

FORCED POPULATION TRANSFER: THE CASE OF PALESTINE

DENIAL OF REPARATIONS

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Forced Population Transfer: The Case of Palestine - Denial of Reparations

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Credit and Notations

To honor anonymity and protect the victims, in some cases their names have been omitted and information regarding their locations have been changed. Many thanks to all who have supported BADIL Resource Center throughout this research project and in particular to all interview partners who provided the foundation for this publication.

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BADIL Resource Center for Palestinian Residency and Refugee Rights is an independent, non-profit human rights organization working to defend and promote the rights of Palestinian refugees and Internally Displaced Persons (IDPs). Our vision, mission, programs and relationships are defined by our Palestinian identity and the principles of international humanitarian and human rights law. We seek to advance the individual and collective rights of the Palestinian people on this basis.

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Introducing the Series

This series of working papers on “Forced Population Transfer: The Case of Palestine” constitutes an overview of the forced displacement of Palestinians as a historic and ongoing process which detrimentally affects the daily life of Palestinians and threatens their national existence.

HISTORICAL CONTEXT: THE CASE OF PALESTINE

At the beginning of the 20th century, most Palestinians lived inside the borders of Mandatory Palestine, referring to “historic Palestine”, consisting of Israel, the 1967 occupied West Bank, including East Jerusalem, and the Gaza Strip. The ongoing forcible displacement policies following the establishment of the British mandate of Palestine in the 1920s made Palestinians the largest and longest-standing unresolved refugee case in the world today. By the end of 2017, an estimated 8.07 million (66 percent) of the global Palestinian population of 12.1 million are forcibly displaced persons. The ultimate aim of BADIL’s series is to distill the complex web of legislation and policies which comprise Israel’s overall system of forced population transfer today. The series is not intended to produce a comprehensive indictment against the State of Israel, but to illustrate how each policy fulfills its goal in the overall objective of forcibly displacing the Palestinian people while implanting Jewish-Israeli settlers/colonizers throughout Mandatory Palestine.

Despite its urgency, the forced displacement of Palestinians rarely receives an appropriate response from the international community. This response should encompass condemnations and urgent interventions to provide relief or humanitarian assistance, while addressing the root causes of this forced population transfer. Given the protracted nature and gravity of the violations, a short-term response from the international community is insufficient to address this issue and, as such, long-term responses should be developed

to put an end to the ongoing displacement as well as to achieve a durable solution. While many individuals and organizations have discussed the triggers of forced population transfer, civil society lacks an overall analysis of the system of forced displacement that continues to oppress and disenfranchise Palestinians today. BADIL, therefore, spearheads targeted research on forced population transfer and produces critical advocacy and scholarly materials to help bridge this analytical gap.

FORCED POPULATION TRANSFER

The concept of forced population transfer – and recognition of the need to tackle its inherent injustice – is by no means a new phenomenon, nor is it unique to Mandatory Palestine. Concerted efforts to colonize foreign land have underpinned displacement for millennia, and the “unacceptability of the acquisition of territory by force and the often concomitant practice of population transfer” was identified by the Persian Emperor Cyrus the Great, and subsequently codified in the Cyrus Cylinder in 539 B.C.; the first known human rights charter. Almost two thousand years later, during the Christian epoch, European powers employed population transfer as a means of conquest, with pertinent examples including the Anglo-Saxon displacement of indigenous Celtic peoples, and the Spanish Inquisition forcing the transfer of religious minorities from their homes in the early 16th century.

Today, the forcible transfer of protected persons by physical force, threats or coercion constitutes a grave breach of the Fourth Geneva Convention and a war crime under the Rome Statute of the International Criminal Court. The forcible displacement of individuals without grounds permitted under international law is a very serious violation, and when those affected belong to a minority or ethnic group and the policies of forcible displacement are systematic or widespread, these practices could amount to crimes against humanity.

International law sets clear rules to prohibit forced population transfer, through the specific branches of international humanitarian law, international human rights law, international criminal law and international refugee law. Both internal (within an internationally recognized border) and external displacement are regulated.

BADIL presents this series of working papers in a concise and accessible manner to its designated audiences: from academics and policy makers, to activists and the general public. Generally, the series contributes to improving

the understanding of the ongoing 'nakba' of the Palestinian people and the need for a rights-based approach to address it among local, regional and international actors. The term 'Nakba' (Arabic for 'catastrophe') designates the first round of massive population transfer undertaken by the Zionist movement and Israel in the period between November 1947 and the cease-fire agreements with Arab States in 1949. The ongoing 'nakba' describes the ongoing Palestinian experience of forced displacement, as well as Israel's policies and practices that have given rise to one of the largest and longest-standing populations of refugees, internally displaced persons and stateless persons worldwide.

We hope that the series will inform stakeholders, and ultimately enable advocacy which will contribute to the dismantling of a framework that systematically violates Palestinian rights on a daily basis. The series is intended to encourage debate and critical comment. Since Israeli policies comprising forced population transfer are not static, but ever-changing in intensity, form and area of application, this series will require periodic updates.

The series of working papers will address nine main Israeli policies aiming at forced population transfer of Palestinians. They are:

1. **Denial of Residency**, published April 2014
2. **Discriminatory Zoning and Planning**, published December 2014
3. **Installment of a Permit Regime**, published December 2015
4. **Suppression of Resistance**, published December 2016
5. **Denial of Access to Natural Resources and Services**, published September 2017
6. **Land Confiscation and Denial of Use**, published October 2017
7. **Denial of Reparations to Refugees and IDPs**
8. **Institutionalized Discrimination and Segregation**
9. **Non-state Actions (with the implicit consent of the Israeli state)**

METHODOLOGY

All papers consist of both field and desk research. Field research consists of case studies drawn from individual and group interviews with Palestinians affected by forced population transfer, or professionals (such as lawyers or employees of organizations) working on the issue. The geographic focus of the series will include Israel, the occupied Palestinian territory and Palestinian

refugees living in forced exile. Most of the data used is qualitative in nature, although where quantitative data is available – or can be collected – it will be included in the research.

Desk-based research will contextualize policies of forced population transfer by factoring in historical, social, political and legal conditions in order to delineate the violations of the Palestinian people's rights. International human rights law and international humanitarian law will play pivotal roles, and analysis is supplemented with secondary sources such as scholarly articles and reports.

Introduction

The denial of reparations – mainly return, restitution, compensation and guarantees of non-repetition – is often denied proper consideration when analyzing Israeli policies of forced population transfer. Many would even argue that it cannot be categorized as a policy of displacement as it is a denial of redress for the act of displacement, and therefore, it takes place after the forcible displacement has occurred. However, in the context of the ongoing forced population transfer of the Palestinian people, this policy is very much connected to the overall policy of ethnic cleansing carried out by Israel. On the one hand, it perpetuates the displacement of Palestinians and facilitates further displacement away from their homes and lands as a result of the ongoing instability preserved by the denial of reparations; on the other, the lack of accountability of Israel for its ongoing denial of reparations promotes future displacement and encourages Israel to continue to displace Palestinians from their homes. Hence, while denial of reparations is a stand-alone method of displacement, it also facilitates the enforcement of other policies of forced population transfer.

This paper seeks to demonstrate how the right to reparations of the Palestinian people is clearly affirmed and protected by international law. It does so by examining Israel's obligations to protect Palestinians from forcible displacement and to grant reparations if this displacement occurs. The first section contains a legal analysis of Israel's obligations, established through the frameworks of international humanitarian and human rights law, the law of nations and refugee law in relation to the right to reparations. After outlining the legal obligations both within Israel and in the occupied Palestinian territory (oPt), the paper provides an overview of Israel's ongoing violations of such obligations, analyzing historic and current policies of denial of reparations. This section is followed by an examination of the obligations of the international community vis-à-vis forcibly displaced Palestinians in light of Israel's complete lack of compliance with its obligations. Highlighting third state responsibility and the role of the international community in providing protection to Palestinian refugees and IDPs is of crucial importance

in the face ongoing Israeli attempts to dismantle the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and to erase the Palestinian refugee issue.

While addressing a number of laws, practices, and methods implemented by the Israeli regime against displaced Palestinians with the aim to deny their right to reparations, this paper should not be considered comprehensive. It highlights many of the policies of denial of return, restitution and compensation in order to provide a broad understanding of the impact of these practices as mechanisms of forced population transfer and ethnic cleansing, and eventually as a key element of Israel's denial of self-determination of the Palestinian people. The methods and practices detailed in the paper are by no means exhaustive.

This paper concludes with a set of recommendations directed at the international community, encouraging international institutions as well as third states to pressure Israel into compliance and suggesting specific actions and policies these countries, and the international community more broadly, could adopt for this purpose and in order to advance a just and durable peace that takes into account the rights of the Palestinian people.

Who are Palestinian Refugees and IDPs?

To this day, around two-thirds of the total Palestinian population worldwide are forcibly displaced persons. They are those Palestinians who have been displaced as a result of the ongoing Zionist Israeli policy of ‘maximum land with minimum Palestinians,’ and who are still denied their right to reparations (i.e. return, restitution and compensation). From a legal perspective, forcibly displaced Palestinians can be divided into two main groups - refugees and Internally Displaced Persons (IDPs). Under international law, especially refugee law, labels play a key role: to fall into a certain legal category means to be entitled to certain rights. To understand the peculiarities - and the shortcomings - that makes the case of displaced Palestinians unique and dissimilar to all other displaced populations, it is imperative to clarify how they are framed under international law.

PALESTINIAN REFUGEES

Due to a multitude of political and historical factors, there currently lacks a comprehensive and universally-accepted definition of Palestinian refugees. The most commonly referred to definition is the one provided by the UNRWA, which identifies Palestine refugees as “persons whose normal residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict” -including then also Palestinian IDPs.¹ Unlike the global definition provided by Article 1A(2) of the 1951 Refugee Convention,² UNRWA’s definition fails to properly define

1 UNRWA, *Palestine refugees*, n.d., available at: <https://www.unrwa.org/palestine-refugees> [accessed 4 June 2018].

2 Article 1(2) defines refugees as persons who “as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it; UN General Assembly, *Convention Relating to the Status of Refugees*, 189 UNTS 150, 28 July 1951, available at: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [accessed 20 September 2018] [hereinafter *Refugee Convention*].

refugee status. Rather, it only establishes the criteria for receiving assistance, meaning that the main factor determining whether a Palestinian falls under this definition is not their forcible displacement but the need for assistance - as they need to have lost both their homes and means of livelihood. UNRWA's definition, moreover, does not fully encompass the whole range of displaced Palestinians today, as it includes only those Palestinians who were displaced during the 1948 War and who are registered or are entitled to register for assistance with UNRWA. Almost a million refugees, including their descendants, from the 1948 War did not register and therefore are not included in the definition.³ The definition also excludes all Palestinians displaced outside the context of the 1948 War, either before or after. Although Palestinians internally displaced during the 1948 War did fall under the 'Palestine refugee' category, UNRWA discontinued assistance for IDPs in July 1952 at Israel's request,⁴ as the Israeli government regarded the issue of the IDPs a domestic Israeli issue.

For the purposes of this publication, the term "Palestinian refugees" will be used to refer to persons belonging to the following groups:

1. Palestinians displaced as a consequence of the 1948 War - commonly referred to as the "Nakba" ("catastrophe") by Palestinians - and their descendants (approximately 6.3 million, including 5.3 million officially registered with UNRWA);
2. Palestinians forced to flee their homes of origin during the 1967 War, and their descendants (approximately 1.1 million);
3. An unknown number of Palestinians displaced outside the area of Mandatory Palestine (the present-day territory of Israel, the West Bank and the Gaza Strip), and who are neither 1948, nor 1967 refugees.

PALESTINIAN IDPs

The Guiding Principles on Internal Displacement (UNHCR Guiding Principles) from the United Nations Office of the High Commissioner for Refugees

3 BADIL Resource Center [hereinafter BADIL], *Q and A: What you need to know about Palestinian Refugees and Internally Displaced Persons*, 2015, available at <http://www.badil.org/phocadownloadpap/badil-new/campaigning-tools/brochures/2015/Q&A-en-2015.pdf>

4 BADIL, *The UN Relief and Works Agency (UNRWA) and a Durable Solution for Palestinian Refugees*, July 2000, available at: https://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.6.pdf

(UNHCR) define IDPs as “persons or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.”⁵ This definition is purely descriptive and does not grant any special rights or guarantees; however, the rights IDPs can enjoy are those already recognized under specific bodies of international law. Indeed, the Guiding Principles are not binding per se, but they reflect and are consistent with binding principles of International Human Rights Law (IHRL) and International Humanitarian Law (IHL).

Specifically, Palestinian IDPs can be divided into two main categories:

1. Those Palestinians who were internally displaced inside the area that became Israel in 1948, and their descendants, including Palestinians displaced during the 1948 War (approximately 384,200) and those subsequently displaced inside Israel, mainly due to internal transfer, land expropriation and home demolitions. The majority of them are located in northern Israel, in the Galilee region, in cities with a mixed Israeli-Palestinian population such as Haifa and Acre, and in the southern Naqab region.⁶
2. Those Palestinians who have been internally displaced in the oPt since 1967 (approximately 334,600) as a result of Israel’s policies of forcible transfer. This group also includes some Palestinian refugees displaced during the 1948 War, who suffered subsequent secondary displacement in the oPt.⁷

The lack of a formal legal definition and the absence of a comprehensive registration system reflects the analogous absence of an authoritative source of information about the majority of Palestinian refugees and IDPs. As a result of and also due to repeated forced displacement, exact estimates of the current size of the Palestinian refugee and IDP population are unavailable.

5 UNHCR, *Guiding Principles on Internal Displacement*, OCHA/IDP/2004/01, June 2001, available at: <http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html> [hereinafter UNHCR, Guiding Principles].

6 Nihad Bokae’e, *Palestinian Internally Displaced Persons inside Israel, Challenging the Solid structure*, BADIL, February 2003; BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons, 2013-2015* (Bethlehem, Palestine), 32 [hereinafter BADIL, Survey 2013-2015]; BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons, 2010-2012*, (Bethlehem, Palestine), 7 [hereinafter BADIL, Survey 2010-2012].

7 By reason of the high frequency of displacement and the absence of a comprehensive registration system, the number of these 1948 refugees who have been displaced again in 1967 is largely unknown.

The only official numbers available are those Palestinian refugees registered for assistance with UNRWA, and those Palestinian refugees outside the areas of operation of UNRWA registered with UNHCR.⁸ Nonetheless, it is estimated that roughly 8.26 million Palestinians are forcibly displaced persons.⁹ Among them, approximately 7.54 million Palestinians are refugees and 615,000 are IDPs,¹⁰ forming the largest and longest-standing group of displaced persons today. Forcibly displaced Palestinians constitute around 66 percent of the entire, worldwide Palestinian population of over 12 million,¹¹ and most Palestinian refugees still live within 100 km of the borders of Mandatory Palestine where their homes of origin are located, mainly in the occupied Palestinian territory (oPt) and in nearby Arab countries (Jordan, Syria and Lebanon).¹²

8 In 2016, 105,937 Palestinians were registered with UNHCR. See UNHCR, *Population Statistics*, available at: <http://popstats.unhcr.org/en/overview> [accessed 5 June 2018].

9 BADIL, *Survey 2013-2015*, *supra* note 6, 32.

10 BADIL has estimated this number based on the number of Palestinian IDPs inside Israel and the number of IDPs in the oPt, which has been recently updated to include recent forcible transfer cases in the West Bank as well as to discount the thousands of internally displaced Palestinians in Gaza who have managed to return to their homes destroyed during the 2014 Israeli assault on Gaza.

11 BADIL, *Survey 2013-2015*, *supra* note 6, 32.

12 *Id.*, 37.

Israel's obligations vis-à-vis forcibly displaced Palestinians

1. OBLIGATION TO PROTECT FROM ARBITRARY OR FORCIBLE DISPLACEMENT

Individual states have the primary responsibility of safeguarding the rights of their citizens and those subject to their authority and jurisdiction.¹³ Israel is bound by this general obligation of protection¹⁴ in the entire territory over which it exercises its jurisdiction, comprising Israel itself and the oPt.¹⁵ Nevertheless, a preliminary distinction is necessary in order to fully understand the range and the sources of its duties.

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- 13 UN General Assembly, *Universal Declaration of Human Rights*, A/RES/3/217 A, 10 December 1948 available at: <http://www.un.org/en/universal-declaration-human-rights/> [accessed 27 Jul 2018] [hereinafter UDHR]; UN General Assembly, *International Covenant on Civil and Political Rights, Annex*, A/RES/21/2200, 16 December 1966, art. 2, available at: <http://www.un-documents.net/iccpr.htm> [accessed 27 Jul 2018][hereinafter ICCPR]; UNHCR Executive Committee, *General Conclusion on International Protection n. 81, (XLVIII)*, 17 October 1997 para. (d), available at: <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>; UN General Assembly, *Office of the United Nations High Commissioner for Refugees*, A/RES/61/137, 19 December 2006, para. (6), available at: <http://www.refworld.org/docid/45fa902d2.html> [accessed 27 Jul 2018].
- 14 According to the International Committee of the Red Cross (ICRC), protection encompasses “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law.” See ICRC, *Professional Standards for Protection Work*, February 2013, p. 12, available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0999.pdf>
- 15 As an occupying power, Israel exercises *effective control* over both the West Bank and the Gaza Strip. In this sense, see the Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, where the Court recognizes the applicability in the oPt of human rights instruments such the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child (Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136, 9 July 2004, available at: <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>, para. 102-113 [hereinafter ICJ, Advisory Opinion on the Wall]. Even though the Palestinian Authority has protection responsibilities towards the Palestinian population, its ability to protect is restrained by the effective control exercised by Israel, which therefore continues to be responsible for the protection of Palestinians. Regarding the Gaza Strip, despite Israel having formally withdrawn its military troops in 2005, it continues to exercise such an effective control within the meaning of Article 42 of The Hague Regulations, and Article 6 of the Fourth Geneva Convention.

Obligation not to arbitrarily displace Palestinians with Israeli citizenship

Israel has a duty to respect the obligations stemming from International Human Rights Law (IHRL), which includes, *inter alia*, the prohibition of the arbitrary displacement of persons subject to its jurisdiction, including Palestinian citizens of Israel, which is the corollary of the fundamental human right to freedom of movement, encompassing the right to choose a place of residence within a person's country, and to leave and enter that country.¹⁶ Arbitrary forced displacement that is based on discrimination,¹⁷ Apartheid,¹⁸ or ethnic cleansing is unlawful under IHRL.

Obligation not to forcibly displace Palestinians in the oPt

IHRL remains an applicable legal framework in situations of occupation. However, Israel is also bound by obligations affirmed by International Humanitarian Law (IHL), which requires an occupying state to protect the civilian population of the occupied territory.¹⁹ The prohibition of forced displacement is even stricter under IHL: Article 49 of the Fourth Geneva Convention states, "individual or mass forcible transfers, as well as deportations of protected persons [...] are prohibited, *regardless of their motive* [emphasis added]"²⁰ and not only amount to a grave breach of the Convention,²¹ but also a war crime under the Rome Statute of the International Criminal Court.²² This prohibition in such contexts is subject

16 See ICCPR, *supra* note 13, art. 12; and UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: <http://www.refworld.org/docid/45139c394.html> [accessed 20 September 2018].

17 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195, 21 December 1965, Art. 5(d), available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 20 September 2018].

18 UN General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1015 UNTS 243, 30 November 1973, art 2(c), available at <https://treaties.un.org/doc/publication/unts/volume%201015/volume-1015-i-14861-english.pdf>.

19 While IHRL applies at all times, IHL, as *lex specialis*, only applies in times of armed conflict (including situations of military occupation). See ICJ, Advisory Opinion on the Wall, *supra* note 15, para. 106.

20 United Nations, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, 12 August 1949, art. 49, available at: <http://www.refworld.org/docid/3ae6b36d2.html> [accessed 27 Jul 2018][hereinafter GCIV]. "Forcible transfer" entails displacement *within* a de jure or de facto national border, while "deportation" (also covered by art. 49) entails displacement *across* such borders.

21 GCIV, *supra* note 20, art. 147.

22 UN General Assembly, *Rome Statute of the International Criminal Court*, 2187 UNTS 90, 17 July 1998, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 27 Jul 2018][hereinafter Rome Statute of the ICC], art. 8(2)(b)(viii).

only to the narrow caveat of imperative military reasons or security of the population, and even then subject to strict criteria for the conditions under which such transfer may happen, and it must be temporary.

Lack of compliance with the duty to protect Palestinians with Israeli citizenship

Within its 1948 borders, Israel acts as a state and therefore its obligation to protect its citizens is the same that is applied to all other states. However, not only has Israel failed to abide by this obligation, it has continually and intentionally displaced Palestinians within and outside that territory.

The 1947 UN Partition Plan recommending the partition of Palestine into two states, and the British mandate that preceded it, provided the necessary conditions for the Zionist movement to induce the widespread displacement of Palestinians in order to make way for a Jewish state. Plan Dalet (Plan D) was formulated in March 1948 by Haganah, the leading Zionist militia led by David Ben Gurion, who two months later became the first Prime Minister of Israel. This plan resulted in a great outflow of refugees in April and early May 1948, before the start of the 1948 War. According to Plan D, Zionist forces deliberately employed violent and coercive tactics aimed at forcibly removing Palestinians from their homes and causing their flight.

By the end of the War, between 750,000 and 900,000 Palestinians had been forcibly displaced. Half of these were displaced before 15 May 1948, when the War officially began. Ultimately, 85 percent of the indigenous Palestinian population, who had been living in the territory that became Israel, were displaced.²³

Since its establishment, Israel has employed a variety of policies to continue displacing large numbers of Palestinians from their homes. Following the 1948 War, Israel established a military government in the Galilee, the “Little Triangle” (an area ceded to Israel under the armistice agreement with Jordan), the Naqab (Negev), and the cities of al-Ramla, al-Lydd, Jaffa, and al-Majdal Asqalan to control the remaining Palestinian population inside Israel and to prevent the return of both Palestinian refugees and IDPs.²⁴

During this period of Israeli military administration (1949-1966), even more Palestinians were expelled from their homes and lands, primarily during military operations aimed at optimizing Israel’s demographic and strategic

23 Tom Segev, *1949, The First Israelis* (New York: Henry Holt, 1986) [hereinafter, Segev, *The First Israelis*].

24 Jiryis Sabri, *The Arabs in Israel* (New York: Monthly Review Press, 1976).

positioning, through the implementation of border corrections (based on 1949 armistice agreements) and displacement policies and practices of the Israeli military government. Palestinian communities in the northern border villages, the Naqab, the “Little Triangle” and in villages partially emptied during the war were among the most significantly affected by internal population transfer and expulsion. Between 1949 and 1966, Israel internally displaced 35,000 to 45,000 Palestinians.²⁵ Israeli forces also transferred Palestinians to new areas within its 1948 borders in order to break up the concentration of Palestinian population centers, and to open up further areas for Jewish settlements.

The ongoing displacement of Palestinian citizens of Israel has not stopped since, as Israel continues to implement policies of land confiscation, discriminatory planning and zoning, denial of services, and institutional discrimination to further displace Palestinians from key strategic areas. In recent years, there has been a clear ‘judaization’ policy in the Naqab and the Galilee, two areas with significant Palestinian populations. Internally displaced Palestinians inside Israel numbered 384,200 at the end of 2014.²⁶

Many other Palestinians that remained inside Israel after 1948 became refugees later on. Within days of the signing of the Egyptian-Israeli General Armistice Agreement, some 2,000–3,000 Palestinians from the villages of al-Fallujah and Iraq al-Manshiyya²⁷ were beaten, robbed and forced to leave their homes by Israeli forces, despite stipulations in the armistice agreement that nothing would befall their population after the Egyptian troops’ withdrawal.²⁸ In 1950, Israel expelled the remaining 2,500 Palestinian residents of the city of al-Majdal Asqalan (today’s Ashqelon) into the Egyptian-controlled Gaza Strip.²⁹ Between 1949 and 1956, more than 20,000 Palestinian Bedouins were expelled from their indigenous lands, mostly located in the Naqab.³⁰ Some 5,000 Palestinian Bedouin in the north, around the villages of Baqqara and Ghannama, were expelled to Syria.³¹

25 BADIL, Survey 2013-2015, *supra* note 6, xxxi .

26 BADIL, Survey 2013-2015, *supra* note 6, 31.

27 al-Fallujah and Iraq al-Manshiyya were Palestinian villages in Mandatory Palestine, located 30 kilometers northeast of Gaza City.

28 Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (Cambridge: Cambridge University Press, 1987), 243.

29 Benny Morris, *1948 and After: Israel and the Palestinians* (Oxford: Clarendon Press, 1990).

30 Israeli Foreign Ministry reports indicate that some 17,000 Bedouin were expelled from the Naqab between 1949 and 1953. Simon and Vermeersch, “Investigation Report”, UNA DAG-13/3.3.1–18, quoted in Benny Morris, *Israel’s Border Wars, 1949- 1956. Arab Infiltration, Israeli Retaliation, and the Countdown to the Suez War* (Oxford: Clarendon Press, 1993).

31 BADIL, Survey 2013-2015, *supra* note 6, xxxii .

Lack of compliance with the duty to protect in the oPt

As the Occupying Power, Israel is prohibited from forcibly displacing any Palestinians in occupied territory unless it is for the security of the population or for imperative military reasons in the context of ongoing hostilities. Notwithstanding this prohibition, Israel has established a system of oppression and forcible transfer aimed at transferring Palestinians from their homes in order to empty the land for further colonial expansion. The different policies of forcible transfer, many of which have been covered by this Series,³² have resulted in large numbers of Palestinians becoming internally displaced inside the oPt. As of the end of 2014 there were 334,600 Palestinians internally displaced within the oPt.³³

2. OBLIGATION TO PROVIDE REPARATIONS FOR THE WRONGS COMMITTED

Under the Law of State Responsibility, states are under an obligation not to commit an internationally wrongful act.³⁴ Upon the commission of such an act, international responsibility is triggered, and the state concerned is thereby under an additional obligation to cease the act (if it is ongoing), offer assurances of non-repetition, and make full reparation for the injuries caused.³⁵

The obligation to provide reparations for the wrongs committed is a basic rule of international law: in the *Chorzów Factory* case, the Permanent Court of International Justice stated that “it is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation.”³⁶ The wrongdoer state should wipe out, as far as possible, “all the consequences of the illegal act,” and re-establish “the situation which would, in all probability, have existed if that

32 For more information on Israel’s policies of forcible transfer on both sides of the Green Line, please see: <http://www.badil.org/en/publication/research/working-papers.html>

33 BADIL, Survey 2013-2015, *supra* note 6, 31, 33, 53-55.

34 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter, ILC, Draft Articles on Responsibility], art. 31.

35 *Id.*, art. 28-31.

36 *Factory At Chorzów (Germany v Poland)*, Merits Judgment, 1928 PCIJ Series A No 17, 13 September 1928, para. 102., available at: http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf

act had not been committed.”³⁷ It should, in other words, restore the *status quo ante* the commission of the international wrong. This is a principle that recognizes the obligation of reparation vis-à-vis states and, as IHRL and IHL have developed, particularly with regards to peremptory norms, so too has the understanding and acceptance through customary international law that obligations with respect to reparations apply also to the benefit of individuals wronged by breaches of international legal principles. This evolution in state practice is reflected in the Draft Articles on State Responsibility and in the findings of the International Court of Justice (ICJ) in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (hereinafter referred to as the Advisory Opinion on the Wall).³⁸

Based on the legal framework outlined above, Israel is therefore obliged to end all arbitrary forced displacement of the Palestinian population who hold Israeli citizenship, and to end all forcible transfer of Palestinians in the oPt. Moreover, it has the obligation to provide reparations for the injuries caused, which take the form of restitution, compensation and/or satisfaction.³⁹

This framework is analogous to the framework of reparations for refugees and IDPs provided by international law itself: according to the pivotal principle of voluntariness,⁴⁰ both refugees and IDPs must have access to durable solutions of their choice, which include the realization of their right of *return* to their previous homes, *restitution* of properties and *compensation* for all losses suffered.⁴¹ While Israel’s international responsibility is triggered

37 ILC, Draft Articles on Responsibility, *supra* note 34, 91-94.

38 ICJ, Advisory Opinion on the Wall, *supra* note 15.

39 ILC, Draft Articles on Responsibility, *supra* note 34, art. 34-38.

40 UNHCR, Guiding Principles, *supra* note 5, Principle 28(2); UNHCR, *Handbook - Voluntary Repatriation: International Protection*, January 1996, available at: <http://www.refworld.org/docid/3ae6b3510.html> [hereinafter *Handbook on Voluntary Repatriation*], chapter 2.3; UN Human Rights Council, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, Walter Kälin: *addendum*, A/HRC/13/21/Add.4, 29 December 2009, 24-33, available at <http://www.refworld.org/docid/49abc00d2.html> [accessed 27 Jul 2018]

41 UN General Assembly, 194 (III). *Palestine -- Progress Report of the United Nations Mediator*, A/RES/194 (III), 11 December 1948, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A> [hereinafter UN General Assembly Resolution 194]; UNHCR, *Guiding Principles*, *supra* note 5, Principle 6, 2(a). As noted above, some Palestinian IDPs were previously 1948 refugees: such persons retain their refugee legal status, but the Guiding Principles apply by analogy “to the extent that applicable refugee law does not address their displacement-related needs (Brookings Institute, *Protecting Internally Displaced Persons: a Manual for Law and Policy Makers*, October 2008, 13).

under the Law of State Responsibility and IHL in its 1948 borders and the oPt,⁴² Palestinian refugees and IDPs rights simultaneously arise under IHRL.⁴³ As Theo Van Boven, the Special Rapporteur for the United Nations Commission on Human Rights, stated in his final report in 1993, “the principal right victims [of human rights violations] are entitled to under international law is the right to effective remedies and just reparations.”⁴⁴

Importantly, upon establishment as a state, Israel inherited responsibility for the illicit conduct of Zionist paramilitary and military forces of the provisional government during its establishment, whose acts significantly contributed to the displacement of Palestinians before, during and after the 1948 War.⁴⁵ According to a report from Haganah, the paramilitary organization that subsequently became the Israeli military forces, “at least 55% of the total of the exodus was caused by our [Haganah/Israeli forces] operations”. To this, the report adds the results of the operations of paramilitary organizations Irgun and Lehi, which “directly [caused] some 15%... of the emigration.”⁴⁶ According to the Law on State Responsibility, actions taken by a movement, whether insurrectional or not, which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration are to be considered as acts of the new state.⁴⁷ Therefore, Israel is required to provide reparations for the consequences of wrongful acts committed by its provisional government and armed forces.⁴⁸

42 IHL, rather than being a separate, autonomous (or “self-contained”) system, spells out in details or modify the general mechanism provided by the Law of State Responsibility, and can therefore be understood only within that framework. See Marco Sassoli, “State Responsibility for Violations of International Humanitarian Law”, *International Review of the Red Cross*, 84, No. 846 (2002): 404.

43 While the Law of State Responsibility and IHL generate obligations upon States, IHRL directly recognizes rights to individuals.

44 Theo van Boven (UN Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms), *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms : final report*, E/CN.4/Sub.2/1993/8, 2 July 1993, para. 45, available at: <http://www.refworld.org/docid/3b00f4400.html> [accessed 27 Jul 2018][hereinafter Study of Special Rapporteur on the Right to Restitution]

45 On the policies of displacement carried out by Zionist militias before the establishment of Israel, see Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge : Cambridge University Press, 2004).

46 Benny Morris, “The causes and Character of the Arab Exodus from Palestine: the Israel Defense Forces Intelligence Branch Analysis of June 1948”, *Middle Eastern Studies*, 22, No. 1 (1986): 5-19.

47 ILC, Draft Articles on Responsibility, *supra* note 34, art. 10(2). In such cases, the attribution to the new State of the conduct of the previous movement “is justified by virtue of the continuity between the organization of the movement and the organization of the state to which it has given rise”, Yearbook of the International Law Commission 2 (2001), Part Two, 50.

48 Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (London: Pluto Press, 2009), 173.

2.1. Right of Return

Right of return as a customary principle under international law

Voluntary return (also referred as “repatriation” in refugee law) has a dual meaning under international law: as a customary right recognized upon individuals and as the preferred solution within the framework of durable solutions designed by the international community to address the plight of refugees⁴⁹ and IDPs.⁵⁰ As a general principle, the right of those who have been displaced to return to their homes of origin finds its basis in four different bodies of international law: IHRL, IHL, the Law of Nations as applicable to state succession, and refugee law. These bodies will be briefly analyzed in the following paragraphs, in light of their applicability to the Palestinian people.

1. In IHRL, the right of return constitutes a customary norm stated in a vast array of international conventions, such as the Universal Declaration on Human Rights (UDHR),⁵¹ the International Covenant on Civil and Political Rights (ICCPR),⁵² the Convention on the Elimination of all Forms of Racial Discrimination (CERD)⁵³ and

49 UNHCR has labelled repatriation as the most preferred solutions several times, see e.g. UNHCR, *Conclusion on International Protection No. 89 (LI) - 2000*, 13 October 2000, , available at: <http://www.refworld.org/docid/3ae68c7e0.html>, which states that “[while] voluntary repatriation, local integration and resettlement are the traditional durable solutions for refugees [...] voluntary repatriation is the preferred solution, when feasible”; see also *UNHCR Conclusions on International Protection: No. 68 (XLIII)–1992; No. 99 (LV)–2004; No. 104 (LVI)–2005; and No. 109 (LXI) – 2009*; UN General Assembly, *Office of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly, A/RES/62/124*, 24 January 2008, para. 16, available at: <http://www.refworld.org/docid/47b2fa642.html> [accessed 27 Jul 2018].

50 This is suggested by the same structure adopted by the UNHCR Guiding Principles (*supra* note 5), where return is the first of the durable solutions envisaged by art. 28-30.

51 UDHR, *supra* note 13, art. 13(2). The UDHR has achieved customary status, and it has therefore binding force. See Hurts Hannum, “The status of the Universal Declaration on Human Rights in National and International Law”, *Georgia Journal of International and Comparative Law* 25, No. 1 (1996): 289-290.

52 ICCPR, *supra* note 13, art. 12(4).

53 General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [hereinafter CERD], art. 5(d)(ii).

several regional treaties.⁵⁴ Notably, Article 12(4) of the ICCPR states that “no one shall be arbitrarily deprived of the right to enter its own country.” This rule, which applies to subsequent generations of refugees and IDPs⁵⁵ and is not restricted to merely “nationals” of a state,⁵⁶ has been signed without reservation by Israel and is therefore fully binding on it. Similarly, CERD Article 5(d)(ii) provides the same protection.

2. IHL, which applies in situations of armed conflicts (including military occupation), contains a second basis for the right of return. The Hague Regulations, annexed to the 1907 Hague Convention, state that the Occupying Power has to maintain as far as possible the legal and social *status quo*, in order to interfere as little as possible with the population’s ordinary existence: this logically implies the possibility for the local population to remain in or to return to their homes of origin after the cessation of the hostilities.⁵⁷ This rule was subsequently incorporated into the Fourth Geneva Convention,⁵⁸ and constitutes the “general” right of return in IHL, which applies to all displaced persons, irrespective on how they came to be displaced during conflict. In addition to this general rule, there is a supplementary, specific basis for the right of return that rises in cases of forcible mass expulsion carried out on a discriminatory basis.⁵⁹ In such cases the illegality of the action becomes even greater as it affects the rights of more people, and intersects the general

54 Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: <http://www.refworld.org/docid/3ae6b3710.html> [accessed 27 Jul 2018], art. 7; Organization of American States (OAS), *American Convention on Human Rights*, Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> [accessed 27 Jul 2018] [hereinafter Pact of San Jose] art. 22(5); Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 27 Jul 2018] [hereinafter Banjul Charter], art. 12(2); Council of Europe, *Protocol 4 to the European 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*, 16 September 1963, ETS 46, art. 3(2), available at: <http://www.refworld.org/docid/3ae6b3780.html> [accessed 27 Jul 2018].

55 Since its phrasing uses the broad verb “enter”, rather than “return” (contained in the UDHR).

56 See HRC, CCPR General Comment No. 27, *supra* note 16.

57 International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available at: <http://www.refworld.org/docid/4374cae64.html> [hereinafter Hague Regulations], art. 43. Additionally, art. 20 of the same Regulations also contains a specific rule concerning the return of captured combatants at the end of hostilities, whose existence implies *a fortiori* the existence of a duty to repatriate civilians.

58 GCIV, *supra* note 20, art. 4, 6, and 158. Article 4 defines the “protected persons” under the Convention, while articles 6 and 158 expressly mention repatriation.

59 GCIV, *supra* note 20, art. 49.

customary norm of international law prohibiting governmental discrimination based upon race, ethnicity, religion or political belief. Moreover, the prohibition against forcible expulsion finds its basis in the Hague Regulations,⁶⁰ and has also been integrated by the Fourth Geneva Convention.⁶¹

3. Under the Law of State Succession, the newly emerged successor state is under the binding customary obligation to allow all habitual residents (regardless of their nationality, and whether physically present at the time of succession, or forced to leave by reason of events leading up to the succession) to return and/or be readmitted to their homes of origin from which they were displaced during the succession process.⁶² Hence, Palestinians displaced in the lead up to or during the Nakba retain a right of return as former habitual residents, unless and until they voluntarily chose a durable solution rather than return and acquired nationality elsewhere. Despite the fact that states enjoy a certain degree of discretion in regulating their nationality status, Israel's discretion as the successor state is not absolute, and it has an obligation to grant nationality to the habitual residents of its territory subject to its succession, irrespective of their temporary location, if they held nationality of the predecessor state.⁶³ In the case of Palestinians, their nationality of Palestine prior to 1948 was established under international law through the Mandate system which recognized sovereignty as residing with the Palestinian people and not reverting to the Mandatory power.⁶⁴ As people who should have been granted nationality status, the Palestinians expelled in 1948 retain two additional and independent grounds for their right of return: the first is based on the rule of readmission, for

60 Hague Regulations, *supra* note 57, art. 46(1).

61 GCIV, *supra* note 20, art. 45, 49, 147.

62 These principles have been more recently articulated in the International Law Commission, *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries)*, 3 April 1999, Supplement No. 10 (A/54/10), art.14, available at: <http://www.refworld.org/docid/4512b6dd4.html> [accessed 27 Jul 2018] [hereinafter Draft Articles on Nationality]. However, for a more detailed discussion of customary law as it applied in 1948 see Ian Brownlie, "The Relations of Nationality in Public International Law," 39 *The British Yearbook of International Law Yearbook of International Law* 284, 320 (1963) and Gail J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, BADIL, 2007, available at http://www.badil.org/phocadownloadpap/Badil_docs/publications/individualROR-en.pdf.

63 Draft Articles on Nationality, *supra* note 62, art. 5. Besides, the nationality status conferral should be conducted without discrimination, as set out in art. 15. Noting that some

64 See Mutaz M. Qafisheh, *The International Law Foundations of Palestinian Nationality: A legal examination of nationality in Palestine under Britain's rule*, (Leiden: Koninklijke Brill NV, 2008). Note that a separate legal question remains for those 150,000 Palestinians denationalized under the British Mandate, for more information see BADIL, Survey 2010-2012, *supra* note 6, endnote 5.

which states are obliged to readmit their own nationals, in light of the corresponding hosting burden they would otherwise impose on other states.⁶⁵ The second follows as a natural corollary of the first, and is based upon the prohibition of denationalization, where states cannot avoid the rule of readmission simply by denationalizing their own nationals (the prohibition becomes even stronger in cases of massdenationalization).⁶⁶

4. The right of return is also considered under refugee law (a subset of IHRL, which also incorporates principles of IHL) as a central remedy within the framework of durable solutions designed by the international community in order to address refugee flows. There are two other solutions considered - voluntary host country integration and voluntary resettlement - but repatriation is the only one that constitutes a right accorded to individuals, which generates a corresponding binding obligation upon the state of origin of the refugee population, following directly from the rule of readmission based in the Law of Nationality (above).⁶⁷ Refugee law points also to the modality under which voluntary return should take place, underlining that it should occur “in safety and dignity without any fear of harassment, discrimination, arbitrary detention, physical threat or prosecution”.⁶⁸

The role of the UN resolutions in restating and strengthening Palestinians’ right of return

The right of return of displaced Palestinians has been expressly recognized by UN bodies on several occasions. General Assembly Resolution 181 of 1947, which provided for the establishment of an Arab state and a Jewish state in

65 This rule is universally recognized and has acquired customary status. See, e.g. Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford : Clarendon Press, 1998) 238; and Guy Goodwin-Gill, *The Refugee in International Law* (Oxford : Oxford University Press 1996) 269.

66 That second rule has also reached customary nature. Paul Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) 54-57.

67 The customary nature of the duty of the country of origin to readmit refugees on its territory is corroborated by various examples, as the 1994 Bosnia Agreement; the 1995 Dayton Agreement, Annex 7; the 1997 Croatia Agreement; the 1994 Guatemala Agreement; the final peace agreement for Cambodia.

68 Handbook on Voluntary Repatriation, *supra* note 40, Chapter 2.6. See also Jeff Crisp, Katy Long, “Safe and Voluntary Refugee Repatriation: from Principle to Practice”, *Journal on Migration and Human Security* 4, No.3 (2016): 141-147. Under IHRL, IDPs are entitled to similar rights, where the Guiding Principles on Internal Displacement affirm the primary duty of the competent authorities of “establish] conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.”(See UNHCR, Guiding Principles, *supra* note 5, principle 28).

Mandatory Palestine, clearly emphasized that the equality, property, minority and religious rights of all those in the territory should be respected.⁶⁹ This means that the prohibition of displacement, denationalization and denial of readmission were set out in the Partition Plan,⁷⁰ well in advance of the subsequent forcible displacement resulting from the establishment of Israel.

The main point of additional reference for 1948 Palestinian refugees is Resolution 194 of 1948, in which the UN General Assembly stated that “refugees [expelled during the Nakba] wishing to return to their homes and live in peace with their neighbors should be permitted to do so at the earliest practicable date.”⁷¹ The role of Resolution 194 went far beyond the limited legal scope of an ordinary General Assembly resolution: rather than being merely recommendatory, it *restated* pre-existing law. Indeed, by 1948 the right of refugees and displaced persons to return to their homes had attained customary status under international law.⁷² Resolution 194 grew in authority over the following years as it was repeatedly reaffirmed by the General Assembly with unanimous or overwhelming majorities.⁷³

As for Palestinians displaced during the 1967 conflict, their right of return has been acknowledged by the UN Security Council with Resolution 237, where Israel was called on “to facilitate the return of those inhabitants who have fled the area since the outbreak of hostilities.”⁷⁴

69 UN Special Committee on Palestine, *Report to the General Assembly*, A/364, 3 September 1947, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/07175DE9FA2DE563852568D3006E10F3> [accessed 27 Jul 2018].

70 UN General Assembly, *Resolution 181 (II): Future Government of Palestine*, A/RES/181(II), 29 November 1947, Chapter 3, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253> [accessed 17 September 2018].

71 UN General Assembly Resolution 194, *supra* note 41, para. 11.

72 W. Thomas Mallison and Sally Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question*, ST/SG/SER.F/4, 1 January 1979, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/885fc39e9de93ec585256dc20067eab6?OpenDocument> [accessed 27 Jul 2018], 31; UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations, August 1949, Lake Success, New York, 1 August 1949, E/1112; E/1112/Add.1, available at: <http://www.refworld.org/docid/3ae68c2d0.html> [accessed 27 Jul 2018].

73 The most recent recall can be found in UN General Assembly, *Palestine refugees' properties and their revenues*, A/RES/72/83, 14 December 2017. See, e.g., Samuel Bleicher “The Legal Significance of Recitation of General Assembly”, *The American Journal of International Law* 63, No.3 (1966): 444. It is also worth mentioning that Israel’s admission to the United Nations itself was intrinsically linked to the fulfilment of principles stated in Resolution 194. See UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, *The Right of Return of the Palestinian People*, ST/SG/SER.F/2, 1 November 1978, where the Special Unit on Palestinian Rights affirms that “in the light of the discussions on the admission of Israel to the UN, and the wording of the resolution, it can be argued that the admission of Israel was linked with its cooperation in implementing the right of return.”

74 UN Security Council, *Security Council Resolution 237*, S/RES/237, 14 June 1967, para. 1., available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/E02B4F9D23B2EFF3852560C3005CB95A>

Moreover, the UN General Assembly recognized the right of return of Palestinians to their homes and property as an *inalienable right*, noting that its realization is “indispensable for the solution of the question of Palestine.”⁷⁵ To that end, it established the Committee on the Exercise of the Inalienable Rights of the Palestinian People, which is specifically mandated, *inter alia*, to enable Palestinians to exercise their inalienable right to return to their homes and properties from which they were displaced.⁷⁶

The UN has also recognized the right of return to their homes of origin of Palestinians in refugee-like situations (that is, people that cannot be legally labelled as refugees, even though if they find themselves in similar circumstances) due to expulsion, deportation and denial of residency rights.⁷⁷

Denial of the Right to Return

From its inception, the main task of Israel has been to advance the mission established by the Zionist movement, namely to appropriate Palestinian land for the construction of Jewish colonies and to reduce the size of the Palestinian population on that land. To this end, Israel prevented the return of the over 750,000 Palestinian refugees expelled during the Nakba, despite their right to return, readmission and citizenship in the newly established state.

“Are [we justified] in opening fire on the [Palestinian] Arabs who cross [the border] to reap the crops they planted in our territory; they, their women, and

75 UN General Assembly, *Question of Palestine*, A/RES/3236, 22 November 1974, available at: <https://documents-ddsny.un.org/doc/RESOLUTION/GEN/NR0/738/38/IMG/NR073838.pdf?OpenElement> [hereinafter UN General Assembly Resolution 3236].

76 UN General Assembly, *Question of Palestine*, A/RES/3376, 10 November 1975, available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3376\(XXX\)&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3376(XXX)&Lang=E&Area=RESOLUTION) [accessed 27 Jul 2018]. See also the last report of the Committee, where it acknowledges that “no progress was noted [...] on return to homes and return of property of Palestine refugees”, UN General Assembly, Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, A/72/35, 5 September 2017, available at: <http://www.refworld.org/docid/59d228984.html> [accessed 27 Jul 2018].

77 On deportation, see, e.g., UN Security Council, *Security Council Resolution 799*, S/RES/799, 18 December 1992, available at: <http://unscr.com/en/resolutions/doc/799>; UN Security Council, *Security Council Resolution 726*, S/RES/726, 6 January 1992, available at: <http://unscr.com/en/resolutions/doc/726>; UN Security Council, *Security Council Resolution 694*, S/RES/694, 24 May 1991 available at: <http://unscr.com/en/resolutions/doc/694>; UN Security Council, *Security Council Resolution 641*, S/RES/641, 30 August 1989 available at: http://dag.un.org/bitstream/handle/11176/58615/S.RES_641%281989%29-EN.pdf?sequence=3&isAllowed=y; UN Security Council, *Security Council Resolution 636*, S/RES/636, 6 July 1989 available at: <http://unscr.com/en/resolutions/doc/636>; UN Security Council, *Security Council Resolution 608*, S/RES/ 608, 14 January 1988 available at: <http://unscr.com/en/resolutions/doc/608>; UN Security Council, *Security Council Resolution 607*, S/RES/607, 5 January 1988 available at: http://repository.un.org/bitstream/handle/11176/59628/S.RES_607%281988%29-EN.pdf?sequence=3&isAllowed=y [all accessed 27 Jul 2018].

their children? Will this stand up to moral scrutiny? We shoot at those from among the 200,000 hungry [Palestinian] Arabs who cross the line [to graze their flocks]—will this stand up to moral review? Arabs cross to collect the grain that they left in the abandoned villages and we set mines for them and they go back without an arm or a leg... [It may be that this] cannot pass review, but I know of no other method of guarding the borders.”⁷⁸

*Moshe Dayan, Israeli military leader and politician, Defense Minister of Israel
1967-1974*

Israeli laws denying Palestinian return

The 1954 Law for the Prevention of Infiltration

In 1948, Israel not only denied the return of Palestinian refugees by destroying their villages and policing the border, it enacted the Prevention of Infiltration Military Order, which later became a law in 1954. This law was, and continues to be, one of the main tools preventing the right of return of Palestinian refugees. It defines Palestinian refugees who fled to neighboring countries as “infiltrators.” This law deems, *inter alia*, the following persons to be infiltrators: nationals and citizens of nearby Arab countries; residents or visitors of those countries or the parts of Palestine outside Israel; and Palestinians without nationality or citizenship—or doubtful status—who moved out of what is now Israel.

Following the Nakba, under the military order, Israeli police carried out raids on Palestinian villages searching for refugees who had returned to their homes or lands. Any returnees caught were subsequently transported to the border and expelled.⁷⁹ In January 1949, for example, refugees from the Palestinian towns and villages of Shafa Amr, Mi’ilya and Tarshiha who tried to return home were met with hostility as Israeli forces detained them, confiscated their belongings, and forcibly deported them to Jordan.⁸⁰

“On 25 October 1948, after the establishment of Israel, the village of Zakariyya was attacked and its inhabitants were expelled. After a few weeks, things calmed down and some villagers returned to the village. After about two months of displacement, my family managed to sneak back into Zakariyya.

78 Benny Morris, *Righteous Victims: a History of the Zionist-Arab Conflict, 1881-2001* (New York: Vintage Books, 2001), 275.

79 Benny Morris, *supra* note 30, 152 and 39.

80 State Archives, Foreign Ministry, Arab Refugees 2444/19; and in Segev, *The First Israelis*, *supra* note 23.

The majority of the inhabitants were prevented from returning. The number of returnees were around 400 people, all included in the Israeli census. Once the families settled back, they returned to their life of agriculture and livestock farming. Our return was not considered acceptable by the Israeli army, and they started to prevent us from reaching the fields freely because of “security reasons.”

Meanwhile, gangs began to attack the fields and harvest crops, and to kill our cattle. The attacks were repeated. After a while it became apparent that these groups were supported and protected by the Israeli army. They were armed like the Israeli army, passing easily through their corridors, and were attacking the village without any objections from the army. When the Mokhtar [local representative of the village], Mohammed Shamrokh, asked the army to protect the village and its inhabitants from these attacks, the Israeli army did not lift a finger, claiming that it was not their responsibility. Instead of providing protection, attacks, pillage and looting increased.

The Mokhtar and the men of the village decided to form protection committees for the villagers. Days later, four men were killed. As a result, these gangs increased their attacks and threatened the villagers, saying that they would punish the population for their rebellion. These gangs began to attack some houses and terrorize the inhabitants, not limiting their attacks to crops and livestock. People were afraid, felt insecure and felt their lives were in danger. That is why some of the villagers fled to the city of Ramla and settled there, and still live there today, while others fled to the area controlled by the Jordanian army at the time, and settled in the camp of Dheisheh and other areas.

In order to save our lives, after two years we had to leave Zakariyya. By the summer of 1951, all who had returned to Zakariyya, had been displaced once again.”

Mustafa Adawi, Abu Osama, Palestinian refugee originally from Zakariyya, 84 years old. Interview: 28 June 2018, Dheisheh camp.

Further, the Law for the Prevention of Infiltration was last amended in 2017 to define not only Palestinians, but *all people* crossing irregularly as infiltrators and allowing the Israeli authorities to detain them for three or more years before their deportation. If border officials determined that those who had crossed could be subjected to persecution if returned back to their countries, then the Law allows them to detain these people indefinitely. This indefinite detention, which is applicable to Palestinian refugees trying to return to their homeland, or even to Palestinians in neighboring countries seeking asylum, violates the prohibition against arbitrary detention under international law, and is a violation of Israel’s obligations under refugee law.

The Law of Return, 1950 and the Israeli Citizenship Law, 1952

Following the 1948 War, Israel also adopted discriminatory citizenship, nationality and residency laws that effectively denationalized Palestinian refugees and prevented them from returning to their places of origin. Citizenship and nationality in Israel are based on a two-tier system, one for Jews and the other for 'non-Jews.' Under the 1950 Law of Return, underpinned by the ideas of 'historical residence' and a 'Jewish nationality' that apply extra-territorially,⁸¹ any Jew can acquire automatic citizenship and residency. The law and its amendments grant Jews around the world, regardless of their national origin or citizenship, the right to enter Israel and to acquire Israeli citizenship and residency. The Law of Return has been instrumental in realizing the Zionist objective of establishing a Jewish state in Palestine.

On the other hand, for 'non-Jews', the subsequent 1952 Citizenship Law⁸² restricts citizenship to people present in Israel, or in an area which became Israeli territory after its establishment, from May 1948 to the date of promulgation of this new law in April 1952. This means that the indigenous Palestinian population, including refugees, must be able to prove that they were in Israel on or before 14 July 1952, or that they are the offspring of a Palestinian who meets this condition. Due to the fact that most Palestinian refugees were displaced outside the borders of Israel before 14 July 1952, they are unable to resume domicile in their homeland. In practice, naturalization only occurs in extraordinary cases and Israeli citizenship is rarely granted to non-Jews.

The Entrenchment of the Negation of the Right to Return Law, 2001

In 2001, to ensure that Israeli negotiators did not sway in their commitment to the Zionist consensus, the Israeli Knesset passed the Entrenchment of the Negation of the Right to Return Law. Section 2 of this law states that "refugees will not be returned to the territory of the State of Israel save with the approval of the simple majority of the Knesset Members." Section 1 of the law defines a refugee as a person who "left the borders of the State of Israel at a time of war and is not a citizen of the State of Israel, including, persons displaced in 1967 and refugees from 1948 or a family member." As such, even if Israeli political leaders did decide to cease their regime's violation of

81 See BADIL (Ed.), Joseph Schechla, "'Jewish Nationality', 'National Institutions' and Institutionalized Dispossession," al-Majdal Magazine, 2004, available at: <http://www.badil.org/en/component/k2/item/885-“jewish-nationality”-“national-institutions”-and-institutionalized-dispossession.html> [all accessed 27 Jul 2018].

82 Known formally as the Nationality Law, but more accurately cited as the Citizenship Law, 5712-1952, 14 July 1953 (Isr.).

international law as it pertains to displaced Palestinians, they would need the permission of a parliamentary majority to do so.

The Nation State Law, 2018

In July 2018, the Knesset passed the long debated Basic Law: Israel as the nation state of the Jewish people (hereafter Nation State Basic Law), constitutionalizing the superiority of the Jewish people and, *inter alia*, entrenching Jewish settlement as a national value and the principle that Israel is open for Jewish migration. The consequence of which is the systematic inferiorization of Palestinians who are explicitly denied their right to self-determination within the Israeli regime, and excluded by omission and incompatibility from national priorities of settlement and return. This basic law functions to: optimize the opportunity for Jewish settlement, including its prioritization as a binding consideration within the legal system; diminish the space and conditions for viable Palestinian communities; and, in its practical effect, excludes the possibility of the return of Palestinian refugees as a foundational doctrine of the Israeli state. Through the combination of these laws and policies, the Israeli regime has effectively denied all forcibly displaced Palestinians their right to return.

Denial of Residency in the oPt

Following the displacement of over 400,000 Palestinians during 1967,⁸³ the Israeli military carried out a census of remaining Palestinians. Any unregistered Palestinian following this census was denied residency status. The 1967 census recorded nearly one million Palestinians living in the West Bank and the Gaza Strip,⁸⁴ and 66,000 Palestinians in East Jerusalem.⁸⁵ Not included in the census were the hundreds of thousands of Palestinians displaced during the 1967 War and those who were outside of the country for personal reasons such as study, work, or travel.⁸⁶

83 BADIL, Survey 2013-2015, *supra* note 6, xxxiv .

84 Human Rights Watch, *Forget About Him, He's not Here. Israel's Control of Palestinian Residency in the West Bank and Gaza*, available at: <https://www.hrw.org/sites/default/files/reports/ipt0212webwcover.pdf>. Also see: BADIL and COHRE, *Ruling Palestine, A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine* (Geneva, Switzerland; Bethlehem, Palestine: COHRE - Centre on Housing Rights and Evictions; BADIL Resource Centre for Palestinian Rights and Refugee Rights, 2005), 125, available at: http://www.badil.org/phocadownloadpap/Badil_docs/publications/Ruling%20Palestine.pdf

85 Yael Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians* (Jerusalem: Center for the Defence of the Individual, 1998).

86 BADIL, Survey 2010-2012, *supra* note 6.

This administrative system was also paired with a set of “prevention of infiltration” military orders, which replicate the 1954 Prevention of Infiltration Law so as to extend its application to the oPt.

Additionally, both versions of the residency system – that in place in Jerusalem under Israeli civil law and that in the rest of the West Bank and the Gaza Strip under Israeli military law – include mechanisms for revoking residency status. Residents require exit permits (subject to the discretion of the Israeli Minister of the Interior and/or Israeli military commander – head of the Israeli civil administration) to travel abroad. Between 1967 and 1994, Israel regarded Palestinians in the oPt as “resident aliens”. If a resident failed to return before the expiry of their permit, they risked being removed from the Population Registry, thereby losing their residency status.⁸⁷ During this period, Israel stripped the residency rights of some 140,000 Palestinians living in the West Bank, and more than 100,000 living in the Gaza Strip, representing more than 10 percent of the Gaza Strip population and thus dramatically shifting the demographic composition of the territory.⁸⁸ The Citizenship Law and census made it very easy for Israeli officials to continually displace Palestinians by merely denying their right to enter. In 1995, the Oslo Accords transferred the “powers and responsibilities in the sphere of population registry and documentation in the West Bank and Gaza Strip ... to the Palestinian side.”⁸⁹

Despite this apparent handover to the Palestinians, in reality Israel has maintained control, as a result of the agreed requirement to notify the Israelis of any change to the Population Registry and its control of all Palestinian borders. Then, in 2000, Israel froze all changes to the registry and no longer recognizes most changes made by the Palestinian Authority (PA). This situation has resulted in a complex array of ongoing residency issues for many Palestinians,⁹⁰ with only births, deaths and replacement of documents being

87 Munir Nuseibah, “Decades of Displacing Palestinians: How Israel Does It,” *Al-Shabaka*, 18 June 2013, available at: <http://al-shabaka.org/node/624> [accessed 28 March 2018].

88 Akiva Eldar, “Israel Admits It Revoked Residency Rights of a Quarter Million Palestinians,” *Haaretz*, 2 June 2012, <https://www.haaretz.com/israel-admits-it-revoked-palestinians-residency-since-1967-1.5176492> [accessed 6 June 2018].

89 Interim Agreement, Annex III, Appendix I, Article 28 (1).

90 Amjad Alqasis and Nidal Alazza, *Denial of Residency- Forced Population Transfer: The Case of Palestine*, BADIL Resource Center for Palestinian Residency and Refugee Rights, available at <http://www.badil.org/en/documents/category/35-publications?download=1097%3Awp-16> [hereinafter Alqasis and Alazza, BADIL, Denial of Residency]; see also Human Rights Watch, “‘Forget about Him, He’s Not Here’: Israel’s Control of Palestinian Residency in the West Bank and Gaza,” February 2012, available at <https://www.hrw.org/report/2012/02/05/forget-about-him-hes-not-here/israels-control-palestinian-residency-west-bank-and> [accessed 18 September 2018]; and B’tselem, “Residents without Status”, available at https://www.btselem.org/gaza_strip/stateless [accessed 18 September 2018].

registered with any consistency. One of the most significant residency issues is the fact that because Palestinians cannot confer their residency status by marriage, they are required to submit family unification applications, which, but for a brief period in 2007, have been on hold since 2000. It is a deliberate strategy designed to limit the growth of the Palestinian population, inhibit Palestinians abroad from returning by way of marriage, and to make life so difficult Palestinians feel they have little option but to leave their homeland, in order that they can live lawfully as a family. It has also led to some 23.4% of children in East Jerusalem being denied their rights of residency, as they are denied full registration at birth when only one of their parents holds residency in East Jerusalem. Unable to satisfy the high evidential threshold to establish East Jerusalem as their “center of life”, Palestinian children are denied basic rights to access education and health care, and their families are often forced to leave.⁹¹

Since the signing of the Oslo Accords, there has been a significant escalation in the revocation of residency rights for Palestinians in East Jerusalem. Some 15,000 Palestinians have been deprived of their already inferior permanent residency rights due to a failure to establish Jerusalem as their “center of life” for seven years or more. This practice is the result of a broad interpretation by the Ministry of Interior in 1995 of a judicial decision by the Israeli High Court in the 1988 ‘Awad v. Prime Minister case.⁹² Many, some who hadn’t even left Jerusalem but nevertheless did not meet some necessary threshold, have been stripped of their residency and forced to leave homes, family, and jobs. This development contributes to a broader Israeli policy to alter and control the demographic population of Jerusalem, keeping the Palestinian population to just 30%, in preparation for “final status” negotiations.⁹³

Denial of return of internally displaced Palestinians

Following the Nakba, over 100,000 Palestinians managed to remain inside Israel, although between 35,000 and 45,000 of them were internally displaced between 1949 and 1966.⁹⁴ These IDPs were defined as “present absentees”

91 Alqasis and Alazza, BADIL, Denial of Residency, *supra* note 90, 39-44; BADIL, “End Israel’s Policy of discriminatory child registration in Jerusalem”, *Written Statement submitted by BADIL to the 27th Session of the UN Human Rights Council, A/HRC/27/NGO/44*, 6 August 2014, available at <http://www.badil.org/en/legal-advocacy/un-submissions/human-right-council.html>.

92 HCJ, 282/88, ‘Awad v. Yitzhak Shamir, Prime Minister and Minister of Interior et al., 5 June 1988, available at http://www.hamoked.org/files/2010/1430_eng.pdf

93 Alqasis and Alazza, BADIL, Denial of Residency, *supra* note 90, 24-27.

94 BADIL, Survey 2013-2015, *supra* note 6.

under the Israeli Absentees' Property Law of 1950.⁹⁵ Despite their presence inside the borders of Israel, they were deemed absent from their properties, which were consequently transferred to the Custodian of Absentee Property together with the properties of Palestinian refugees. While they eventually acquired Israeli citizenship, these internally displaced Palestinians have never been allowed to exercise the right to return to their towns and villages of origin or restitution of their properties.

The case of Iqrit and Kufr Birim

Iqrit and Kufr Birim are two Palestinian villages located in the north of the Galilee region, near the border with Lebanon. The residents of these villages are part of the approximately 384,000 internally displaced Palestinians from around 60 towns and villages inside Israel. As with the other Palestinian IDPs displaced during the 1948 War, despite being citizens of the state, they have been denied their right to return to their villages since 1948 and their properties have been illegally appropriated by Israel.

In 1948, the Israeli army requested the residents of Iqrit and Kufr Birim to leave their villages due to "security concerns" along the Lebanese border. Residents of the villages complied with the order after receiving assurances from the military that they would be permitted to return within 15 days. Some of the villagers were forced across the border into Lebanon. In 1951, the Israeli High Court ruled that the Israeli military's 'temporary expulsion' of the residents of the village of Iqrit and Kufr Birim, in the Galilee, was illegal and villagers should be permitted to return.⁹⁶ Following the High Court's ruling, Israel's military government in the area obtained retroactive inclusion of the villages into the northern "security zone". In essence, the military's actions created an Arab-free area along the borders, issued expulsion orders, and destroyed the villages. Iqrit was destroyed with explosives in 1951 and Kufr Birim by aerial bombardment in 1953.

This situation resulted in a decades-long judicial battle led by the former Palestinian residents of the villages to have their right to return recognized. In November 1963 the Military Commander issued a closure order according to Regulation No. 125 of the 1945 Emergency Regulations that forbade entry

95 Absentee Property Law, 5710-1950, SH, No. 37, 86. An English translation of the law is available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/E0B719E95E3B494885256F9A005AB90A> [accessed 7 June 2018].

96 Marwan Dalal "Choices of Law, Fragments of History: On Litigating in the Israeli Legal System", *Journal of Palestine Studies*, 35, No. 3 (2005/2006), available at: <http://www.palestine-studies.org/jps/fulltext/41714> [accessed 6 June 2018].

to the villages. The residents of Iqrit reapplied for their resettlement in the village, but the government, headed by Golda Meir, decided in July 1972 that the residents of Iqrit and Kufr Birim would not be allowed to return to their villages, and would be compensated and resettled in their existing residences.

The case persisted in public discourse, and, in 1977, the new government of Menachem Begin nominated a committee, headed by Minister Ariel Sharon, to examine the issue of the return of the residents. The committee decided not to allow their return. In 1981, the residents issued their third petition to the Supreme Court, in which they requested the cancellation of both the closure order and the confiscation of their land. The petition was denied on the grounds of the long-time delay. The Court assumed that the expropriation was legal and that there was no change in the security situation that should justify cancellation of the orders.⁹⁷

In 1995, government deliberations about Iqrit and Kufr Birim were again launched under the Rabin government by the then Minister of Justice, David Liba'i. Liba'i proposed to settle the case if the Palestinian residents of the villages agreed to, a) partial return (only heads of households accompanied by two descendants); b) forgo land restitution (only a small parcel of land would be leased to returning households); and, c) not to engage in agriculture. This proposal was rejected by the residents of the two villages, who by then numbered some 8,000 people with claims to 36,972 dunums of land. In total, the government had offered to lease 1,200 dunums of the villagers' original land (about 3 percent) back to a limited number of proposed returnees. Israel's Security Cabinet decided against their return because of fifty-year-old "security concerns" and most importantly, because it "would set a precedent for other displaced Palestinians, who all demand to return to their homes and lands."⁹⁸

In 1997, the residents of Iqrit and Kufr Birim re-filed their case with the Israeli High Court; however, the issue remained unresolved under the Netanyahu and Barak governments in the late 90s. In 2001, Ariel Sharon became Prime Minister of Israel and quickly interfered to stop this judicial process. He sent an affidavit in his name, asking the Court not to recognize the villagers' right to return. He argued that such a decision would have long-term implications that could affect final status negotiations over the refugee issue. The Court accepted Sharon's demand and ruled against the right to return of Iqrit and Kufr Birim's indigenous residents.

97 HCI, 141/81, Committee of Iqrit vs. the Government of Israel, 36(1), P.D. (1982), (Isr.) 129.

98 Nur Masalha, *Catastrophe Remembered. Palestine, Israel and Internal Refugees, Essays in Memory of Edward Said* (London : Zed Books , 2005), 41.

To this day, the residents of both villages remain displaced. There have been recent initiatives in both Iqrit and Kufr Birim to practice return and temporarily reside in their villages.

“My name is Nahida Zahra, and I am a second generation refugee from Kufr Birim. [Kufr Birim] was occupied in 29 October 1948, and in 7 November 1948 the Israeli occupation started a census of the inhabitants. They told the residents that they had to leave the village for only two weeks, but our families were never allowed to return there.

The inhabitants moved to the [previously depopulated] village of al-Jish, but the houses were not enough for all of them, and some were relocated to the Lebanese village of al-Rmaish.⁹⁹ Some families were separated from each other. For us, the Nakba became a double Nakba.

Some tried to return to the village, but the Israeli soldiers were always shooting at them. Ziad Ghantous [a resident] was killed on his way back to the village. The Israelis used to scare people to prevent them from exercising their right of return. One of the techniques they used was to drop bombs around the village. One time, one of the bombs dropped in front of a house, opening up a hole to an underground well. When two girls ran out of the house to see what was going on, they fell into the well. Later, their family found them drowned in the well.

[On 21 January 1949] our families obtained permits to repair our houses. To do so, they allowed us to use only mud. [A month later] two military vehicles came and arrested around 65 people from the village and sent them to Jenin. There, the Jordanian soldiers started to shoot at them thinking they were Israelis, while the Israeli soldiers were shooting at them from the other side. They started to shout “We are Palestinian!” to stop them from shooting. After being displaced, they lived in a camp near Jenin, then they were transferred to [a camp in] Nablus until we collected enough money and sent someone to bring them back. After a long trip, they tried to return again to Kufr Birim, but they were prevented by the Israelis. Thus, they went back to al-Jish.

After the displacement, my family, the priests, the Mokhtar, and other inhabitants established a committee, which was in charge of reporting any changes that were made on the land of Kufr Birim. But every complaint that the committee sent to the courts were simply ignored.

In 1972, our families organized a symbolic return that lasted one and a half years. At that time, I was 10 years old, and I remember how all the families gathered and took turns patrolling the village, sharing tasks between each

99 It should be noted that the original Israeli plan was to relocate to Lebanon the whole population of Kufr Birim. This and other testimonies cite a “high commander” that ordered the villagers to move five kilometers to the North, while the Lebanese border is only four kilometers from the village. For more information, see BADIL, *Returning to Kafr Bir'im*, October 2006, 25, available at: http://www.badil.org/phocadownloadpap/Badil_docs/publications/Birim-en.pdf

other. There were always five families staying in the village, while the rest were going to work and vice versa. We worked, ate, and socialized together. But eventually, the Israeli forces raided the church and assaulted the priest, threw the Bible away and arrested some of the returnees.

In 1983, the youth of Kufr Birim founded the “Al Awdah” [“return” in Arabic] Association. Its goal is to change the path of our struggle and build an educational program about our land and homeland, in order to give a legacy to our children. Between 1984 and 1985, we also started the “return camp,” to gather all generations of people from the village, to build and maintain relationships between them.

In 2013, we agreed to repeat the return experiment of 1972 and, on 17 August 2013, we started the “I declare my return” initiative. We returned to Kufr Birim, and around 300 people stayed there taking turns. It was the first time since 1972 that I had slept there – the first day of the new year, I opened my eyes and I was in Kufr Birim! During that time, we held many cultural activities; I did a tour between the houses for all the artists. We also asked the elderly to take the youth for a tour, to introduce them to the village and to write on each home the name of its original owner. People from all parts of the world were visiting the camp.

That camp, in 2013, was one of the best camps [we organized]. That year we called it the “reunification camp”. We had discussion sessions with many personalities from our village, who now live abroad. Some people had never been to the village before. We also launched balloons with the name of each city that our children would love to visit.

Unfortunately, we cannot set up a camp every year because of the political and security conditions, I wish we could do it always, it’s really effective. The idea took a positive dimension, but we don’t know what should be the next step. The Israeli occupation didn’t like what we were doing, because the land is registered under the Israel Land Authority and the Israel Nature and Parks Authority. [So they filed a case against us, and] in February 2015, during the first trial session they requested our evacuation. They also asked us to remove the mint we planted. The court allowed us to stay, but later on, the Israel Lands Administration appealed to the Central Court, demanding the evacuation of the village within three months. Eventually, they confiscated all the daily life tools [we were using] to force us to leave, such as electricity sources, water and bedding. This was the first and the last time we were evacuated from the village after we started the “I declare my return” initiative.

The Birim case is part of the Palestinian case, it’s the same case, and even the occupation authorities themselves recognize this connection. I am a refugee in my land, and so is my family.”

Nahida Zahra, 56 years old, current resident of al-Jish village.

Interview: via Skype, 31 May 2018

Violent suppression of the “Marches of Return”

Several marches and demonstrations have been, and still are, organized by members of Palestinian civil society to demand the practical implementation of the right of return. These are often brutally suppressed by Israel, in violation of the freedom of opinion and expression recognized by Articles 19 and 20 of the UDHR and Article 19 of the ICCPR.¹⁰⁰

One of the biggest marches demanding the right of return took place in 2011, when thousands of Palestinian refugees marched from the West Bank, the Gaza Strip, Lebanon, Syria, Jordan and Egypt towards Israel’s borders. This march resulted in the killing of at least 14 Palestinians in the northern border of Israel, where thousands of Palestinians from Lebanon and Syria marched for their right of return.¹⁰¹ Over a 100 Palestinians were injured by the Israeli forces during these marches.¹⁰²

More recently, Palestinians in the Gaza Strip have organized an ongoing march¹⁰³ that has been taking place every Friday since 30 March 2018 called “The Great March of Return.” Thousands of Palestinians have taken part in the protest, marching towards the border demanding the realization of their rights. This show of popular mobilization has been violently suppressed by Israel. Utilizing excessive and lethal force, as at 29 September 2018, the Israeli military had killed at least 203 Palestinians in Gaza, 151 killed during the demonstrations, and injured over 10,000.¹⁰⁴ Of those wounded, at least 5,814 were injured by live ammunition, including 939 children. Those injured also included some 115 paramedics and 115 journalists. Israeli suppression of this protest has gone so far as to include airstrikes on Gaza, threatening to break out into the fourth Gaza war in 10 years.

100 For more information about Israel’s practices of suppression of resistance, see BADIL, *Forced Population Transfer: The Case of Palestine. Suppression of Resistance*, Working Paper No. 19, December 2016, available at <http://www.badil.org/phocadownloadpap/badil-new/publications/research/working-papers/wp19-Suppression-of-Resistance.pdf>

101 Anshel Pfeffer, “Fourteen Killed as Northern Border Breached by Palestinians During Nakba Day Demonstrations,” *Haaretz*, 16 May 2011, available at: <https://www.haaretz.com/1.5012507> [accessed 9 July 2018].

102 Alan Taylor, “Palestinian Protests on Israel’s Border”, *The Atlantic*, 17 May 2011, available at: <https://www.theatlantic.com/photo/2011/05/palestinian-protests-on-israels-borders/100067/>; Ethan Bronner, “Israeli Troops Fire as Marchers Breach Borders”, *The New York Times*, 15 May 2011, available at: <https://www.nytimes.com/2011/05/16/world/middleeast/16mideast.html> [accessed 9 July 2018].

103 The march is ongoing at the moment of writing.

104 Al Mezan Center for Human Rights, “Seven Protesters Killed, Two of Them Children, and 257 Injured at Friday Demonstrations in Gaza”, 29 September 2018, available at: <http://www.mezan.org/en/post/23230> [accessed 2 October 2018].

The actions by the Israeli forces in response to the demonstrations amount to unlawful, excessive, indiscriminate and disproportionate use of lethal force. On 28 April 2018, the UN High Commissioner for Human Rights stated that, “[i]n the context of an occupation such as Gaza, killings resulting from the unlawful use of force may also constitute willful killings which are a grave breach of the Fourth Geneva Convention.”¹⁰⁵

This suppression represents another expression of Israel’s policy of denial of return, violently stopping any initiative that demands the right of return for forcibly displaced Palestinians.

“The March of Return began on the anniversary of Land Day on 30 March 2018. But this protest was not born today; it is part of other activities that took place in the past. We have been participating in these events since the Nakba [1948] until now. [My 14-year-old son] Hussein joined the demonstrations, I’ve joined them before, and my father joined them as well. The aim of these demonstrations is to send three messages. The first is addressed to the whole world, and it is to say that we have a right in this land, that this land was robbed, and that we must have our own state like the rest of the people in the world. The second message is for the Israeli occupation, to tell them that we did not forget our right of return. And the third message is for our children, our families and the whole Palestinian population: hold on to the right of return because it is a sacred right and we cannot forget it.

[My son] Hussein was hit in the abdomen by an explosive device, at approximately 2 pm, at the Karni checkpoint, east of al-Shojaeya in Gaza City. He was killed instantly. According to the testimony of some people who were there, Hussein was more than 300 meters away from the separation fence and therefore did not pose any danger to Israel. My son participated peacefully in the marches. He had no weapon. He participated like any other child, trying to deliver his message. As refugees, we have a right to return to our lands and we have to achieve our dream.”

*Mohammad Maddi, Palestinian refugee in the Gaza Strip
Interview: Gaza Strip, June 2018*

Israeli justifications for the Denial

More often than not Israel’s claims of the importance of maintaining a Jewish majority are enough to shut down any discussion on the right of return as an

¹⁰⁵ OHCHR, “Gaza deaths: Israel must address excessive use of force,” 27 April 2018, available at: <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22995&LangID=E> [accessed 9 July 2018].

option for refugees. This “need” is based on the demand for national self-determination of the Jewish people that is often prefaced on the basis of the Jewish character of the state; a reality recently enshrined into law by the passing of the Nation State Basic Law.¹⁰⁶

As a result, the “need” by Israel to maintain a Jewish majority, in a country where the majority of the population is not Jewish (i.e. Palestinians in the oPt, Israel and those living in forced exile), and in which mass immigration has not been sufficient to establish such a majority, has inevitably led to discriminatory policies aimed at forcibly displacing indigenous Palestinians from their homes and denying them the right to return to them. However, preventing refugees from returning to their homes based on their ethnicity and other practices of separation, segregation and/or discrimination based on racial, ethnic, national or religious background is illegal under international law.

Over the years, Israel has developed a regime of institutional discrimination against non-Jews, based on extra-territorial and privileged nationality status of Jews in Israel. Residents of Israel are thus divided under the law into Jewish nationals and non-Jews (mainly Palestinians), the latter treated as second-class citizens under an almost separate legal and bureaucratic umbrella. Discrimination is particularly prevalent in Israel’s laws and policies regulating immigration and access to citizenship, land and public services. Formal endorsement of this discriminatory regime is a requirement for all political parties wishing to participate in Israel’s parliamentary elections. This system and the privileged Jewish nationality status it seeks to uphold are the main obstacles to a durable solution to the Palestinian refugee issue.

2.2. Right to Restitution

The Principles on Housing and Property Restitution for Refugees and Displaced Persons (the “Pinheiro Principles”),¹⁰⁷ adopted in 2005 by the UN Sub-Commission on the Promotion and Protection of Human Rights, state at Principle 2 that “all refugees and displaced persons have the right to have restored to them any housing, land and/or property they were arbitrarily or unlawfully deprived,” and describe the right to restitution as a “distinct right [which] is prejudiced neither by the actual return nor non-return of refugees

¹⁰⁶ Israel as the Nation State of the Jewish people Basic Law, 5778-2018 (Isr.).

¹⁰⁷ Paulo Sérgio Pinheiro (UN Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons), *Housing and property restitution in the context of the return of refugees and internally displaced persons*, E/CN.4/Sub.2/2005/17, 28 June 2005, available at: <https://undocs.org/E/CN.4/Sub.2/2005/17> [accessed 27 Jul 2018][hereinafter Pinheiro Principles].

and displaced persons.”¹⁰⁸ Meaning that, restitution could, and should, be enforced even when those displaced decide not to exercise their return.

In this framework, restoration of property simultaneously constitutes a free-standing, autonomous right¹⁰⁹ and, where return is realized in practice, a corollary of the right of return¹¹⁰. The rights to restitution and return are in fact complementary, but they rely on separate provisions and principles of international law. That means, in practical terms, the right to property restitution is not affected by the choice of a refugee to not repatriate and to resettle in a third country. Equally, the decision to exercise the right of return, is not contingent on returning to previous actual homes, it is a right to return to their homeland generally.

While not binding themselves, the Pinheiro Principles reflect widely accepted principles of IHRL, IHL, and the Law of Nationality. As with the right of return, the right to restitution finds its basis in IHRL, IHL and in the Law of Nations, and is expressly considered under refugee law and by several UN resolutions.

1. Under IHRL, the right to housing and property restitution can be derived from both the right to property and the right to adequate housing, with their respective protections against arbitrary governmental interference. The right to property is included in the UDHR and the ICCPR,¹¹¹ as well as in regional instruments like the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights and the European Convention on Human Rights.¹¹²

108 Pinheiro Principles, *supra* note 107, Principle 2(2). The 2007 Handbook uses an even stronger language, stating that “long-term displacement does not extinguish or de-legitimize restitution claims - nor does a decision to resettle or integrate locally”, Inter-Agency Handbook on Property Restitution for Refugees and displaced Persons. (see FAO, NRC, OCHA, OHCHR, UN-HABITAT, UNHCR, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the ‘Pinheiro Principles’* (March 2007), 18-20, available at: https://www.un.org/ruleoflaw/files/pinheiro_principles.pdf)

109 Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Return of Refugees or Displaced Persons’ Property*, Working Paper submitted by Mr. Paulo Sergio Pinheiro pursuant to Sub-Commission decision 2001/122, E/CN.4/Sub.2/2002/17.

110 For instance, in this regard the Commission on Human Rights for Bosnia and Herzegovina condemned violations of the property rights of displaced persons in light of the circumstance that they “undermine the principle of the right of return”. See UN Commission on Human Rights, *Situation of human rights in the Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia* (Serbia and Montenegro), E/CN.4/RES/1996/71, 23 April 1996, available at: <http://www.refworld.org/docid/3b00f25638.html> [accessed 6 June 2018], para 926.

111 UDHR, *supra* note 13, art. 12 and 17, ICCPR, *supra* note 13, art. 17(1).

112 Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, available at: <http://www.refworld.org/docid/3ae6b38317.html>, art. 1; Banjul Charter, *supra* note 54, art. 14; Pact of San Jose, *supra* note 54, art. 21.

2. As for IHL, Customary Rule 133 states that “the property rights of displaced persons must be respected.” A framework of protection for private property is given by the Hague Regulations and the Fourth Geneva Convention, where the latter also provides a particularly strong prohibition against “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, which amounts to a grave breach of the same Convention.¹¹³
3. The Law on Succession of States postulates an additional basis for the right of restitution of 1948 displaced Palestinians: the doctrine of “acquired rights”, widely recognized as reflecting a customary norm of international law, states that in case of a change of sovereignty over territory the “acquired” rights of individuals regarding their property located in that territory cannot be affected by the sovereignty change itself, and remain instead vested in the original property owner.¹¹⁴
4. The right to restitution is also contained in refugee law. UNHCR considers “returnee recovery of access to land, housing and property through the establishment of a fair and equitable restitution and compensation framework” essential to repatriation programs,¹¹⁵ and recognizes that “all returning refugees should have the right to have restored to them or be compensated for any housing, land or property of which they were deprived in an illegal, discriminatory or arbitrary manner before or during exile.”¹¹⁶

More specifically, the Palestinian right to restitution is directly addressed by international law. Resolution 194 is again the main point of reference.¹¹⁷ Even though the word “restitution” is not expressly mentioned, the

113 Hague Regulations, *supra* note 57, art. 46-55; GCIV, *supra* note 20, art. 53 and 147.

114 Gail Boling, “Absentees’ Property Laws and Israel’s Confiscation of Palestinian Property: a Violation of UN Resolution 194 and International Law”, *The Palestine Yearbook of International Law*, 11, (2000/2001): 117 [hereinafter Boling, Absentees’ Property Laws].

115 UNHCR, *Handbook for integration and repatriation activities* (Geneva: 2004), 16, available at: <http://www.unhcr.org/partners/guides/411786694/handbook-repatriation-reintegration-activities-emcomplete-handbookem.html> [accessed 27 Jul 2018].

116 UNHCR, *Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees*, No. 101 (LV) - 2004, 8 October 2004, available at: <http://www.refworld.org/docid/417527674.html> [accessed 6 June 2018].

117 The right of Palestinian refugees and IDPs to restitution had also been affirmed by the UN in numerous other General Assembly resolutions. See e.g. UN General Assembly, *Question of Palestine*, 22 November 1974, A/RES/3236, available at: <http://www.refworld.org/docid/3b00f0468.html> [accessed 20 September 2018]; UN General Assembly, *General Assembly Resolution 34/146, A/RES/36/146*, 16 December 1981, available at: <http://www.un.org/documents/ga/res/36/a36r146.htm> [accessed 27 Jul 2018].

legislative history of the document reveals that “[t]here is no doubt that in using this term [‘to their homes’] the General Assembly meant “the return of each refugee from Palestine (Arab, Jewish or other) to “his [her] house or lodging and not to his [her] homeland.”¹¹⁸ In a working paper on historical precedents for property restitution and compensation the United Nations Conciliation Commission for Palestine (UNCCP) Secretariat emphasized that “the underlying principle of paragraph 11, sub-paragraph 1, is that the Palestine refugees shall be permitted [. . .] to return to their homes and be reinstated in the possession of the property which they previously held.”¹¹⁹

The right to restitution has been also mentioned by the ICJ, in its Advisory Opinion on the Wall, where it rules that “Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the Wall in the Occupied Palestinian Territory.”¹²⁰

Protection and administration of Refugees’ and IDPs’ property

Refugee and IDP properties and possessions should be protected “against destruction and arbitrary and illegal appropriation, occupation or use.”¹²¹ As a corollary to this principle, it is fair to assume that the same properties have to be protected and administered until a durable solution is implemented. When, on 11 April 1949, the UNCCP expressly demanded Israel suspend the Emergency Regulations (Absentees’ Property) Law, 5709-1948 and to place refugee property under a “custodian”, the Israeli Representative responded that indeed they had done so, noting “the custodian acts as a trustee for the absentee owners, whose property is administered in their interests,” and recognizing the

118 United Nations Conciliation Commission for Palestine (UNCCP), *Analysis of Paragraph 11 of the General Assembly Resolution of 11 December 1948*, Working Paper Prepared by the UN Secretariat, A/AC.25/W/45, 15 May 1950, available at: <https://unispal.un.org/DPA/DPR/UNISPAL.NSF/796f8bc05ec4f30885256cef0073cf3a/94f1c22721945319852573cb00541447?OpenDocument> [accessed 7 June 2018].

119 UNCCP, *Historical Precedent for Restitution of Property or Payment of Compensation for Refugees*, Working Paper of the UN Secretariat, A/AC.25/W.81/Rev.2 (Annex 1), 23 October 1961, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/3E61557F8DE6781A052565910073E819> [accessed 7 June 2018], para 1.

120 ICJ, Advisory Opinion on the Wall, *supra* note 15, para 153.

121 UNHCR Guiding Principles, Principle 21. *A fortiori*, this principle has to be regarded as effective also for refugees.

right to compensation.¹²² Right after Israel's admission to the UN, the Israeli Representative signed a protocol with the UNCCP, which accepts Resolution 194 regarding Palestinian refugees, including "the respect for their rights and the preservation of their property." At around the same time, though, he pointed out that no restitution would take place for Palestinian refugees, stating that Israel retained the right to use the "abandoned" property as it saw fit and may "enact legislation for the more rational use of absentee property."¹²³

In this regard, with Resolution 36/146C, in 1981, the UN General Assembly recognized that Palestinian refugees are entitled to their property and to the incomes derived from that property, in conformity with the principles of justice and equity. Most notably, it requested the Secretary-General to take "all appropriate steps," in consultation with UNCCP, for the protection and administration of Palestinian property, assets and property rights in Israel, and to establish a fund for the receipt of income derived therefrom, on behalf of their rightful owners.¹²⁴ This Resolution has been reaffirmed by the General Assembly in every annual session, but the fund has never been created and Israel steadfastly insists on rejecting its implementation.¹²⁵

Denial of the Right to Restitution

As explained previously, under international law, reparations should, as far as possible, "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."¹²⁶ However, in the same way that Israel has refused to recognize

122 Michael Fischbach, *Records of Dispossession, Palestinian Refugee Property and the Arab-Israeli* (New York : Columbia University Press, 2003) [hereinafter Fischbach, *Records of Dispossession*], 86, and Adnan Abdelrazek, "Israeli Violation of UN Resolution 194 (III) and Others Pertaining to Palestinian Refugee Property", *Palestine-Israel Journal*, 15, No. 4; 16, No. 1, available at: <http://www.pij.org/details.php?id=1220> [accessed 7 June 2018].

123 Fischbach, *Records of Dispossession*, *supra* note 122, 86.

124 UN General Assembly, *Resolution 36/146 United Nations Relief and Works Agency for Palestine Refugees in the Near East*, A/RES/36/146(A-H), 16 December 1981, available at: <https://unispal.un.org/DPA/DP/UNISPAL.NSF/0/16DC32D615D8176B852560D9005860C5> [accessed 20 September 2018].

125 See its latest recall in UN General Assembly, *Palestine refugees' properties and their revenues*, A/RES/72/83, 14 December 2017, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/83 [accessed 27 Jul 2018]; and as for Israel's rejection policies see United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), *Palestine refugees' properties and their revenues*, A/72/334, 14 August 2017, available at: <https://undocs.org/A/72/334> [accessed 27 Jul 2018]; UNRWA, *Palestine refugees' properties and their revenues*, A/71/343, 19 August 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/263/72/PDF/N1626372.pdf>

126 Lena El-Malak, "Reparations for Palestinian Refugees", *Forced Migration review*, 26 (2006), available at: <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR26/FMR2624.pdf>

the right of return of Palestinian refugees and IDPs since 1948, it has also denied Palestinians their right to restitution of their homes and properties. A series of laws were passed by the Knesset with the intention of rendering any potential restitution process impossible through the confiscation and subsequent privatization of Palestinian land.

Confiscation and Privatization of Properties of Displaced Palestinians

Following the Nakba, gaining control of the lands of displaced Palestinians became one of the main objectives of the newly-established Israeli government.¹²⁷ Israel immediately expropriated an estimated 17,178,000 dunums (17,178 km²) of land in 1948 from Palestinian refugees and afterwards continued to expropriate an additional 700,000 dunums (700 km²) from internally displaced Palestinians.¹²⁸ The rights of Palestinians did not stand in the way, as first Prime Minister of Israel David Ben Gurion argued in 1948: “the war will give us the land. The concepts of ‘ours’ and ‘not ours’ are peace concepts, only, and in war they lose their meaning.”¹²⁹

After 1948, the property of all forcibly displaced Palestinians was declared ‘absentee property’ and was transferred to a Custodian,¹³⁰ based on the Emergency Regulations for Absentees’ Property of December 1948 that later became the 1950 Absentee Property Law. This Law defined ‘absentee’ broadly so that it applied to every Palestinian who had left their usual place of residence in Palestine after November 1947. Once the properties were acquired by the Custodianship Council for Absentee’s Property, which was, in theory, not allowed to sell the property, Israel was able to utilize and privatize the land (and the buildings that were on it)¹³¹ through a roll-out of additional laws in partnership with government and non-government agencies.

In addition to the aforementioned legislation, the main laws used for such objectives were:

- The 1950 Development Authority (Transfer of Property) Law, which gave the Development Authority broad powers to acquire and

127 Jad Isaac, *The Israel-Palestine Conflict: Parallel Discourses* (University of California Los Angeles Center for Middle East Development Series 1st ed., 2011), 68

128 BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons*, 2002 (Bethlehem, Palestine), 3, available at: http://www.badil.org/phocadownload/Badil_docs/publications/Survey-2002.pdf .

129 Nur Masalha, *Expulsion of the Palestinians: The Concept of “Transfer” in Zionist Political Thought, 1882-1948* (Washington: Institute for Palestine Studies 1992):180.

130 Absentee Property Law, *supra* note 95.

131 See Fischbach, Records of Dispossession, *supra* note 122, 48.

develop property to allow it to be sold, and established that it was only allowed to sell land to the state, the Jewish National Fund (JNF) or to institutions approved by the government;

- The 1953 Land Acquisition (Validation of Acts and Compensation) Law, which allowed the Custodian to vest ownership of the appropriated Palestinian lands into the Development Authority for the development of Israel;
- The 1960 Basic Law: Israel Lands, which defined “Israel Lands” as lands in the ownership of the state, JNF and the Development Authority and established that lands managed by the Israel Lands Administration shall not be transferred;
- The 1960 Israel Lands Administration Law, which granted certain powers to approve the sale, transfer, and lease of “Israel Lands” with the approval of the Israel Lands Council ; and,
- The 1961 Covenant between the government and the JNF, which granted the JNF 50 percent representation on the Israel Lands Council even though the JNF only owned 13 percent of “Israel Lands.” This law culminated in the gradual transfer of Palestinian lands to Jewish-Israelis, as it gave the JNF a strong and influential position in the Israel Lands Council to manage all “Israel Lands,” not only the portion it owned directly. Tenders for JNF lands are only open to Jewish-Israelis. This explicitly excludes non-Jews (namely Palestinians) from accessing land under the administration of the JNF.

The intentions behind the gradual transfer of the properties of displaced Palestinians to Israel were covered in depth by Michael Fischbach in his book *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict*:

“One of the most successful operations of clearing peasants from their land was articulated by Yosef Weitz, the director of the Jewish National Fund. He proposed after the end of the 1948 war what became known as a policy of “retroactive transfer,” in a memorandum appropriately entitled “A Scheme for the Solution of the Arab Question in Israel.” The memo summarized measures which essentially would “prevent the return of Palestinian refugees [to their homes]; prevent Palestinian farmers from cultivating their abandoned fields; and settle Jewish immigrants in 90 abandoned villages; and destroy the remainder of the abandoned villages.” When Ben-Gurion agreed to all these measures but objected to the last clause (apparently for utilitarian reasons),

Weitz carried them out anyway. Virtually all of this plunder was carried out under the cover of meticulous legal procedures. A whole army of lawyers attached to the Jewish Agency, the state, the office of the chief of staff, and the Justice Ministry-together with a retinue of international “legal experts”-labored on the issue of confiscated lands. The most effective tool of this conquest was the Emergency Regulations for Absentees’ Property of December 1948, drafted by the Justice Ministry. These regulations, we are informed, “shifted the legal definition of what constituted abandoned land from the land itself to its owner: instead of declaring land to be ‘abandoned,’ people were now declared ‘absentees’ whose property could be seized by the state”. And when people were not absent, they were ‘absented’ on behalf of the state, as happened to thousands of Palestinians who remained in Israel but escaped from the fighting arena for safety, as civilians do everywhere, and subsequently found that their land officially sequestered.”¹³²

The stated objective of the Absentee Property Law is to safeguard absentee property until the status of Palestinian refugees is resolved. However, the law, in combination with other land-related laws, confers legitimacy to illegal Israeli actions detrimental to the right to property restitution of Palestinian refugees and IDPs.¹³³ Israel has confiscated, and continues to confiscate, refugee and IDP properties through its absentee property regulations and land laws, and has sold, and continues to sell, those properties. The privatization of these properties is not only prohibited under international law, it thwarts the right of Palestinian refugees to restitution of their lands and properties.

The example that follows is a testimony of a family from Jaffa. The family shares ownership of their home with Amidar, an Israeli State-owned housing company, that received partial ownership when a portion of the home was declared absentee property and was transferred to the Development Authority. The current partial control of the home by Amidar puts the property at risk of privatization.

“I’m now 77 years old. I never lived in any other place than Jaffa. My husband had six siblings; there were seven of them altogether. In 1948 when the war

132 Salim Tamari, Records of Dispossession Review, *Journal of Palestine Studies*, 34, No. 3, 2004/5, available at: <http://www.palestine-studies.org/jps/fulltext/41576> [accessed 7 June 2018] [hereinafter Salim Tamari, Review].

133 See section above on International Refugee Law. Additionally see UNHCR, *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework*, PPLA/2005/01, March 2005, available at: <http://www.refworld.org/docid/425689fa4.html> [accessed 21 September 2017].

erupted, three of his siblings were in Lebanon on vacation. They were registered as absentees and so their property was registered as absentee property as well. My husband inherited the entire family home [three sevenths of those shares were declared absentee property]. He passed away in 1973, and almost thirty years later, Israelis started coming knocking on my door. They used to tell me “we are from Amidar and there are three shares registered as absentee property here, which means the State owns them.” They took the measurements of the home, and then they started bringing me a paper every month. It had the amount of money I had to pay monthly for using three shares of my own home as well as the debt [fines] I owe the state for staying in the home without paying. They used to tell me that they will divide our home and give the three shares to other people that I don’t know. Imagine some strangers living in my home and sharing the bathroom and the kitchen with me...

[In 2007] we received a lawsuit from Amidar, they filed one against us. The case went on for around 10 years. Amidar’s lawyer told the judge that our home falls under this law from 1948, the Absentee Property Law, which means that the three shares [declared as absentee property] are owned by the State. They wanted to sell the home; they wanted to make money from those three shares. The judge ruled that we could buy the three shares for half the price, which is one million shekels [around 275,000 USD]. We had to buy three shares of our own home, and they gave us 90 days to agree on everything with Amidar and buy the shares.

This home has never been empty; I’ve been living in this home for 50 years and I’ve only ever lived in this home and my husband lived in it before 1948. This home can’t be an absentee property because it was never empty. Still, in all of these 50 years they never stopped harassing me, knocking on my door, and sending people to harass me. I remember one time a guy came to my home and started screaming and telling me: “This isn’t your home; you think you’re going to take it? It’s not yours to take.” It was extremely painful; we spent most of our lives in courts.

We know that there is no escape from this, and we’re also exhausted, if we don’t solve this case now it’s going to follow our children and their children after them. Even the solution they gave us a few months ago isn’t easy. It’s not easy to buy three shares of your own home at such an expensive price. Now there is the million shekels that they want us to pay. I’m really scared to die before I get to see my children living peacefully in our home; I just want them to be happy here. What should I do? My [eldest] son has four children to take care of, how can he afford to pay a million shekels?

My daughters would tell me to sell the home and move to another place to find

peace of mind. But I always told them that I became a widow and worked hard all of these years to keep this home, and to keep it for them, how can I sell it now? Why would I? It's impossible. I would never sell this home and leave.”

Sara Afteem, 77-year old female resident of Jaffa.

Interview: Jaffa, 20 March 2017

Israeli justifications for the denial

One of the justifications used by Israel to deny the restitution of properties taken from displaced Palestinians has been that of reciprocity. The logic behind this narrative is that Israel absorbed a significant number of Jewish immigrants or refugees from neighboring Arab countries, some of whom had their properties confiscated by the states from which they came, particularly Egypt and Iraq. Therefore, Israel claims that a reciprocal exchange happened in 1948, in which Palestinian properties, and any income generated therefrom, were used to compensate and accommodate the large numbers of Arab Jews who abandoned their properties following Arab-Israeli hostilities.¹³⁴

This issue became prevalent during the permanent status negotiations in Camp David (1999) and Taba (2000), when Elyakim Rubinstein, Israel's Attorney General and chief negotiator, disclosed that the records of the Custodian of Absentee Property were no longer available.¹³⁵ He also added that the money resulting from the administration of these properties since the establishment of the Custodian had been used up and thus, it was the responsibility of the international community to raise these funds. Again, Israel continued to justify the denial of the income generated by the assets of displaced Palestinians, claiming it is a form of 'exchange' for all the displaced Jews they hosted. However, regardless of the status of the properties of those Jews who arrived to Israel from Arab countries, it does not affect the legal right of Palestinians to restitution of their properties.

To tie in such a way the claims to reparations of different, unrelated groups of refugees is without legal basis: all refugees and victims of gross violations of international law are equally entitled to receive reparations, with no group to be favored above the others, and no group's claims are conditional on the realization of another group's claims. To that end, claims to reparations can be made against the offending state only – that is, Arab Jews claiming

134 Michael Fischbach, "Palestinian Refugee Compensation and Israeli Counterclaims for Jewish Property in Arab Countries", *Journal of Palestine Studies* 38, no.1, (2008): 6.

135 Salim Tamari, Review, *supra* note 132.

refugee status, or Israel on their behalf, should direct their claims to the respective Arab states, and Israel should not seek to tie those claims to any negotiations between Israel and the Palestinians. In effect, Israel is creating a false equivalence between the responsibilities of the Arab states towards Arab Jews, as the alleged offending states, and Palestinians, for whom Arab states bear legal responsibilities as any other third state party bears obligations for gross violations of international law, but for whom Israel bears primary responsibility.

2.3. Right to Compensation

Another component of reparation can be represented by the payment of a monetary sum for harms suffered.¹³⁶ As international law expressly points at restitution in kind as the preferred form of reparation and durable solution, compensation should be considered a complementary means of reparation, applicable either when restitution is not factually possible anymore, as determined by an independent, impartial tribunal,¹³⁷ or when the right holder knowingly accepts it in lieu of restitution, according to the principle of voluntariness.

Compensation may include recompense for material losses (e.g. for any damage to their returned properties, for the income derived from the interim use of returned properties, or for those who choose not to exercise their right of return¹³⁸) as well as non-material losses¹³⁹ (e.g. social and moral damages, or lost earnings and opportunities as a result of displacement).

As with the right of return and the right to restitution, refugees' and IDPs' right to compensation rests upon IHRL, IHL and the Law of Nations. It is also explicitly considered under refugee law and is reflected in and strengthened by numerous UN Resolutions, including Resolution 194, which refers to "principles of international law and equity" and thus confirms the customary

136 Pinheiro Principles, *supra* note 107, Principle 21.

137 Pinheiro Principles, *supra* note 107, Principles 2 and 21.

138 Compensation is not in a mutually exclusive relationship with the right of return - these rights are instead complementary among each other, as confirmed by paragraph 11 of Resolution 194. For those who choose not to exercise their right of return, compensation (for both material and non-material losses) can always be claimed.

139 See for example, the compensation recognized for Jewish victims of Nazi atrocities under the Wiedergutmachung program, described in Atif Kubursi, *Palestinian Losses in 1948: The Quest for Precision* (Washington, DC: The Center for Policy Analysis on Palestine, 1996). See also Hannah Garry, "The Right to Compensation and Refugee Flows: a 'Preventative Mechanism' in International Law?", *International Journal of Refugee Law*, 10, No. 1/2 (1998): 114.

nature of the rights involved.¹⁴⁰ UN Resolution 194 states that “compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or equity, should be made good by the governments or authorities responsible.”¹⁴¹

In its Advisory Opinion on the Wall, the ICJ specifically addressed the topic of compensation in light of the damages derived from the construction of the Wall, by recognizing that “in the event that [...] restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considered that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the Wall’s construction.”¹⁴² To that aim, in 2007, the General Assembly created the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD),¹⁴³ conceived to be “a register of damage caused to all natural or legal persons concerned.”¹⁴⁴

Denial of the Right to Compensation

The obligation to provide compensation for Palestinian refugees has not only been challenged by Israel, but also by host Arab states and Palestinians themselves. In the case of Israel, the reasons are based on a denial of

140 For a more detailed analysis, see. See Michael Lynk, “Compensation for Palestinian Refugees: an International Law Perspective”, *The Palestine Yearbook of International Law*, XI, 2000/2001, 155-183. For the basis of the right of compensation to Palestinian refugees under the Law of Nations (notably, the Law of Expropriation), see Boling, Absentees’ Property Laws, *supra* note 114, p. 122. See also UN General Assembly Resolution 194, *supra* note 41; UN General Assembly Resolution 36/146, *supra* note 124; UN General Assembly, *Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources*, A/RES/58/229, 23 December 2003, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/229 [accessed 27 Jul 2018].

141 UN General Assembly Resolution 194, *supra* note 41, art. 11.

142 ICJ, Advisory Opinion on the Wall, *supra* note 15, para. 153.

143 UN General Assembly, *Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory*, A/RES/ES-10/17, 24 January 2007, available at: <https://undocs.org/A/RES/ES-10/17> [accessed 27 Jul 2018].

144 UN General Assembly, *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, A/RES/ES-10/15, 2 August 2004, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F3B95E613518A0AC85256EEB00683444> [accessed 27 Jul 2018]. However, the system set up by the register has several flaws: for instance, non-material damages are not considered; the UNRoD Office is not a compensation commission, and it has no judicial, nor quasi-judicial status; the burden of production of evidence is placed solely on claimants. See Rhodri Williams, “United Nations Register of Damage (UNRoD) Rules and Regulations Governing the Registration of Claims, Introductory note”, *International Legal Materials*, 49, No. 2, (2010): 620-628.

responsibility for the displacement of Palestinians, as well as, to a certain extent, what Israel calls the 'exchange' of Palestinian refugees for Arab Jews.

Israeli policy makers are concerned that compensation might be construed as a tacit admission of moral guilt; an admission of responsibility for the displacement of Palestinians.¹⁴⁵ Additionally, they are fearful of the large sums compensation would entail.¹⁴⁶ Israel has also sought to link the issue of Jewish refugee claims in Arab states to that of Palestinian refugee claims in its own state, partly to seek compensation for the former but more so in an effort to offset or cancel out any liability for the latter.¹⁴⁷

More importantly, Palestinians have exercised and expressed their right to outright reject offers of reparations packages that include only compensation as a solution to their right of return, refusing it as an alternative to return or restitution, which ought to be prioritized as per international legal principles.¹⁴⁸ Palestinians seek a solution that implies more than a simply financial transaction with Israel; namely one that is founded on a rights-based approach, which carries liability for their dispossession.¹⁴⁹ This became particularly pertinent in the 1990s as the Balkan Wars reinvigorated international focus on the need for repatriation and reparations.¹⁵⁰ Similarly, the post-Oslo period saw Palestinian refugees become a core element of permanent status negotiations.¹⁵¹ During this process, Palestinians rejected Israel's offers of compensation in exchange for basic rights such as return and restitution. Also problematically, these offers were to be funded by third states, as Israel claimed that compensation was the sole responsibility of the international community.¹⁵²

Arab states have also resisted compensation schemes proposed by Israel and the US, which seek to finance the large-scale resettlement of refugees

145 Rex Brynen, "Compensation for Palestinian refugees: Law, Politics and Praxis," *Israel Law Review* 51, no. 1 (2018): 29-46, available at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C5CE1B9FEE96AB8DA5C7CB3F7F1D63E8/S0021223717000255a.pdf/compensation_for_palestinian_refugees_law_politics_and_praxis.pdf

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*

150 Lena El-Malak, "Reparations for Palestinian refugees," *Forced Migration Review*, 2006, available at: <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/palestine/elmalak.pdf>

151 *Ibid.*

152 Jacob Tovy, "Negotiating the Palestinian Refugees," *Middle East Quarterly Spring 2003 Volume 10: Number 2*, 1 March 2003, available at: <https://www.meforum.org/articles/other/negotiating-the-palestinian-refugees> [accessed 10 July 2018].

in the Arab world.¹⁵³ Arab states instead seek a solution whereby Palestinian refugees can return to their homes and are no longer reliant on host states for aid and services. There is also reluctance from Arab states to finance anything that resembles compensation to Palestinians for Israeli actions in 1948 and subsequently. Given Arab states are not responsible for the creation of the Palestinian refugee issue, they reject claims that they should have to pay the price for it.¹⁵⁴

2.4. Guarantees of non-repetition

The obligation to guarantee non-repetition of an internationally wrongful act follows as a consequence of the obligation upon the state concerned to cease that act. Such an obligation usually serves a preventive function, and “may be described as a positive reinforcement of future performance.”¹⁵⁵ As pointed out by the former Special Rapporteur for the United Nations Commission on Human Rights, “there exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at the prevention of the recurrence of similar violations, and the issue of the follow-up given by the State...”¹⁵⁶

Guarantees of non-repetition in cases of serious violations of IHRL or IHL may include the assurance of effective civilian control of military and security forces; the application of international standards of due process, fairness and impartiality to all civilian and military proceedings; and the review and reform of laws contributing to or allowing gross/serious violations of IHRL and IHL.¹⁵⁷

As a starting point, Israel would need to stop the ongoing displacement of Palestinians, repeal the aforementioned legislative acts such as the Law for the Prevention of Infiltration and the Absentee’s Property Law, withdraw the corresponding military orders, and enact appropriate

153 Michael R. Fischbach, “The United Nations and Palestinian Refugee Property Compensation,” *Journal of Palestine Studies* 31, no. 2 (2002): 34-50, available at: <https://www.jstor.org/stable/pdf/10.1525/jps.2002.31.2.34.pdf?refreqid=search%3A60022ac6ac442499c0e8762dbdde4b44>

154 Rex Brynen, “Financing Palestinian Refugee Compensation,” *Palestinian Refugee Research Net*, available at: https://prrn.mcgill.ca/research/papers/brynen_990714.htm [accessed 10 July 2018].

155 ILC, Draft Articles on Responsibility, *supra* note 34, Commentary to Article 30.

156 Study of Special Rapporteur on the Right to Restitution, *supra* note 44, para. 55.

157 United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006, Principle 21, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> [accessed 27 Jul 2018]

legislations in order to wipe out the effects of displacement and prevent further displacement. This would include such measures as a legislative bill to prevent further displacement of Palestinians; a census of people who already have been displaced; and action protocols to guarantee the rights of displaced persons.

3. OBLIGATIONS OF THE INTERNATIONAL COMMUNITY

3.1. International Protection

Under international law, one of the primary duties of states is to ensure the protection of its citizens and persons under its sovereignty or jurisdiction. When states are unable or unwilling to ensure such protections, international law states that it is the responsibility of the international community to provide comprehensive protection to those who are entitled to it.¹⁵⁸ The general framework for international protection is provided by the 1951 Convention relating to the Status of Refugees¹⁵⁹ (Refugee Convention) and its 1967 Protocol¹⁶⁰ - both ratified by Israel - and the Statute of the Office of the High Commissioner for Refugees.¹⁶¹

Tracing the interpretation of international protection for refugees and IDPs in relevant jurisprudence, reports of the Executive Committee of UNHCR, and best practices of states and non-mandated organizations (such as NGOs or UN agencies), it follows that international protection encompasses three essential elements:

- Physical safety and security – ensuring protection against physical harm;
- Legal protection – ensuring and respecting fundamental human rights and freedoms, including access to justice, legal status, security of

158 UNHCR, *Refugee Protection: A Guide to International Refugee Law*, 1 December 2001, 8, available at: <http://www.refworld.org/docid/3cd6a8444.html> [accessed 27 Jul 2018].

159 UN General Assembly, *Convention Relating to the Status of Refugees*, 189 UNTS 150, 28 July 1951, available at: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [accessed 27 Jul 2018] [hereinafter Refugee Convention].

160 UN General Assembly, *Protocol Relating to the Status of Refugees*, 606 UNTS 267, 31 January 1967, available at: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [accessed 27 Jul 2018].

161 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, A/RES/428(V), 14 December 1950, available at: <http://www.unhcr.org/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html> [accessed 27 Jul 2018][hereinafter UNHCR Statute].

property/funds in home countries (the rights set out in the Refugee Convention are the minimum), and finding a durable solution;

- Material security – ensuring the well-being of refugees, by guaranteeing their human dignity and equal access to basic needs and services.

IDPs are only partially covered by the Refugee Convention and its Protocol since, unlike refugees, they have not crossed an international border. However, considering that they have many of the same protection needs as refugees, some principles of refugee law are applicable to IDPs by analogy. The legal framework applicable to IDPs is provided by the UNHCR Guiding Principles.¹⁶² The Principles reflect and are consistent with principles of customary international law¹⁶³ and have been widely accepted by states, international organizations and NGOs.¹⁶⁴

In the case of Palestinian refugees and IDPs, the unique characteristics of their situation and the role played by the United Nations in generating their displacement (among other factors), led to the establishment of a separate, disjointed, and ultimately deficient protection regime. Due to misinterpretations of Article 7 of the UNHCR Statute and Article 1D of the Refugee Convention, the majority of Palestinian refugees and IDPs do not fall under the UN's "universal" scheme.¹⁶⁵ Only a narrow group of Palestinians currently fall under UNHCR's mandate; the rest are subject to the alternative framework for protection and assistance established under the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief Works Agency for Palestine Refugees (UNRWA).¹⁶⁶

United Nations Conciliation Commission for Palestine (UNCCP)

The UNCCP was established by UN Resolution 194, with the aim of assisting governments and authorities in achieving a final settlement of the Arab-Israeli conflict. The objective of the UNCCP included finding a durable solution

162 UNHCR, Guiding Principles, *supra* note 5.

163 Walter Kälin, "The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool", *Refugee Survey Quarterly*, 24, No.3 (2005): 27-36.

164 See, for instance, the statement by the German Federal Government, *7th Human Rights Policy Report*, 17th June 2005, 97-98, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule131_sectionb [accessed 27 Jul 2018].

165 See, BADIL, "Closing Protection Gaps: A Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention," February 2015, available at: <http://www.badil.org/phocadownloadpap/badil-new/publications/Handbook-art1d/Art1D-2015Handbook.pdf>

166 BADIL, Survey 2013-2015, *supra* note 6, 72-79.

for 1948 refugees (including IDPs), notably by facilitating “the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation” for the property of those choosing not to return and for loss of or damage to property. The UNCCP was specifically endowed by the General Assembly in Resolution 194 with a protection mandate that encompassed the rights, properties and interests of Palestinian refugees. In essence, the agency was established with a dual mandate: to seek conciliation between the parties of the Arab-Israeli conflict, and to provide protection to the refugees, notably by safeguarding their right of return and their right of restitution of property. Regarding the latter, as mentioned, in 1949 the UNCCP did issue a demand that Israel suspend the Emergency Regulations (Absentees’ Property) Law until a final peace settlement was reached, and issued a further demand for refugees’ property to be placed in the category of “enemy property” under a custodian. It also requested the suspension of all measures of requisition and occupation of Palestinian houses, and the reuniting, in their homes, of refugees belonging to the same family.

Despite these and other numerous steps undertaken, UNCCP’s power gradually decreased throughout its short period of activity; its objective shifting from the realization of repatriation for Palestinian refugees to mere information gathering on refugee property in Israel and investigation on the possibility of compensation.¹⁶⁷ By the mid-1950s, the agency effectively ceased its functions, essentially as a result of Israel’s refusal to work in cooperation with it, several internal disputes among its members, and the international community’s unwillingness to support it in the fulfillment of its mandate.¹⁶⁸ Although it was never officially abolished, the UNCCP ceased to make a substantial contribution towards the implementation of its protection mandate: to this day, the only annually published report by the UNCCP is a one-page document stating that “it has nothing new to report”.¹⁶⁹

United Nations Relief and Works Agency (UNRWA)

UNRWA was established by UN Resolution 302 to work in parallel with UNCCP, complementing its actions by providing essential humanitarian and relief

167 See, e.g. Susan Akram, “Palestinian Refugees and their Legal Status: Rights, Politics and Implications for a Just Solution”, *Journal of Palestine Studies*, 31, No. 3, (2002):36-51; Dr Lena El-Malak, “Palestinian Refugees in International Law: Status, Challenges, and Solutions”, *Immigration, Asylum and Nationality Law*, 2006, 20(3), p. 187.

168 BADIL, *The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees*, Information & Discussion Brief, Issue No. 5, June 2000, available at: http://badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.5.pdf

169 UNCCP, *Seventy-first Report*, A/72/332, 15 August 2017, available at: <https://undocs.org/A/72/332> [accessed 27 Jul 2018].

assistance. Originally intended to be a temporary agency, UNRWA's mandate has been repeatedly renewed by the General Assembly. UNRWA's services – which include education, health, relief and social services, microfinance and emergency assistance – are available for registered “Palestine refugees” living in its area of operations (Jordan, Lebanon, Syria, the Gaza Strip and the West Bank, including East Jerusalem) and who are in need of assistance. UNRWA's role has evolved over time, providing emergency humanitarian assistance to displaced Palestinians as well as encompassing, to a certain extent, international protection. UNRWA defines protection in general terms, as “what the Agency does to safeguard and advance the rights of Palestine refugees,” and has adopted a “holistic approach” which embodies protection through “internal” and “external” dimensions. Notably, while the former is developed through service delivery programs, the latter is articulated through engagement with relevant duty bearers, by “monitoring and reporting of violations and by engaging in private and public advocacy.” However, despite this step forward, UNRWA remains to this day neither explicitly mandated nor adequately equipped to provide the just and durable solution to which Palestinian refugees are entitled.¹⁷⁰

United Nations Office of the High Commissioner for Refugees (UNHCR)

Established by UN Resolution 319,¹⁷¹ UNHCR is currently the main global refugee agency responsible for ensuring the international protection of refugees and seeking permanent solutions for refugee crises, as the “guardian” of the framework outlined by the Refugee Convention.¹⁷² Its 1950 Statute¹⁷³ defines refugees as “all persons outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and who, as result, require international protection,” but places an exclusion clause in paragraph 7(C), pursuant to which its competence “shall not extend to a person [...] who continues to receive from other organs or agencies of the United

170 BADIL, *Bulletin No. 27: Understanding the Political Underpinnings of UNRWA's Chronic Funding Crisis*, June 2018, available at <http://badil.org/en/publication/research/briefs.html> [accessed 27 Jul 2018].

171 UN General Assembly, *Refugees and Stateless Persons*, A/RES/319, 3 December 1949, available at: <http://www.refworld.org/docid/3b00f1ed34.html> [accessed 7 June 2018] [hereinafter UN General Assembly Resolution 319].

172 UNHCR's mandate goes however beyond that of the Refugee Convention, including protection for returnees (i.e. former refugees), stateless persons and, in specific circumstances, internally displaced persons. UNHCR, *Note on the Mandate of the High Commissioner for Refugees and His Office*, October 2013, available at: <http://www.refworld.org/docid/5268c9474.html> [accessed 27 Jul 2018].

173 UNHCR Statute, *supra* note 161.

Nations protection or assistance.” This provision, coupled with Article 1(D) of the Refugee Convention, has been interpreted to place restrictions upon UNHCR’s scope in providing international protection to Palestinian refugees who already fall under the mandate of the UNCCP and UNRWA. However, Article 1(D) contains a parallel inclusion clause stating that “when such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of the Convention.” While this norm could theoretically authorize UNHCR to assume responsibility for Palestinian refugees and IDPs,¹⁷⁴ it has been narrowly interpreted by UNHCR itself as applying only to those persons “outside UNRWA’s area of operations”, and as such “no longer enjoy the protection or assistance of UNRWA.”¹⁷⁵

A deficient system of protection for Palestinian Refugees and IDPs

The displaced Palestinian population is therefore facing a substantial lack of protection. Israel, as the state exercising jurisdiction, is unwilling to provide Palestinians with any form of protection, causing and perpetrating their displacement and the continuing violation of their rights. In such cases, it is the duty of the international community to intervene and to provide the denied protection: as the UN General Assembly recognized in Resolution 319, “the problem of refugees is international in scope and in nature”.¹⁷⁶ As also recognized by the Pinheiro Principles, the international community, especially the UN, has a general responsibility to act in order to enforce the realization of the right of return and restitution to refugees and IDPs.¹⁷⁷ However, since the UNCCP has been unable to fulfil its mandate for decades, and only a small number of Palestinians are benefiting from UNHCR protection, there is currently no UN agency specifically mandated to provide legal protection and seek a durable solution (especially return and property restitution) for Palestinians. Instead of being administered by a UN custodian appointed to protect and manage refugees’ and IDPs’ land and properties (as was formerly proposed by Arab states’ delegations)¹⁷⁸ in order to allow their legitimate owners to receive the

174 See the alternative interpretation of Article 1(D) proposed by Susan Akram and Terry Rempel in “Recommendations for Palestinian Refugees: a Challenge to the Oslo Framework”, *The Palestine Yearbook of International Law*, 11, No.1 (2000/2001): 27-36.

175 UNHCR, *UNHCR Revised Statement on Article 1D of the 1951 Convention in relation to Bolbol v. Bevándorlási és Állampolgársági Hivatal pending before the Court of Justice of the European Union*, October 2009, para 8, available at: <http://www.refworld.org/docid/4add79a82.html> [accessed 27 Jul 2018].

176 UN General Assembly, Resolution 319, *supra* note 171.

177 Pinheiro Principles, *supra* note 107, Section VI.

178 Fischbach, Records of Dispossession, *supra* note 122.

incomes derived therefrom and to facilitate their restitution, these lands and properties have been seized by the Israeli government over many years.

3.2. ACCOUNTABILITY: THIRD STATE OBLIGATIONS

When an international wrong is committed, under certain circumstances international law imposes legal obligations upon third states. These are prescribed by the Law of State Responsibility, IHL, and International Criminal Law.

Third State Obligations under the Law of State Responsibility

According to the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles), which reflect the relevant norms of customary law, international responsibility of third states arises in the case of a third state's complicity in the commission of the international wrong, i.e. when a state is providing aid or assistance in the commission of such an act.¹⁷⁹

In addition to this, in the case of a serious breach of a peremptory norm of general international law, (considered at Part II, Chapter III of the ILC Draft Articles) all states, as part of the international community, are bound by specific obligations. A peremptory norm of international law is defined by Article 53 of the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."¹⁸⁰ The International Law Commission (ILC) identified a certain number of obligations as peremptory, including the prohibition of racial discrimination and apartheid, the basic rules of IHL, the right of self-determination, the prohibition of the threat of force and the prohibition of land annexation¹⁸¹ - rules which are all, to

179 ILC, Draft Articles on Responsibility, *supra* note 34, art. 16.

180 United Nations, *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 23 May 1969, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 27 Jul 2018], art. 53.

181 International Law Commission, *Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)*, Supp. No. 10 (A/56/10), 2001, available at http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf, 283-284. See also ILC, Draft Articles on Responsibility, *supra* note 34, 112 (racial discrimination and apartheid); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, 8 July 1996, available at: <http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>, para 79 (fundamental rules of IHL); Case Concerning East Timor (Portugal v. Australia), 1995 ICJ 90, 30 June 1995, available at: <http://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>, para 29 (right to self-determination); *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945, available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>, art. 2(4) (prohibition of the threat of force).

different extents, relevant to the Palestinian context.¹⁸² In such cases, by reason of the importance of the rights involved, all states can be held to have a legal interest in their protection and are therefore entitled to invoke responsibility of any state in breach.¹⁸³

When a serious breach of an obligation under peremptory norms occurs, international law imposes a primary two-pronged obligation upon all states: they have a duty to cooperate to bring the serious breach to an end, and a parallel duty of abstention in recognizing this situation as lawful and in rendering assistance in maintaining that situation.¹⁸⁴ As part of the international community, third states can also invoke the responsibility of the state which committed the serious breach and claim, *inter alia*, reparations for the beneficiaries of the obligation that was breached.¹⁸⁵

Duty of cooperation

The first obligation, as set out in Article 41(1) of the ILC Draft Articles, is that of a positive duty on all states to cooperate in bringing any serious breach to an end through lawful means, whether or not they are affected by the breach itself. Cooperation is also mentioned in several preambles to human rights treaties, such as the UDHR and ICCPR.¹⁸⁶ All states, as members of the international community, are hence required to make a “joint and coordinated effort,”¹⁸⁷ adopting appropriate measures in order to bring an end to Israel’s practices of population transfers.

182 See, e.g., the withdrawn Report issued by UN Economic and Social Commission for Western Asia, *Israeli practices towards the Palestinian People and the Question of Apartheid*, E/ESCWA/ECRI/2017/1, 15 March 2017, available at https://www.middleeastmonitor.com/wp-content/uploads/downloads/201703_UN_ESCWA-israeli-practices-palestinian-people-apartheid-occupation-english.pdf

183 ILC, Draft Articles on Responsibility, *supra* note 34, art 48(1)(b). This principle was firstly underscored by the ICJ in the Barcelona Traction case. See Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 1970 ICJ 3, 5 February 1970, available at: <http://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>, para 32-33.

184 ILC, Draft Articles on Responsibility, *supra* note 34, art. 41.

185 ILC, Draft Articles on Responsibility, *supra* note 34, 127, para 12.

186 While normally preambles are not legally binding, they can be relevant for the interpretation of the treaty concerned, as set out by Article 31(2) of the Vienna Convention on the Law of Treaties, *supra* note 180. The preamble of UDHR affirms the pledge of UN member states “to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”; while the ICCPR preamble highlights “the obligation of states under the charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms”. The recalling of the role of the UN must be read in light of the general duty of cooperation which stems from UN membership status.

187 ILC, Draft Articles on Responsibility, *supra* note 34, 114.

The norm does not provide a list of possible means of cooperation as these will depend on the circumstances of the given situation and can be articulated within an institutional as well non-institutional framework.¹⁸⁸ These may include the suspension of membership, or the expulsion from international or regional bodies, as well as the refusal to admit a country to a membership, or the exercise of universal jurisdiction (that is, the jurisdiction of any state to engage in criminal prosecution of individuals that have committed particularly heinous crimes, regardless of the nationality of any persons involved and where the crimes were committed).

Duty of abstention

According to Article 41(2) of the ILC Draft, all states are under a duty of abstention which in turn consists of two obligations. The first obligation is a duty of collective non-recognition of the legality of situations resulting directly from the serious breach committed. The obligation covers both formal recognition as well as acts which might be interpreted as recognition of the violation of the peremptory norm. It can be put into effect by adopting measures against the state which is committing the breach, such as, for instance, non-recognition of passports or travel documents, withdrawal of consular representation or diplomatic missions, denial of the legal validity of public or official acts, and refusal of membership of international organizations.¹⁸⁹ The relevance of this obligation finds support in state practice, in decisions of the ICJ¹⁹⁰ and regional courts,¹⁹¹ and in several resolutions of the UN General Assembly and Security Council.¹⁹²

188 Massive violations of human rights, like the situation of apartheid and racial discrimination, as well as the continuing practice of forced population transfer, could constitute the basis for an intervention of UN Security Council under Chapter VII of the UN Charter. In this regard see Catherine Phuong, *The International Protection of Internally Displaced Persons* (Cambridge: Cambridge University Press, 2004), 208.

189 James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 684.

190 See e.g. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 ICJ 16, 21 June 1971, available at: <http://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>, para 121-126.

191 *Loizidou v. Turkey*, Merits Judgment, [1996] ECHR 70, 18 December 1996, available at: <http://www.refworld.org/cases,ECHR,402a07c94.html> [accessed 7 June 2018]; *Cyprus v. Turkey*, Judgment, [2001] ECHR 331, 10 May 2001, available at: <http://www.refworld.org/cases,ECHR,43de0e7a4.html> [accessed 27 Jul 2018], para 89-98.

192 Furthermore, see e.g. UN Security Council Resolution 216 of 12 November 1965, Resolution 217 of 20 November 1975, Resolution 253 of 29 May 1968 and Resolution 277 of 18 March 1970 concerning the situation in southern Rhodesia; UNGA Resolutions 31/6 A of 26 October 1976, 32/105 N of 14 December 1977, 34/93 G 12 December 1979 and Security Council Resolution 402/1976 of 22 December 1976, relating to the Bantustans in South Africa.

Regarding Israel, the obligation of non-recognition has been reiterated in numerous UN General Assembly and Security Council resolutions. For instance, in 2016, the UN General Assembly applied the principle of non-recognition in its Resolution 2234 relating to the establishment of Israeli settlements in the oPt, where it reaffirmed that “it has no legal validity and constitutes a flagrant violation under international law.”¹⁹³ More recently, the General Assembly condemned the U.S. decision to transfer its embassy to Jerusalem, calling “upon States to refrain from the establishment of diplomatic missions” in Jerusalem.¹⁹⁴ In addition to this, the ICJ, in its Advisory Opinion on the Wall, affirmed the responsibility of the international community “not to recognize the illegal situation resulting from the construction of the wall.”¹⁹⁵

The second obligation of abstention prohibits states from rendering aid or assistance in maintaining the situation created by a serious breach, requiring states to abstain from or terminate any contribution to the maintenance of such a situation. This goes beyond the responsibilities that adhere to a case of third state complicity in the commission of an internationally wrongful act,¹⁹⁶ as it deals with the conduct “after the fact”, independently of the continuous character of the breach.¹⁹⁷ As part of the international community, states are required to halt all forms of cooperation with Israeli institutions that provide material support to the maintenance of the *status quo* generated by Israel’s violations of international law. Applications of this principle can also be found in UN Resolutions,¹⁹⁸ and in the Advisory Opinion on the Wall, where the ICJ ruled that the international community should refrain from “render[ing] assistance in maintaining the situation created by such construction.”¹⁹⁹ In this regard, the example of trade relations between Israel and the EU is worth noting. Notwithstanding the adoption of some remarkable steps, such as the decisions regarding the inapplicability of all trade agreements

193 UN General Assembly Resolution 2234/2016, 23 December 2016. Another example is given by UNGA and UNSC Resolutions on the status of the city of Jerusalem issued in the aftermath of the 1967 war: see UNGA Resolution 2235 of 4 July 1967, Resolution 2254 1967, UNSC Resolution 476 of 30 June 1980, Resolution 478 of 20 August 1980; and UNGA Resolutions 47/70 A-G of 14 December 1992.

194 UN General Assembly, *Status of Jerusalem*, A/ES-10/L.22, 19 December 2017, available at: <https://undocs.org/A/ES-10/L.22> [accessed 27 Jul 2018].

195 ICJ, Advisory Opinion on the Wall, *supra* note 15, para 146.

196 ILC, Draft Articles on Responsibility, *supra* note 34, art. 16.

197 *Ibid*, 115.

198 Particularly in Resolution 465, where the UN Security Council called upon “all States not to provide any assistance to be used specifically in connection with settlements in the occupied territories”, or in UN General Assembly Resolution 2334.

199 ICJ, Advisory Opinion on the Wall, *supra* note 15, para 146.

between EU and Israel to the oPt,²⁰⁰ the EU has blatantly failed to implement its commitments, by maintaining commercial trades of goods produced in the Israeli colonies illegally imposed on the oPt.²⁰¹

Although state responsibility arises independently of its invocation by another state, the ILC has underlined the necessity of specifying the measures third states may take when faced with a breach of an international obligation, in order to respect the obligations of cessation and reparation by the responsible state.²⁰² To this end, Article 48 of the ILC Draft Articles considers which actions states may take in order to protect collective interests of a group of states, or of the international community as a whole. It provides an exhaustive list of claims, stating that third states are entitled to request the cessation of the wrongful act and assurances of non-repetition,²⁰³ in the interests of the injured state or of the beneficiaries of the obligation breached.²⁰⁴ Additionally, Article 54 of the ILC Draft Articles affirms that third states are also entitled to take “lawful measures” against the responsible state, to ensure cessation of the breach and reparations.²⁰⁵

Third State Obligations under International Humanitarian Law

While the obligations contained in the Fourth Geneva Conventions have a peremptory nature, and thus justify the entitlement of third states to take action under Article 48 of the ILC Draft Articles, Common Article 1 of the four Geneva Conventions goes beyond this general provision, establishing “not only a right to take action, but also an international obligation to do so.”²⁰⁶ Under Common Article 1, all Contracting Parties are bound by the obligation

200 European Union, *Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards*, 2013/C 205/05, 13 July 2013, available at: http://eeas.europa.eu/archives/delegations/israel/documents/related-links/20130719_guidelines_on_eligibility_of_israeli_entities_en.pdf; European Union, *Interpretative notice on indication of origin of goods from the territories occupied by Israel since June 1967*, C(2015) 7834, 11 November 2015, available at https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf

201 See BADIL, *EU-Israel Trade: Promoting International Law Violations*, December 2017, available at: <http://www.badil.org/phocadownloadpap/badil-new/publications/research/in-focus/EU-Israel-Trade.pdf>

202 ILC, *Draft Articles on Responsibility*, *supra* note 34, 116.

203 *Ibid.*, art.48(2)(a).

204 *Ibid.*, art. 48(2)(b).

205 *Ibid.*, art. 54. Such lawful measures could be e.g. suspension of treaties, embargos or other sanctions. For examples in this regard.

206 Knut Dörmann, Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violation”, *International Review of the Red Cross*, 96 (2014): 707-736.

“to respect and ensure respect for the Conventions in all circumstances.”²⁰⁷ The wording “ensure respect” implies a positive duty for all state parties, independently of their involvement in a given armed conflict, to take measures aimed at ensuring compliance with the rules set out in the Geneva Conventions, putting an end to ongoing violations²⁰⁸ and preventing their occurrence.²⁰⁹ This obligation constitutes an obligation of means (or obligation of due diligence) which does not require states to reach a specific result, but rather imposes a specific duty of conduct, regardless of the achievement of the desired outcome. Examples of possible measures include actions aimed at exerting diplomatic pressure, retorsion,²¹⁰ and actions taken in cooperation with international organizations.

Additionally, according to Article 146 of the Fourth Geneva Convention, each state party is under an obligation to prosecute persons alleged to have committed, or ordered to be committed, grave breaches of IHL, who are in its 1948 borders. This obligation allows states to exercise jurisdiction in their own courts regardless of the nationality of those persons involved, or the absence of any connection between the crime committed and the prosecuting state’s territory (thus applying the principle of universal jurisdiction). If a state prefers they may hand such persons to another state party for trial.²¹¹

Third State Obligations under International Criminal Law

International Criminal Law is a body of international law aimed at ensuring the personal accountability of perpetrators of particularly heinous international crimes including, *inter alia*, war crimes and crimes against humanity – which include the crimes of apartheid and forcible transfer.²¹² Under the Rome Statute of the International Criminal Court, all state parties are subject to a general duty of cooperation with the International Criminal Court (ICC)

207 Article 1, Geneva Conventions I, II, III, IV.

208 Rule 144 of the ICRC Customary Law Study provides, *inter alia*, that states “must exert their influence, to the degree possible, to stop violations of International Humanitarian Law”. See ICRC, Customary IHL, Rule 144. Ensuring Respect for International Humanitarian Law *Erga Omnes*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144 [accessed 7 June 2018].

209 See e.g. UN Security Council Resolution 681, where the Security Council called upon the contracting parties “to ensure respect by Israel, the occupying power, for its obligations” in accordance with Common Article 1 (UN Security Council, Security Council Resolution 681, S/RES/681, 20 December 1990, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/E22E5043636EE55852560DD00637DF4> [accessed 8 June 2018]).

210 Unfriendly conduct which is not inconsistent with any international obligation of the state engaging in it even though it may be a response to an internationally wrongful act. See ILC, Draft Articles on Responsibility, *supra* note 34, 128.

211 GCIV, *supra* note 20, art. 146.

212 Rome Statute of the ICC, *supra* note 22, art. 7(1)(d), 7(1)(j), 8(2)(a)(vii).

“in its investigation and prosecution of crimes”²¹³ that have occurred within its jurisdiction. This obligation is particularly relevant in light of the ICC’s preliminary examination, legitimated by the access of the State of Palestine to the Rome Statute, which conferred to the ICC jurisdiction to investigate serious crimes committed in its territory.²¹⁴

International Community’s practice in ensuring reparations to refugees and IDPs: the Bosnian case

An example of intervention by the international community in reinforcing the implementation of the right of refugees and IDPs to reparations can be drawn from the Bosnian experience. In the aftermath of the war, following the dissolution of former Yugoslavia, the international community intervened on several levels to ensure the implementation of the peace agreement that settled the conflict in 1995 (General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement). Notably, the agreement contained a set of rules on refugee return and property restitutions.²¹⁵ International assistance and investment in post-war reconstruction were conditions of its implementation.²¹⁶ The Council of Europe exerted its influence by conditioning Bosnia’s membership to the EU on the application of refugee return and property restitution, requiring the Bosnian government to comply with a list of criteria, including the implementation of property laws that would allow refugees and displaced persons to return to their homes of origin.²¹⁷ Additionally, to facilitate property restitution as stated in the Dayton Agreement, international actors put pressure on local authorities to pass appropriate domestic legislation, and set up an ad hoc implementation plan characterized by a rights-based approach. Moreover, they provided information and education campaigns about restitution rights, training of local housing officers, and more funding for housing authorities when needed. Notwithstanding its shortcomings, the Bosnian example constitutes a relevant reference point for the Palestinian case, where the international community recognized the importance of return and restitution to achieve a durable peace.

213 Rome Statute of the ICC, *supra* note 22, art. 86.

214 See International Criminal Court, *Report on Preliminary Examination Activities 2017*, 4 December 2017, available at: https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf

215 Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons, 14 December 1995, available at: <http://www.refworld.org/docid/3de497992.html> [accessed 27 Jul 2018].

216 James Boyce, “Aid Conditionality as a Tool for Peacebuilding: Opportunities and Constraints”, *Development and Change*, 33, No. 5 (2002): 1025-1048.

217 Parliamentary Assembly of the Council of Europe, *Bosnia and Herzegovina’s application for membership of the Council of Europe*, Opinion 234 (2002), 22 January 2002, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16967&lang=en> [accessed 27 Jul 2018].

4. CONSEQUENCES OF THE LACK OF COMPLIANCE AND ACCOUNTABILITY

4.1 Perpetuation of displacement: ongoing exile

Israel's lack of compliance with international law vis-à-vis Palestinian refugees and IDPs is twofold. On the one hand, Israel fails to uphold its obligation to ensure the basic rights of Palestinians under its jurisdiction and to protect them from arbitrary forced displacement. On the other hand, it also fails and is unwilling to respect its obligation to provide reparations to Palestinians forcibly displaced by its actions.

Denying the right of return to Palestinian refugees is central to realizing the Zionist goal of “a maximum amount of land with the minimum amount of Palestinians.” Israel's ongoing forced population transfer of Palestinians—accompanied by the denial of return—is a continuing violation of Palestinian individual and collective rights. Discrimination is particularly blatant in Israel's laws and policies regulating immigration and access to citizenship, land and public services. This system and the privileged Jewish nationality status it seeks to uphold are the main obstacles to a durable solution to the Palestinian refugee and IDP issue. In fact, the *erga omnes* obligation to implement the collective right to self-determination first requires enabling refugees and other displaced persons to return to their homes and repossess their property, because how could they otherwise realize their right to self-determination while still in exile? Consequently, the Palestinian right to self-determination is meaningless without ensuring the right of Palestinian refugees to voluntary repatriation.

Changing the demographic composition of an occupied territory is fundamental to colonial practice. In continuing its demographic manipulation of Mandatory Palestine, including the oPt, Israel has not only denied more than 8.1 million Palestinian refugees and IDPs their fundamental right to reparations since 1948, but is also continuing to forcibly displace and transfer the occupied Palestinian population, replacing it with Jewish-Israeli civilians since 1967. Both practices constitute grave breaches of the Fourth Geneva Convention and amount to a serious violation of IHRL and multiple UN resolutions. The population transfer of an occupied civilian population *out* of a territory and the Occupier's civilian population *into* the occupied territory constitute crimes against humanity and/or war crimes under Articles 7 and 8 of the Rome Statute.

Moreover, in the absence of the right of reparations, including return, Palestinians remain marginalized and vulnerable to repeated displacement. Approximately half of all displaced Palestinians continue to live as refugees in forced exile, outside the borders of Mandatory Palestine. Many of these refugees have experienced further forced displacement due to ongoing political crises in the region. Armed conflict, unstable relations between Arab countries and the Palestinian Liberation Organization (PLO) or Palestinian Authority (PA), and discriminatory policies result in the repeated displacement of Palestinian refugees, displacements which would not occur if Israel respected Palestinians' internationally-recognized right of return. This denial of return, coupled with discriminatory policies in host countries, has left Palestinians in limbo and unable to find even temporary refuge. By denying Palestinian refugees the right to return to their places of origin, Israel carries principal responsibility for the current situation of Palestinian refugees abroad.

The international community has the potential and authority to play a significant role in holding Israel accountable for its violations of international law. State Parties to the Fourth Geneva Convention have a legal obligation to investigate and prosecute Israeli perpetrators of war crimes, who enter territory under their jurisdiction. The international community is also responsible for the enforcement of international law and the implementation of international resolutions. The inability of the UN and its agencies to implement decisions, particularly General Assembly Resolution 194 of 1948 and Security Council Resolution 237 of 1967, does not relieve States individually or collectively from assuming their responsibilities to enable and facilitate the voluntary return of Palestinian refugees to their original homes from which they were displaced, to ensure the restitution of their property, and to secure compensation for the damage inflicted upon them as a result of their displacement.

4.2 Promoting further displacement

Although the international community has been voting in favor of resolutions recognizing the right to reparations for Palestinian refugees and IDPs, it has not shown sufficient political will in properly and effectively pressuring Israel into compliance. Redressing such historical injustice is not only important from a legal or moral standpoint, but would also serve as a deterrent for Israel to continue displacing Palestinians as part of its ongoing settler-colonial enterprise.

The broad impunity that Israel enjoys serves as an incentive for further forcible displacement, as it comes at no expense for Israel. The failure, or unwillingness, of the international community to effectively pressure Israel and to facilitate reparations results in the ongoing and ever-increasing exile and dispossession of the Palestinian people. As long as the international community does not intervene and apply pressure for reparations for all forcibly displaced Palestinians, Israel will continue to have the tacit consent to proceed with its breaches of international law, and the number of forcibly displaced Palestinians will continue to increase.

Despite numerous UN resolutions calling for the implementation of prior UN resolutions 194 and 237, no international organization has actively engaged in the search for a comprehensive solution to the Palestinian refugee and IDP issue since the early 1950s. Rather, international politics has confined the UN to a guardian of Palestinian refugee rights and limited its role to providing humanitarian aid. On the other hand, solutions have been left to political negotiations between the parties, which are undertaken specifically outside the ambit of international law. These negotiations have been subject to a balance of power that is in Israel's favor, and Israel, in turn, has sought at all times to avoid recognition and implementation of the right of reparations.

5. CONCLUDING REMARKS

In light of Israel's failure to afford protection to Palestinian refugees and the ongoing denial of reparations, the international community has an obligation to protect the rights of Palestinians, in particular the right to self-determination and the right of Palestinian refugees and IDPs to reparations.

The international community, both through the United Nations and individual states, has largely failed to meet its obligations towards the Palestinian people for reasons primarily resulting from the lack of political will among powerful western states. Despite the gravity of the policies and practices implemented by Israel, which have resulted in the mass forcible transfer of Palestinians spanning decades, no UN agency or other authoritative body has been designated as primarily responsible for their protection or the pursuit of durable solutions. UNRWA is mandated to provide humanitarian assistance for Palestinian refugees, which is a necessary intervention and one of the

core pillars of international protection, but this is only a temporary measure aimed at alleviating suffering and cannot replace a comprehensive political solution.

Addressing this completely unacceptable and unsustainable state of affairs therefore represents a matter of great urgency and it can only be realized through the application of concerted pressure by the international community through all available channels. These joint efforts should be based on adopting and supporting rights-based durable solutions within a long-term strategy. This strategy would incorporate developing mechanisms and taking effective measures to bring Israel into compliance with international law; ensuring the end of Israeli policies of forcible displacement, the effective protection of Palestinian refugees, IDPs and those at risk of forcible transfer in Palestine and host countries; and realization of the right to reparations of all forcibly displaced Palestinians.

Adopting a rights-based approach and solution would mean that the international community must exert pressure on Israel to recognize the right of return of Palestinian refugees, and to implement it, starting with the revocation of all legislation and policies set in place to that deny return of all those displaced, followed by taking positive steps to facilitate the repatriation of all those displaced. A rights-based solution would also entail the realization of the right to restitution, both for Palestinian returnees and also for those choosing not to return. The international community must also make concerted efforts to establish a compensation mechanism, not in place of the right of return, but in addition to it, to compensate forcibly displaced Palestinians for material and non-material damages. Finally, it is essential that there are firm guarantees of non-repetition, in order to ensure that forcibly displaced Palestinians can take voluntarily determine their status and future.

Recommendations

The international community, states, UN Agencies (particularly UNRWA and the UNCCP) and international civil society must take all measures available within international law to hold Israel accountable for its policies and practices resulting in ongoing human rights violations and international crimes committed against the Palestinian people. These steps include:

- Upholding the fundamental and inalienable rights of the Palestinian people (right to reparations and right to self-determination) by fulfilling their obligations and responsibilities to provide humanitarian aid and assistance as well as protection, and to end the discriminatory exclusion of Palestinians from the international and/or national protection system/s;
- Developing robust mechanisms to bring Israel into compliance with international law, investigate violations, determine responsibility and accountability for the injuries, loss of life and property, ensure reparations from those responsible, and prosecute those guilty of serious violations of IHRL and IHL;
- Enacting appropriate legislation in order to wipe out the effect of previous and ongoing displacement and to prevent further displacement;
- Prosecuting individuals who have committed serious violations of IHL or IHRL. The duty of cooperation of the international community extends also to the exercise of the universal jurisdiction over those individuals in a State's territory;
- Refusing to recognize as lawful, situations generated by serious breaches of peremptory norms of international law. The legal validity of Israeli legislation such as the Law for the Prevention of Infiltration and the Absentee's Property Law and their consequences must not be recognized;

- Protecting refugees' and IDPs' properties: third states should not recognize the appropriation and privatization of those properties;
- Exerting pressure on Israel through non-recognition of Israeli passports or travel documents, restrictions on diplomatic representations (including expulsion of staff), halting privileges for Israeli companies and politicians, aviation bans, and restriction on travel for specific individuals;
- Activating the United Nations Register of Damage Caused by the Construction of the Wall without delay in order to facilitate the due compensation of damages suffered as a consequence of the construction of the Wall;
- Initiating the process of crafting durable solutions immediately that includes refugee and internally displaced communities in order to strengthen democratic principles and structures, expand the range of solutions, and lend greater legitimacy to peace-making;
- Implementing an arms embargo, halting any military cooperation and training programs with Israel and refraining from trading any kind of military equipment.
- Cooperating with international civil society to bring an end to Israel's unlawful conduct through lawful means such as supporting comprehensive economic sanctions.

This Series of Working Papers on forced population transfer constitutes a digestible overview of the forced displacement of Palestinians as a historic, yet ongoing process, which detrimentally affects the daily life of Palestinians and threatens their national existence. The Series utilizes an inclusive interpretation of the human rights-based approach, emphasizing that obligations under international law must supersede political considerations. Outlining the nuances and the broader implications of forced population transfer requires careful scrutiny of Israeli policies aimed at forcibly transferring Palestinians, and their role in the overall system of suppression in Palestine.