel as an Occupying Power as demonstrated below. This is particularly true for the issues covered by the present opinion, as the Bedouins were transferred from areas which were without any doubt under effective Israeli control (otherwise Israel could not have transferred them).

In light of the characteristics of those displacements three main systems of law are applicable for Area C. It is important to recall that for the purpose of this Expert Opinion, the relevant elements do not only consist of the act of displacement itself, but also its causes and circumstances and the situation of the people affected once displaced. As a matter of law, the following legal frameworks address those various aspects in different ways. While international law constitutes the primary body of norms to consider the lawfulness of those displacements and underlying Israeli policies and practices, the domestic legal frameworks, and its significance under international law, are also relevant, notably with regard to the rationale and justifications given by the Israeli authorities to carry out the transfer of Bedouin communities. In particular, given that not all displacements *per se* are unlawful under international law, the reasons pertaining to the displacements based on local laws are to be taken into account.

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[12] Article XI, para. 2 (b), Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, D.C. September 28, 1995, signed between the Government of the State of Israel and the Palestine Liberation Organization.

[13] OCHA, *Area C of the West Bank: Key Humanitarian Concerns*, January 2013, p. 1, available at: http://www.ochaopt.org/documents/ocha_opt_area_c_factsheet_January_2013_english.pdf. Based on the definition used in an Israeli census conducted by the Central Bureau of Statistics in 1967, the word "community" is defined as follows: "a community will be considered any permanently settled point lying outside the area of another community and in which at least 50 people were counted." See Commander of IDF Forces, *Population Census-1967*, Jerusalem, Central Bureau of Statistics Publishers, IDF Forces Command, 1968, p. 29.

First international law consisting of treaty law and customary law binds Israeli policies and activities in such area. Among those international norms, the primary rules to consider are those of the international law of belligerent occupation. Pursuant to Article 42 of the 1907 Hague Regulations and Article 2 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), and as recognized by the International Court of Justice[14] and by the doctrine and as accepted by the Israeli Supreme Court, sitting as a High Court of Justice[15], Israel has the status of Occupying Power in the West Bank. In that regard, the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, while establishing a distinction between three areas (A, B and C) with various degrees of responsibility and power devoted to the Palestinian Authority, did not change the overall status of Israel as an Occupying Power.[16] Despite the initial arguments put forward by Israel challenging the *de jure* applicability of the Geneva Convention IV provisions related to occupation, including the fact that the West Bank was not a "territory of a High Contracting Party" prior to 1967 as per Article 2 of the GC IV, and the maintenance of this official line of reasoning to this date, the Israeli State Attorney, expressing a governmental position apparently acknowledged the *de facto* application of the humanitarian provisions of the GV IV.[17]

The main principle underlying the law of belligerent occupation is that occupation does not transfer any title of sovereignty to the occupant on the occupied territory. In nature the occupation is to be considered transitional and temporary.[18] As stated in the British Military Manual, "Occupation differs from annexation of territory by being only of a temporary nature" and "During occupation, the sovereignty of the occupied state does not pass to the occupying power. It is suspended." Furthermore,

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[14] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 78.
[15] For example, H.C. 390/79**,** *Mustafa Dweikat et* al. v. the Government of Israel et al. (the *Elon Moreh* Case), 34(1) *Piskei Din* 1; excerpted in: (1979) 9 *Israel YbkHR* 345.
[16] E. Benvenisti, "The Status of the Palestinian Authority", in E.Cotran and C.Mallat (eds.), *The Arab-Israeli Accords: Legal Perspectives*, 1996, pp. 58–60.
[17] See Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge CUP, 2009, pp. 20-21 and 24 and section 12 of the Complementary Argument on Behalf of the State in HCJ 1526/07 Ahmad `Issa `Abdullah Yassin et al. v Head of the Civil Administration et al., 5 July 2007, cited by Bimkom – Planners for Planning Rights, *The Prohibited Zone - Israeli planning policy in the Palestinian villages in Area C*, June 2008, p. 8.
[18] See for example, L. Oppenheim, *International Law: A Treatise*, Vol. II: *Disputes, War and Neutrality*, (6th edition by H. Lauterpacht, 1944), pp. 432-434 and Christopher Greenwood, "The Administration of Occupied Territory in International Law", in Playfair, Emma (ed.), *International Law and the Administration of Occupied Territories*, Oxford University Press, Oxford, 1992, p. 244.

"[t]he law of armed conflict does not confer power on an occupant. Rather it regulates the occupant's use of power. The occupant's powers arise from the actual control of the area."[19] This principle is entrenched in Article 43 of the 1907 Hague Regulation that imposes a duty on the occupant to respect, unless absolutely prevented, existing law, putting an emphasis, as does already Article 42, on the *de facto* nature of the occupant's authority. At the same time, as will be discussed below, Article 43 obliges an occupying power to restore and maintain public order and civil life, but while doing so it must respect, except absolutely prevented, local laws.

Beyond the question whether prolonged occupation constitutes a distinct legal category of occupation, the factual situation of an occupation continuing over a long period of time must be taken into consideration when analyzing the duties and obligations of the occupying power. This is particularly significant with the obligation to restore and ensure public order, civil life and safety. Those latter notions evolve as time elapses, when moving away from combat-like situations, with the necessity to adapt to the needs of the population under occupation. Nevertheless, the powers of the occupant in general are constrained by specific duties and prohibitions under international law, and its legislative power in particular remains limited under international law of belligerent occupation.

Finally, it is important to stress that the principal concern of GC IV is the protection of "protected persons", i.e. persons "who at any given moment and in any manner whatsoever, find themselves, in cases of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[20]

Specific norms pertaining to situations of belligerent occupation set out in IHL treaties and which acquired a customary status as will be described below consequently apply. These consist *inter alia* of Section III of the 1907 Hague Regulations and of Section III of Part III of the Geneva Convention IV. The subject matter of this Expert Opinion requires in particular to consider the following specific architecture of the belligerent occupation regime: The Occupying Power has the obligation pursuant to Article 43 of the 1907 Hague Regulations to restore and ensure public order and safety. However, its legislative power to achieve this and other purposes is restricted. In addition, and more importantly for this Opinion, the Occupying Power is also bound by specific prohibitions as spelled out in the 1907

[19] UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), para. 11.19.
[20] See Article 4 of Geneva Convention IV.

Hague Regulations and GC IV, notably the prohibition of individual or mass forcible transfers of protected persons (Article 49) and the prohibition of destruction of private property (Article 53 of GC IV and Article 46 of the 1907 Hague Regulations) and the prohibition to transfer parts of its own population into the occupied territory (Art. 49 (6) GC IV). Despite the fact that Israel's HCJ held in the past that Article 49 of the GC IV did not form part of customary international law, notably in its 1980 judgment in the *Kawasme case* and its 1985 judgment in the *Nazal case*[21], as noted above, it is part of Israel's treaty obligations. Furthermore extensive State practice and decisions of international courts and tribunals confirmed that the prohibition contained in Article 49 acquired a customary law status.[22] IHL also includes the related provision of the GC IV on 'Grave Breaches' (Article 147) whereby the unlawful transfer of protected persons constitutes a grave breach of the Convention.

Furthermore, it is widely recognized by third States, United Nations practice and judicial decisions that international human rights law (IHRL) also binds an Occupying Power with respect to the population of an occupied territory save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.[23] This must be particularly true in Area C, where Israel exercises exclusive jurisdiction in the matters relevant for this Expert Opinion, and especially in light of the long-term occupation. At this stage, it is important to stress that IHRL provides guarantees and rights relevant in the context of the displacement process, including the right to adequate housing (Article 11 of ICESCR) and the freedom from arbitrary or unlawful interference with privacy, family and home (Article 17 of ICCPR), right to health (Article 11 and 12 of ICESCR). Human Rights standards also set out safeguards to be respected as part of the process leading to the displacement such as the rights to be consulted and informed. Relevant IHRL norms may therefore complement existing prohibitions

[21] J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I. Rules, Cambridge University Press, 2005, pp. 458-459.
[22] Ibid., pp. 457-461. For a recent example of State practice reaffirming that Article 49 is a codification of customary law, see *Memorandum on Voluntary Departure from Occupied Territory*, Office of Legal Counsel, US Department of Justice, 16 July 2004, p. 2.
[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit*., paras. 107-112. See also references in W. Kalin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc. E/CN.4/1992/26, 16 Jan. 1992, paras 57-59; Human Rights Committee, *Concluding Observations: Israel*, 1998, UN Doc. CCPR/C/79/Add.93, para. 10; ECrtHR, *Loizidou v Turkey*, Merits, 1996, Series VI, 2216 at 2235-2236, para. 56 and *Cyprus v Turkey*, 10 May 2001. paras. 69-77; Human Rights Committee, *General Comment No. 31*, 2004, CCPR/C/74/CRP.4/Rev.6., para. 10; and UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), para. 11.19.

under IHL, providing further protection, either in terms of additional guarantees prior to the displacement or when considering the situation of those displaced as a result of the transfer.

Secondly, the domestic law applicable in the territory before it was occupied also continues to apply, except if the Occupying Power has revised it, which is only lawful in certain circumstances. Before 1967, the West Bank was under Jordanian rule and consequently Jordanian laws were in force in this territory. The law in force at the time was therefore a complex amalgam of Ottoman codes, British Mandate amendments thereto and regulations adopted before 1947, and Jordanian law. All those laws remain in force if they were not abrogated before the occupation started and if they are not contrary to international law. Indeed it is worth noting that the Occupying Power exercises limited legislative powers with regard to the territory it occupies and may enact or abolish laws only under certain conditions set out by the international law of belligerent occupation. In conformity with its legal obligations as an Occupying Power, when Israel started occupying the West Bank in 1967, the IDF Military Commander competent for the West Bank issued proclamations stating that the prevailing law would remain in force (i.e. Jordanian Law and British Mandate regulations), subject to changes made by military orders and proclamations.[24]

A comprehensive review of domestic laws and orders adopted by Israel applicable in Area C falls outside the scope of this Expert Opinion. However they might be relevant when considering the obligations of Israel under international law as spelled out above. Having said that they cannot alter Israel's international obligations. They will be addressed as arguments, including lack of land ownership or lack of building permits based on local laws, which are invoked by the Occupying Power to justify the displacement of Bedouin communities and in order to determine whether those rationales are acceptable under the specific norms of international law. In other words, under international law the related Israeli military orders or Israel's application or interpretation of preexisting local law, according to which the presence of Bedouins is unlawful, might be itself unlawful in the first place.

[24] See for example, D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State of University New York Press, New York, 2002, p. 25, and R. Shehadeh, "The Legislative Stages of the Israeli Military Occupation", in *International Law and the Administration of Occupied Territories*, E. Playfair (ed), Oxford University Press, Oxford, 1992, pp. 151-168. For the specific case of deportations and related local laws and military orders, see HPCR Policy Brief, 2004, *op. cit*., p. 6.

II. INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

1. The prohibition of forcible transfers under the international law on belligerent occupation

1.1 The definition of the prohibition

Article 49 of the GC IV is comprised of six paragraphs. While the most important and relevant paragraphs are the first two paragraphs that prohibit forcible transfer and consider under strict conditions evacuation by the Occupying Power, a reference will be made to the other paragraphs, either for the purpose of clarifying the meaning and scope of that specific prohibition or if they have a particular bearing for the purpose of this Expert Opinion. Paragraphs 1 and 2 read as follows:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

A. Meaning and scope of the prohibition

From the outset, it is important to stress that although the draft provision submitted by the ICRC ahead of the 1949 Diplomatic Conference referred to the prohibition of deportations and transfers, this absolute ban was not confirmed in 1949. The prohibition does not cover transfers of all kinds but only forcible transfers.[25]

The first paragraph refers to two types of acts: transfer and deportation. The ICRC Commentary of this provision does not provide clear criteria to distinguish between the two terms, apart from noting that in the paragraph 6 of Article 49 prohibiting the deportation or transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, "the meaning of the words "transfer" and "deport" is rather different from that in which they are used in the other

[25] J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (1958), p. 279.

paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power".[26] For both acts, the wording of paragraph 1 explicitly refers to a displacement taking place from and to a particular location, i.e "from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not". While some of the literature argues that Article 49 (1) prohibits forcible transfers *within* an occupied territory "as per the letter" of this provision[27] or assumes it does[28], a literal interpretation of this paragraph does not say so. The scope of this prohibition is limited to transfer and deportation towards a destination outside the occupied territory. The *travaux préparatoires* of the GC IV might be claimed to confirm this restricted understanding, in comparison to evacuations and the related exception in paragraph 2:

> "In principle, these evacuations take place only within an occupied territory which distinguish them from the transfers envisaged in the first paragraph. (…) This special case [of evacuation to another territory] constitutes an exception to the first paragraph."[29]

The HCJ of Israel seemed to adopt this restrictive approach when it addressed a petition against a decision to put three Palestinians from the West Bank on assigned residence in the Gaza Strip under Article 78 of the GC IV, a measure only allowed within an occupied territory. It rejected the argument made by the petitioners, invoking Article 49 of the GC IV that the West Bank and the Gaza Strip were two distinct territories, stating that there was "no reason to consider the provisions of art. 49" in that case, thus suggesting that this provision only covers cases of displacement towards a location outside the occupied territory.[30]

However, paragraph 2 starts with the word "nevertheless", which indicates that it regulates an exception to the prescription contained in paragraph 1, which would cover those evacuations, if not for paragraph 1. According to ICRC Commentary of Additional Protocol I regarding its Article 85, the term "nevertheless […] clearly shows that paragraph 1 also prohibits forcible transfers within occupied

[26] Ibid., p 283.
[27] See for example, HPCR, Policy Brief, *op. cit*., pp. 3-4.
[28] See for example, Diakonia, *The forced transfer of Bedouin communities in the oPt - Legal Brief*, November 2011, p. 1.
[29] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. IIa (1949), p. 827
[30] HCJ, *Ajuri v. IDF Commander*, 3 September 2002, HCJ 7019/02; HCJ 7015/02, para. 22.

territory."[31] In addition, paragraphs 3 and 4, which prescribe modalities for transfers authorized by paragraph 2 refer not only to "evacuations", but also to "transfers", a term only used in paragraph 1.

Therefore, in our view correctly, another interpretation emerged, taking into account a different criterion based on destination to distinguish between transfer and deportation. While not uniformly consistent, the subsequent jurisprudence of the International Criminal Tribunal for former Yugoslavia (ICTY) identified a criterion based on destination in the context of persons charged with the count of deportation under the crime against humanity. In *Prosecutor v. Krstic*, in 2001, the Trial Chamber held that "both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State".[32] Similarly in 2002, in *Prosecutor v. Krnojelac*, the Trial Chamber also stressed "deportation requires the displacement of persons across a national border, to be distinguished from forcible transfer, which takes place within national boundaries".[33] Furthermore, in the context of the first decision of the ICTY dealing with the charge of unlawful transfer of a civilian under Article 2 (g) of the Statute as a grave breach of the GC IV in 2003, in the *Naletilić and Martinović case*, the Trial Chamber noted that it was required among other elements to prove the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, leading to the transfer of a person from occupied territory or within occupied territory.[34]

The term transfer would therefore refer to the displacement of protected persons within an occupied territory. Such reading of the prohibition of forcible transfer under Article 49 paragraph 1 could also be derived from Article 85 (4) (a) of Additional Protocol I that includes among grave breaches of this treaty "the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" and considers this as being "in violation of Article 49 of the Fourth Convention". This interpretation was confirmed by the Statute of the International Criminal Court that criminalizes conduct described in the grave breach

[31] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.), Geneva, 1987, para. 3502, footnote 28.
[32] *Prosecutor v. Krstic*, ICTY, Trial Chamber, IT-98-33, 2001, para. 521
[33] *Prosecutor v. Krnojelac*, ICTY, Trial Chamber, IT-97-25-T, 2002, para. 474.
[34] *Prosecutor v. Naletilic and Martinovic,* ICTY, Trial Chamber, IT-98-34-T, 2003, para. 521.

to Additional Protocol I as a serious violation of the laws and customs applicable in international armed conflict.[35] The current doctrine on the scope of Article 49 paragraph 1 similarly endorses this broader reading.[36] For example Professor Eyal Benvenisti this provision "relates to any transfer of protected population from wherever it is located, whether the issue is a transfer inside the occupied territory, or deportation outside that territory".[37]

The reference to "involuntary and unlawful evacuation of individuals" in the ICTY case law defining transfer as a relocation within a given territory should however be considered with caution. The term 'evacuation' is indeed envisaged in the GC IV in a separate paragraph (Article 49 para. 2) that explicitly (unlike Article 49 para. 1) refers to displacement within the occupied territory.[38]

Paragraph 2 foresees a specific case; that of evacuations in the context of ongoing hostilities and being carried out in the interest of the protected persons themselves. Indeed, this provision envisages the possibility for the Occupying Power to "undertake total or partial evacuation of a given area *if the security of the population or imperative military reasons so demand*" (emphasis added). The ICRC Commentary notes that "[u]nlike deportation and forcible transfers, evacuation is a provisional measure entirely negative in character".[39] Therefore, paragraph 2 described as an "exception" to the prohibition contained in paragraph 1[40], as it refers to a specific situation that is a temporary evacuation (Article 49 para. 2, last sentence). In other words, the security of the population or imperative military reasons can only justify one kind of forcible transfer: a provisional measure of evacuation.

Furthermore, the prohibition of forcible transfer and deportation having been drafted to address the abuses committed during World War II, the wording reflects the patterns of displacement during that conflict. In as much as evacuations within the occupied territory from one area to another for security reasons are allowed under paragraph 2, *a contrario* if such considerations are lacking and that an evacuation is

[35] Article 8 (2) b (viii) of the 1998 Rome Statute.
[36] Y. Dinstein, *op. cit*., pp. 161-162.
[37] E. Benvenisti, *Expert Opinion on the prohibition of forcible transfer in Susya Village*, 30 June 2012 (unofficial English tranlsation from Hebrew), available at: http://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/the_prohibition_of_forcible_transfer_in_susya_village.pdf, p. 3.
[38] Y. Dinstein, *op. cit*., p. 162.
[39] J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (1958), p. 280.
[40] Idem. See also J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, *op. cit*., pp. 457 and ff.

not in the interests of the protected persons, this would amount to a prohibited forcible transfer. This is also in line with one of the fundamental principles of the law of belligerent occupation to balance the security interests of the Occupying Power with the interest of the protected persons.[41] The evolution of the types of armed conflict and practices of displacement accounts in part for the criminalization of acts of displacement under international criminal law that go beyond the scope of paragraph 1 as highlighted earlier.

To conclude, it is possible to deduce from Article 49 paragraphs 1 and 2 of GC IV, taking also into account the evolution of the criminalization of the violation of this norm as war crime, that forcible transfer within an occupied territory is prohibited under international law of belligerent occupation.

B. Conditions for a displacement to constitute a forcible transfer under IHL

For a displacement to amount to a forcible transfer prohibited, several conditions must be met, in addition to the element based on destination clarified earlier.

In light of the specific policies and practices associated with the displacement of Bedouin communities in Area C, the undersigned wish to first underline that the notion of forcible transfer must be interpreted broadly in line with the purpose of the GC IV to ensure protection of the protected persons. As noted by another expert, this is necessary to address the "ability of the occupying army to adversely use different rationales and take diverse indirect measures by manner that causes the protected persons to leave their location".[42] In particular, as shown below, the 'forcible' character of the transfer must be defined taking into account related practices and policies by the Israeli authorities that do no *per se* constitute transfer but actually cause the displacement.

The first condition for a displacement to be qualified as a prohibited forcible transfer is for the displaced to be protected persons under the GC IV. Pursuant to Article 4 (1), protected persons are "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a

[41] E. Benvenisti, The International Law of Occupation (2nd Ed., 2012), p. 100.
[42] E. Benvenisti, *Expert Opinion on the prohibition of forcible transfer in Susya Village*, *op. cit*., p. 5.

Party to the conflict or Occupying Power of which they are not nationals". The victim can be only one protected person or a group of persons as the prohibition refers to individual or mass transfers.

The second condition pertains to the displacement itself. It corresponds to protected persons being removed from their residence or the area where they are present to another location. This is confirmed in the ICC Elements of Crimes for the grave breach of forcible transfer that refers to the terms 'another location' as well.[43] This can be through an act or an omission. Considering that not all displacements are prohibited the key elements lies in establishing the forcible nature of the transfer. This denotes a lack of protected person's genuine wish to leave.

The term forcible has been interpreted broadly, going beyond the specific use of physical force. In the context of the count of deportation as a crime against humanity the ICTY Trial Chamber defined deportation "as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".[44] It further stated, quoting the Krstic Trial Judgment (para. 529):

> "Forced" is not to be interpreted in a restrictive manner, such as being limited to physical force. It may include the "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment". The essential element is that the displacement be involuntary in nature, where the relevant persons had no real choice.[45]

As a result the forcible character can be established not only when physical force or the threat of force but when creating a set of circumstances constitutive of a coercive environment. The ICTY Trial Chamber, in the first decision related to unlawful transfer as a grave breach also referred to Article 31 of the GC IV to assess the absence of genuine wish, that "provides for a general prohibition of physical and moral coercion covering pressure that is direct or indirect, obvious or hidden".[46] It added:

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[43] International Criminal Court, *Elements of Crimes*, 2002, U.N. Doc. PCNICC/2000/1/Add.2.
[44] *Prosecutor v. Krnojelac*, ICTY, Trial Chamber, IT-97-25-T, 2002, para. 474.
[45] Ibid., para 475 (footnotes omitted). See also *Prosecutor v. Stakic*, ICTY, Appeals Chamber, IT-97-24-T, 2006, para 281.
[46] *Prosecutor v. Naletilic and Martinovic,* ICTY, Trial Chamber, IT-98-34-T, 2003, para 519.

> The jurisprudence of the Tribunal also supports that the term 'forcible' should not be restricted to physical coercion. […] The determination as to whether a transferred person had a "real choice" has to be made in the context of all relevant circumstances on a case-by-case basis. Forcible transfer is the movement of individuals under duress from where they reside to a place that is not of their choosing.[47]

The ICTY Trial Chamber, referring to the negotiations of Article 31 during 1949 Diplomatic Conference and the omission of the words "against their free will", also interpreted this as a recognition that in certain situations, "even an expression of consent does not automatically make the transfer lawful, as such consent may have been rendered "valueless" by the situation".[48]

The final element to be assessed, which is closely linked to the determination of the forcible character of the transfer relates to the case of evacuations envisaged in paragraph 2 of Article 49. This provision sets out two alternative considerations that can justify, in the particular context of ongoing hostilities a total or partial evacuation of a given area: "if the security of the population or imperative military reasons so demand". However, as noted above, this is not strictly speaking an exception to the prohibition of forcible transfer, notably when considering whether the evacuation would qualify as a forcible transfer. Article 31 of the GC IV prohibits physical or moral coercion against protected persons. The ICRC Commentary notes that this provision cannot be considered in isolation and that the prohibition "only applies in so far as the other provisions of the Convention do not implicitly or explicitly authorize a resort to coercion."[49] It further refers as an example to the right of the Occupying Power to carry out evacuation under Article 49. Therefore, in that case the use of coercion would be allowed under IHL.[50]

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[47] Idem.
[48] Ibid., para 519, footnote no. 1357.
[49] J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War*, *op. cit*., p. 220.
[50] *Prosecutor v. Naletilic and Martinovic,* ICTY, Trial Chamber, IT-98-34-T, 2003, para 519 and footnote no. 1358.

1.2 The displacements of Bedouin communities from the Jerusalem periphery as forcible transfers

A. The past waves of displacements

The Bedouin communities first affected by the waves of displacement in 1997, 1998 and 2007 were mostly from the Jahalin tribe and were displaced from their dispersed rural kinship groups in the eastern periphery of Jerusalem to the "Arab al Jahalin village" (also known as "al Jabal"). These displacements concerned some 150 families, relocated in an Area C hillside named Raghabneh, re-named as the Arab al Jahalin village or "al Jabal".

While those three waves of displacements did not take place through exactly the same modalities and circumstances, these differences are not relevant for evaluating their lawfulness under the prohibition of forcible transfers.

Regarding the first wave, in 1994, the Israeli authorities informed the Bedouin communities that they would be displaced to the centralized site of Raghabneh. It is reported that the Bedouin opposed such decision on the basis that "the concentration of the dispersed groups into a single location would destroy their traditional livelihood and the social fabric of their small kinship groups; the selected location was in close proximity to a large-scale garbage dump posing significant health hazards, and the land selected by the ICA for the future Bedouin village was already owned by Palestinians from Abu Dis".[51] They initiated legal proceedings to challenge their eviction that concluded in a HCJ's ruling on 28 May 1996 rejecting their final appeal on the basis that they lack property rights .[52] Following that decision, the Israeli authorities demolished structures belonging to 65 families throughout 1997 who were relocated to the new site by bus.[53]

The second wave affected 35 families, who like during the first wave refused to leave, but they returned to the area where they used to live following the demolitions. On 1 March 1998, the Bedouin community's lawyer secured a HCJ's injunction allowing the Bedouins to remain on the demolition site provided that they negotiate with the ICA about their transfer. They obtained compensation packages, including the issuance of plots of land in the new location, financial compensation

[51] UNRWA/Bikom, *op. cit*., p. 14.
[52] HCJ, 2966/95, *Mohamed Ahmad Salem Harash and 19 others v Minister of Defense*, 28 May 1996 (unofficial translation by a lawyer).
[53] UNRWA/Bikom, *op. cit*., p. 14

and water connection that were extended to those affected by the first wave of displacement, and they then moved to the al Jahalin village.[54]

The third wave was comprised of 50 families, among whom twelve already lived in the Raghabneh area prior to 1967. It is important to note that while those remaining 38 families had already moved close to the outskirts of Raghabneh in the late 1970's during the establishment of Ma'ale Adummim settlement and during the first two waves in 1997 and 1998, they did so out of fear of demolitions by the ICA. Furthermore, although they agreed to negotiate with the Israeli authorities, it was reportedly due to "the fact that their kinship group had already been overrun by the creation of the al Jabal village" and that they "lost their sense of community since other groups of Salamaat Bedouin had been transferred to the same site, entirely spatially transforming the original community which had previously been kinship-defined."[55] So despite the fact that many families did not move at all and were allocated plots of land in their own location, unlike the two prior waves of displacements, this peculiar situation resulted from circumstances that forced them to leave in the first place. Additionally it is understood that some families were actually displaced, the fact that this was done in the vicinity of their prior location of residence is irrelevant for the purpose of classifying this as a displacement.

This factual information on the circumstances and modalities of the displacements need to be reviewed under the conditions for a transfer to be a prohibited forcible transfer under IHL. Firstly, as demonstrated above, the geographic scope of the prohibition also includes transfers within an occupied territory. It is undisputed that the Bedouin communities affected by the three waves of displacement were transferred to another part of Area C, which is considered as part of the same territory occupied by Israel. Secondly the Bedouins being non-Israeli citizens, the majority having been registered as UNRWA Palestine refugees when they were first displaced from their ancestral land in the early 1950's, they qualify as "protected persons" under GC IV due to the fact that they are not nationals of the Occupying Power. Additionally, the absence of hostilities makes any justification under paragraph 2 of Article 49, i.e. the possibility to classify those transfers as an exception under the regime of evacuations, impossible. Anyway, such an argument would be

[54] Ibid., p. 16.
[55] Idem.

dismissed, as evacuations are to be of a temporary nature, whereas the displacements of Bedouin communities to al Jabal are deemed permanent.

The key issue to determining the legality of those displacements lies in the question whether they can be qualified as forcible under IHL. As demonstrated above the ICTY jurisprudence clarified the interpretation of this term that must be understood in a broader manner than the strict use of physical force. It also includes "the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".[56]

The forcible nature of the displacements in 1997 combined both the use of force and threat. First it can be deduced from the fact that they were preceded by forced evictions. Therefore the modalities of the transfer did not result from a genuine choice. This is also supported by the Bedouin communities acquiring legal representation to challenge their transfer as soon as they were informed by the Israeli authorities of the plan to relocate them and the arguments put forward to oppose such displacement in terms of impact on their traditional way of life. An Israeli court adjudicating a dispute between a construction company involved in the development work of the settlement and the Israeli authorities noted the forced character of the evacuation.[57] The modalities of the actual transfer involved the use of soldiers and police as well as bulldozers. The Bedouin families displaced were also forcibly moved by bus to the alternative site with their hillside where their possessions had been pre-positioned in shipping containers.[58] The demolition of their structures following the 1996 HCJ's ruling also contributed to the forcible nature of the transfer. It is to be noted that the Israeli authorities carried out the forced evictions on the basis of Bedouins' lack of land ownership. However as discussed below, this justification based on local law cannot be taken for granted, nor can it render the transfer lawful, and must be reviewed under international law.

The displacement of 1998 similarly involved demolition and expulsions orders characterising the forcible character of the transfer.[59] The arrangement signed in

[56] *Prosecutor v. Krstic*, ICTY, Trial Chamber, IT-98-33, 2001, para. 529.
[57] Jerusalem District Court, *Sasi Building Earth and Road Contractors (1986) Ltd. v The State of Israel – Ministry of Housing and Construction*, Civil 1260/99, Judgment, 21 August 2006.
[58] UNRWA/Bimkom, *op. cit*., p. 14, See also B'Tselem, *On the Way to Annexation: Human Rights Violations Resulting from the Establishment and Expansion of the Ma'ale Adumim Settlement*, 1999, p. 26, http://www.btselem.org/sites/default/files/on_the_way_to_annexation.pdf
[59] B'Tselem, *On the Way to Annexation*, *op. cit*., p. 27

February 1999 by the attorney of the 35 families to be displaced only addressed the conditions of the displacement as described above, without altering the forcible nature of the transfer.[60] Furthermore, as stated by the ICTY, "even an expression of consent does not automatically make the transfer lawful, as such consent may have been rendered "valueless" by the situation".[61] In that regard, the measures adopted prior to this arrangement by the Israeli authorities created a coercive environment rendering the consent to those modalities in the 1999 agreement irrelevant for the matter of a legal determination under the prohibition of forcible transfers.

The last wave of displacement in 2007, while in appearance distinct from the two previous ones, can still qualified as a forcible transfer. It was not accompanied by the actual use of force but it resulted from a coercive environment. Indeed, as noted above, Bedouin families moved prior to 2007 in the vicinity of al Jabal out of fear of demolition and expulsion carried out in the context of the 1997 and 1998 transfers. In that regard, the forcible character of the transfer is established as the displacement was caused by fear of violence described by the ICTY as part of the relevant elements to determine a forced displacement. Consequently the fact that most of the Bedouin families affected in 2007 were not *per se* displaced has no bearing when it comes to the violation of the prohibition, which occurred at the time they first moved.

In light of the above, the undersigned conclude that the past three waves of displacements amount to forcible transfer under IHL and are in breach of Article 49 (1) of the GC IV.

B. The current plans for the displacement of the remaining Bedouin communities

In light of the patterns and modalities of the displacement of the Bedouins communities in 1997, 1998 and 2007, the announcement in 2006, re-stated in 2011 by ICA of its plan to 'relocate' the remaining 23 rural Bedouin communities from the Jerusalem periphery requires further scrutiny at to its lawfulness under international law.

[60] Ibid., p. 33.
[61] *Prosecutor v. Naletilic and Martinovic,* ICTY, Trial Chamber, IT-98-34-T, 2003, para 519, footnote no. 1357.

Like for the previous waves of displacements, the conditions of qualifying as protected persons and the absence of a situation for justified evacuation make the assessment primarily dependent on the forcible character of the transfer. As the plan of the ICA became clearer in July 2011, the leaders of the targeted communities formed the Protection Committee for Bedouin Communities in the Jerusalem Periphery. This Committee had three main requests, the main one being for the Bedouins to be allowed to return to their tribal territories in the Negev.[62] In parallel a petition was lodged with the Israeli HCJ in March 2012.[63] Those elements, including challenging the transfer before a court, combined with the policies and practices identified below, account for the lack of genuine will of the Bedouins to leave. While it was reported that some individuals might have given their consent, the continuing coercive environment Bedouins suffer from means that such consent does not hinder the transfer to be forcible.[64] Even where the transfer was voluntary this may have been created by a coercive environment or socio-economic conditions for which the occupying power is responsible. In any case, even if some of those individuals might not have been forcibly transferred, they keep their rights as protected persons under IHL and under IHRL. The ICA informed the HCJ in 2012 that it was re-considering the plan, with a new location for the transfer. According to the new plans, Jerusalem, Ramallah and Jericho periphery Bedouin communities will be transferred, in part or in all, to three locations in the West Bank: Al Jabal, as in the previous transfers, Nuweima, and Fasayil. The plans for Nuweima having been made public last week seem to be the most certain ones to go ahead. This change of the destination of the transfer does not modify the legal assessment detailed out in this opinion. The rationale behind this plan remains the settlement expansion in the strategically important 'E1' area. It is however to be hoped that the conditions in the two latter alternative relocation sites will be better than in al Jabal.

The undersigned therefore also consider that the current plans to displace the remaining Bedouin communities would amount to forcible transfer under IHL if carried out.

[62] UNRWA, Factsheet, *Bedouin Palestine refugees: the Jahalin tribe in the eastern Jerusalem periphery*, p. 2.
[63] See Petition HCJ 3930/12.
[64] Diakonia, *The forced transfer of Bedouin communities in the oPt*, *op. cit*., p. 1.

2. The obligation to restore and ensure public order and civil life and the relevance of local laws on land rights in determining the lawfulness of the transfer

2.1 The definition and scope of the obligation

Article 43 of the 1907 Hague Regulations reads in the most widely adopted English translation of the original authentic French texts:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

The International Military Tribunal at Nuremberg and the International Court of Justice have recognized that this provision is part of customary international law, and therefore binding upon all States.[65] The Israeli Supreme Court has also recognized the applicability and justiciability of the 1907 Hague Regulations based on the acceptance that they have a customary value.[66]

Article 43 spells out two obligations for the occupant: the obligation to restore and ensure public order and civil life and the obligation to leave local legislation in force. Given the fact that measures, such as eviction or seizure orders, adopted by the Israeli authorities leading to the displacement of Bedouin communities may be interpreted as part of the Occupying Power's duty to ensure public order and civil life, it is necessary to elaborate on the meaning and the scope of this obligation.

Regarding the definition of the field of application of this obligation, the expression 'public order and safety' does not only refer to security issues. The French version of Article 43, which is the only authentic text, uses the words 'l'ordre et la vie publics'. The legislative history of this provision offers evidence of a broader

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[65] *Trial of the Major War Criminals*, International Military Tribunal in Nuremberg. published in 41 *AJIL* (1947) 172, in particular at 248-249, and *Legal Consequences of the* Construction *of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ, paras. 89 and 124. See also E. Benvenisti, *The International Law of Occupation* (1993), p. 8; G. Von Glahn. *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation* (1957), p. 95, D. Kretzmer (2002), *op. cit*., p. 57, and Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, 16 *EJIL* 661, at 663.

[66] Judgment in the *Beth-El* case (H.C. 606/78 and 610/78), in *Military Government in the Territories Administered by Israel: the Legal Aspects* (M. Shamgar ed. 1982). See also *A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82, PO 37 [4], 785, 793.

interpretation of those terms, which cover 'des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours' ('social functions, ordinary transactions which constitute daily life').[67] Several courts endorsed this broad construction. A tribunal set up in the British occupied zone of Germany after the World War II interpreted the French phrase 'l'ordre et la vie publics' as relating to "the whole social, commercial and economic life of the community".[68] The Israeli Supreme Court endorsed the same approach when stating that the obligation to restore and ensure public life and order encompasses "a variety of aspects of civil life, such as the economy, society, education, welfare, health, transport and all other aspects of life in a modern society".[69] The obligation to restore and ensure public order and civil life is therefore broader than just guaranteeing security. This obligation is one of means and not of result, the public order and the civil life being only aims that the occupant must pursue with all available, lawful and proportionate[70] means, as confirmed by the expressions 'all the measures in his power' and 'as far as possible' in Article 43.

However, it is fundamental to stress that this obligation must be implemented in full respect of other IHL rules as well as human rights norms. This is especially important in the context of the matter reviewed in this Expert Opinion. First some measures the occupying power may take under this obligation are governed in detail by specific IHL rules as discussed below. In particular Article 46 of the 1907 Hague Regulations provide that family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Additionally it states that private property cannot be confiscated.[71]

Furthermore, the measures the occupant can take are also limited by numerous prohibitions set out in GC IV, including the prohibition of forcible transfers (Article

[67] This explanation has been proposed by Baron Lambermont, the Belgian representative at the negotiations for the Brussels Convention of 1874, which never entered into force, but is known as the 'Brussels Declaration', considered to codify many old rules of IHL. See Ministère des Affaires Etrangères de Belgique, *Actes de la Conférence de Bruxelles de 1874*, at 23, reproduced in E. Schwenk, 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations', 54 *Yale LJ* (1944–1945), at 393. Similarly Y. Dinstein, *op. cit*., p. 94.

[68] Germany, British Zone of Control, Control Commission Court of Criminal Appeal, *Grahame v. Director of Prosecution,* 26 July 1947. 14 *AD* Case no. 103, 228, at 232.

[69] *A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82 (1983), 37 [4] *Piskei Din*, English summary in: (1984) *Israel YbkHR* 301, at 306.

[70] This requirement includes proportionality between the interest of the population to have civil life restored and the adverse impact the means chosen by the occupying power to restore civil life may have for the population.

[71] For other examples in the 1907 Hague regulations, Arts. 48–52 on taxation, contributions and requisitions, and Arts. 53, 55, and 56 on public property.

49 of GC IV) and the prohibition of the destruction of civilian constructions/objects (Article 53 of GC IV). Finally, while the obligation to enhance civil life is an obligation of means, changes of the existing legislation or institutions justified by this exception are only lawful if they actually enhance civil life compared with the situation under the previous legislation. It is up to the occupying power to prove that the situation under the legislation it has introduced is better than that under the previous legislation. If, in a situation of long-term occupation it turns out that such enhancement did not occur, the change introduced cannot be justified and must be repealed.

Although the standard of conduct required under the obligation to restore and ensure public order and civil life is not the same as that with which human rights instruments expect states to comply in fulfilling human rights, this obligation is actually twofold: an obligation to restore public order and one to ensure that public order and civil life are guaranteed. The Supreme Court of Israel specifically highlighted that the general obligation of Article 43 consist of those two requirements.[72] It seems reasonable to contend that the second duty is particularly important as the occupation is prolonged over time and when the occupant is moving away from combat-like situations to issues related to the changing needs and the normal life of the civilian population.[73]

Finally, when fulfilling its duty to restore and ensure public order and civil life, the occupant must respect its obligations under international human rights law. This is particularly relevant because public order is restored **and ensured** through law enforcement operations that are governed by human rights norms. As recalled earlier, international human rights law continues to apply in times of armed conflict, including in situations of occupation, save cases of derogation or suspension for derogable rights under certain conditions. It is true that restoring or ensuring public order may constitute an emergency where the occupant is entitled to derogate from some of the rights. However it may be argued that in cases of prolonged occupation,

[72] *A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82 (1983), 37 [4] *Piskei Din*, English summary in: (1984) Israel *YbkHR* 301, at 306.
[73] See for example, Justice Shamgar of the Israeli Supreme Court qualified the second obligation as a "subsequent and continuous" duty which needs to be adjusted to changing social needs. See H.C. 69 +493/81, *Abu Aita et al. v. Commander of the Judea and Samaria Region et al*., 37(2) Piskei Din 197; English excerpt in: (1983) 13 *Israel YbkHR* 348, at 356-357, quoted by Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 2009, p. 98, footnote 24.

the duty of the occupant to ensure civil life in the broad meaning of the term may be subject to more limitations under international human rights law in as much as lawful reasons for derogation may not be invoked. In the case of Israel, the International Court of Justice held that with regard to the ICCPR, due to the fact that Israel notified derogation concerned only Article 9 of the Covenant, "the other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory".[74] As for the ICESCR, the Court, referring to the Concluding Observations of the Committee on Economic, Social and Cultural Rights on Israel, concluded: "In the exercise of the powers available to it [as the occupying Power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights".[75]

2.2 The displacements of Bedouin communities and the issue of land rights

While the Occupying Power's positive obligation to restore and ensure public order and civil life is to be implemented in full respect of the prohibition of forcible transfers and cannot override this ban, the displacement of Bedouin communities is often framed under the terms of the former obligation. This is an important shift both under IHL and IHRL, compared to the prohibition of forcible transfers, in that it requires to consider the relevance and validity of local laws as per the Occupying Power's obligation of Article 43 of the 1907 Hague Regulations, or the significance of lawfully residing on a land under IHRL, as in principle the prohibition of forced evictions does not cover evictions carried out by force in accordance with the law.[76] Therefore, the measures adopted by a given official authority on the basis of domestic or local law can be qualified as lawful evictions. However the mere reference to the local law when carrying out an eviction according to the law does not make the displacement lawful as this rationale must be reviewed under international law.

This question is particularly relevant in that the displacement is justified on the twofold argument that Bedouins lack land rights under local laws in the Jerusalem periphery and that Israeli authorities order evictions and expulsions to remedy this situation. In that regard, the history of displacements of Bedouin communities over

[74] ICJ, *Legal Consequences of the Construction of a Wall, op. cit.*, para. 127.
[75] Ibid., para. 112.
[76] Committee on Economic, Social and Cultural Rights, *General Comment 7 - Forced evictions, and the right to adequate housing*, 1997, U.N. Doc. E/1998/22, para. 4.

the past 60 years and their traditional way of living as a nomadic pastoralist tribe are particularly pertinent, especially as the past three waves of displacement proved to have affected those traditions. While this nomadic culture may at first be seen as undermining their entitlements to claim rights on the land they settled in, the protection of their ancestral way of life needs to be taken into account when applying IHL and IHRL norms, not least because the Occupying Power may introduce new legislation (necessary for neither security nor maintaining law and order purposes) only if it enhances the situation of the occupied population.

The main point of contention, beside the dispute on when the Bedouins settled in the eastern periphery of Jerusalem, as highlighted in the 1996 HCJ's ruling[77], lies in whether or not the Bedouin communities in this eastern periphery of Jerusalem lack land and property rights. It is understood that as they settled in those locations along their established migration routes, the land-use was secured though ad-hoc arrangements with local Palestinian landowners, "from simply securing the blessing of a land owner to reside on the land, to the payment of monthly rent or the sharing of any agricultural profits resulting from land use on a seasonal basis".[78] It is therefore paramount to highlight that restricting the presence of Bedouins in the eastern Jerusalem periphery to a question of legal land ownership right, in whatever limited way this right is defined, such as the duration of the presence on the land as in the case at hand, is artificial given the fact that their very traditional of life is nomadic. Indeed it is reported that by nature the Bedouins do not remain in one area permanently and have maintained those traditions for thousands years until 1967 and the increasing restrictions of their mobility arising from the occupation of the West Bank. In that regard, the undersigned tend to agree with the striking quote of an Israeli NGO: "The only way the Bedouin can comply with the law, given the terms of reference of the IDF and the High Court of Justice, is to cease being Bedouin".[79]

The contention about the land from which Bedouins communities were displaced in the eastern periphery of Jerusalem and that was to become the Ma'aleh Adumim settlement is based upon a combination of different legal justifications, which are controversial. In the mid 1970s, several years after they were declared

[77] HCJ 2966/95, *Mohamed Ahmad Salem Harash and 19 others v Minister of Defense*, 28 May 1996.
[78] UNRWA/Bimkom, *op. cit*., p. 10
[79] B'Tselem, *On the Way to Annexation*, *op. cit*., p. 29.

"closed military zone", some 3500 hectares of land were expropriated by the ICA for the purpose of establishing the settlement.[80] While declaring a land "closed military zone" does not affect the ownership of the land, it greatly impacts the ability of those who claim to own it to establish their claim: this indeed prevents the "continuous use" of the land, which is the main way to prove private ownership in the absence of deeds according to local laws. Finally further parts of land were later declared "state land"[81] (defined by ICA as all lands not being categorized as private) at the beginning of the 1980s after the Israeli HCJ ruled the requisition of land for settlement purposes illegal. The declaration of "state land" is a measure based on an Israeli broad interpretation of the Ottoman Lands Law of 1855, putting aside Jordanian laws, and putting the burden of proving ownership rights, through the concept of "continuous use" of the land. on Palestinians[82] (a practice violating Article 43 of the Hague Regulations). The Israeli authorities invoked the status of "state land" to justify the transfer of Bedouins and apparently developed this justification to circumvent the 1979 Israeli HCJ ruling prohibiting Israel from building settlements on private Palestinian land.[83] As far as the claim that the land from which the Bedouins were transferred was state land is concerned, in its 1998 ruling the HCJ noted that the Bedouin "did not claim in the past and do not claim now that they own the land". [84] However, this was only a procedural matter related to the type of arguments submitted to the Court by the petition. In other words, even if they had claimed that it was their own land, given their traditional way of life and the fact that the measures adopted by the Israeli authorities to displace the Bedouins communities are based on the status of "state land", it would have been very difficult for the Bedouins to prove they, or anyone else, own the land (apart from the fact that in the case of Bedouins other rights than ownership should be recognized, in particular concerning public

[80] B'Tselem, *The Hidden Agenda: The Establishment and Expansion Plans of Ma'ale Adummim and their Human Rights Ramifications*", 2009, p. 9, available at: https://www.btselem.org/download/200912_maale_adummim_eng.pdf

[81] See for example, *Eviction Order - Order concerning Government Property,* Civil Administration Judea and Samaria, Custodian of Abandoned and Government Property, 31 August 1994. In the context of the first petition brought by the Bedouins' lawyer, Appeals committee's decision, *Hassan Muhammad Hassan Azhish et al. v The Custodian of Government Property*, Files 12/81, 13/81 and 22/81, 2 April 1995 (unofficial translation by a lawyer). See also B'Tselem, *On the Way to Annexation*, *op. cit*., p. 9

[82] B'Tselem, *On the Way to Annexation*, *op. cit*., pp. 9-10.

[83] On this issue, see, M. Sfard, E. Schaeffer, et al., *A Guide to Housing Land and Property Law in Area C of the West Bank*, February 2012.

[84] HCJ 1242/98. *Abdullah Salem Sa'ida lahalin et al . Civil Administration for Judea and Samaria and the Military Commander of Mea and Samaria*, pp. 13-14, quoted by B'Tselem, *On the Way to Annexation*, *op. cit*., p. 29.

land). In 1996, the HCJ had already actually ruled that they have not rights on this land.[85]

Moving from this land issue to its relevance under the international law of belligerent occupation, it is important to note that the 1996 judgement of the HCJ, in the unofficial translation provided to the undersigned, makes no reference to the relevant norms of international law on belligerent occupation and focuses on the absence of property rights. Conversely, the issue of the land or property rights in determining whether a transfer is prohibited relates to the powers of the occupant. First, the very classification of the land as "state land" by Israel can be challenged under Article 43 of the 1907 Hague Regulations. It may also be argued that state land should anyway be used for the benefit of the protected population (or the occupying forces) and certainly not to construct illegal settlements. Furthermore, while in principle the Occupying Power can claim it is keeping with its duty to ensure public order when carrying out evictions of persons who have no right under local law to settle in a given place, this obligation is also limited by specific IHL prohibitions, notably the prohibition of forcible transfers. In our case, as noted above, it is controversial whether the protected persons had a right under applicable local law to settle in the places from which they were transferred. In determining whether this is the case, an occupying power must, as must a state on its own territory take into account the specificities of Bedouin communities and of their relationship with the land on which they settle or which they use. The recognition and development of the rights of indigenous peoples suggests that for communities such as Bedouins too, a broader understanding of land rights, beyond the mere question of ownership is necessary, which consider the use as well. For example the United Nations Declaration on the Rights of Indigenous Peoples provides for their "right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired". Additionally, "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired".[86]

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[85] See also, Appeals committee's decision, *Hassan Muhammad Hassan Azhish et al. v The Custodian of Government Property*, *op. cit*.

[86] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, 61/295, Article 26 (1) and (2)

In any case the right and the obligation to enforce local law could only prevail over the prohibition of forcible transfers and of house demolitions in case of an unlawful appropriation of the land occurring during the occupation. If the previous sovereign respected certain traditional land rights of Bedouins, the occupying power must respect them too, as the legislation it has to respect is not only written legislation. Furthermore, the rationale behind the transfer of the Bedouin communities in 1997 and 1998 is the use of land for the establishment of the Ma'ale Adummim settlement in the Jerusalem periphery, which dates back to 1975[87]. This cannot in any way be construed as falling within the scope of the maintenance of public order and civil life as foreseen in Article 43 of the 1907 Hague Regulations. The creation of a settlement within the occupied West Bank for the purpose of relocating Israeli citizens is in itself a violation of Article 49 (6) of GC IV that prohibits the Occupying Power to deport or transfer parts of its own civilian population into the territory it occupies.

In addition, limiting the judicial review of the transfer of Bedouins to an issue of land rights in relation to the status of "state land" fails to take into account the positive obligation of Israel to ensure public order and civil life. This obligation having been interpreted by the HCJ itself as including the welfare of the population and to be understood according to evolution of the society in a dynamic way.[88] This would include taking into account the recognition that the realization of economic, social and cultural rights must be done in full respect for the social and cultural identity, customs and traditions of indigenous and tribal peoples.[89] The Committee on Economic, Social and Cultural Rights had previously raised concerns in the context of the relocation of Arab-Bedouin from the Negev desert to new centralized settlements about the negative impact these measures will have on their cultural rights and links with their traditional and ancestral lands.[90]

The undersigned conclude that Israel's obligation to restore public order and civil life cannot override the prohibition of forcible transfers. In particular the argument that

[87] UNRWA, Factsheet, *Bedouin Palestine refugees: the Jahalin tribe in the eastern Jerusalem periphery*, p. 2.
[88] *A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82, PO 37 [4], 785. p. 800.
[89] See for example *ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, Article 2.
[90] CESCR, Concluding observations of the Committee on Economic, Social and Cultural Rights, ISRAEL, E/C.12/ISR/CO/3, 2011, para. 37.

the expulsions and evictions on the basis that the Bedouin lack land ownership rights are measures pertaining merely to the enforcement of the local laws as amended by Israel may be rejected on three main grounds:

- First, changes and interpretations of the local laws by Israel to declare the land on which Bedouin settled as "state land" might be in violation of the obligation of Israel not to amend the legislation of the occupied territory.
- Secondly, the rationale behind the transfer of Bedouin communities being the creation and expansion of settlements, which is a violation of the international law of belligerent occupation, it prevails over the justification that those evictions are based on lack of property rights.
- Finally Israel should take into account the recognition of specific rights for Bedouins on land use when it relates to the preservation of their traditional way of life; in this case the Bedouin communities as a pastoralist nomadic tribe.

3. Other relevant norms of international law of belligerent occupation and IHL applicable to practices and policies associated with forcible transfer

In light of the policies and practices adopted by the Israeli authorities, the patterns of displacements of Palestinians in general and of Bedouins in particular in the oPt require to consider other norms of international law. While such policies and practices may be part of the legal determination of whether a transfer is a prohibited forcible transfer, they may also amount *per se* to violations of international law that incidentally resulted in a displacement. They commonly pertain to either the causes leading to the displacements or the means used to achieve them, such as house demolitions, or to situations resulting from the displacement, including the measures taken vis-à-vis the displaced persons. There may also be rationales and justifications put forward by the Occupying Power to carry out the transfer that although based on domestic law have no bearing under international law. Those additional norms must be discussed in the context of the general obligations of the Occupying Power highlighted above.

As noted, the powers of the occupant must be exercised in respecting the specific prohibitions set out under IHL. Pursuant to Article 53 of Geneva Convention

IV, "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations".

In addition to Article 46 of the 1907 Hague Regulations that provides for the respect of family honour and rights, the lives of persons, and private property, as well as religious convictions and practice as well as stating that Private property cannot be confiscated in the specific context of occupation, Article 27 (1) and (2) of GC IV set out the general obligation towards protected persons who "are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs" and who "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof".

Furthermore, in terms of positive obligations, in addition to the obligation to restore and ensure public life and order (Article 43 of the 1907 Hague Regulations), that includes welfare and health towards the population of the occupied territory, the occupying power has "the obligation to maintain the material living conditions of the population in the occupied territory at a reasonable level"[91] derived from Article 55 (1) of GC IV and Article 69 (1) of Additional Protocol I.

The above obligations *a fortiori* also apply towards the persons who have been displaced. The GC IV only envisages specific duties regarding the particular case of justified evacuations during ongoing hostilities. Article 49 (3) provides that the Occupying Power "shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated". It is consistent with the fact that the Convention could not organize such duties of the Occupying Power vis-à-vis protected persons who were victims of forcible transfer. Having said that, it does not mean that those victims would not be entitled to the same treatment for the mere reason that their situation results from an IHL violation. Even a victim of a violation of GC IV remains a protected person under GC IV.

[91] H. Spieker, *Humanitarian Assistance, Access in Armed Conflict and Occupation*, *MPEPIL - online*, 2010, para 9.

Irrespective of the land ownership issue, the demolition of Bedouins' structures prior or after the transfer could also amount to a violation of Article 53 of GC IV. This must be considered in the broader context of the planning and building system in Area C. Among the categories of house demolitions carried out by the Israeli authorities are houses that may be demolished because building permit was not sought prior to their construction. Such demolitions are labeled "administrative demolitions"[92]. As noted by the undersigned in a previous Expert Opinion, the current planning and building system is characterized by a very high rate of rejection of building permit applications by Palestinians, leading the latter to build without permit and exposing themselves to "stop work" orders and demolition orders.[93] Demolitions of houses built without a permit may be considered to violate Article 53 if the lack of permit is due to a system, which is contrary to the legislative powers of the occupant, which is so in Area C.[94]

As mentioned above, the demolition orders, the overly restrictive planning and building regime, coupled with the ever-growing threat against their traditional pastoralist way of life, the settlement policy increasing the threat of physical and psychological violence created circumstances that rendered the transfer of Bedouin communities forcible under international law.

Furthermore, the relocation site, al Jabal village in an area on the northern boundary of Jerusalem's municipal garbage dump, due to the physical and planning conditions of the neighbourhood and of the living conditions there[95] also raises serious concerns as to the obligations of the Occupying Power under IHRL. While an extensive legal review of this question goes beyond the scope of this Expert Opinion, the undersigned wish to recall that the Israeli authorities remain bound by IHRL obligations with regard to the treatment of displaced Bedouins. Due to the lack of specific IHL obligations on this issue, IHRL would apply to provide additional protection. Some of those obligations were highlighted by the Committee on Economic, Social and Cultural Rights in 1998:

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[92] See HPCR, *The legality of house demolitions under International Humanitarian Law*, Harvard University, 31 May 2004.
[93] See for example, Human Rights Watch, *Separate and Unequal, op. cit.*, 2010, p. 11.
[94] M. Sassoli and T. Boutruche, *Expert Opinion on International Humanitarian Law Requiring of the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding area C of the West Bank*, 2011, available at:
http://rhr.org.il/heb/wp-content/uploads/62394311-Expert-Opinion-FINAL-1-February-2011.pdf
[95] UNRWA/Bimkom, *op. cit.*, pp. 21 and ff.

> The Committee notes with deep concern the situation of the Jahalin Bedouin families who were forcibly evicted from their ancestral lands to make way for the expansion of the Ma'aleh Adumim and Kedar settlements. The Committee deplores the manner in which the Government of Israel has housed these families in steel container vans in a garbage dump in Abu Dis in subhuman living conditions. The Committee regrets that instead of providing assurances that this matter will be resolved, the State party has insisted that it can only be solved through litigation.[96]

Similarly certain issues, ranging from the lack of information and consultation in an expulsion process to questions around the adequate standards of living, are not properly governed under IHL. The continued applicability of IHRL may serve to regulate those issues, in particular regarding the right of everyone to a home (Article 17 of the ICCPR) and the right to adequate housing stemming from the right to an adequate standard of living under Article 11 (1) of the ICESCR.

The undersigned consider that the forcible transfers of Bedouin communities should not be addressed in isolation and should be linked to the other associated policies and practices that may constitute violations of IHL and IHRL.

4. The specific issue of the prevention or restriction of humanitarian assistance

Given the acute vulnerability of victims of forcible transfer, the question of the Occupying Power's obligations with respect to the humanitarian assistance other actors may offer arises. According to Article 59 (1) of GC IV, in case "the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population". This has been interpreted as setting out a "duty to agree to humanitarian assistance being delivered to this population and, respectively, to grant access to outside actors offering such assistance".[97] This provision also foresees the obligation to "facilitate [relief schemes] by all the means at its disposal". Such obligations are to be applied taking into account certain control rights, notably in terms of verification and supervision (See for example Article 59 (4)). Furthermore, according to Article 60, the Occupying

[96] Committee on Economic, Social and Cultural Rights, Concluding observations: Israel, E/C.12/1/Add.27, 4 Dec 1998, para. 12.

[97] Ibid., para. 10.

Power has an obligation not to "divert relief consignments from the purpose for which they are intended".

The displacement of Bedouin community raises a particular issue as to the way Israeli authorities deal with efforts by the International Community and humanitarian actors to alleviate the consequences of the demolitions of Bedouin structures. There are currently several court cases, following demolition orders being issued by the ICA on structures donated by the international community to improve living conditions and coping strategies of the Bedouin communities facing expulsion from the Ma'ale Adummim area. Furthermore, it is reported that during a recent meeting of the Knesset Sub-committee of the Foreign Affairs and Defense Committee on 27 April 2014 discussions focused on 'illegal Palestinian construction' in Area C, particularly in EI, as well as various methods of enforcing a prohibition on construction and the role of international organisations and third States in facilitating and funding such construction.

This issue of the destruction (prohibited by Art. 53 GC IV) of structures funded by humanitarian actors as a result of a prior demolition raises also concerns under the obligations of the Occupying Power to facilitate humanitarian assistance, discussed above. While the GC IV provisions focus on relief schemes these should be interpreted as including shelter such as tents, provided by humanitarian actors for Bedouins.

> The undersigned concludes that Israel has an obligation to facilitate humanitarian assistance towards the affected Bedouin communities and that conversely the destruction of humanitarian non-food items could be seen as a breach of the GC IV.

III. FORCIBLE TRANSFER AS A GRAVE BREACH AND ITS IMPLICATIONS

From the outset it is worth recalling that the terms "war crimes" refer to the generic category of a series of violations of IHL rules that trigger the individual criminal responsibility under international law. While "grave breaches" to the GCs and to the Additional Protocol I are war crimes, they correspond to a term of art in

IHL in that only a certain agreed list of violations of IHL norms amount to grave breaches as a technical denomination carrying a specific legal regime.

It is important to note that forced displacement was already envisaged as a war crime in the Charter of the Nuremberg International Military Tribunal under the crime of "deportation to slave labor or for any other purpose of civilian population of or in occupied territory".[98] In 1949 the GC IV included the violation of the prohibition of forcible transfer as part of the list of grave breaches to the Convention, to which the specific regime set out in the GC applies as discussed below. Article 147 uses a slightly different terminology as Article 49 (1) and refers to the "unlawful transfer of a protected person". Similar to the divergence of views on the extent to which the first paragraph of Article 49 covers forcible transfer within an occupied territory, there have been different interpretations on the content of the corresponding grave breach. In that regard the 1977 Additional Protocol I marked an evolution in the criminalisation of the violation of this norm. Article 85 4 (a) added as a grave breach "the transfer by the Occupying Power of all or parts of the population of the occupied territory *within* or outside this territory, in violation of Article 49 of the Fourth Convention" (emphasis added). This wording can come in support of the broader interpretation of Article 49 (1) spelled out above. Most importantly, it clarifies the content of the grave breach of forcible transfer by explicitly criminalizing this form of displacement within the occupied territory. The ICRC Commentary noted that on the basis of the ICRC Commentary of Article 49, "it may be concluded that such a forcible transfer [within occupied territory] was already a grave breach within the meaning of Article 147".[99] Another part of Article 85 4 (a) also added a new element in making the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies a grave breach compared to Article 147 of GC IV.

While Israel is not a Party to Additional Protocol, nor to the Statute of the ICC, it is important to stress that this latter instrument is relevant as the most recent codification of existing war crimes. The ICC Statute took into account this evolution of the definition of forcible transfer and contains two distinct, though potentially overlapping, war crimes of forcible transfer. Article 8 (2) (a) (vii)-1 restates unlawful transfer as a grave breach to the GCs, while Article 8 (2) (b) (viii) codifies "the

[98] Article 6 (b), Charter of the International Military Tribunal, 8 August 1945.
[99] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, *op. cit*., para. 3502, footnote 28. It however referred to diverging views in the doctrine.

transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory *within or outside this territory*" (emphasis added) as serious violations of the laws and customs applicable in international armed conflict.

The latter provision explicitly refers to transfer within the occupied territory. However the *Elements of Crimes* adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court in 2002 elaborates on the elements of those two war crimes. In that regard, the war crime of unlawful transfer also seems to cover all forcible transfers, including forcible transfer within the occupied territory in that the first element of this crime consists of the transfer of "one or more persons to another State or *to another location*" (emphasis added).[100] Similarly, the other war crime of forcible transfer specifically states the displacement can take place "within or outside" the occupied territory.[101]

Finally it is worth noting that while for the crime against humanity of deportation or forcible transfer of population the Element of Crimes includes the element that the transferred person or persons were lawfully present in the area from which they were so transferred[102], there is no mention of such requirement for the two war crimes of transfer contained in the ICC Statute.

Although it will be to a tribunal to determine through a judicial process whether such crimes of forcible transfer were committed against the Bedouin communities, this Expert Opinion can make the following legal determination *prima facie*. For the purpose of this classification the ICC document on the Elements of Crimes provide the constitutive elements for the war crime of unlawful transfer envisaged in Article 8 (2) (a) (vii)-1 of the ICC Statute that correspond to the same crime identified as a grave breach in the GC IV. Those elements are:

> 1. The perpetrator deported or transferred one or more persons to another State or to another location.

[100] ICC, *Element of crimes*, *op. cit*., p. 17. See also for a similar interpretation, K. Dörmann, "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, 2003, p. 375.
[101] ICC, *Element of crimes*, *op. cit*., p. 22.
[102] Ibid., p. 6.

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

As noted by Professor Eyal Benvenisti in Expert Opinion, in conjunction with Article 30 of the ICC, "There is no requirement that the person intended to cause the transfer or deportation, it is sufficient that he was aware that this is an expected outcome of his action".[103] Based on the factual information described above those elements can be established regarding the displacements of Bedouin communities. This is particularly the case in the context of the prolonged occupation by Israel with regard to elements 3 and 4. Even if the intent was to be required, it could also be constituted given the modalities and associated practices related to the displacement of Bedouin communities whereby their transfer cannot be seen as an incidental indirect consequence, but was the primary purpose of the evictions and demolitions.

Given the uncertainty of the ICC being seized of the situation in the oPt, despite the recent developments, and the temporal limitation restricting the potential jurisdiction of the Court to the ongoing efforts to displace the remaining Bedouin communities, the undersigned wish to highlight the importance of the legal specific regime attached to the existence of graves breaches to the GCs. This must be read in conjunction with the discussion on the obligation of third States below. Article 146 of GC IV provides:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

[103] E. Benvenisti, *Expert Opinion on the prohibition of forcible transfer in Susya Village*, *op. cit*., p. 3.

> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In addition to the obligation for State parties to the GC IV to enact the appropriate legalisation establishing penal sanctions for such grave breaches, this article sets out the principle of universal jurisdiction, in that any State in the world can and must exercise jurisdiction over alleged perpetrators of graves breaches, including forcible transfer, irrespective of the nationality of the victims, that of the perpetrator and of the location of the crime. In the current case, third State courts could therefore prosecute or extradite alleged perpetrators of the forcible transfer of Bedouins. However, it must be noted that over the past decade some States amended their legislation on universal jurisdiction to include the requirement of the presence of the alleged perpetrator on the territory of the concerned State for the universal jurisdiction to be exercised. Article 148 of GC IV also recalls the principle of responsibility for the High Contracting Parties with regard to grave breaches.

The undersigned consider that the forcible transfers of the Bedouin communities may amount to graves breaches of the GCIV and that consequently the regime of grave breaches as set out by Article 146 of the GC IV applies, including the potential avenue to rely on the principle of universal jurisdiction for prosecution of alleged perpetrators.

IV. *OBLIGATION OF THIRD STATES IN PREVENTING THE DISPLACVEMENT OF BEDOUINS AND THE OBLIGATIONS OF THE STATE OF PALESTINE*

Unlike other branches of international law, IHL contains a unique obligation, set out in Common Article 1 of 1949 Geneva Conventions[104], which is also of a customary nature.[105] States must, in all circumstances, respect and *ensure respect* for IHL. This obligation has important consequences especially in the context of this Expert Opinion for third States vis-à-vis Israel engaged in forcible transfer of Bedouin communities. They are expected to take all possible steps to ensure that IHL is respected by all parties, in particular by parties to a conflict or by Occupying Powers.

[104] This obligation is also contained in Article 1, para. 4 of 1977 Additional Protocol I.
[105] See *Military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, *ICJ Reports,* 1986, paragraph 220.

Although some States had a restrictive interpretation of this obligation limited to the parties to a conflict[106], the International Court of Justice in its 2004 Advisory Opinion on the Wall rejected this approach. The Court held that every High Contracting Party to the Conventions, regardless of whether they are parties to a conflict, is bound by this obligation.[107] This interpretation is confirmed by State and international organizations practice as well as by the doctrine.[108] Therefore States must take active part in ensuring compliance with the rules of IHL by all parties concerned, as well as react against violations. It is necessary to stress that this obligation is not limited to grave breaches to the GCs but applies to all norms contained in those treaties.

When considering the status of the GC IV norms, especially the absolute prohibitions such as the one regarding forcible transfers, there are additional implications under general international law on State responsibility. Article 41 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts[109] envisages specific consequences of a serious breach of obligations under peremptory norms of general international law: 1) states shall cooperate to bring to an end through lawful means any serious (gross or systematic) breach of a peremptory norm of general international law; 2) no state shall recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining that situation.[110] While no details are given about the concrete measures to be taken to

[106] 'UK Policy on the Occupied Palestinian Territories', Letter to Hickman and Rose by Nick Banner, UK Foreign and Commonwealth Office, 20 September 2005.
[107] ICJ, *Legal Consequences of the Construction of a Wall, op. cit.*, para. 158.
[108] L. Boisson de Chazournes and L. Condorelli, "Quelques remarques à propos de l'obligation des Etats de "respecter et de faire respecter" le droit international humanitaire "en toutes circonstances"", in C. Swinarski (ed.) (1984) *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix Rouge en l'honneur de Jean Pictet*, Dordrecht, Martinus Nijhoff, pp. 17-35, and from the same authors, "Common Article 1 to the Geneva Conventions Revisited: Protecting Collective Interests", *IRRC*, 2000, No. 837, pp. 67-87. In Resolution S/RES/681 (1990) of 20 December 1990, the Security Council "gravely concerned at the dangerous deterioration of the situation of all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and at the violence and rising tension in Israel (…), called upon the High Contracting Parties to the said Convention to ensure respect by Israel, the Occupying Power, for its obligations under the Convention in accordance with article 1 thereof".
[109] General Assembly, Resolution 56/83, 12 December 2001.
[110] In the Wall Case, following its reference to common article 1, the ICJ stated that: "[G]iven the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction", see ICJ, *Legal Consequences of the Construction of a Wall, op. cit.*, para 159.

give effect to such obligations[111] one may foresee that third States have a duty, also under the obligation contained in Common Article 1 of the GCs to exert pressure on Israel to put an end to the particular plan to remove the remaining Bedouin communities as a matter of preventing further forcible transfers.

As for the State of Palestine, it is necessary to recall the complex fragmentation of the West Bank. The State of Palestine would have similar obligations as mentioned above in terms of prevention regarding the transfer of Bedouins in Area C as there is not much more that could be expected, due to the exclusive control of Israel on this zone. However if the ongoing plans to displace the remaining Bedouin communities were to be amended to include some locations in Area A, more obligations arise from the increased control and responsibility of the Palestinian Authority over this type of area *as per* the 1995 Agreement. At the latest after its accession to the Geneva Conventions, the obligation described above to ensure their respect, including by Israel, and under its obligation not to contribute to violations or to recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining that situation, Palestine should avoid to facilitate the forcible transfer of Bedouins by agreeing to receive them (with the exception of humanitarian emergency situations resulting from violations). The accession of the State of Palestine to seven core international human rights treaties on 2 April 2014 may equally have significant consequences.[112] It is true that prior to this development the Palestinian Authority already had explicit obligations contained in the Oslo Accords.[113] Furthermore as a governing entity exercising a certain amount of control over a given territory, the Palestinian Authority was considered as a duty bearer under human rights law.[114] However this accession clarifies the situation and

[111] U. Palwankar, "Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law", 1994, *IRRC*, No. 298, pp. 9-25.
[112] OHCHR, Press Briefing, 2 May 2014, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=14556
[113] Cf. Annex I of the Protocol Concerning Redeployment of the Interim Agreement of September 28, 1995 and Article XIV of the 1994 agreement on the Gaza Strip and the Jericho Area. See "The "Roadmap": Repeating Oslo's Human Rights Mistakes," Human Rights Watch, May 6, 2003, http://www.hrw.org/backgrounder/mena/israelpa050603.htm, and "An Analysis of the Wye River Memorandum," Human Rights Watch, November 1998, available at: http://www.hrw.org/press98/nov/israel1102.htm
[114] "Mission to Lebanon and Israel," Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special

bring into play the UN human rights monitoring mechanisms, such as the treaty bodies set up by the relevant treaties the State of Palestine acceded to.

In particular, if the ICA plans were to be amended to include transfers to Area A, some of the Bedouin communities to be displaced would fall under the jurisdiction of the State of Palestine. In that respect, the State of Palestine acceded to the ICCPR and to ICESCR that entered into force on 2 July 2014. This requires for example to ensure that the right to adequate housing. This being said, those remarks do not affect Israel's obligation as an Occupying Power.

The undersigned conclude that third States and the State of Palestine has specific obligations either to prevent further displacements or, if such endeavour is unsuccessful, to provide assistance to those who may be displaced in Area A in the future.

CONCLUDING REMARKS

While the undersigned understood that the upcoming plans to transfer the remaining Bedouins from the eastern Jerusalem periphery might imply further negotiations with potentially affected communities, including through the Bedouin Protection Committee, the legal conclusions of this Expert Opinion remain relevant.

In the light of the above, it is submitted that:

1) **The past three waves of displacements amount to forcible transfer under IHL and are in breach of Article 49 (1) of the GC IV.**

2) **The current plans to displace the remaining Bedouin communities would amount to forcible transfer under IHL if carried out.**

3) **Israel's obligation to restore public order and civil life cannot override the prohibition of forcible transfers. In particular the argument that the expulsions and evictions on the basis that the Bedouin lack land ownership rights are measures pertaining merely to the enforcement of the local laws as amended by Israel may be rejected on three main grounds:**
   - **First, changes and interpretations of the local laws by Israel to declare the land on which Bedouin settled as "state land" might be**

Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari,UN doc A/HRC/2/7, para. 19.

in violation of the obligation of Israel not to amend the legislation of the occupied territory.

- **Secondly, the rationale behind the transfer of Bedouin communities being the creation and expansion of settlements, which is a violation of the international law of belligerent occupation, it prevails over the justification that those evictions are based on lack of property rights.**
- **Finally Israel should take into account the recognition of specific rights for indigenous peoples ion land use when it relates to the preservation of their traditional way of life; in this case the Bedouin communities as a pastoralist nomadic tribe**

4) **The forcible transfers of Bedouin communities should not be addressed in isolation and should be linked to the other associated policies and practices that may constitute violations of IHL and IHRL.**

5) **Israel has an obligation to facilitate humanitarian assistance towards the affected Bedouin communities and that conversely the destruction of humanitarian non food-items could be seen as a breach of the GC IV.**

6) **The forcible transfers of the Bedouin communities may amount to graves breaches of the GCIV and consequently the regime of grave breaches as set out by Article 146 of the GC IV applies, including the potential avenue to rely on the principle of universal jurisdiction for prosecution of alleged perpetrators.**

7) **Third States and the State of Palestine has specific obligations either to prevent further displacements or to provide assistance to those who may be displaced in Area A in the future.**

Prof. Marco Sassoli
Signature

Dr. Théo Boutruche
Signature

Date: 22 September 2014