

No Home, No Homeland

A New Normative Framework for
Examining the Practice of Administrative
Home Demolitions in East Jerusalem



הוועד הישראלי נגד הריסת בתים
The Israeli Committee
Against House Demolitions
الحركة الاسرائيلية ضد هدم البيوت

The Israeli Committee Against House Demolitions (ICAHD) is a human rights and peace organization established in 1997 to end Israel's Occupation over the Palestinians. ICAHD takes as its main focus, as its vehicle for resistance, Israel's policy of demolishing Palestinian homes in the Occupied Palestinian Territory and within Israel proper.

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Executive Summary

The Israeli Committee Against House Demolitions (ICAHD) estimates that as of August 2011 approximately 26,000 homes had been demolished in the occupied Palestinian territories (OPT), including East Jerusalem, since the start of the occupation in June 1967. The phenomenon of home demolitions can be divided into three main categories: punitive, land-clearing/military, and administrative demolitions. Punitive demolitions involve the demolition of homes as punishment for the actions of people associated with the homes, typically for acts which are deemed to threaten the security of Israel and Israeli civilians and military personnel. Contrary to common perception, punitive demolitions constitute less than 10 percent of home demolitions carried out by the Israeli authorities. In February 2005 the Israel Defense Forces (IDF) suspended the practice; it was reinstated in January 2009, but its use since has been limited.

Land-clearing and military operations demolitions involve the demolition of a home or structure during the course of military operations and in order to achieve a military objective, such as clearing a piece of land to make way for military vehicles or other such purposes. Military operations demolitions constitute more than half of the demolitions of Palestinian homes and typically have been carried out in Gaza and the West Bank, excluding East Jerusalem.

Lastly, administrative home demolitions entail the demolition of homes and structures built without Israeli authorization. Since the Oslo Accords and the division of the West Bank and Gaza into Areas A, B and C, the practice of administrative home demolition has been limited (with few exceptions) to Area C of the West Bank and East Jerusalem, where Israeli authorities have exclusive control over all planning, zoning and building activities. Administrative home demolitions account for roughly 25 percent of all demolitions, and in East Jerusalem they constitute the overwhelming majority of home demolitions.

This report focuses on the specific set of laws, policies and practices applied to Palestinians in East Jerusalem related to, and often resulting in, administrative home demolitions. Administrative home demolitions in East Jerusalem do not occur in a vacuum, and often the most serious violations of Palestinian rights occur at earlier stages leading up to, or threatening, demolition – as well as in the lack of meaningful alternatives to unauthorized building risking demolition (such as leaving the area). The situation in East Jerusalem is also distinct in many ways from that of the remainder of the OPT, in that Israel has illegally annexed the territory and therefore applies its own domestic laws to the area in full – rather than treating it as occupied territory and its Palestinian residents as protected persons under applicable international law. Thus, Israel applies a different set of laws and policies to Palestinians in East Jerusalem than to the remainder of the OPT, which are explained and analyzed in this report vis-à-vis its obligations under international human rights law and international humanitarian law (the laws of war and occupation). Furthermore, the fate of East Jerusalem will hold a critical role in

any resolution to the Israeli-Palestinian conflict.

East Jerusalem is currently home to approximately 300,000 Palestinians. Since the June 1967 occupation and immediate annexation and incorporation of the area now known as “East Jerusalem” into Israel, the various Jerusalem municipal governments, along with the Ministry of Interior, have applied policies that aim, directly and indirectly, to maintain a Jewish majority in the city of Jerusalem. In certain cases, these demographic motivations have been expressed explicitly by public officials; in other cases these motivations are simply evidenced by the consistent and overwhelmingly telling results of the policies and practices applied to Palestinian East Jerusalem, which serve to maintain a Jewish majority. Alongside the restrictions placed on Palestinian growth, Jewish population growth is encouraged and enjoys state support, including the continuous expansion of Jewish neighborhoods – or settlements – in East Jerusalem.

One of the main methods of controlling Palestinian growth in East Jerusalem is via the imposition of restrictions on planning and building in the Palestinian sector. To begin with, only 13 percent of the total land area in East Jerusalem is zoned for Palestinian building (with less than nine percent zoned for housing), ostensibly based on the need to maintain open, “green spaces” (such as parks, nature reserves and agricultural zones), to preserve holy sites and archeological areas, and for other municipal construction (such as roads and infrastructure). However, given the major housing shortage among the Palestinian sector, these restrictions place grave burdens on Palestinians seeking housing whose only option is to build new housing. Additionally, Palestinian areas are typically zoned for lower “plot ratios” than in Jewish areas. In other words, the approved building density in the Palestinian sector (the percentage of the total land area on which the building may be constructed, as well as its approved height) allows for fewer housing units than in the Jewish areas of the city, oftentimes even with regard to neighboring communities.

Naturally, proper zoning is a prerequisite for obtaining a permit to build. Additional requirements include adequate infrastructure, proof of land ownership, as well as significant costs and fees. While these requirements are identical for both Jewish and Palestinian building permit applicants, the two communities' respective socio-economic and political realities vary significantly. Firstly, many areas of the Palestinian sector lack adequate infrastructure, mainly due to underinvestment in the Palestinian sector over the years and disproportionate allocation of municipal funds between Palestinian and Jewish areas in the city. Given that installing the necessary infrastructure without municipal support is often either unauthorized or cost-prohibitive, many areas in which Palestinians would wish to build, even when properly zoned for building, do not meet the standards for obtaining building permits. Secondly, unlike in West Jerusalem where the Property Registry has been maintained, proving land ownership in East Jerusalem is extremely complex. The majority of the area was not registered during the periods of British and Jordanian control prior to 1967, and in that year Israel froze the process of land registration

there. In fact, the ownership of over half of the land in East Jerusalem is not registered, thereby rendering it effectively impossible under the current procedures (tightened since the start of the Second Intifada) for landowning residents to obtain permits for new construction on their land.

Lastly, the building permit process entails high costs and fees. While in the Jewish sector, the costs of construction projects are typically shared by construction companies and home purchasers, Palestinian building endeavors are often carried out by individuals or small groups of individuals – particularly given that Palestinian areas are almost without exception zoned for smaller buildings, rather than apartment complexes and high-rise condominiums. The high costs therefore present an additional obstacle to Palestinians in obtaining building permits in East Jerusalem.

The situation is merely worsened by the major population growth experienced by the Palestinian sector in East Jerusalem. As it stands, Israel has not updated the regional urban plan for East Jerusalem since its occupation and annexation in 1967, and no new Palestinian neighborhood has been created since. Meanwhile, in the 44 years that have since passed, the Palestinian population has more than quadrupled (from 66,000 in 1967 following the war to 300,000 today). This growth is partly explained by natural population growth (notably at slightly higher rates than the Jewish population), and partly by the current laws and policies regarding residency rights for Palestinians and their family members.

Palestinian East Jerusalemites are eligible for permanent resident status in Israel, but that status is conditioned upon many criteria that oftentimes pose challenges for Palestinians who work, travel and live in other parts of the world (including the West Bank and Gaza), in order to be with family or for various other reasons. Permanent residency status was revoked from 13,000 Palestinian East Jerusalemites between 1967 and 2008, and reinstating residency status is a lengthy, often unsuccessful legal process, and without residency Palestinians risk deportation from East Jerusalem – even if they and their families were born there. Fearing losing their residency status and its accompanying rights and benefits, many more Palestinians choose to remain in the city despite the array of obstacles placed before them, including the shortage of legally available housing.

Similarly, many Palestinian East Jerusalemites meet their spouses through family members or in common cultural spaces, which do not necessarily correspond to the artificial border Israel has created between East Jerusalem and the West Bank. Since the start of the Second Intifada, Israel has all but canceled the ability of spouses and family members of Palestinian permanent residents to obtain residency permits based on family unification. However, faced with the prospect of losing the East Jerusalem residency status and benefits granted one spouse and owed to her/his children, many Palestinian families choose to live in East Jerusalem despite the fact that at least one family member lacks authorization and lives under constant threat of deportation.

Additionally, the erection of the separation barrier (or “wall”), beginning in

2002 in the Jerusalem area, placed many Palestinians formerly considered East Jerusalem residents and holding permanent residency in Israel on the “Palestinian” (West Bank) side of the barrier. Fearing loss of residency rights should they continue to live on the “wrong side of the fence,” over one hundred thousand Palestinians fled to the “Israeli” (remaining East Jerusalem) side of the wall, and many remained, thereby increasing the Palestinian population and its density in what remains within the city of Jerusalem.

All of these factors have contributed to the growth of the Palestinian population in East Jerusalem far beyond the amount of authorized housing and other building. For a variety of reasons – including the desire to remain in the physical place in which they originated, to maintain ties with their communities, and in order to avoid the loss of residency rights and benefits – many Palestinians choose every year to remain in East Jerusalem and to build without authorization (illegally). As of 2007, and since the start of the Second Intifada, for every building built with a permit, there were approximately 10 more built without authorization. Currently, there are at least 15,000 and up to 20,000 unauthorized buildings in the Palestinian sector of East Jerusalem.

Enforcement of building and planning laws, including demolition and the levying of fines, is executed in a discriminatory manner. For instance, numerically speaking, Palestinians are accountable for only approximately 20 percent of the building infractions in the city, but more than 70 percent of demolitions in Jerusalem are carried out against Palestinian buildings. While Jews represent approximately 64 percent of the population in Jerusalem, demolitions of their buildings over the past several years have represented only 28 percent of the demolitions carried out. What is more, given the zoning and planning situation in Jerusalem, Palestinians are more likely to engage in more serious building infractions than Jews who face far fewer obstacles in obtaining permits. As the municipality ostensibly prioritizes more serious infractions, entire Palestinian homes and structures are more likely to be demolished than Jewish homes and structures. Additionally, based on practices on the ground, Palestinians in Jerusalem are more likely than Jews to experience expedited demolitions and evictions with limited opportunities to defend against them. Lastly, the more serious the offense the greater the fine that may be levied on the offender, and thus Palestinians pay a disproportionately higher amount of the fines to the Jerusalem Municipality and Ministry of Interior for building infractions.

Two additional, related phenomena are present in East Jerusalem: self-demolition and forced (or court-ordered) evictions. In many cases, Palestinians whose homes or other buildings have received demolition orders prefer to conduct the demolition themselves and to spare themselves, and particularly their children, the psychological burden of the indefinite wait for the day of demolition and the experience of witnessing one's home or business demolished – physically. Over recent years there have been several forced evictions of over 200 Palestinians from their homes in several neighborhoods in East Jerusalem in order to allow Jewish building, typically

based on claims of Jewish land ownership from prior to 1948 or based on the historical, religious or archeological importance of an area. These evictions also increase the demand for housing, the motivation to build illegally, and indirectly, the number of demolitions, and of course cause further displacement of Palestinians.

Ultimately, the combination of these policies and practices results in – whether intentionally or not – displacement of Palestinians in order to preserve Jewish demographic control over the city. This report contains a “mission accomplished flow chart” graphically representing the variety of laws, policies and practices and how they interact to create a “domino effect,” placing great hardships before Palestinians in East Jerusalem, and eventually resulting in a slow migration out of the city that preserves the demographic policy apparently motivating them.

Our detailed analysis of these policies and practices under international human rights law (which applies to areas under a state's “effective control”), and international humanitarian law (which applies to occupied territory), leads to the conclusion that Israel is in violation of at least five major legal obligations or prohibitions, which form the basis of the new normative framework – or legal “language” – for examining and critiquing administrative home demolitions in East Jerusalem presented in this report.

First, Israel's practices in East Jerusalem violate the right to adequate housing enshrined in several bodies of international human rights law. Specifically, the human right to adequate housing is contained, *inter alia*, in the Universal Declaration on Human Rights of 1948 (Art. 25(1)); the International Covenant on Economic, Social and Cultural Rights of 1966 (Art. 11); the International Covenant on Civil and Political Rights of 1966 (Art. 17); the International Convention on the Elimination of All Forms of Racial Discrimination of 1969 (Art. 5(e)(iii)); the Convention on the Rights of the Child of 1990 (Arts. 16, 27); and General Comments 4 (1991) and 7 (1997) of the UN Committee on Economic, Social and Cultural Rights. Additionally, Israel, as the occupying power, is obligated to protect the homes of the protected persons (Palestinians) under international humanitarian law (namely in the Hague Regulations and the Fourth Geneva Convention).

According to this legal framework, Israel is obligated not only to ensure that Palestinian East Jerusalemites are guaranteed access to legal, affordable, safe housing, but also to focus on their needs in particular, as they are disadvantaged politically, economically and socially whether examined under Israel's obligations under international human rights law or international humanitarian law. Instead, the multitude of policies and practices applied in East Jerusalem result in a dearth of legally available, affordable, and accessible housing for the Palestinian population.

Second, a process of displacement of a particular ethnicity has begun as a result of institutionalized policies designed to alter the ethnic, religious or racial composition of the affected population, by creating a situation in which leaving is not by choice but based on lack of alternative, and rendering the displacement unlawfully obliged. The Palestinians obliged to make this choice are part of what this report

terms the process of unlawful/arbitrary “ethnic displacement” in East Jerusalem, in contravention of international human rights law and international humanitarian law, and Israel's policies create a situation of *de facto* forced deportation, which may rise to the level of a war crime. In cases in which Palestinians were deported out of the city or refused reentry, Israel has committed the war crime of forced deportation. Additionally, Israel's policies and practices in East Jerusalem may constitute “inhuman acts” under the Article 7(1)(d) of the Rome Statute of the International Criminal Court, as well as a violation of the UN Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.

Third, the policies and practices applied to East Jerusalem leave many Palestinians with little choice but to either remain in the area, build illegally and risk demolition of their homes and displacement, or to leave the area and risk losing their residency rights – and in most cases their right to return to Israel (and East Jerusalem). This places many Palestinians at risk of becoming stateless (or “residency-less,” as many already lack citizenship in any state). The basic right to nationality is enshrined in international human rights law (including the Universal Declaration on Human Rights, the International Convention on Civil and Political Rights, and the Convention on the Reduction of Statelessness), and it includes the right to non-discrimination in acquiring and maintaining nationality as expressed in Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

Even in cases in which a Palestinian former East Jerusalem resident has not been rendered stateless (or “residency-less”) by her/his exclusion from Israel (as she/he has successfully obtained residency or citizenship elsewhere), s/he has been barred from returning to her/his place of habitual residence – and in most cases, her/his homeland. This situation constitutes both a violation of the right to return to one's home under universal human rights law provisions, as well as the specific rights of members of indigenous groups. Additionally, Palestinian East Jerusalemites' inability to access, travel between and live in any part of the occupied territory (East Jerusalem, the West Bank and the Gaza Strip) violates several basic provisions of international humanitarian law. Fourth, Israel is obligated under international human rights law to create and maintain conditions for Palestinians' realization of their rights to self-determination, participation without discrimination in public affairs, and the collective ability of groups to develop and advance their respective communities economically, socially, culturally and politically, according to their needs. Additionally, Israel's obligations under international humanitarian law are relevant here, as the occupying power has a duty to maintain public order and safety in the occupied territory, which it cannot be said to uphold when the lack of development either for or by Palestinians in East Jerusalem leads to housing shortages, displacement, and more.

Finally, the very act of home demolition in occupied territory often constitutes a violation of international humanitarian law, and even a war crime. Property destruc-

tion – absent military justification – is a clear violation of Article 23(g) of the Hague Regulations and Article 53 of the Fourth Geneva Convention, among other sources of international humanitarian law. It is safe to say that the majority of administrative demolitions conducted in East Jerusalem that the Jerusalem Municipality defends as enforcement of building and planning laws in fact are not justified, as they are not based on laws that conform with Israel's duties and rights under international humanitarian law and cannot be considered military necessity, and thus constitute illegal property destruction. That said, there will be exceptions to this rule that fall under the fulfillment of Israel's duties toward the Palestinians as the protected persons, and thus it cannot be said that the practice of administrative home demolitions in East Jerusalem is *per se* illegal. Nonetheless, Israel is in violation of international humanitarian law, and due to the large scale of the violation, it may well constitute a grave breach of international humanitarian law and even a war crime.

In sum, Israel is bound by both international human rights law and international humanitarian law, and the set of laws, policies and practices it applies to Palestinians in East Jerusalem render it in violation of several major provisions of international law that together form the new normative framework presented in this report. Israel must remedy these violations in order to fulfill its obligations as a law-abiding nation, and in order to pave the way for a viable, peaceful and just resolution to the Israeli-Palestinian conflict.

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1 GENERAL INTRODUCTION

Jerusalem is known as one of the holiest sites in the world to three major religions: Judaism, Christianity and Islam. What is less well known is that while members of all three religions reside in the city today, the city is divided both geographically (East and West Jerusalem) and demographically. Likewise, far fewer are aware of the assertive efforts made on the part of the Israeli authorities for over four decades to ensure that the Palestinian population – both Christian and Muslim – remains small in numbers and weak as a society. In order to accomplish this goal, a sophisticated set of policies and practices have been put into place, whose implementation has become increasingly aggressive and widespread over the years. The result is the daily struggle for over 300,000 Palestinian East Jerusalem residents between securing authorized housing and adequate infrastructure, maintaining residency, health care and education benefits, and generally remaining financially afloat. Indeed, as this report will show, many of these hardships are the result of Israel’s violation of several norms and obligations under international law.

This report first provides in Chapter II a general overview of these policies and practices by presenting a summary of the dedicated work and research of many of the region’s most established human rights organizations. Following this summary, in Chapter III we present a visual representation – in the form of a flow chart – of the current situation in East Jerusalem, which we view not as the tragic accumulation of various unrelated circumstances, but rather a cause-result set of policies and practices that ultimately accomplish a very specific goal. With these policies and practices as a backdrop, we then propose in Chapter IV a new normative framework – or legal “language” – for examining and critiquing administrative home demolitions in East Jerusalem. This framework outlines five major areas of international law to which Israel is subject and apply them to the set of policies and practices applied in East Jerusalem, forming conclusions about Israel’s failure to adhere to these norms. Lastly, this report offers its overall conclusions.

A note on the home demolitions data provided in this report

Throughout the report data is presented regarding the situation in Jerusalem, including figures on home demolitions. It must be noted that there is no uniform data on the number and frequency of home demolitions. Administrative home demolitions in the city of Jerusalem are conducted by two different authorities – the Municipality and the Ministry of Interior – and only the former regularly publishes data on demolitions. The total numbers of home demolitions provided by the authorities therefore differ from those collected by human rights organizations based on their observations and reports from the field. What is more, these numbers alone cannot express the type of building, the percentage of the structure that was demolished, or how many families’

homes were affected: for instance, regardless of whether an unlicensed section (such as a balcony or room) of a building (residential or commercial) was demolished, or an entire multi-story residential building, the incident will almost always be recorded by the authorities as one demolition. From what we know about demolition patterns in East versus West Jerusalem, we can assume that the majority of demolitions in East Jerusalem are demolitions of whole structures and often entire homes owned by Palestinians, whereas demolitions in West Jerusalem are most often partial demolitions, or of businesses rather than homes. Additionally, the practice of “self-demolition” – whereby a building owner, rather than the authorities, demolishes a building under demolition order is not comprehensively documented in any official government data; the unofficial data that is available is included here.

In this report, we are clear about the source of all figures, and we indicate where figures vary. It should be noted, however, that despite the variance in the data on home demolitions over the last decade, all figures reflect a significant disparity in demolition frequency between East and West Jerusalem, disproportionate to the incidence of building violations in each sector, and therefore are telling of the selective implementation of the law and the deliberately different policies toward the Jewish sector versus the Palestinian sector of Jerusalem.

2 OVERVIEW OF THE POLICIES AND PRACTICES RELATED TO ADMINISTRATIVE HOME DEMOLITION IN EAST JERUSALEM

2.1 The 70/30 Demographic Policy and the Judaization of Jerusalem

2.1.1 History of the 70/30 Demographic Policy

In the war of June 1967 between Israel and its neighbors, Israel captured and occupied territory in and around Jerusalem, including the Old City of Jerusalem, among other territories.¹ To this day, Israel maintains an occupation over much of the territories captured,² but in June 1967 it annexed and asserted full sovereignty over approximately

¹In the war of 1967, often referred to as the “Six Day War,” Israel captured territories under the control of Syria (the Golan Heights), Jordan (the West Bank) and Egypt (the Gaza Strip and the Sinai Peninsula).

²Israel withdrew from the Sinai Peninsula over the course of the years 1979 to 1982 within the framework of a peace treaty with Egypt (the Camp David Accords). Regarding the Gaza Strip, during Israel’s unilateral “Disengagement Plan” of 2005 the Israeli civilian settlements were evacuated from the Gaza Strip, and Israel claimed to have ended its occupation of the territory. However, human rights groups and much of the international community claim that Israel’s continued control of the borders, air space, and waterways renders

70,500 dunams (7,050 hectares or 17,400 acres) of land and redrew Jerusalem's municipal boundaries, nearly tripling the area of the city overnight.³ The area annexed in 1967 is what is known as "East Jerusalem". Today there are at least 300,000 Palestinian residents in East Jerusalem, whereas the total population of both East and West Jerusalem is around 835,000, comprising just over 11 percent of Israel's total residents.⁴

The 1967 annexation and incorporation of East Jerusalem's neighborhoods and Palestinian population caused the proportion of Jews in Jerusalem to plummet from 97 to 74 percent.⁵ Maintaining a sizeable Palestinian population in East Jerusalem – one that was statistically likely to grow at a more rapid rate than the Jewish population because of relative fertility rates – presented a substantial obstacle for those wishing to unite all of Jerusalem as the capital of the Jewish state.⁶ In the early years following the annexation, the Israeli government set a goal for the Jewish population within the city of between 80 and 90 percent.⁷ To this end, the government provided incentives to Jews from elsewhere to move to Jerusalem.⁸ However, when it quickly became evident that the city's Jewish population was not growing at the same rate as its Palestinian population, the government decided that a more proactive tactic was necessary in order to maintain an overwhelming Jewish majority.⁹

In 1973, then Prime Minister Golda Meir appointed the Inter-ministerial Commission to Examine the Rate of Development for Jerusalem, otherwise known as the "Gafni Commission".¹⁰ The Gafni Commission report declared that it was imperative for the future of Jewish control over the city to maintain the 1972 demographic ratio of 73.5

the territory effectively occupied to this day and triggers Israel's responsibilities toward Gaza and its civilians. *See, e.g.*, Gisha and Physicians for Human Rights-Israel, "Rafah Crossing: Who Holds the Keys?", March 2009, available at http://www.gisha.org/UserFiles/File/publications/Rafah_Report_Eng.pdf

³Association for Civil Rights in Israel, *Human Rights in East Jerusalem: Facts and Figures*, 41 (May 2010) [hereinafter "ACRI 2010"]. The city of Jerusalem previously spanned only 38,000 dunams (3,800 hectares or 9,400 acres), to which approximately 70,500 dunams were added. *Id.*

⁴Jerusalem Municipality Report, Sheet 242, "Distribution According to Age and Sex within Jerusalem (Place of Residency Determined with a Preference for Official Address)," 31 Dec 2009, created based on the Ministry of Interior Population Registry. This figure does not reflect the number of Palestinians living illegally in East Jerusalem that therefore does not appear in the Population Registry, estimated by various sources to be between 20,000 and 75,000, although water and infrastructure use indicates that the figure is most likely closer to 20,000.

⁵B'Tselem, "A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem," 45 (1997) [hereinafter "B'Tselem, A Policy"].

⁶LAW – Palestinian Society for the Protection of Human Rights and the Environment, "Land and Settlement Policy in Jerusalem," 6 (2000) [hereinafter "LAW"].

⁷B'Tselem, *A Policy*, *supra* note 5, p. 12 at 45.

⁸*Id.*

⁹*Id.*

¹⁰LAW, *supra* note 6, p. 12 at 6; B'Tselem, *A Policy*, *supra* note 5, p. 12 at 45.

percent Jews to 26.5 percent Palestinians.^{11 12} This plan is often referred to as the “demographic balance policy,” or the “70/30 Plan,” and it is routinely invoked in guiding Jerusalem city planning and development.¹³

2.1.2 Judaization and Home Demolitions

As is discussed in detail below, administrative home demolitions in East Jerusalem are directly connected to planning, zoning and building policies in the city. Thus, it is of extraordinary significance that this policy of preference based on ethnic background – often referred to as “Judaization” – has been an alleged motivation behind policymaking regarding planning, zoning and building in Jerusalem. Interestingly, this motivation is not concealed but rather openly discussed by Jerusalem Municipality officials. In 1977, then Director of the Planning Policy Section of the Jerusalem Municipality, Israel Kimhi, stated that:

A cornerstone in the planning of Jerusalem is the demographic question. . . . That decision, concerning the city’s rate of growth, serves today as one of the criteria for the success of the process of Jerusalem’s consolidation as the capital of Israel.¹⁴

Former Jerusalem Mayor Teddy Kollek’s advisor on Arab affairs, Amir Cheshin, wrote in his well-known book, *Separate and Unequal*:

The planning and building laws in East Jerusalem rest on a policy that calls for placing obstacles in the way of planning in the Arab sector – this is done in order to preserve the demographic balance between Jews and Arabs in the city, which is presently in a ratio of 72 percent Jews versus 28 percent non-Jews.¹⁵

The current city master plan, “Jerusalem 2000,” the first comprehensive plan covering West and East Jerusalem, first approved in 2007 by the Jerusalem Local Planning Committee, stresses the importance of maintaining a demographic balance such that there is an overwhelming Jewish majority.¹⁶ However, the current Jerusalem plan strives

¹¹*Id. above* Indeed, documentation from the Jerusalem Municipality dating back to the 1970s confirms plans for sustaining a demographic advantage of Jews over Palestinians in the city.

¹²*See, e.g.*, EU HEADS OF MISSION REPORT ON EAST JERUSALEM. Part A, Final 23/11/09 [hereinafter “EU”], at 2; Amir Cheshin, Bill Hutman and Avi Melamed, *SEPARATE AND UNEQUAL: THE INSIDE STORY OF ISRAELI RULE IN EAST JERUSALEM* (1999) [hereinafter “Cheshin, Separate and Unequal”]; Allison Hodgkins, “The Judaization of Jerusalem – Israeli Policies Since 1967”, PASSIA publication No. 96, December 1996, Ch. 1.

¹³EU, *supra* note 12, p. 13 at 2; LAW, *supra* note 6, page 12 at 6; B’Tselem, A Policy, *supra* note 5 12 at 46. This policy’s use is not restricted to Jerusalem; many other municipalities function based on similar demographic goals in other parts of Israel. B’Tselem, A Policy, *supra* note at 46.

¹⁴B’Tselem, A Policy, *supra* note 5 12 at 46 (excerpted from I. Kimhi, *Introduction to POPULATION OF JERUSALEM AND REGION: GROWTH FORECASTS*).

¹⁵Cheshin, *Separate and Unequal* *supra* note 12, 13 at 12.

¹⁶*See, e.g.*, ACRI 2010, *supra* note 3, p. 12 at 46; Coalition for Jerusalem, “Master Plan 2000 Action

for a 60/40 ethnic demographic balance, rather than 70/30, which, according to the plan is no longer realistic.¹⁷ The plan has not as of yet been submitted and implemented, as in early 2009 Interior Minister MK Eli Yishai (of the Shas party) rejected the plan on the basis that it favors the Palestinian population.¹⁸ Since then, the municipality has reportedly reduced the already inadequate number of planned housing units designated for the Palestinian population.¹⁹

In practice, strict adherence to this policy translates as severe ramifications that extend to all corners of Palestinian life in East Jerusalem. In the context of planning and building, the policy's implementation means that it is not coincidental that the Jerusalem Municipality has, for instance: failed to prepare a comprehensive Town Planning Scheme (TPS) for Jerusalem including the Palestinian sector; delayed the approval process for plans in progress for the Palestinian sector; zoned much of the planned land as "green area" rather than residential zones; expropriated green areas for the "public interest" of Jewish development only; created obstacles for Palestinians in obtaining building permits; and, where building is permitted, restricted the allowed building. In other words, rather than addressing the needs and welfare of its residents, the Jerusalem Municipality is focused on maintaining and expanding the presence of one group while driving the other out.

In sum, numerous government documents and quotes by officials demonstrate that Israeli policies in Jerusalem are ultimately motivated by the goal of maintaining permanent control over annexed Jerusalem. Israel fulfills that goal by limiting Palestinian building and housing opportunities such that many are forced to leave Jerusalem at the risk of losing their residency and accompanying rights (as is discussed in detail below), while crippling the society of those that remain, effectively rendering any future Palestinian sovereignty over East Jerusalem next to impossible.

It is also worthy of note that East Jerusalem Palestinians are not members of municipal bodies nor do they sit on the planning and building committees that decide the plans and policies directly affecting their housing and community living standards.

Alert," Jan 18, 2006, *available at* <http://coalitionforjerusalem1.blogspot.com/2006/01/master-plan-2000-action-alert.html> (retrieved 29 Dec. 2010).

¹⁷*See, e.g.*, Bimkom, "Planning in Jerusalem: The Implications of the New Outline Plan of Jerusalem for Palestinian Neighborhoods," 2 (31 Dec 2009) *available at* [url: http://eng.bimkom.org/Index.asp?ArticleID=138&CategoryID=98&Page=1](http://eng.bimkom.org/Index.asp?ArticleID=138&CategoryID=98&Page=1) (retrieved 14 Dec. 2010) [hereinafter "Bimkom, Planning in Jerusalem"].

¹⁸*Id.* at 3. In fact, as of this writing the plan remains under debate between Jerusalem Mayor Nir Barkat and the Ministry of the Interior regarding the area available for Palestinian building, and in each revision that area decreases.

¹⁹EU, *supra* note 12, p. 13 at 2. This decrease can be easily seen in each of the revised plans so far submitted and under continuous debate between the Ministry of the Interior and the Jerusalem Municipality. Interview with Meir Margalit, Jerusalem City Council Representative and ICAHD Field Coordinator (7 Dec 2010) (notes on file with author) [hereinafter "Interview with Margalit"].

Upon Israel's annexation of the territory in 1967, Palestinian East Jerusalemites were offered “permanent resident” status with the option of becoming Israeli citizens under certain conditions. They were faced with a difficult choice, given that citizenship was predicated on pledging allegiance to Israel and on recognizing the occupation of that area as permanent, among other requirements. Most Palestinian East Jerusalemites therefore chose not to pursue their citizenship option and continue to refrain from doing so today.²⁰ However, this has meant that they are not eligible to vote in national elections, and as most make the political choice not to vote in municipal elections, they have little to no political clout or influence over the national and local laws and policies that govern their lives. Additionally, permanent residency status, as opposed to citizenship, is conditioned upon presence in Israel and therefore may be revoked.

2.1.3 A Note on Israeli Settlements in East Jerusalem

While international news is abuzz with reports about the Israeli “settlement freeze” in the occupied Palestinian territories (OPT), based on demands made by the United States under the Roadmap for Peace and current negotiations, settlement construction and expansion continues in East Jerusalem. Israel’s interpretation of the Roadmap is that it does not apply to East Jerusalem,²¹ which Israel considers within its proper jurisdiction and sovereignty, despite the international consensus regarding the illegality of annexation of occupied territory and of settlement activities (as is discussed below in the legal analysis section of this report).

This report will not devote much time to the complex project of settlement construction and expansion in East Jerusalem, as in the West Bank. It is important to note, however, that in the context of home demolitions and related policies, Jewish settlements in East Jerusalem not only encroach onto potential land for Palestinian development, but are often erected on private Palestinian land on which Palestinians previously attempted to build homes but whose applications for permits were rejected. Jewish settlement has been an integral part of both the strategy and result of the 70/30 demographic plan and thwarts any possibility of establishing East Jerusalem as the capital of a future Palestinian state. Roughly one-third of the area annexed in 1967 (around 24,000 dunams) was expropriated for the eventual creation of the 12 Jewish settlement neighborhoods that exist today in East Jerusalem,²² hosting some 190,000

²⁰B’TSELEM. A WALL IN JERUSALEM: OBSTACLES TO HUMAN RIGHTS IN THE HOLY CITY, 4 (Summer, 2006). [hereinafter “B’Tselem, A Wall”].

²¹See, e.g., EU, *supra* note 12, p. 13 at 2.

²²Bimkom, Planning in Jerusalem, *supra* note 17, p. 14 ; B’Tselem, A Wall, *supra* note 20, p. 15 at 10; B’Tselem Info Sheet on East Jerusalem Planning Policies, 1, [hereinafter “B’Tselem Info Sheet”], available at http://www.btselem.org/English/Jerusalem/Discriminating_Policy.asp (retrieved 1 Dec. 2010).

settlers in approximately 47,000 housing units, and not one single Palestinian housing unit.²³ 37 percent of the total number of settlement housing units tendered between 2001 and 2009 were reportedly located in East Jerusalem,²⁴ and today 40 percent of all Israeli settlements in the OPT are in East Jerusalem.²⁵ What is more, not a single new Palestinian neighborhood has been established in East Jerusalem since its occupation and annexation in 1967, let alone in West Jerusalem.²⁶ Instead, Jerusalem's housing and development policies have provided incentive for Jews to move to and remain in the city, whereas they have only encouraged – if not forced – Palestinians to leave it.

2.2 The Inability to Obtain Building Permits to Build Homes Legally

2.2.1 Local/Regional Planning and Building Committee Policies

As discussed above, building and planning in the Jerusalem area is directly influenced by the demographic goals of preserving an overwhelming Jewish majority in West and East Jerusalem. By its very nature, urban planning requires making decisions that affect who, how and how many may live in or use areas of a city. Ideally urban planning takes into consideration the cultural, traditional, social and economic needs of the various sectors of a city's population and the types of uses desirable to them. In Jerusalem, a host of local and regional planning and building policies restrict Palestinian opportunities to build legally through various means. These policies not only ensure that the Palestinian population physically has no room to expand in numbers, but they also render life so miserable and burdensome that many choose to leave. Here we should note that Palestinians are rarely if ever represented in the local and regional committees that decide planning and building policies for the city. The following sub-sections describe several of the major policies and practices that restrict legal building options for Palestinians and as a result accomplish these demographic goals.

2.3 Discriminatory Zoning and Restricted Construction Areas

After the various waves of land expropriations by the Israeli government after the 1967 occupation and annexation, approximately one-third of the land in East Jerusalem was

²³EU, *supra* note 12, p. 13 at 2; B'Tselem, A Wall, *supra* note 20, p. 15 at 10; B'Tselem Info Sheet, *supra* note 22, p. 15

²⁴EU, *supra* note 12, p. 13 at 2.

²⁵Bimkom, Planning in Jerusalem, *supra* note 17, p. 14, "Facts and Figures".

²⁶Amir Paz-Fuchs, Efrat Cohen-Bar. Common Grounds that Exclude, in CITY OF COLLISION: JERUSALEM AND THE PRINCIPLES OF CONFLICT URBANISM 230 (Philip Misselwitz and Tim Rieniets – eds, Birkhauser, 2006) [hereinafter "Paz-Fuchs, Cohen-Bar"].

expropriated for the construction of Jewish neighborhoods.²⁷ Approximately 46,500 of 70,500 dunams remain in Palestinian East Jerusalem, though present expropriations continue to deplete that amount.²⁸ In fact, only approximately 25,000 dunams – around 50 percent of the remaining Palestinian lands – have approved plans.²⁹ The plans used are based on two British Mandate planning schemes – the Jerusalem Regional Planning Scheme RJ5 (1942) and Samaria Regional Planning Scheme RS15 (1945) – which essentially freeze Palestinian development (in both East Jerusalem and the West Bank) to what it was in the 1940s.³⁰ The remaining “unplanned” areas defaulted to their British Mandate era designations as open rustic or agricultural landscapes, which is discussed further below.³¹

Of the planned areas (25,000 dunams), only around 9,000 dunams have been zoned for Palestinian construction of any kind, some 6,000 of which are zoned for residential building.³² In other words, *less than nine percent* of post-1967 annexed East Jerusalem (70,500 dunams) is legally available for housing for Palestinian residents.³³

The outstanding planned land, approximately 16,000 dunams – or around 22 percent of all of East Jerusalem – is zoned for public institutions, roads and other infrastructure, and “green area” where construction is prohibited.³⁴ The use of “green area” zoning is a prevalent way to designate land ostensibly for either agricultural use or “open landscape” on which building of any kind is strictly forbidden.³⁵ The generally stated

²⁷Paz-Fuchs, Cohen-Bar, *supra* note 26, p. 16 at 230.

²⁸Figures range from 45,500 to 46,500, depending on the source. *See, e.g.*, Ir Shalem, “Jerusalem, East Jerusalem – The Current Planning Situation, A Survey of Municipal Plans and Planning Policy,” 4 (1998)[hereinafter “Ir Shalem”]; B’Tselem, A Policy, *supra* note 5, p. 12 at 71; Amnesty International, “Israel and the Occupied Territories, Under the rubble: House demolition and destruction of land and property,” 49 (AI Index: MDE 15/033/2004 May 2004) [hereinafter “Amnesty”].

²⁹ICAHD, A Destructive Policy, Home Demolitions in East Jerusalem, Figures, Trends and Ramifications 17 (2004) [hereinafter “ICAHD, Destructive”]; Paz-Fuchs, Cohen-Bar, *supra* note 26, p. 16 at 230. The Ministry of Interior’s Jerusalem District Commissioner Ruth Yosef claimed in 2005 that “budget deficiencies” prevent the city from drafting plans for the remainder of the area. ICAHD, No Place Like Home, House Demolitions in East Jerusalem 16 (2007) [hereinafter “ICAHD, No Place”].

³⁰ICAHD, OBSTACLES TO PEACE: A RE-FRAMING OF THE PALESTINIAN-ISRAELI CONFLICT, 4th Ed., 55 (March 2009) [hereinafter “ICAHD, Obstacles”].

³¹Paz-Fuchs, Cohen-Bar, *supra* note 26, p. 16 at 230.

³²Figures regarding the total area zoned for Palestinian construction range from 7,500 to 9,178, depending on the source. *See, e.g.*, Ir Shalem, *supra* note 28, p. 17 at 5; LAW, *supra* note 6, p. 12 at 11-12; Amnesty, *supra* note 28, p. 17 at 49. Figures also vary slightly as to how much land is zoned for residential building.

³³Figures vary by source. *See, e.g.*, Ir Shalem, *supra* note 28, p. 17 at 5; B’Tselem, A Wall, *supra* note 20, p. 15 at 10; ICAHD, Obstacles, *supra* note 30, p. 17 at 66.

³⁴Figures range from 35 to 40 percent depending on the source. *See, e.g.*, Amnesty, *supra* note 28, p. 17 at 49; Bimkom, “The Planning Deadlock: Planning Policy, Land Regularization, Building Permits and House Demolitions in East Jerusalem,” 4 (2005) [hereinafter “Bimkom, Planning Deadlock”]; ICAHD, Destructive, *supra* note 29, p. 17 at 16.

³⁵Bimkom, Planning Deadlock, *supra* note 34, p. 17 at 5.

government rationale behind zoning areas as “green” is to respond to the public’s needs by providing land for cultivation of agriculture, preserving open views, protecting environmental balance, preventing overcrowding and facilitating pleasant urban life.³⁶ However, 22 percent is far beyond the Palestinian community’s needs, particularly given the grave housing shortage. In one extreme case, the neighborhood of Jabal Mukaber, the area designated as “green” reaches almost 70 percent of the total land included in the neighborhood.³⁷ Instead, land zoned as green area is typically land that exists outside already built-up Palestinian areas, thus restricting legal expansion of those areas.³⁸ Jerusalem Municipal Manager, Head of Policy and Planning, Charles Kohn, explains that land in East Jerusalem is zoned as green area “in order to prevent coalescence” between Palestinian villages.³⁹

Indeed, the government is rather forthright about its intentions in zoning land as green area. Former Jerusalem Mayor Teddy Kollek admitted in a Municipal Finance Committee meeting in October of 1991 that the parcels preserved as “green area” are “only green for the Palestinian population,”⁴⁰ or green until such time as Jewish neighborhoods will be built there.⁴¹ In fact, many Jewish settlements are built on land previously zoned as green area and rezoned for Jewish development.⁴²

In addition to the zoning of large swaths of land as “green land,” building is restricted in certain areas on the grounds that the land is of public importance. Examples include the “Holy Basin” (approximately 2,200 dunams stretching from Abu Tor to Mount Scopus, where the Hebrew University of Jerusalem is located, for archeological/religious reasons);⁴³ an area in which construction is planned for the “Eastern Ring Road,” a 20 kilometer road crossing East Jerusalem from north to south (for environmental reasons);

³⁶See, e.g., Interview with Charles Kohn, Jerusalem Municipal Manager, Head of Policy and Planning, in Jerusalem, Israel (14 June 2004) (transcript on file with author) [hereinafter “Interview with Charles Kohn”]; Interview with Sami Ersheid, Attorney, in Jerusalem, Israel (28 June 2004) (notes on file with author).

³⁷Paz-Fuchs, Cohen-Bar, *supra* note 26, p. 16 at 230.

³⁸Alternative Information Center (AIC), *Cleansing and Apartheid in Jerusalem: An Alternative Guide to Jerusalem 12* (2004) [hereinafter “AIC”].

³⁹Interview with Charles Kohn, *supra* note 36, p. 18 .

⁴⁰See AIC, *supra* note 38, p. 18 at 12; LAW, *supra* note 6, p. 12 at 14.

⁴¹ICAHD, *No Place*, *supra* note 29, p. 17 at 17-18.

⁴²LAW, *supra* note 6, p. 12 at 14. Some examples include Ramot, a Jewish neighborhood built in 1973 on land zoned green at the time, and Reches Shu’fat, built in 1990 on land zoned green since 1968. *Id.* An even more insidious example is that of the Palestinian village of Shu’fat (originally zoned for residential building by the 1966 Jordanian plan), which was zoned as “open landscape,” then filled with cypress tree groves, only to be given in 1994 to the Jewish National Fund to build Jewish housing. Amnesty, at 50. Jabal Abu Ghaneim was determined to be “green area” until 1999 when it became the Jewish settlement, Har Homa, inhabited by over 2,000 Jewish residents as of 2006. B’Tselem, *A Wall*, *supra* note 20, p. 15 at 10.

⁴³Shaul Arieli, Michael Sfard. *THE WALL OF FOLLY*. 2008 (Hebrew only), at 293; ICAHD, *No Place*, *supra* note 29, p. 17 at 26.

area around the separation barrier (for security reasons); and two national parks in East Jerusalem – the area surrounding the walls of the old city of Jerusalem, and Emek Tzurim, located on the western slope of Mount Scopus, with plans underway to create a new national park on the eastern slope of Mount Scopus.⁴⁴ The National Parks, Nature Reserves, and Memorial Sites Act (1998) stipulates that once an area has been designated as a national park (by the Minister of the Interior), no construction or other use of the area will be permitted without the authorization of the Israel Nature and Parks Authority (NPA), although property rights held prior to the proclamation remain.⁴⁵ The NPA has been vested with far-ranging powers to enforce these restrictions. For instance, once the Minister of the Interior has proclaimed an area a national park, the NPA's inspectors are granted police powers to enforce the prohibition on other uses, including the power to detain, search and interrogate “trespassers” (even property owners) suspected of committing “illegal” acts that might harm the national park, ranging from destroying park property to grazing, and also the power to seize and destroy property.⁴⁶

2.3.1 Low Plot Ratios

Building density is another element of zoning and a mechanism for restricting Palestinian building. Allowable percentages in Palestinian building areas have typically ranged between 25 and 75 percent, with only two levels (in other words, the structure may occupy no more than this percentage of the plot's square meterage over two stories).⁴⁷ By contrast, in West Jerusalem percentages range from 75 to 125 percent,⁴⁸ and in Jewish settlements in East Jerusalem, which border Palestinian neighborhoods, percentages reach up to 140-200 percent and 8 stories.⁴⁹

⁴⁴ICAHD, No Place, *supra* note 29, p. 17 at 26; Paz-Fuchs, Cohen-Bar, *supra* note 26, p. 16 at 228-29.

⁴⁵Paz-Fuchs, Cohen-Bar, *supra* note 26, p. 16 at 231.

⁴⁶*Id.*, at 5. Such acts are punishable by up to three years in prison. *Id.*

⁴⁷*See, e.g.*, ACRI 2010, *supra* note 3, p. 12 at 45; AIC, *supra* note 38, p. 18 at 12; LAW, *supra* note 6, p. 12 at 11; B'Tselem, A Wall, *supra* note 20, p. 15 at 82. For instance, as of the date (1998) of Ir Shalem's publication, (*supra* note 28, p. 17 at 28) approximately 60 percent of parcels in East Jerusalem have been zoned under “Class 5” to allow 50 percent density over two floors; another 14 percent have been zoned at a density of 37.5 percent, and two percent have been zoned at 25 percent. Only 21 percent of the land zoned for building in Palestinian East Jerusalem has been zoned at 70 or 75 percent. Ir Shalem, *supra* note 28, p. 17 at 11. According to ACRI's 2010 report, these figures have not dramatically changed in the over ten years elapsed since that report. ACRI 2010, *supra* note 3, p. 12 at 45.

⁴⁸ACRI 2010, *supra* note 3, p. 12 at 45.

⁴⁹The settlement Nof Zahav, which is presently being planned inside the village of Jabal Mukaber, allows building percentages that reach 140 percent, whereas percentages in the rest of the village reach only 50 percent. AIC, *supra* note 38, p. 18 at 12; Interview with Margalit, *supra* note 19, p. 14. Although it is rare for any area to exceed 120 or 140 percent, the ultra-orthodox Jerusalem neighborhood of Mea Shearim allows percentages up to 200 percent. *See, e.g.*, AIC, *supra* note 38, p. 18 at 12; LAW, *supra* note 6, p. 12 at 11; B'Tselem, A Policy, *supra* note 5, p. 12 at 82. For more examples, *see* ICAHD, No Place, *supra* note 29, p. 17

It should be noted that since 2006 the Municipality has increased the allowable plot percentages in East Jerusalem in the Jerusalem master plan, “Jerusalem 2000”.⁵⁰ According to Meir Margalit, Jerusalem City Council representative and ICAHD field coordinator, although the plan has yet to be approved, and its approval is continuously delayed, the plot ratio increases included in it are implemented in practice; still, increases of equal proportion are stipulated in the plan for both sectors, and thus the disparity between them is maintained.⁵¹ Furthermore, the increased percentages in the Palestinian sector do not rise to the level required in order to adequately increase the number of housing units available or to render them more affordable. In fact, there has only been one public housing project in all of East Jerusalem since 1967, as opposed to West Jerusalem, in part due to the fact that the low plot ratios prohibit that type of construction.⁵²

The Municipality’s explanation for these discrepancies between the Palestinian and Jewish sectors is that the lower building percentages are intended to accommodate the cultural needs of Palestinians, who prefer living in rural settings with low buildings and large expanses of land and open green space.⁵³ The Municipality’s approach appears almost cynical, given the broader context of policies and practices described in this report, which have anything but a positive effect on the “cultural needs of Palestinians.” Moreover, the Municipality’s conclusions about Palestinian residential living preferences in East Jerusalem cannot be based on more than mere presumptions, as there is no official representation of the Palestinian sector in the city’s decision-making bodies regarding planning and zoning. In fact, over the last 30 years, there has been a trend among Palestinians toward urbanization, particularly those who have chosen to move to cities such as Jerusalem, rendering high rises and apartment complexes both economically and culturally desirable.⁵⁴ Nevertheless, even if these “cultural preference” claims were valid, basic needs including housing typically trump cultural preferences in dire situations such as that of East Jerusalem. The result of these zoning policies, compounded with the difficulty of obtaining building permits, which is discussed below,

at 19.

⁵⁰ICAHD, No Place, *supra* note 29, p. 17-19.

⁵¹Interview with Margalit, *supra* note 19, p. 14 .

⁵²*Id.* The one public housing project in Palestinian East Jerusalem is the “Nusseibeh” project in the Beit Hanina neighborhood.

⁵³*See* Letter from Ehud Olmert, Mayor of Jerusalem, to Shimon Peres, Deputy Prime Minister and Minister of Foreign Affairs (23 Apr. 2001) (on file with author) [hereinafter “Letter from Ehud Olmert”]; Interview with Charles Kohn, *supra* note 36, p. 18 ; ICAHD, No Place, *supra* note 29, p. 17 at 18-19.

⁵⁴*See, e.g.,* B’Tselem, A Policy, *supra* note 5, p. 12 at 83; Letter from Ehud Olmert, *supra* note 53, p. 20 . For example, the cities of Ramallah, Gaza City, Abu Dis (in the Jerusalem area), and other cities under the Palestinians Authority’s planning control, have seen a boom in high-rise residential construction over the last several decades.

is a major shortage of legal housing options in the Palestinian sector of East Jerusalem.⁵⁵

2.3.2 Lack of Infrastructure

Infrastructure is a pre-requisite for building authorization under planning and building laws applicable to Jerusalem. The Municipality's failure to provide adequate infrastructure (i.e. water, sewage, roads, etc.) in large sections of East Jerusalem means that building permits may not be obtained in those areas, even where permits are sought in areas zoned for building and for appropriate plot ratios and densities.

Palestinians represent over one-third of Jerusalem's population, but they have never been allocated a proportionate share of any budget item in Jerusalem.⁵⁶ Only about 5-10 percent of the municipal budget is spent in Palestinian areas.⁵⁷ As a result, Palestinian neighborhoods in East Jerusalem typically lack decent roads, water pipes, street cleaning and proper sewage systems.⁵⁸ (For more details, see ACRI table on East Jerusalem conditions in the Appendix.) This situation is in sharp contrast to areas in which Jewish Israelis live in West Jerusalem and East Jerusalem settlements.⁵⁹

Over the years, as the population of East Jerusalem has grown, the cost of completing the necessary infrastructure in East Jerusalem has grown dramatically. As of 2006 the Municipality had estimated that it would cost approximately NIS 185 million (US \$52 million or €40 million) to provide adequate infrastructure to allow the issuance of new building permits.⁶⁰ As of this report's writing funds have not been allocated for this purpose. What is more, the true cost of completing the infrastructure in East Jerusalem in order to bring it to the level of that of West Jerusalem is much higher. In 1994, the Municipality estimated that it would cost NIS 520 million (US \$147 million or €113 million) to complete the needed infrastructure in East Jerusalem; by 2005 the cost had doubled to over NIS 1 billion (US \$ 281 million or €218).⁶¹

⁵⁵See, e.g., ICAHD, *Destructive*, *supra* note 29, p. 17 at 16.

⁵⁶See B'Tselem, *A Wall*, *supra* note 20, p. 15 at 21.

⁵⁷EU, *supra* note 12, p. 13 at 5.

⁵⁸EU, *supra* note 12, p. 13 at 5. Additionally, almost no public areas and services are provided (such as parks, squares, clinics, libraries, youth and community centers, and playgrounds), and there is an inadequate number of classrooms in schools operating in the Palestinian sector in East Jerusalem. *Id.* See also UN Office for the Coordination of Humanitarian Affairs (OCHA), occupied Palestinian territory, "The Planning Crisis in East Jerusalem," 1 May 2009 [hereinafter "OCHA, Planning Crisis"].

⁵⁹EU, *supra* note 12, p. 13 at 5.

⁶⁰ICAHD, *No Place*, *supra* note 29, p. 17 at 20.

⁶¹International Peace and Cooperation Center and Margalit, "Discrimination in the 1 Municipality estimates the cost at nearly NIS 2 billion (over US \$563 million or €435).⁶² What is more, the installation of infrastructure often entails the imposition of high fees and development taxes on the part of residents, where for much of East Jerusalem's Palestinian residents the economic situation is already dire. Even when residents have been able to sustain these costs, the Municipality has typically delayed work in Palestinian East Jerusalem

2.3.3 Proof of Ownership

Since 2002, new procedures were put into place increasing the requirements for obtaining a building permit, including proof of ownership of the land on which the applicant wishes to build, beyond the requirements of the Planning and Building Law.⁶⁴ Until the new procedures were placed in effect, the Jerusalem Municipality was satisfied with the law's proof of ownership procedures (i.e. proof of tax payments, succession orders (inheritance), confirmation from the village council or "Mukhtar," affidavits from neighbors, publication of a notice in the press or posted in public places, and more), but in 2002 the rules were tightened supposedly due to concerns of fraud.⁶⁵ The new procedures virtually guarantee that most East Jerusalemites cannot meet the requirements of obtaining a permit.⁶⁶

While proving ownership in West Jerusalem is a simple procedure conducted through the Property Registry, it is much more difficult in East Jerusalem, given the fact that the majority of the area was not registered by the British or the Jordanians prior to 1967, and in that year Israel froze the process of land registration there.⁶⁷ In fact, the ownership of over half of the land in East Jerusalem is not registered, thereby rendering it effectively impossible under the new procedures for landowning residents to obtain permits for new construction on their land.⁶⁸

An additional obstacle to proving ownership exists when property has changed hands over the years, but the change could not be registered in any Property Registry. To meet the requirements of the new procedures, the Municipality requires that the change be recorded by the Ministry of Justice through a procedure that requires the previous owner to report the purchase personally.⁶⁹ In the many cases in which properties have been purchased from an original owner who is now deceased or living abroad, proof of ownership is not an option, and thus the new owner is barred from obtaining a building permit.⁷⁰

Additionally, no permits for construction will be granted or land sales approved in

residential areas.⁶³

⁶⁴Bimkom, Planning in Jerusalem, *supra* note 17, p. 14 at 5.

⁶⁵ICAHD, No Place, *supra* note 29, p. 17 22-23.

⁶⁶For examples *see* ICAHD, No Place, *supra* note 29, p. 17 at 22.

⁶⁷Bimkom, Planning in Jerusalem, *supra* note 17, p. 14 at 5.

⁶⁸ICAHD, No Place, *supra* note 29, p. 17 at 23; Meir Margalit, SEIZING CONTROL OF SPACE IN EAST JERUSALEM 39 (JUNE 2010) [HEREINAFTER "MARGALIT, SEIZING"].

⁶⁹ICAHD, No Place, *supra* note 29, p. 17 22-23.

⁷⁰*Id.* In some cases this procedure would cause investigation into ownership which could result in the declaration of at least one of the owners an "absentee" and thus the Custodian (i.e. the State of Israel) will become one of the partners in ownership – a result which not only prevents the new owner from obtaining a building permit but may eventually result in the State's authorization of the property for Jewish development. *Id.* at 23.

dozens of neighborhoods of East Jerusalem until the process of “re-plotting” or “re-parcellation” is completed, which depends, among other things, on proving ownership.⁷¹ Re-plotting is the process under which individual plots of land that are privately owned are consolidated and re-divided in order to allow for up to 40 percent of the re-parceled area to be expropriated for public use.⁷² Until these plans are approved, residents experience a *de facto* planning freeze in which no building permits are available to them.⁷³ According to Margalit, approximately 10 percent of neighborhoods in East Jerusalem are under such a “freeze”.⁷⁴

2.3.4 Cost of Permits

Even when East Jerusalem residents wish to obtain building permits for plots of land that are properly zoned, for the allowable ratios and densities, with the necessary infrastructure, and regarding which they can prove ownership, they must be able to afford the various costs of the permit application process, which under normal circumstances are exorbitant. Fees are required for everything from filing, to development fees for roads and sidewalks, to sewage system costs, to registration of the borders of the plot.⁷⁵ The estimated cost of obtaining a permit to build a 200 square meter house on a half dunam (500 square meters) of land in a Palestinian neighborhood is NIS 70,730 (US \$19,930/€15,393).⁷⁶

Although the fees required are in almost all circumstances alike for Palestinian and Israeli Jewish applicants, their financial circumstances tend to be so vastly different that permits are a far more tremendous burden for most Palestinian families.⁷⁷ Firstly, there is a substantial discrepancy in income level between Palestinians and Jews in the city; according to data from 2008, of those in Jerusalem living under the poverty line, 67.7

⁷¹ICAHD, No Place, *supra* note 29, p. 17 at 20; Bimkom, Planning Deadlock, *supra* note 34, p. 17 at 6.

⁷²Bimkom, Planning Deadlock, *supra* note 34, p. 17 at 6.

⁷³*Id.* at 6.

⁷⁴Interview with Margalit, *supra* note 19, p. 14 .

⁷⁵ICAHD, Destructive, *supra* note 29, p. 17 at 25.

⁷⁶*Id.* For a breakdown of costs, *see* the table of fees at *id.*

⁷⁷Certain fees are required of Palestinian residents only. ACRI 2010, *supra* note 3, p. 12 at 45. For instance, although the average cost to link water or sewage is NIS 200/US \$56/€44 per meter of digging, and the cost is the same in every part of East and West Jerusalem as it is controlled by private companies, the remoteness of infrastructure stations in Palestinian East Jerusalem raises the cost substantially for Palestinians. Ir Shalem, *supra* note 28, p. 17 at 16. Additionally, an exemption from payment of “betterment 1” However, in Palestinian areas in East Jerusalem, families often build more than one house on the plot they own, and thus the second home will begin to incur these fees (at a rate of about NIS 160 /US \$45/€35 per sq. m.). This is less of an issue for Jewish applicants who do not build in the same way due to different social-familial structures. ICAHD, No Place, *supra* note 29, p. 17 at 24.

percent were Palestinians whereas 23.3 percent were Jews.⁷⁸ Secondly, most Jewish applicants have access to government loans, tax incentives and housing subsidies that are not available to Palestinians.⁷⁹ As of 2000, 80 percent of all construction in East Jerusalem was for the Jewish population and had some sort of governmental financial support, whereas the remaining 20 percent is independent Palestinian construction.⁸⁰ Thirdly, the burden of these fees is more heavily borne by Palestinians seeking permits because of the nature of building amongst the Palestinian versus the Jewish sectors. In Jewish neighborhoods, applicants for permits generally represent construction companies building housing complexes for dozens of families who, through the rental or purchase process, distribute the costs amongst all the residents; by contrast, Palestinian applicants typically represent individual families building homes for the members of their family alone, bearing the entire costs themselves.⁸¹

In sum, the cumulative effect of the laws and policies described above is that there are nearly insurmountable obstacles placed before Palestinians in East Jerusalem who wish to obtain permits to build homes.

In the next section we examine the circumstances that leave many Palestinians with little choice but to build unauthorized homes, despite the high risk of demolition, or leave their homes and communities altogether.

2.4 The Increased Demand for Housing in East Jerusalem

2.4.1 Natural Population Growth

As was discussed above, less than nine percent of annexed East Jerusalem is available for Palestinian residential use, and no new Palestinian neighborhood has been created in East Jerusalem since 1967 – and this is despite natural population growth.⁸² According

⁷⁸Central Bureau of Statistics, 2008.

⁷⁹There is a nation-wide policy in Israel that family members of those who have completed army service – which comprises the majority of Jewish Israelis, as army service is compulsory, with exceptions only for the Orthodox, the mentally or physically disabled, and a few other specific cases – are eligible for financial benefits that those who have not served are not eligible to receive. On the other hand, Palestinians – citizens and permanent residents, alike – are not conscripted into the army and rarely volunteer, for political reasons, and therefore the majority are not eligible for these loans, tax deductions or subsidies. See Amnesty, *supra* note 28, p. 17 at 34; LAW, *supra* note 6, p. 12 at 13.

⁸⁰LAW, *supra* note 6, p. 12 at 13; interview with Margalit, *supra* note 19, p. 14 .

⁸¹See, e.g., B'Tselem, A Policy, *supra* note 5, p. 12 at 82. This is all the more so given the low plot ratios allowed in East Jerusalem neighborhoods, rendering those areas less attractive for commercial builders who cannot build housing complexes but only individual family homes there, which is less lucrative. See ICAHD, No Place, *supra* note 29, p. 17 at 19.

⁸²The growth rate of the Arab population in Israel as of 2008 was 2.6%, while that of the Jewish population is 1.7%. These figures both represent a decrease from 1999 from 3.8% and 2.7%, respectively. Arab Muslims have the highest population growth rate in the country, at 2.8% in 2008. Statistical Abstract

to a 2010 European Union report, population growth in the Palestinian sector demands an additional 1,500 housing units per year.⁸³ However, given that urban planning in East Jerusalem is stagnant for the Palestinian sector, while its natural population growth is steadily increasing (factors increasing population are discussed below), there is an “artificial housing shortage” of over 25,000 housing units in the Palestinian sector.⁸⁴ It has been estimated that if the planning and building policies of today vis-à-vis East Jerusalem remain in place, by 2030 there will be a housing shortage that will directly affect 150,000 Palestinians.⁸⁵

2.4.2 Residency Revocation Rules

As discussed previously, in the 1967 occupation and annexation of what is now East Jerusalem, the vast majority of Palestinian residents were granted resident status and Israeli identity cards, but did not become citizens of Israel. The option of citizenship was available to them, but was conditioned upon meeting several requirements, including some knowledge of the Hebrew language and taking an oath of loyalty to the State of Israel,⁸⁶ and virtually no Palestinians opted for citizenship under these conditions for political and legal reasons.⁸⁷ Today, Palestinians born in East Jerusalem may still obtain citizenship, but only if they apply between the ages of 18 and 21 and can prove presence in East Jerusalem for the past five consecutive years.⁸⁸

of Israel, 2009, Central Bureau of Statistics, “Table 2.2 - Population, by religion” (PDF), *available at* http://www.cbs.gov.il/reader/shnaton/templ.shnaton_e.html?num_tab=st02_02&CYear=2009 (retrieved 29 Dec. 2010).

⁸³EU HEADS OF MISSION REPORT ON EAST JERUSALEM, 5 (2010). According to an April 2009 OCHA report, 1,100 additional authorized housing units are needed each year in order to fulfill the need. OCHA, *The Planning Crisis in East Jerusalem: Understanding the Phenomenon of “Illegal” Construction*, 2 (2009).

⁸⁴ICAHD, *Obstacles*, *supra* note 30, p. 17 at 55. According to Margalit, the actual housing shortage is difficult to calculate because the population figures for Palestinian East Jerusalemites represent only those registered in the Population Registry and do not include the large number of Palestinians living “illegally” in East Jerusalem generally in order to live with their families or perhaps for economic opportunity. In other words, the shortage is an estimate based on the Population Registry figures plus an estimated number of undocumented residents. Interview with Margalit, *supra* note 19, p. 14 .

⁸⁵Ir Amim, “Jerusalem Master Plan 2000 -- General Analysis and Comments” 1 (June, 2010), *available at* http://www.ir-amim.org.il/eng/_Uploads/dbsAttachedFiles/master.pdf (retrieved 19 Dec 2010).

⁸⁶Sec. 5 of the Citizenship Law, 1952.

⁸⁷Accepting citizenship, to most Palestinians in East Jerusalem, would be an acknowledgment and acceptance of Israel’s authority over the territory it has occupied and annexed. Additionally, under international law an occupying power may not require that the protected persons swear allegiance or loyalty to it. This is further discussed in section IV(b)(iv) below.

⁸⁸Sec. 4A of the Citizenship Law, 1952. It should be noted that the years 18-21 are of significance. They are the years during which many Palestinian East Jerusalemites, having just finished high school (and not drafted to the Israeli army), go to university, to work or to other study and training programs, often in the West Bank or even abroad. This means that in the somewhat rare case in which a Palestinian wishes to apply

The parameters and meaning of the residency status granted to East Jerusalemite Palestinians did not become clear until the landmark 1988 'Awad case before the Israeli High Court of Justice, in which the court decided that the resident status of East Jerusalem Palestinians would be that of permanent resident, just like foreign citizens wishing to reside in Israel.⁸⁹ A holder of permanent resident status in Israel is entitled to receive social benefits, including health care, social security, welfare and education, as well as the right to live and work in Israel and has the right to apply for a *laissez-passer* travel document. Permanent residents are entitled to vote in municipal elections, but not national elections (and as was mentioned in section II(a)(ii), most Palestinian East Jerusalemites choose not to vote for political reasons). Unlike citizenship,⁹⁰ children of permanent residents are not automatic recipients of the same status, and a permanent resident who marries a non-resident or non-citizen of Israel must apply for his/her status via the process of family unification, which entails severe obstacles as discussed below.

What is more, unlike citizenship, permanent residency and its accompanying rights and benefits are tenuous and may be revoked at the discretion of the Minister of Interior. Residency is typically revoked based on lack of presence for seven or more years,⁹¹ and in some cases even expires automatically and without due process (including notification and an opportunity to appeal the decision),⁹² despite the Ministry of Interior's insistence that this does not occur.⁹³ East Jerusalem permanent residents are forced to repeatedly prove their entitlement to this status to the Ministry of Interior and National Insurance Institute through a process of extensive investigations, physical searches and inquiries in search of grounds for revoking residency (such as lack of consistent presence, immigration to the West Bank, or obtaining residence in a foreign country). These procedures entail presentation of a host of documents, as well as substantial processing fees, and they often involve significant delays for months and even years.⁹⁴

for citizenship, additional hurdles are placed before her/him.

⁸⁹H CJ 282/88, *Mubarak 'Awad v. Yitzhak Shamir et. al.*, 42(2) PD 426.

⁹⁰See Sec. 4 of the Citizenship Law, 1952, on "Nationality by birth."

⁹¹See 'Awad, 42(2) PD, *supra* note 89, p. 26 ; Sec. 11 of the Citizenship Law, 1952; Sec. 11 of the Entry into Israel Law, 1952; Regulation 11 of the Entry into Israel Regulations, 1974. Note: The regulations concerning the expiration of permanent residency status were enacted only in 1985. The Entry into Israel Regulations of 1974 did not contain such a provision.

⁹²See, e.g., ACRI 2010, *supra* note 3, p. 12 at 44.

⁹³See, e.g., Letter to Adv. Yotam Ben-Hillel, HaMoked: Centre for Defence of the Individual, from Meli Davidian, Supervisor of Freedom of Information Law of the Ministry of Interior, Director of Population, Immigration and Border Authority, 5 Nov. 2009 [hereinafter "letter to HaMoked"] (on file with author).

⁹⁴ACRI 2010, *supra* note 3, p. 12 at 44. Although around 70% of applications for social benefits are eventually accepted by the National Insurance Institute following its investigations along with those of the Ministry of Interior, the policy effectively denies East Jerusalemite Palestinians months of benefits (including unemployment, disability and pension) during the period spent processing and verifying their applications, creating another motivation for many to leave East Jerusalem in search of immediate benefits perhaps available

At times applicants are forced to hire lawyers and bring proceedings in court, which is typically time-consuming, costly and incurs further delays.⁹⁵ Additionally, there is no simple residency “reinstatement” procedure, and those whose residencies have been revoked must apply anew, as if applying as a foreign citizen with no connections to Israel, despite in most cases having been born in Jerusalem, through a long and difficult legal procedure.

As of 1995, the Ministry of Interior began implementing a more aggressive residency revocation policy based on a wider interpretation of the ‘*Awad* case and Regulation 11A of the Entry into Israel Regulations.⁹⁶ Whereas previously the Ministry of Interior had treated East Jerusalem Palestinians the same as those in the West Bank and Gaza regarding the ability to travel for extended periods to and from neighboring Arab countries for work, study and family, as long as they renewed their travel documents as necessary (and even a family member could do so in their absence), as of 1995 this was no longer possible and residencies were suddenly revoked without warning and retroactively.⁹⁷ In the ‘*Awad* case, the court described the “permanent residency reality” as an often abstract, complex concept involving a host of factors, and used the term “center of life” as a basis for determining presence in East Jerusalem – rather than actual presence. In an additional case examining the issue just a few years after ‘*Awad*, the court held in *Shqaqi* that an East Jerusalemite Palestinian’s permanent residency status could be revoked merely by establishing that she had relocated her “center of life,” despite the fact that she had not resided outside of Jerusalem for seven years or more, nor had she obtained permanent residency or citizenship elsewhere.⁹⁸

This dramatic Ministry of Interior policy shift resulted in the loss of residency status by Palestinians who either were living “abroad” (the Gaza Strip and the West Bank are considered abroad, including adjoining East Jerusalem neighborhoods), or who still maintained permanent residency in East Jerusalem but had moved their “center of life” outside Israel for reasons ranging from travel, work and study to family responsibilities. Although in 1998 the policy was “loosened” by then Minister of Interior Natan

to them in the West Bank, Gaza Strip, Jordan or elsewhere. B’Tselem, *A Wall*, *supra* note 20, p. 15 at 7.

⁹⁵ACRI 2010, *supra* note 3, p. 12 at 44.

⁹⁶Regulation 11A of the Entry into Israel Regulations, 1974, determines that: “. . . a person shall be considered as one who has left Israel and has settled in a country outside of Israel if one of the following pertains to him: (1) He resided outside of Israel for a period of at least seven years. . . ; (2) He has received a permanent residence permit of that country; (3) He received citizenship of that country through naturalization.” Israeli citizens may choose to carry dual citizenship, with the exception of members of the Knesset (Israeli Parliament). *See* Basic Law: The Knesset, Sec. 6A.

⁹⁷For more on this topic, *see* amicus brief application by Israeli NGOs HaMoked and ACRI to the HCJ in the matter of *Siag v. Minister of Interior*, 2008, available at http://www.hamoked.org/items/110021_eng.pdf (retrieved 27 Dec. 2010).

⁹⁸H CJ 7023/94, *Fathiya Shqaqi, et. al. v. Minister of Interior*, Takdin Elyon 95(2).

Sharansky,⁹⁹ many Palestinians remained unable to reinstate their residency under the Sharansky policy – including those who had moved themselves or the “center of their lives” abroad prior to the change in policy.

The years between 1995 and 2000 saw high rates of residency revocation that had not been experienced since the early 1980s.¹⁰⁰ Following a short lull, there was a dramatic increase in revocations again, beginning in 2006:

While permanent residency status was revoked from 13,000 Palestinian East Jerusalemites between 1967 and 2008, the number of revocations between 2006 and 2008 was the same as that of 1967 through 2005; **in other words, half of the residency revocations since the start of the 1967 occupation and illegal annexation (some 6,500) took place between 2006 and 2008.**¹⁰¹

In 2008 alone, 4,577 East Jerusalem residents lost their status, amongst whom 99 were children under the age of 18, the majority for lack of consistent presence for seven years – in other words “relocation” of the “center of life”.¹⁰² The Ministry of Interior attributes the increase to the streamlining of its control and enforcement procedures, which entails more aggressive efforts to verify the status of individuals on its own initiative, rather than conducting such verifications only after receiving applications for social benefits.¹⁰³

Revocation of residency rights typically comes with a letter instructing the recipient to return her/his identity card and leave the country within 15 days, but deportation orders in East Jerusalem are rarely enforced and executed. Thus, those who wish to

⁹⁹What is known as the “Sharansky Declaration”, made during the course of hearings in the petition, HCI 2227/98 *HaMoked - Center for the Defence of the Individual v. Minister of the Interior*.

¹⁰⁰Whereas in the eight years prior to 1995 approximately 20-50 residencies were revoked each year, in 1995 91 were revoked; 739 in 1996; 1,067 in 1997; 788 in 1998; 411 in 1999; 207 in 2000; B’Tselem, “Revocation of Residency in East Jerusalem,” *available at* http://www.btselem.org/english/jerusalem/revocation_statistics.asp (retrieved 26 Dec. 2010).

¹⁰¹ACRI 2010, *supra* note 3, p. 12 at 44.

¹⁰²Letter to HaMoked, *supra* note 93, p. 26 . In 2008, of the 4,577 residencies revoked, only 38 were revoked on the specific grounds of “immigration” to the West Bank, however lack of presence in East Jerusalem includes presence in the West Bank or Gaza. According to the Ministry of Interior, 89 residencies were reinstated that year. Between the years 2005-2007, 1,869 residencies were revoked from East Jerusalemites, of which 91 were children under the age of 18. HaMoked Update, 12 April 2009, *available at* http://www.hamoked.org.il/news_main_heb.asp?id=744 [hereinafter “HaMoked Update”]. In 2009, 721 residencies were revoked from East Jerusalemites. Respondent Ministry of Interior’s Motion to Dismiss HaMoked Administrative Appeal AA 22948-02-11, filed to the Jerusalem District Court (sitting as Court of Administrative Affairs), 19 May 2011, *available at* <http://hamoked.org.il/files/2011/114482.pdf>. In 2010, 191 residencies were revoked from East Jerusalemites, of which 108 were women and 8 were children under age 18. Additionally, the Ministry of Interior claims to have “reinstated” in 2011 the residencies of 67 individuals whose residencies had been revoked between the years 1983 and 2009. Letter to HaMoked from the Ministry of Interior, 12 July 2011, *available at* <http://www.hamoked.org.il/files/2011/114651.pdf>.

¹⁰³*See, e.g.*, ACRI 2010, *supra* note 3, p. 12 at 44; HaMoked Update, *supra* note 102, p. 28 .

remain in East Jerusalem despite the revocation of status become unlawfully present in their homes – for many in the place in which they and their parents were born. It also entails the immediate termination of social rights and benefits, the right to work legally inside Israel and East Jerusalem under the wages and conditions such work entails, and limits freedom of movement to and from Israel and East Jerusalem including to family members and holy sites. Faced with these risks, many Palestinians prefer to *build* illegally, despite the risk of home demolition – rather than lose their residency status and be *present* illegally and lose all of the aforementioned rights and benefits. In the following section, we expand on this phenomenon.

What is more, Israel’s revocation of residency status is often conducted even in cases in which no other residency or citizenship is guaranteed to an individual. It should be noted that while West Bank and East Jerusalemite Palestinians have the option of applying for Jordanian *laissez-passer* documents for ease of travel,¹⁰⁴ these passports do not carry a right to residency or citizenship in Jordan.¹⁰⁵ In fact, since the armed hostilities that took place in Jordan between the Jordanian authorities and the PLO culminating in the events of September of 1970 (“Black September”), the policy of the Kingdom of Jordan has been to deny any Palestinian living west of the Jordan River the option of residency or citizenship and to cancel previous citizenships held.¹⁰⁶ Instead, responsibility for the Palestinians’ status was handed over to the PLO and now to the Palestinian Authority (PA) through the Interim Agreement following the Oslo Accords.¹⁰⁷ However, given that the PA is not a recognized sovereign state, and Israel occupies the territory over which the PA asserts its authority, it does not have final control over the status of its residents. Rather, beyond typographical changes, the Israeli authorities control the Palestinian Population Registry in the West Bank and Gaza, just as they control all entry and exit to and from these territories. In 2000 the Israeli authorities froze all changes to this registry, with the exception of registering minor

¹⁰⁴Obtaining this document entails an application process and travel to Amman, whereas Israeli travel documents may be obtained by application locally. The option of obtaining Jordanian travel documents is based on the fact that until 1967 East Jerusalem, like the rest of the occupied territory of the West Bank, was under Jordanian control and on the compromise of the Jordanian government following the political and violent clashes between the Palestinian Liberation Organization (“PLO”) and the Jordanian government in September 1970. *See* selected excerpts of Expert Opinion of Adv. Jonathan Kuttab [hereinafter “Kuttab”] (on file with author).

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷Despite the common impression that the Oslo Accords and the peace process they aimed to set into motion are “dead” (even expressed by PM Benjamin Netanyahu), the divisions of authority and legal jurisdiction between the Palestinian Authority and Israel have generally been respected by both parties. Article 9(2) of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, D.C., 28 December 1995 *available at* <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> (retrieved 27 Dec. 2010).

children.¹⁰⁸ As such, Israel regularly revokes the residency status of individuals who are not guaranteed residency or citizenship elsewhere. In fact, in some cases, Israel has revoked the residency of individuals with non-permanent status elsewhere that is also revocable.¹⁰⁹ Israel has also become increasingly restrictive in its policies of allowing Palestinians from the West Bank and Gaza to join their spouses and family members in East Jerusalem, which the next section briefly discusses.

2.4.3 Family Unification Issues

Unlike Jewish Israeli citizens, Palestinian permanent residents and citizens alike do not have the right to obtain residency or citizenship for their non-citizen, non-resident spouses who wish to join them in Israel or East Jerusalem through family unification – if the latter are Palestinian residents of the West Bank or Gaza. While in the past there were obstacles to obtaining residency for Palestinian spouses based on individual circumstances, including security barriers often based on secret evidence unknown to the applicants, since 2003 the Israeli government has imposed a wholesale freeze on the family unification process between Palestinian non-citizens and non-residents wishing to live with their permanent resident spouses inside Israel and East Jerusalem.

The Citizenship and Entry into Israel Law (Temporary Order) 2003 canceled the option of granting permanent residency status in Israel to residents of the OPT.¹¹⁰ Certain narrow exceptions to the prohibition are outlined in the law, including for those who, prior to the law's enactment, had filed applications for residency or citizenship, or who had obtained permanent or temporary residency permits and wish to renew.¹¹¹ Additionally, temporary permits not exceeding six-months are available on a case-by-case basis for purposes of work, medical treatment, or to prevent a child under age 12 from being separated from a parent legally in Israel.¹¹² It is worthy of note that even in 2010, many years after the height of the Second Intifada, the State has expressed its interest in extending the application of the “temporary” order, and perhaps in codifying it into Israeli law.¹¹³

¹⁰⁸There is no official government declaration of this policy. For more, *see, e.g.* Gisha, “Disengaged Occupiers: The Legal Status of Gaza,” Jan. 2007, from p. 50, available at <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf> (retrieved 27 Dec. 2010).

¹⁰⁹*See* Kuttab, *supra* note 104, p. 29

¹¹⁰The Citizenship and Entry into Israel Law (temporary provision) 2003, Sec. 2.

¹¹¹*Id.*, Sec. 4.

¹¹²*Id.*, Sec. 3.

¹¹³*See* HCJ 5030/07, *HaMoked - Center for the Defence of the Individual v. Minister of the Interior*, State's Supplementary Response, 13 April 2010 [hereinafter “HCJ 5030/07, State's Supplementary Response”].

Given the geographical, cultural, linguistic and political contiguity between East Jerusalem and the West Bank, many East Jerusalem residents naturally find their spouses in the West Bank, and vice versa. These couples are then faced with the harsh choice between living in the OPT and risking the loss of one spouse's

2.4.4 The Separation Barrier (“The Separation Fence”/ “The Wall”)

In 2002, Israel began construction of a separation barrier (often referred to as “the Wall”) between Israel and the West Bank, claiming that the barrier was necessary for security reasons and that it was temporary. As of this writing, eight years later, the barrier is almost complete in the West Bank, and continues to be constructed in East Jerusalem.¹¹⁴ One of the main criticisms of the barrier often voiced by the international community and by Israeli human rights organizations is that it *de facto* annexes large areas of the OPT to Israel (approximately 9.4 percent) in contravention of international law.¹¹⁵ The areas of the West Bank placed on the western or “Israeli” side of the barrier almost exclusively contain Israeli settlements or uninhabited (often agricultural) land sought for settlement expansion.¹¹⁶ In the East Jerusalem area, the barrier sets additional “facts on the ground” rendering Israel’s unilaterally declared annexation of East Jerusalem, which comprises 3.9 percent of the West Bank, a more concrete physical reality, and incorporates 12 Israeli settlements into Jerusalem.¹¹⁷

At the same time, the erection of the barrier physically separated families, friends, business ventures and communities which were arbitrarily divided between East Jerusalem and the adjoining areas of the West Bank.¹¹⁸ In order to maintain those ties, and for Jerusalem residents who suddenly found themselves on the “other side” of the barrier and in fear of losing their status and rights based on lack of presence, a wave of some 120,000 Palestinians entered East Jerusalem when the wall was first constructed.¹¹⁹

permanent resident status and accompanying benefits, and living in East Jerusalem while one spouse risks deportation either for illegal presence or upon denied renewal of her/his temporary permit. Given that the employment opportunities and social benefits are typically preferable in East Jerusalem than under the occupied Palestinian Authority, and entail far fewer restrictions on the freedom of movement, at least within Jerusalem, such families often prefer to remain illegally in East Jerusalem and build illegally there, if need be. Alternatively, these families will leave East Jerusalem, and the resident spouse, along with any children, may well lose her/his residency and thus her/his right to return to her/his home, or place of habitual residence.

¹¹⁴The northern and southern sections of the barrier in the Jerusalem area were completed in July 2003. In 2005 construction of various additional sections was completed. *See, e.g.* B’Tselem, Separation Barrier, available at <http://www.btselem.org/english/Separation.Barrier/Jerusalem.asp>

¹¹⁵UN Office for the Coordination of Humanitarian Affairs (occupied Palestinian territory) and World Health Organization West Bank & Gaza Office (occupied Palestinian territory), 1 Health, “ 2, available at http://www.ochaopt.org/documents/ocha_opt_special_focus_july_2010_english.pdf (retrieved 17 May 2011); regarding the international legal community’s opinion, *see, e.g.*, the International Court of Justice’s Advisory Opinion, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, I.C.J Reports (Advisory Opinion) p. 136 [hereinafter “Legal Consequences”].

¹¹⁶*See, e.g.* Bimkom and B’Tselem, “Under the Guise of Security: Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank” (2005).

¹¹⁷EU, *supra* note 12, p. 13 at 6.

¹¹⁸For instance, the barrier cuts straight through and surrounds the East Jerusalem neighborhoods of Abu Dis, Beit Hanina and A-Ram and surrounds Bir Nabala, Anata and Nu’aman, cutting them off from Jerusalem.

¹¹⁹In Arieli and Sfard, *supra* note 43, p. 18 at 310, citing Arnon Sofer.

According to Meir Margalit, shortly after and upon realizing that their residencies were not being revoked, the majority of East Jerusalem residents who had crossed to the western or “Israeli side” of the Wall returned to their homes on the “West Bank side” of the barrier, located to the east of the Wall.¹²⁰ However, there are still many incentives for Palestinians on the West Bank side of the barrier to move to the “Israeli” (illegally annexed) side of Jerusalem (regardless of their residency status), including access to services, education, and health care, as well as the desire to be free from restrictions on movement and increased difficulties in carrying out family, business and other interactions on the West Bank side of the barrier. This situation creates an additional – even if minor – population growth factor and thus bears some impact on the demand for housing.

2.5 The Lack of Available and Authorized Housing Leads to Unauthorized (“Illegal”) Building

2.5.1 The Resulting Impact of these Policies and Practices

The combination of inadequate planning for the Palestinian sector in East Jerusalem, namely restricting the Palestinian residential areas to some 8 percent of the entire municipal region and failing to authorize building to accommodate the true Palestinian population size in East Jerusalem (which is constantly increasing based on natural growth, the risk of residency revocation, the erection of the separation barrier, and more), and the obstacles placed before Palestinians wishing to obtain building permits, produces a situation in which many Palestinians are faced with the harsh choice between leaving their East Jerusalem homes or building without authorization and living under constant threat of demolition.

As it stands, many choose the former.¹²¹ The remainder are either among the rare few able to meet the requirements for obtaining a permit, as outlined above, or more often those who choose building illegally and risking demolition over losing residency, community, and the right to remain in the place in which many of them were born. In

¹²⁰Interview with Margalit, *supra* note 19, p. 14 .

¹²¹According to Margalit, it is difficult to measure the number of Palestinians who leave East Jerusalem for the West Bank, Gaza and elsewhere, partly because the true population of both registered and undocumented Palestinians is unknown, and partly because of the many creative ways Palestinians create homes for themselves in non-residential spaces that are not counted as housing units, such as stores and other businesses. Most Palestinians will do whatever possible to stay in East Jerusalem for the host of reasons discussed in this report, even if it means living in high densities, with inadequate infrastructure and services, living in fear of home demolition, and in many cases fear of deportation for lack of residency. The exodus of Palestinians out of East Jerusalem is something he predicts in the coming years, if the situation remains, when no housing possibilities – even illegal and unpleasant – will remain. *Id.*

fact, even the Jerusalem Municipality has admitted that the high rate of unauthorized building in East Jerusalem is not a sign of disregard for the law on the part of Palestinian residents, but rather that the planning, zoning and permit system fails to meet the true needs of the Palestinian population there.¹²²

2.5.2 The Extent of the Phenomenon

Israeli authorities assert that 40 percent of the total number of buildings in East Jerusalem have been built without permits.¹²³ NGO estimations have ranged, such that in 2003-2004 the figures stood at one-third, and as of 2007 had risen to one-half.¹²⁴ Between 2001 and 2003, there were a total of 4,040 new buildings erected in the area and a mere 393 building permits granted.¹²⁵ In 2003 alone, the Jerusalem Municipality recorded 1,435 new buildings in Palestinian East Jerusalem, while it had granted only 59 building permits, representing roughly four percent of the new buildings.¹²⁶ As of 2007, and since the start of the Second Intifada, for every building built with a permit, there were approximately 10 more built without authorization.¹²⁷ Currently, there are at least 15,000 and up to 20,000 unauthorized buildings standing in the Palestinian sector of East Jerusalem.¹²⁸

While not all unauthorized homes have been granted demolition orders, there are approximately 1,500 demolition orders in East Jerusalem pending enforcement.¹²⁹ According to figures published by the European Union, as of the end of 2009, more

¹²²ACRI 2010, *supra* note 3, p. 12 at 46.

¹²³ICAHD, No Place, *supra* note 29, p. 17 at 10.

¹²⁴Estimated at one-third in 2003-2004: *see, e.g.*, ICAHD, Destructive, *supra* note 29, p. 17 at 8. According to Bimkom, as of 2007, of the 39,000 housing units in Palestinian neighborhoods in East Jerusalem, 20,000 were built without authorization, or just over 50 percent. Bimkom, Planning in Jerusalem, *supra* note 17, p. 14 facts and figures. OCHA estimates that 28 percent Palestinian homes in East Jerusalem are built without authorization from the Israeli authorities. OCHA, "The Case of Sheikh Jarrah – Fact Sheet", October 2010.

¹²⁵Municipal figures provided in ICAHD, Destructive, *supra* note 29, p. 17 at 9.

¹²⁶*Id.*

¹²⁷ICAHD, No Place, *supra* note 29, p. 17 at 10. Certificate of completion figures are also telling. Based on figures provided by the Jerusalem Municipality regarding the issuance of building completion certificates, between 2004 and 2008 the percentage of certificates issued to Palestinians in East Jerusalem ranged from 1.4% to 6.9% of the total issued. In 2009, the percentage reached 15.7%; however, this remains disproportionate to the size of the Palestinian population in East Jerusalem (roughly one-third of the population under the Jerusalem Municipality's jurisdiction). Letter from the Jerusalem Municipality Authorization and Supervision Branch to the Head of the Local Planning and Building Committee, 18 Jan 2010, para. 4 [hereinafter "Letter from the Jerusalem Municipality"]. The percentages were as follows for the years 2004 to 2009: 2004 (6.1%); 2005 (1.4%); 2006 (3.2%); 2007 (4.5%); 2008 (6.9%); 2009 (15.7%). *Id.*

¹²⁸15,000 is the estimate provided in Paz-Fuchs, Cohen-Bar, *supra* note 26, p. 16 at 230. Jerusalem Mayor Nir Barkat estimates around 20,000, but according to Margalit these are all rough estimates. Interview with Margalit, *supra* note 19, p. 14.

¹²⁹This is an unofficial estimation by OCHA. OCHA, The Case of Sheikh Jarrah, 4 (Oct. 2010).

than 60,000 Palestinians in East Jerusalem (20 percent of the Palestinian population in the city) were at risk of their homes being demolished due to unlicensed building.¹³⁰ An additional consequence of the planning and building reality in East Jerusalem is severe housing density and overcrowding, where the average density in East Jerusalem is nearly twice that of West Jerusalem.¹³¹

The government has often argued that the overcrowding and growing disparity in housing shortages, infrastructure and municipal services between East and West Jerusalem are a direct result of the Jordanian government's disregard for the area during the period between 1948 and 1967.¹³² Hence, they claim that overcrowding pre-dates the 1967 annexation and that progress from their efforts to improve living conditions is simply unnoticed because of the grave situation with which they were presented.¹³³ However, figures show just the opposite; for instance, the discrepancy in density between the Palestinian and Jewish sectors in 1993 represented twice that of 1967.¹³⁴ These figures point to the reality of a growing population that continues to reside and build in East Jerusalem, despite the vast shortage of legally available housing.

¹³⁰EU, *supra* note 12, p. 13 at 6.

¹³¹For instance, housing density in Palestinian neighborhoods is approximately 11.6 square meters per person, while that of Jewish neighborhoods is 20.3 square meters per person. B'Tselem, Statistics on building density in East Jerusalem, *available at* http://www.btselem.org/english/jerusalem/building_density_statistics.asp (retrieved 29 Dec. 2010). These figures have not changed over recent years. For instance, in 2002, density in Palestinian neighborhoods was 11.9 sq.m. per person, whereas Jewish neighborhoods had 23.8 sq.m. per person. B'Tselem Info Sheet, *supra* note 22, p. 15. As of 2008, Palestinian homes contained 1.9 residents per room, whereas Jewish homes contained approximately 1 resident per room. ACRI 2010, *supra* note 3, p. 12 at 46. For figures dating back to the 1990s, *see* B'Tselem, A Policy, *supra* note 5, p. 12 at 38. According to international human rights groups, housing conditions in an area are considered overcrowded when more than two people occupy each room in a home. *Id.* As of the late 1990s, an estimated 30 percent of Palestinians in East Jerusalem lived with between three and four people per room, as compared to just over two percent of Jews in the rest of Jerusalem who live at this level of density. *Id.* The levels are particularly staggering in the Old City, where the Muslim Quarter approaches 487 people per hectare (10,000 square meters), and the Christian Quarter hosts approximately 263 per hectare, whereas the Jewish Quarter holds 183 people per hectare. Applied Research Institute, Jerusalem (ARIJ), *Expanding Jewish Presence in the Old City* (Mar. 1998), *available at* http://www.poica.org/editor/case_studies/view.php?recordID=602 (retrieved 29 Dec. 2010). The Muslim and Christian Quarters are both inhabited primarily by Palestinians; the Jewish Quarter is inhabited primarily by Jews.

¹³²B'Tselem, A Policy, *supra* note 5, p. 12 at 42.

¹³³*Id.* at 43.

¹³⁴*Id.* at 38.

2.6 The Discriminatory and/or Disproportionate Demolition of Palestinian Homes versus Demolition in the Jewish Sector

As we have seen thus far, long before a Jerusalem resident is faced with a demolition order or its actual implementation (the destruction of her/his home), Jerusalem planning, zoning, and permit application processes are decidedly discriminatory towards the Palestinian sector. These policies and practices may not be overlooked when examining the demolition of homes. In other words, the Jerusalem Municipality's seemingly neutral policy of enforcing the law regarding building violations – as might be expected of any municipality in the world – cannot be evaluated in a vacuum. Rather, one must analyze the policy within its context, as we have outlined above.

2.6.1 Frequency and Type

There is a large discrepancy in the number of demolitions carried out each year in Palestinian East Jerusalem versus West Jerusalem. For instance, the Jerusalem Municipality demolished over 615 structures¹³⁵ in East Jerusalem between 2001 and 2009;¹³⁶ whereas only 245 were demolished in West Jerusalem during the same period, despite the fact that Jews constitute roughly two-thirds of the population in all of Jerusalem.¹³⁷ In other words, while Jews represent approximately 64 percent of the population in Jerusalem, demolitions of their buildings represented only 28 percent of the demolitions carried out during that period. Overall, more than 70 percent of demolitions in Jerusalem are carried out against Palestinian buildings, but Palestinians are accountable for only approximately 20 percent of the unauthorized building in the city.¹³⁸

Naturally, there are Jewish structures demolished in East Jerusalem each year as well, but also in disproportionate frequency given the population (again, there are

¹³⁵Note again that “structure” does not adequately reflect the number of housing units demolished, as a structure that is a kioak or even a single-family home is recorded the same as a 7-storey apartment building containing 28 housing units (example from the actual demolition of such a building in Ras Al-Amud in September 2005).

¹³⁶Data combined from the following sources: Letter from the Jerusalem Municipality, *supra* note 127, p. 33 at para. 3; B'Tselem, Statistics on Demolition of Houses Built Without Permits in East Jerusalem (information provided to B'Tselem by the Jerusalem Municipality in 2004 and 2008), *available at* http://www.btselem.org/english/Planning_and_Building/East_Jerusalem_Statistics.asp (retrieved 29 Dec. 2010) [hereinafter “B'Tselem, Statistics on Demolition”].

¹³⁷Letter (transmitted by electronic mail) from the Jerusalem Municipality to ICAHD on 27 January 2010. The Ministry of Interior also issues demolition orders and carries them out, but in drastically lower frequency. Between 2001 and August of 2008, the Ministry of Interior demolished 105 structures in East Jerusalem, versus the 536 demolished by the Municipality during the same period. Complete comparative data on Ministry of Interior demolitions between East and West Jerusalem is not currently available.

¹³⁸According to Jerusalem Municipal figures compiled by ICAHD, between 2006 and 2008, the number of building infractions recorded in East Jerusalem was 2,983, whereas in West Jerusalem it was 10,183.

approximately 300,000 Palestinians and 190,000 Jews in East Jerusalem). From 1999 to 2003, for instance, 232 Palestinian structures were demolished in East Jerusalem by both the Jerusalem Municipality and the Ministry of Interior, while only 30 Jewish structures were demolished.¹³⁹

The Jerusalem Municipality explains these discrepancies as an effort to prioritize enforcement based on the degree of violation.¹⁴⁰ Given the fact that unauthorized building is so widespread, the Municipality's general policy is to focus first on the larger violations based on area – whole homes rather than balconies or additions. These are seemingly neutral, non-discriminatory criteria.¹⁴¹ However, not surprisingly, given the lack of adequate planning, zoning and permit issuance in the Palestinian sector, larger violations are predominantly found among the Palestinian sector, and not the Jewish sector.¹⁴² Additionally, demolitions in the Jewish sector match the kinds of violations most often found there, which are illegal additions and extensions beyond the allowable density and height limitations provided in the relevant plan, or commercial buildings, rather than an entire residency.¹⁴³ In fact, as of this report's writing no case is known of a West Jerusalem residential building having been demolished in its entirety.¹⁴⁴

Furthermore, Palestinians experience discrimination in the type of demolitions

¹³⁹B'Tselem, Statistics on Demolition, *supra* note 136, p. 35 ; ICAHD, No Place, *supra* note 29, p. 17 at 7. Note: according to figures from the Jerusalem Municipality provided to ICAHD in an electronic correspondence on 27 January 2010 with May Ofir, Head of the Department of Development and Building Enforcement at the Jerusalem Municipality, there were 156 demolitions between the years 1999 and 2003. However, both B'Tselem and ICAHD's figures include demolitions carried out by both the Jerusalem Municipality and the Ministry of Interior, which presumably the Municipality's figures do not.

¹⁴⁰*See, e.g.*, ICAHD, No Place, *supra* note 29, p. 17 at 15. In fact, given the extremely high number of building violations, as detailed in the previous section, the authorities are in fact only demolishing a fraction of the unauthorized buildings. *Id.* at 10-11. And yet, their preference for large-scale violations must be viewed in context.

¹⁴¹In a document released on 21 May 2009, the Jerusalem Municipality explained its planning policy. On home demolitions, for instance, the document states: "Administrative demolition orders are issued according to identical criteria throughout the city. The Jerusalem Municipality does not, and shall not, have a policy which aim is to discriminate between the various sectors living and residing in Jerusalem." EU, *supra* note 12, p. 13 at 5.

¹⁴²*See, e.g., id.*; World Bank Technical Team, "Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency," 9 May 2007, *available at* <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WestBankrestrictions9Mayfinal.pdf> (retrieved 25 Sept. 2011).

¹⁴³ICAHD, No Place, *supra* note 29, p. 17 at 8; B'Tselem, A Wall, *supra* note 20, p. 15 at 11. Data provided to B'Tselem by the Head of the Department of Construction Administration of the Jerusalem Municipality for 2005. Infractions: Jewish (5653); Pal (1529). Demolitions: Jewish (26); Pal (76). *See also* Amnesty, *supra* note 28, p. 17 at 42. In 2003, 10 structures were demolished in West Jerusalem, three of which were gas stations. ICAHD, Destructive, *supra* note 29, p. 17 at 7. Fourteen of the 99 demolitions in East Jerusalem were gas stations. *Id.* at 5.

¹⁴⁴ICAHD, No Place, *supra* note 29, p. 17 at 15; Interview with Margalit, *supra* note 19, p. 14 .

orders and the options to challenge them. The majority of demolition orders served on Palestinian structures are administrative order. These orders may be executed beginning 24 hours after their delivery, putting the owners on extremely short notice to launch a legal challenge to the demolition. The majority of demolition orders served on Jewish structures, on the other hand, are judicial demolition orders, which must be processed by a court of law and, therefore, are accompanied by increased protections and appeal opportunities that often delay or prevent demolitions from being carried out.¹⁴⁵ The practical result is that Palestinians in Jerusalem are more likely than Jews to experience expedited demolitions and evictions with limited opportunities to defend against them.

2.6.2 Penalties Imposed

Building infractions carry penalties in East and West Jerusalem, just as in the rest of the country and in most places in the world. However, because of disproportionate enforcement in the Palestinian sector, Palestinians carry the brunt of the burden. In particular, heavy fines are levied against building infractions.¹⁴⁶ As the calculation of the fine is based on the size of building offense, naturally Palestinian building violations on average incur greater fines than the unauthorized additions and balconies fined in West Jerusalem and among the Jewish sector.

Between 2001 and 2006, the Municipal Court in Jerusalem collected NIS 153,240,833 (over US \$43 million/€31 million) in fines.¹⁴⁷ Fines levied against Palestinians represented approximately 70 percent of Jerusalem Municipality collections and all of those from the Ministry of Interior.¹⁴⁸ Given that the Jerusalem Municipality and Ministry

¹⁴⁵For instance, from 1992 to 1996, 50 out of every 100 Jewish demolition orders issued were administrative, as compared with 86 out of every 100 in the Palestinian sector. LAW, *supra* note 6, p. 12 at 15. This trend continues today. Interview with Margalit, *supra* note 19, p. 14. Additionally, the claim of “inhabited residence” as grounds for a “freeze order” or a stay of execution of the demolition, is available only when the building meets standards established by law as constituting “inhabitable” – such as running water, electricity, sewage, etc. Given the circumstances in much of the Palestinian sector of East Jerusalem, as discussed above, such infrastructure is often unavailable for Palestinian families. Thus, it is far more difficult for a Palestinian family in East Jerusalem to obtain a freeze order than for a Jewish family in East or West Jerusalem. ICAHD, No Place, *supra* note 29, p. 17 at 9. It should be noted that although freeze orders may be obtained, ICAHD has never heard of an order that was actually canceled. ICAHD, Obstacles, *supra* note 30, p. 17 at 63.

¹⁴⁶Imprisonment is a penalty for those who do not pay fines, typically for a period of 3-6 months. Having served one’s sentence does not render a building legal. The building violator will continue to be susceptible to future fines, imprisonment and demolition.

¹⁴⁷ICAHD, No Place, *supra* note 29, p. 17 at 9.

¹⁴⁸*Id.* Additionally, the general practice from 1967 until 2001 was to allow an unauthorized builder to overcome the illegality of the building through the payment of a fine, without the need for further steps (such as a permit or demolition). However, as of 2001, the Jerusalem Municipality adopted a policy of re-opening such cases, charging owners with illegal construction, contempt of court or unauthorized occupation of a building, imposing fines and sometimes even imprisonment, as well as issuing demolition orders. *Id.* at 12,

of Interior's home demolition budgets combined are a mere fraction of this sum,¹⁴⁹ this fact renders the proportionally low budget allocation and investment in planning, zoning, infrastructure and services in Palestinian East Jerusalem even more glaringly discriminatory.

2.6.3 A Note on Self-Demolition

When a home or other building is scheduled for demolition, the owner may choose to wait for the authorities to come and demolish it or to "self-demolish". Self-demolition often averts the imposition of the penalties described above, including fines and imprisonment, and it places the conditions and timing of the demolition in the owner's hands. According to reports, self-demolition is an increasing trend, and some sources, including an end of 2009 European Union report, attribute the trend to an attempt to diminish the psychological trauma that home demolition causes, particularly to children.¹⁵⁰ Even the Jerusalem Municipality in its update on enforcement of building laws from January 2010 noted the increase in self-demolitions, in many cases even prior to owners and occupants having received a demolition order.¹⁵¹ The Municipality attributed the phenomenon to effective deterrence.¹⁵²

The rates of self-demolition are difficult to calculate, and the figures provided by the Municipality are incomplete. Extensive documentation has been conducted independently by the partners of the Displacement Working Group (DWG), a forum composed mainly of humanitarian agencies working in East Jerusalem and the West Bank, including representatives of the UN Office for the Coordination of Humanitarian Affairs (OCHA), Palestinian and Israeli human rights NGOs, INGOs and ICAHD. According to their figures, in the year 2009, for instance, of the 80 demolitions carried out in East Jerusalem,¹⁵³ 28 were self-demolitions, of which 20 were homes (as opposed to 8 non-residential structures).¹⁵⁴ As of December 2010, of the 78 demolitions documented

13.

¹⁴⁹In 2005, for instance, the Municipality's home demolition budget was NIS 2.4 million (around US \$658,650/€487,131), and the Ministry of Interior's was NIS 3.4 million (around US\$933,087/€690,102). Although these figures do not include the costs of aerial photography to spot illegal construction and the inspectors and legal professionals involved in the system, these costs combined still represent a fraction of the fines collected (NIS 7 million in 2009 – almost US \$2m/€1.4m). *Id.* at 10.

¹⁵⁰EU, *supra* note 12, p. 13 at 6.

¹⁵¹See Letter from the Jerusalem Municipality, *supra* note 127, p. 33 at para. 3.

¹⁵²*Id.*

¹⁵³Note that the Municipality reported 65 demolitions in East Jerusalem in the same year (*see id.*).

¹⁵⁴Displacement Working Group, "Demolitions & Displacement in East Jerusalem & Area C, January - December 2009." The Displacement Working Group is a network chaired by OCHA of some 50 NGOs including ICAHD (and with a mailing list of 500 individuals and organisations, including members of the donor community and journalists, UNRWA, ICRC, SAVE, CARE, OXFAM, and others), under the Protection

in East Jerusalem by the DWG, seven were self-demolitions of which six were homes.¹⁵⁵

2.7 Forced Evictions of Palestinians from their Homes in East Jerusalem

In addition to the various set of policies and practices described above, forced evictions of Palestinians from their homes in East Jerusalem in order to give way to Jewish building is an increasing phenomenon, and it too contributes to the displacement of Palestinians in East Jerusalem. Currently, the most striking examples of the phenomenon are mainly concentrated in the Sheikh Jarah and Silwan neighborhoods of East Jerusalem, in which Israeli settler organizations have made several successful appeals to the authorities to evict Palestinians from their homes and land. These appeals have been made on various grounds, including: claims of ownership prior to the establishment of the State of Israel and the Jordanian occupation of the West Bank (including East Jerusalem) in 1948 (as is the case in Sheikh Jarah);¹⁵⁶ the launching of legal proceedings to change the status of the land to “public” (or “state”) land based on its religious, historical or environmental value, thereby altering the zoning and rendering Palestinian homes illegal (as has been the case in Silwan, particularly regarding claims of archeological/historical importance);¹⁵⁷ and even private methods of land purchase.¹⁵⁸

According to OCHA figures, as of October 2010 over 60 Palestinians had lost their homes in the Sheikh Jarah neighborhood alone, and an additional 500 stood to lose

Cluster of the UN.

¹⁵⁵Displacement Working Group oPt, “Demolition Summary Table,” updated 31 December 2010. It should be noted that generally each demolition refers to each single structure, and buildings with multiple apartments are recorded the same, as one building. For instance, in two of the six cases of self-demolition documented, two apartments in each structure were self-demolished. The figures here, like those of the Municipality and Ministry of the Interior do not reflect the number of homes lost, but rather the number of structures demolished.

¹⁵⁶These claims are made based on the Law and Administrative Matters Law [Consolidated Version], 1970, instructing the General Custodian to “release” property formerly administered by the Jordanian authorities (during the Jordanian occupation of the West Bank and East Jerusalem) to its previous owner. It is worthy of note similar claims regarding properties formerly held by Palestinians prior to 1948 in what is now Israel are not acknowledged by Israeli law, as the Absentee Property Law, 1950, applies almost exclusively to non-Jews (see definition of “absentee” in Section 1(b) of the law) and grants the Custodian of Absentee Property virtually unfettered discretion to “release” vested property to the prior owner (see Sections 28 and 29 of the law).

¹⁵⁷In Silwan, governmental and quasi-governmental bodies, including the Jewish National Fund, the Israeli Antiquities Authority and the Israeli Nature and Parks Authority, have handed the administration and management of up to one-third of the land in the neighborhood to the settler organization, ELAD. *See, e.g.,* Ir Amim, Shady Dealings in Silwan (May 2009) [hereinafter “Ir Amim”]; Margalit, Seizing, *supra* note 68, p. 22

¹⁵⁸In some cases the validity of these transactions has been challenged. *See, Ir Amim, supra* note 157, p. 39, esp. at 15-17.

their homes in ongoing proceedings launched by the various settler groups active in the area; since late 2008 the Israeli authorities have evicted over 60 Palestinians from their homes in the Karm Al Ja'ouni neighborhood (or the “Tomb Quarter”), and current plans for the area threaten to evict an additional 300 Palestinians.¹⁵⁹ The United Nations High Commissioner for Human Rights report of March 2011 reported that according to new development plans in the Al-Bustan area of Silwan, over 40 Palestinian homes in the neighborhood are scheduled to be demolished, which would evict some 500 residents.¹⁶⁰ These are among the more egregious cases of state- and municipality-sanctioned evictions of Palestinians in East Jerusalem in order to make way for Israeli settler development, and are an additional cause of displacement of Palestinians and the increasing demand for housing in decreasing spaces in East Jerusalem.

3 MISSION ACCOMPLISHED – A FLOW CHART

3.1 Introduction and Explanation

The policies and practices discussed in the previous chapter were presented roughly in the order in which they impact one another, forming a chain of cause and effect. Israel’s deliberate attempts to control the demographics of the city of Jerusalem lead to the creation of policies and practices that ultimately curb Palestinian population growth, as well as individual and community development in East Jerusalem. We briefly summarize the previous chapter here in order to show this chain of policies and their “domino effect”.

Israel’s demographic goals and the process of “Judaizing” East Jerusalem serve as the background and motivation for planning, zoning and housing policies that directly impact and harm Palestinian lives. At the outset, the Israeli authorities and Jerusalem Municipality have neglected (and continue to neglect) to provide adequate city plans for East Jerusalem that respond to the needs of the Palestinian population, both in terms of its growing size and its cultural needs. This situation creates enormous obstacles for Palestinians wishing to build new homes or expand existing homes. Discriminatory and limited zoning for Palestinians, restricted construction areas, low plot ratios in the Palestinian sector, the lack of infrastructure, combined with permit application requirements including strict proof of ownership in a context that does not allow for

¹⁵⁹OCHA, “The Case of Sheikh Jarrah – Fact Sheet”, October 2010, *available at* http://www.ochaopt.org/documents/ocha_opt_sheikh_jarrah_factsheet_2010_10_11_english.pdf [hereinafter “OCHA, Case of Sheikh Jarrah”].

¹⁶⁰Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, 3 March 2011, para. 33, citing *Humanitarian Monitor*, June 2010.

such stringency, and the high costs involved, render obtaining building permits virtually impossible for most Palestinians in East Jerusalem.

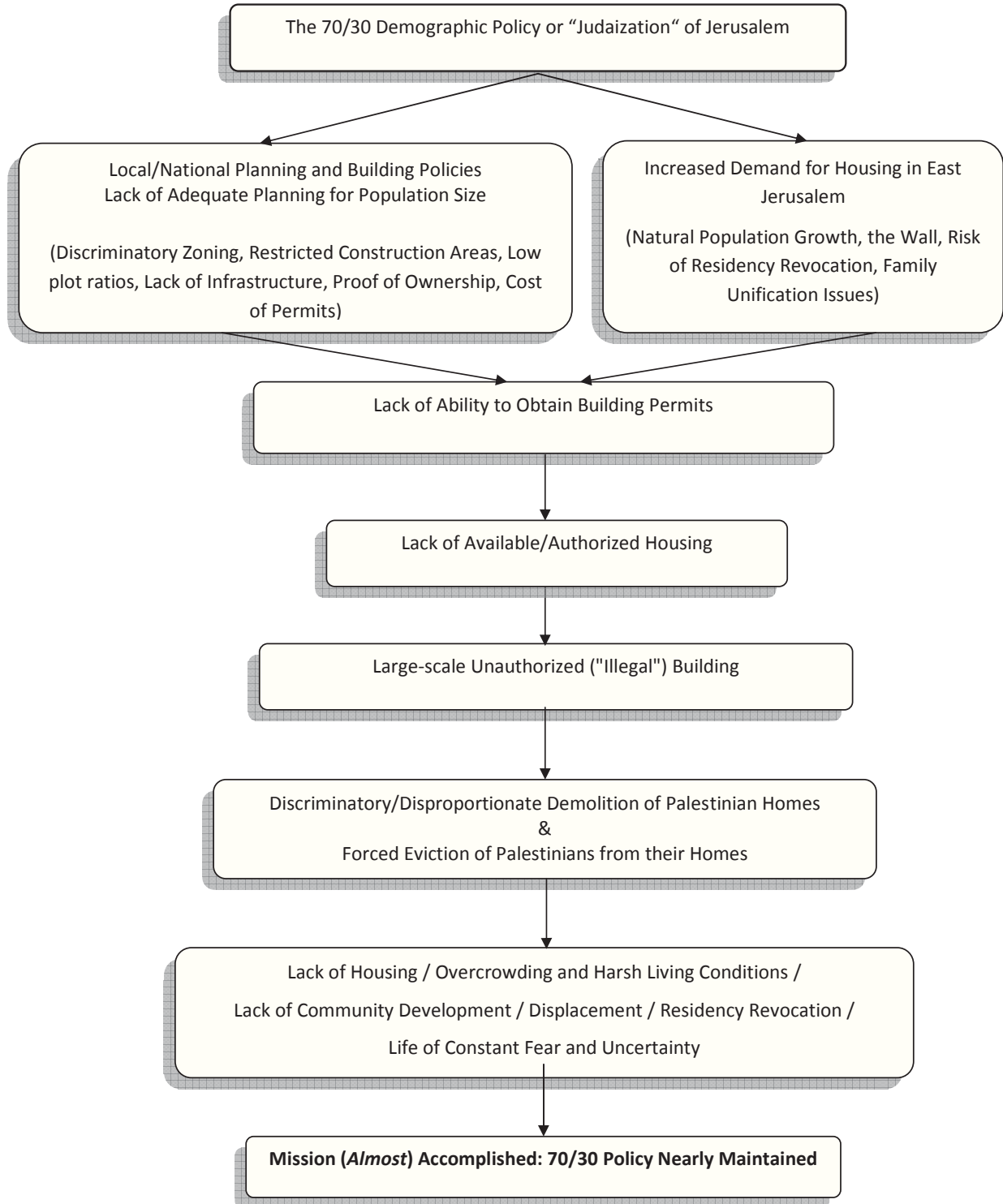
At the same time, the population in East Jerusalem continues to grow, not only because of natural population growth, but also because of Israeli policies such as the construction of the Wall and the risk of loss of residency and its accompanying benefits due to lack of presence in East Jerusalem. This growth only increases the demand for housing and exacerbates the housing shortage and the lack of physical space properly zoned for Palestinian building. What is more, over recent years Palestinians in East Jerusalem have experienced forced eviction from their homes in order to allow Jewish building, in many cases based on discriminatory policies.

The cumulative result of all of the above policies and practices is that many Palestinian East Jerusalemites are left with two overwhelmingly undesirable choices (both of which violate their basic rights, as will be explained in the next section): either to build illegally and risk home demolition – disproportionately carried out against Palestinian homes – and additional penalties, heavy fines and even imprisonment; or, to leave the area and risk losing their residency, along with their social benefits (and those of their children), their freedom of movement, and possibly their standard of living, as well as their ability to return. Fearing residency revocation above all, many East Jerusalem Palestinians remain in the city against all odds – living in fear of demolition, crowded into existing homes, living in commercial spaces and even in the streets. Still others who have lost their residencies prefer to remain illegally in the city, risking being caught and deported.

But this status quo is unsustainable. Eventually the population will reach a boiling point at which even these unsatisfactory options will no longer be available, and Palestinians will be obliged to leave East Jerusalem for the West Bank and elsewhere. In fact, as it stands, thousands of Palestinians for whom East Jerusalem was their home since birth, and even their families' home for generations, have lost their residency status. Given the exponential increase in revocation over the last several years, it appears that this phenomenon may only intensify in years to come, serving as another mechanism for maintaining control over the city's demographics.

Hence, the 70/30 demographic balance goal behind all of these policies is achieved and maintained close to its original goal, both currently and with a view to the future. The following is a flow chart that visually represents this process. Although it is presented vertically, the flow chart should be viewed as circular, as it starts and finishes in the same place.

ii. Mission Accomplished Flow Chart



4 A NEW NORMATIVE LEGAL FRAMEWORK

4.1 Introduction and Explanation

Much research and voluminous documentation have been conducted regarding the phenomenon of home demolitions, and even specifically on demolitions within the context of the set of policies and practices employed by the Israeli authorities in East Jerusalem. Their findings have been collated and summarized in the chapters above. Indeed, many reports have pointed to Israel's illegal acts in East Jerusalem under international humanitarian and human rights law, as well as under Israel's own laws. This report attempts to generate a more comprehensive legal discourse regarding home demolitions within the context of Israel's policies and practices toward East Jerusalem, highlighting the bodies of international law implicated and developing a framework for analyzing and discussing Israel's legal liability.

Naturally, some context is necessary before turning to the five areas of violation of international law that form the basis of this normative framework regarding home demolitions in East Jerusalem. The mere legal status of East Jerusalem creates a complex legal backdrop for any discussion of rights and obligations. Israel's 1967 occupation of what is now termed "East Jerusalem" was part of an act of war. According to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed regulations (commonly referred to as the "Hague Regulations"), which form part of customary international humanitarian law applicable to all nations, "territory is considered occupied when it is actually placed under the authority of the hostile army" (Article 42). The act of occupation, in and of itself, is not *per se* illegal, but both the Hague Regulations and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (hereinafter "the Fourth Geneva Convention") grant rights as well as impose duties on the occupying power (here, Israel) toward the occupied population, known as the "protected persons" (here, the Palestinians).

The prohibition on the annexation of occupied territory – incorporation under the full *sovereignty* of the occupying power – is based on general principles of international law, the United Nations Charter, and has been inferred from Article 43 of the Hague Regulations as well as indirectly by Articles 47 and 154 of the Fourth Geneva Convention.¹⁶¹ Israel's annexation of East Jerusalem as part of Israel proper has not been recognized as legal by the international community, and UN Security Council

¹⁶¹The United Nations Charter codified international legal principles by prohibiting the conquering of territory through aggression (*see especially* Articles 1.1 and 2.4). Art. 47 of the Fourth Geneva Convention stipulates the continued applicability of the Convention to the occupied territory even in cases of annexation of the said territory. Art. 154 incorporates the Hague Regulations into the Convention, and it has been argued that the two documents read together render annexation illegal under international humanitarian law.

Resolution 478 of 1980 rejected the legality of Israel's attempts to "alter the character and status of Jerusalem."¹⁶² Israel is a party to the Fourth Geneva Convention, which is also considered customary international law, and notably, in conferences held in 1999 and 2001, the High Contracting Parties to the Convention reaffirmed the applicability of the Convention to the OPT, including East Jerusalem.

Regardless of whether annexation is deemed illegal, as long as Israel exercises effective control over East Jerusalem – whether as occupier or as sovereign – it is obligated to uphold international human rights law. International human rights laws impose duties on nations to protect the populations under their control. In a simple sovereign state situation, a government must uphold the human rights of its citizens and those residing in its jurisdiction. Under a situation of occupation, it is the position of the UN Human Rights Committee,¹⁶³ the International Court of Justice,¹⁶⁴ the European Court of Human Rights,¹⁶⁵ and the British House of Lords,¹⁶⁶ among others, that the standard of effective control over a territory substitutes for sovereignty and therefore triggers the applicability of international human rights law. Hence, Israel is obligated to uphold, at the very least, the human rights of all persons residing in East Jerusalem, Gaza, the West Bank and the Golan Heights.

The following sections will detail five areas in which Israel's fulfillment of its obligations toward the population of East Jerusalem is called into question. Reference will be made to both international humanitarian and human rights laws, and the extent of their relative application should be understood given the background provided here.

¹⁶²Text of the resolution available at <http://unispal.un.org/UNISPAL.NSF/0/DDE590C6FF232007852560DF0065FDDB> (retrieved 29 Dec. 2010).

¹⁶³Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

¹⁶⁴See, e.g., *Legal Consequences*, supra note 115, p. 31 at pp. 177-181; and, *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996 (Advisory Opinion), p. 226, at p. 240.

¹⁶⁵See, e.g., *Loizidou v. Turkey* (Preliminary Objections), Decision of 23 February 1995, Para. 62; and, *Behrami v. France, Saramati v. France, Germany and Norway* (Application No's 71412/01 and 78166/01 (unreported), 2 May 2007).

¹⁶⁶See, e.g., *R (Al-Skeini) v. Secretary of State for Defence*, UKHL 26, [2007] 3 WLR 33 [13.6.2007], (regarding the occupation of Iraq), available at

<http://www.parliament.the-stationery-office.com/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf> (retrieved 29 Dec. 2010); *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, UKHL 58, [12.12.2007], available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf> (retrieved 29 Dec. 2010).

4.2 The Normative Framework

4.2.1 Violation of the Right to Adequate Housing

The right to adequate housing is anchored in both international humanitarian law and international human rights law, and it has been elaborated at great lengths in various documents of the latter. Let us first turn to a discussion of the application of international humanitarian law.

Given that East Jerusalem is illegally annexed occupied territory, and thus international humanitarian law applies to the territory, Israel is obligated under Article 43 of the Hague Regulations to maintain public safety and order in the occupied territory. Additionally, the home as private property is protected under Article 46 of the Hague Regulations, together with Article 27 of the Fourth Geneva Convention, both of which protect “family honor” and rights. According to the official commentary on the Geneva Conventions of 1949 prepared by the International Committee of the Red Cross (ICRC) and edited by jurist Jean S. Pictet (hereinafter “Pictet Commentary”),¹⁶⁷ the obligation to respect and protect family and property rights extends to the “family dwelling and home.” The commentary adds that the family dwelling and home may not be subjected to “arbitrary interference”.¹⁶⁸

The policy of administrative home demolitions in East Jerusalem is generally not arbitrary; Israeli authorities consistently claim that homes are demolished as in any other law-abiding society where inhabitants have built without authorization. However, the lack of planning and development required to provide opportunities for authorized home-building in the Palestinian sector is also not arbitrary, but rather based on laws and policies that themselves violate standards of international law. What is more, the lack of adequate planning and development for Palestinians in East Jerusalem, which leads to a restricted number of building permits available despite the ever-growing population (for all of the reasons outlined in section II(c) above), and thus a shortage of available authorized housing, is a violation of Israel’s obligation to maintain safety and order.¹⁶⁹

Furthermore, in reading these sections of international humanitarian law together, in maintaining safety and order Israel is especially obligated to protect and respect the right of families to their homes (and private property) and to respect “family honor.” The mere threat of home demolition experienced by thousands of families violates “family honor,” and the demolitions themselves have an incredibly traumatic impact on

¹⁶⁷Pictet, Jean S. (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Fourth Geneva Convention Relative to the Treatment of Civilian Persons in Time of War* (Geneva: ICRC, 1958) [hereinafter “Pictet Commentary”], 202.

¹⁶⁸*Id.*

¹⁶⁹The obligation to maintain safety and order is complex and will be discussed at the end of the 5th section below on the Right to Development.

a family's dignity, honor and well-being.¹⁷⁰

Israel is obligated to find an appropriate housing solution for the protected persons, the Palestinian residents, living under its occupation in East Jerusalem. These violations are all the more flagrant in situations in which it may be established that the demolition is not only illegal because it is justified by improper laws, but that it in and of itself constitutes a war crime, as is discussed in the last subsection of this chapter. In sum, although the policy of administrative home demolitions in East Jerusalem is presented as part of enforcing law and order, its end result is the denial of the basic right to protection of the home, and a lack of safety and order – which is particularly so given the increase in demolitions since the start of the Second Intifada.

This argument is strengthened further by the wealth of legal support for the right to adequate housing found in international human rights law, which, as explained previously, applies to East Jerusalem regardless of the fact that it is occupied territory. The right to housing is based on various bodies of international human rights law, including: the Universal Declaration on Human Rights of 1948 (hereinafter “UDHR”) (Art. 25(1)); the International Covenant on Economic, Social and Cultural Rights of 1966 (hereinafter “CESCR”) (Art. 11); the International Covenant on Civil and Political Rights of 1966 (hereinafter “ICCPR”) (Art. 17); the International Convention on the Elimination of All Forms of Racial Discrimination of 1969 (hereinafter “CERD”) (Art. 5(e)(iii)); and the Convention on the Rights of the Child of 1990 (hereinafter “CRC”) (Arts. 16, 27).

Article 11(1) of the CESCR contains the most elaborate iteration of the right to housing, with an emphasis on *adequate* housing, as part of the general right of every individual to an adequate standard of living for himself and his family. The provision includes not only the basic right to housing but also the right to “the continuous improvement of living conditions.” Furthermore, the article obligates States Parties, of which Israel is one, to take appropriate measures to ensure the realization of these rights.

In 1991 and 1997 the UN Committee on Economic, Social and Cultural Rights further defined the right to adequate housing and recorded their commentary in General Comments 4 (1991) and 7 (1997). According to the Committee, “the right to housing should not be interpreted in a narrow or restrictive sense . . . Rather it should be seen as the right to live somewhere in security, peace and dignity.”¹⁷¹ Included in this right are the rights to adequate basic infrastructure and “adequate location with regard to work and basic facilities – all at a reasonable cost.”¹⁷² The requirement that affordable housing

¹⁷⁰For instance, in 2009 alone, 300 individuals (149 of them children) lost their homes in East Jerusalem as a result of administrative house demolitions. ACRI 2010, *supra* note 3, p. 12 at 47.

¹⁷¹The Right to Adequate Housing (Art. 11(1)): 13/12/1991. CESCR General Comment 4. (General Comments), para. 7.

¹⁷²*Id.*

be made available is reiterated later in General Comment 4, which includes an obligation on States Parties to ensure that the cost of housing in a given area is proportionate to the income levels there.¹⁷³ Additionally, adequate housing must be made accessible to all segments of the population, particularly disadvantaged groups.¹⁷⁴ States Parties are required to reform laws and policies in order to adhere to these conditions, and in particular they must “not be designed to benefit already advantaged social groups at the expense of others.”¹⁷⁵

According to this framework, Israel is obligated not only to ensure that Palestinian East Jerusalemites are guaranteed access to legal, affordable, safe housing, but also to focus on their needs in particular, as they are disadvantaged politically, economically and socially whether examined under Israel's obligations under both international human rights law and international humanitarian law.¹⁷⁶ Instead, the multitude of policies and practices applied in East Jerusalem result in a dearth of legally available, affordable, and accessible housing for the Palestinian population. Israel claims that it does not discriminate, as its policies and practices are neutral and equal toward both Jews and Palestinians in Jerusalem. Even assuming that this is the case, the disadvantaged position of Palestinian East Jerusalemites is well known to the Israeli authorities – including their disparate average income when compared to the Jewish sector, their housing needs, the lack of adequate infrastructure provided them, the difficulty of proving ownership over the lands they own, and on which they are interested in building, their lack of representation in official policymaking bodies, and more. And yet these very aspects of life among the Palestinian sector present a barrier to much of the Palestinian population when seeking permits to build or expand housing because they prevent them from meeting the prerequisites required by law and policy in Jerusalem.

Israel's policies and practices are therefore manifestly inappropriate to an entire segment of the population, and they result in the mass violation of the right to adequate housing. **The onus is on the Israeli authorities to show that the clear discriminatory result is not discriminatorily motivated; and regardless of the motivation, Israel is obligated to reform the laws and policies that are inappropriate for a significant and disadvantaged segment of the population, or that benefit one segment at the expense of another, in order to ensure the right to adequate housing for the entire population**

¹⁷³*Id.* at para. 8(c).

¹⁷⁴*Id.* at para. 8(e).

¹⁷⁵*Id.* at para. 11; paras. 12 and 15.

¹⁷⁶It should be noted that general prohibitions on discrimination (as found in the ICCPR, CESCR, CERD, CRC and Apartheid Convention, *inter alia*) apply to East Jerusalem regardless of whether it is considered legally annexed territory or occupied territory (given the “effective control” test discussed above). If it is considered occupied then Israel owes additional duties to the Palestinian residents as protected persons (according to international humanitarian law), and they may not be denied basic rights, such as the right to housing, in favor of civilians of the occupying power (i.e. settlers).

of Jerusalem.

One result of this violation over the past several decades, and particularly since the start of the Second Intifada, when building violation enforcement including administrative demolitions increased in frequency, has been the displacement of many Palestinian East Jerusalemites. This result will be discussed in the next section.

For those who have chosen to remain in unauthorized, unsafe, and often unaffordable housing situations in East Jerusalem, and whose homes are then demolished, the violation is two-fold. At the outset, their rights to adequate housing have been violated as the situation in East Jerusalem does not guarantee them access to safe, legal and affordable housing. Secondly, when their homes are demolished, their basic right to housing is again violated and may even constitute prohibited “forced eviction” according to the CESCR and CRC, among others.

The UN Committee on Economic, Social and Cultural Rights acknowledged in its General Comment 7 of 1997 that the use of the term, “forced evictions,” is problematic, as are the terms “illegal evictions” or even “unfair evictions”.¹⁷⁷ In many cases evictions are conducted according to law and in the fulfillment of obligations to maintain public safety and order. However, the Committee notes that evictions cannot be considered legal when they are based on laws that do not meet the standards of the International Covenants on Human Rights.¹⁷⁸ In January of 2009, UN Special Rapporteur on Adequate Housing, Raquel Rolnik, stated that: “Forced evictions constitute a grave breach of human rights. They can be carried out only in exceptional circumstances and with the full respect of international standards.”¹⁷⁹

While it would appear that Israel’s practice of demolishing unauthorized homes in East Jerusalem is conducted in accordance with the law, and thus not arbitrarily, **the very laws and policies that govern the demolition regime, which necessarily result in mass evictions, do not meet basic standards of human rights law – and in fact violate them.**

Thus, Israel’s lack of adequate planning and development for the Palestinian sector in East Jerusalem, combined with the imposition of inappropriate laws and policies for obtaining building permits, and its practice of punishing violations of these laws including administrative home demolitions, create a situation in which its obligation under international humanitarian law to maintain public safety and order are violated, as well as its obligations under international humanitarian and human rights law to respect the home and to guarantee the right to adequate housing. Additionally, Israel may be

¹⁷⁷The Right to Adequate Housing (Art. 11(1)): Forced evictions: 20/05/1997. CESCR General Comment 7. (General Comments), para. 3.

¹⁷⁸*Id.*

¹⁷⁹UN Special Rapporteur on Adequate Housing – Statement on Forced Evictions in Cambodia, 30 Jan 2009.

conducting illegal “forced” (or “unfair”) evictions.

4.2.2 The process of “ETHNIC displacement” and *de facto* forced deportation

As has been discussed throughout this report, the lack of available, legal housing for Palestinians in East Jerusalem, along with the lack of adequate infrastructure and development opportunities, combined with the widespread demolition of Palestinian homes without permits, have caused many Palestinian East Jerusalemites to leave their homes, often including their families and communities, for other East Jerusalem neighborhoods; still others have found themselves with no choice but to leave not only their physical homes and neighborhoods but also East Jerusalem, their place of habitual residence and their place of birth. Because of increased enforcement of residency revocation regulations, many of those who leave also lose their right to return. It appears that we can expect to see an increase in the trend to leave the area in the coming years, as the Palestinian population will reach capacity and no physical space will remain in the already densely crowded sections of East Jerusalem into which Palestinians are packed as a direct result of the policies and practices implemented by the authorities. As this report claims in this section, the current situation has begun what we will term a process of “ethnic displacement”.

Displacement is any situation in which one has no alternative but to leave one’s home or place of habitual residence. Displacement may be the result of several types of external factors, each with various legal implications. It should be noted that the terms “deportation”, “transfer”, “forced eviction” and “forced migration” are among the terms used to describe unlawful displacement and are often used interchangeably. The terms themselves are of less importance than understanding what is permitted and prohibited under international law, and which rights and obligations are triggered accordingly. Therefore, before commencing a discussion on the process of ethnic displacement taking place in East Jerusalem, we will take a moment to outline various displacement scenarios and their legal ramifications. An examination of the full body of international law relating to displacement shows that there are three general categories of displacement of persons:

1. Unlawful displacement (“deportation or transfer”) *by force* describes a situation in which a person or population of civilians is removed from their homes against their will and through the use of physical violence or the threat thereof; it is a war crime when committed during times of war or occupation and a human rights violation when committed during times of peace, *unless* imperative to the safety of those deported/transferred (displaced) or for military necessity.
2. Unlawful or “arbitrary” displacement *by obligation* describes a situation in which

the displacement is executed either during war or peace and through obligation, rather than physical force or the threat thereof, but where the grounds for the displacement are illegal (i.e. not for the safety of those displaced or otherwise in violation of international law); it constitutes a human rights violation and potentially a war crime.

3. Lawful, non-arbitrary displacement *for safety* describes a situation in which persons are obliged (usually not physically forced) to leave their homes in the interest of safety and health, typically as a result of natural disaster, war or other exigent circumstances; this type of displacement is not illegal in and of itself, but it does create rights on the part of the displaced, such as to return, and if such rights are not upheld, a legal violation has occurred.

In this section we will attempt to demonstrate that Israel's policies and practices toward the Palestinian population of East Jerusalem have stimulated a process of unlawful/"arbitrary" displacement by obligation, as described in the second category above, specifically on an ethnic basis, and that Israel is therefore in violation of international human rights law. It is our conclusion that the current reality in East Jerusalem, and its probable near future, at the very least violate this provision of international human rights law – but may also violate international humanitarian law and thereby constitute a war crime. Let us turn to a more detailed discussion on the three categories of displacement in order to support our conclusion.

Forced displacement during times of war or occupation is termed "unlawful deportation or transfer"¹⁸⁰ and is illegal under international humanitarian law. It is considered a war crime, as it is a grave breach of the Fourth Geneva Convention Article 49(1), taken together with Article 147, and reiterated by the Rome Statute of the International Criminal Court ("Rome Statute") Articles (8)(2)(a)(vii) and 8(2)(b)(viii).¹⁸¹ In this case the deportation or transfer involves the forced (either physically or through the threat of physical force) relocation of persons or populations within or outside state borders (and in the case of an occupation, the relocations of protected persons within

¹⁸⁰The use of the term "deportation" here must not be confused with other uses of deportation to describe the legal removal of persons unlawfully present in a place or country based on the laws of the place, as long as they meet standards of international law (i.e. they are neither based on or conducted with a discriminatory or otherwise improper motivation). Examples include when a state deports a person whose visa has expired or who has infiltrated a border illegally without proper legal documentation to stay. In such a case the person does not have a right to return to the place from which s/he was removed, and the deportation is legal, despite the fact that it is also forced or obliged.

¹⁸¹When the deportation or transfer is conducted on a large scale and as "part of a widespread or systematic attack directed against any civilian population," then it may reach the level of a crime against humanity, in addition to a war crime, according to the Rome Statute's definitions and specifically Article 7(1)(d).

the occupied territory, into the territory of the occupying power, or elsewhere).¹⁸² The legal exception to this prohibition is when the deportation or transfer is unavoidable for military necessity or in order to protect the safety of the person or population, and in such a case their right to return must be ensured immediately after the military necessity ceases or upon the restoration of safe conditions.¹⁸³

International human rights law prohibits displacement by force *or* obligation, during war (or occupation) *or* peace. Its provisions have been summarized and compiled into the “Guiding Principles on Internal Displacement”. While the Guiding Principles are “soft law,” and as such not binding on states as are treaties and other signed conventions, according to the UN Special Rapporteur on the Human Rights of Internally Displaced Persons, these Guiding Principles “restate and compile human rights and humanitarian law relevant to internally displaced persons.”¹⁸⁴ The Guiding Principles define internally displaced persons as:

persons or groups 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 (emphasis added).¹⁸⁵

This definition has also been adopted by the ICRC and OCHA.¹⁸⁶ It is our view that this definition applies to displacement across internationally recognized borders as

¹⁸²See, e.g. ICRC, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003), 109 (on Art. 8(2)(a)(vii) of the Rome Statute, “unlawful deportation or transfer”): “Accordingly, the crime of unlawful deportation or transfer is committed as soon as people are *forcibly removed from their ordinary residences for purposes not permitted by international humanitarian law* (emphasis added).”

¹⁸³Article 49(2) of the Fourth Geneva Convention contains a similar provision regarding evacuation of parts or all of the protected persons, allowing such evacuation if it is for their protection during hostilities and given that they are permitted to return to their homes as soon as the hostilities have ended. Such evacuation should not be to places outside the occupied territory unless physically impossible to do otherwise. See Pictet *Commentary*, *supra* note 167, p. 45 at 280.

¹⁸⁴Office of the United Nations High Commissioner for Human Rights, Special Rapporteur on the Human Rights of Internally Displaced Persons, “International Standards,” *available at* <http://www2.ohchr.org/english/issues/idp/standards.htm> (retrieved 29 Dec. 2010).

¹⁸⁵The Guiding Principles on Internal Displacement, Annotations, 2nd Edition, by Walter Kälin, 2008, *available at* <http://www.asil.org/pdfs/stlp.pdf> (retrieved 29 Dec. 2010). Published by the American Society of International Law and the Brookings Institute in 1998 and updated as recently as 2008, Introduction – Scope and Purpose, 2 [hereinafter “Guiding Principles”].

¹⁸⁶ICRC Publication 2009 ref. 4014, *Internal displacement in armed conflict: facing up to the challenges*, 2009.

well.¹⁸⁷

The Guiding Principles state a prohibition against – or, phrased positively, grant a right to every human being to be protected from – displacement by force or obligation.¹⁸⁸ As international humanitarian law has carved out narrow, specific exceptions to the prohibition, so too has international human rights law. Under international human rights law, displacement is allowed: on a temporary basis when during armed conflict and based on military necessity or in order to protect the safety of the civilians; in cases of large-scale development projects if and only if they are “justified by compelling and overriding public interests;” and in cases of natural disasters where displacement is necessary for the health and safety of the civilians evacuated, and for only as much time as is necessary.¹⁸⁹

When such exceptions are invoked, international human rights law reiterates international humanitarian law’s requirement that those deported/transferred (displaced) be guaranteed the right to return to their homes upon the cessation of the war/occupation, and expands their rights, whether during war or peace. These rights include: the right to return to one’s home once conditions are safe; the receipt of humanitarian assistance if needed; the right to seek asylum in other countries should the displacement be prolonged and due to circumstances giving rise to refugee status; the guarantee of all basic human rights (standard of living, family privacy, adequate housing, etc.).¹⁹⁰ In short, displacement is permitted under international law *only* when based on proper legal grounds conforming with international legal standards (such as eviction or deportation based in law), *or* in the interest of safety or military necessity, and where the latter invokes a host of rights, including the right to return.¹⁹¹

As stated, displacement by force during times of war, occupation or peace is prohibited under both international humanitarian and human rights law, with the exception of cases of military necessity or for the protection of the displaced (both of which invoke rights on the part of the displaced). Unlawful/“arbitrary” displacement *by obligation* is an illegal form of displacement achieved *without* the use of physical force, but rather through the imposition of an obligation (such as through the applicable laws and policies), but where the obligation itself violates international law.

¹⁸⁷It follows logically that “externally” displaced persons are those who meet the ICRC/OCHA definition but who *have* crossed an internationally recognized border.

¹⁸⁸Guiding Principles, *supra* note 185, p. 51, Principle 6(1).

¹⁸⁹*Id.*, Principle 6(2)(b)-(d).

¹⁹⁰Guiding Principles, *supra* note 185, p. 51; the Convention Relating to the Status of Refugees (1951).

¹⁹¹For more on the topic of displacement as a result of natural disaster, *see* António Guterres, UN High Commissioner for Refugees, “Climate change, natural disasters and human displacement: a UNHCR perspective” (Aug. 2009) *available at* http://www.globalmigrationgroup.org/pdf/UNHCR_Policy_Paper_Climate_Change.pdf (retrieved 29 Dec. 2010).

Recalling that the Guiding Principles define the internally displaced as those “forced or obliged (emphasis added),” Principle 6 lists five major examples of unlawful or “arbitrary” displacement, the first of which is displacement **“based on policies of apartheid, ‘ethnic cleansing’ or similar practices aimed at/ or resulting in altering the ethnic, religious or racial composition of the affected population.”** The term “arbitrary” here refers to displacement with an illegal motivation – even if based on legal grounds. Given the definition of this sub-category of arbitrary displacement, we will term the sub-category “ethnic displacement”. The 70/30 demographic policy applied to East Jerusalem explicitly aims to alter the ethnic (and religious) composition of the city of Jerusalem and is a blatant motivating factor behind the imposition of discriminatory laws, policies and practices on the Palestinian population there. The result is a **process of ethnic displacement**.

The displacement process in East Jerusalem is not as obvious as in other illegal displacement scenarios around the globe, whether internal or external. During the execution of home demolitions, Israeli authorities physically and forcibly remove Palestinians from their physical homes or housing structures, but they do not physically and forcibly remove them from East Jerusalem. Israel does revoke the permanent residency status of thousands of East Jerusalemite Palestinians (which implicates separate violations of international law to be discussed in the next section) and occasionally issues notices of deportation from the area based on illegal presence, and those notices carry the threat of physical removal from East Jerusalem; in practice, however, Israel generally does not physically deport those whose residency has been revoked. In fact, there are only a handful of such cases, most of which involved the deportation of politically controversial figures from East Jerusalem to the (rest of the) West Bank.¹⁹² It is worth noting that such *forcible* deportations meet the definition of unlawful deportation or transfer (here, within the occupied territory) under international humanitarian law – and constitute, *prima facie*, a war crime.

Since Israel’s 1967 occupation there have been few forced deportations out of East Jerusalem, and there has been no mass exodus of Palestinians out of East Jerusalem by other means. In many ways, these are convenient facts for Israel, as they conceal the slow trickle of Palestinians out of East Jerusalem and allow it to appear “voluntary”. Nonetheless, even in cases in which Israel has not physically deported a Palestinian from East Jerusalem, the denial of her/his right to reenter the territory based on residency

¹⁹²For instance, in June 2010 the Jerusalem District Court issued deportation orders against four Palestinian Hamas-affiliated Jerusalem Legislative Council members who are residents of Jerusalem, including the well-known Mohammad Abu Tir, for “illegal presence in Jerusalem.” Their residencies had been revoked based on their affiliation with Hamas (rather than for lack of presence for seven or more years). As of this writing, Mr. Abu Tir is the only one of the four to have been physically removed by the Israeli army, the other three having taken refuge in the offices of the ICRC where they remain to date.

revocation – regardless of the reason s/he originally left – effectuates the deportation. Thus, the denial of reentry by a protected person to occupied territory is *de facto* forced deportation and violates Article 49 of the Fourth Geneva Convention. This denial of reentry also violates Article 27 of the Fourth Geneva Convention, which prohibits the occupying power from discriminating between protected persons, as it treats certain Palestinians differently from others, granting some the right to move freely in the occupied territory and restricting the movement of others.¹⁹³

As for those Palestinian East Jerusalemites who have neither been physically deported out of the city nor whose residencies have been revoked while located “abroad,” Israel’s policies and practices in the city create a hostile living environment that eventually obliges many to leave. Notwithstanding the exceptions, the fact is that it is abundantly difficult to obtain a building permit in the Palestinian sector of Jerusalem, and many Palestinians in East Jerusalem are faced with no choice but to build illegally and wait for their homes to be demolished, or to leave the area and risk not being allowed to return. The fact that the option to build illegally exists and is quite popular does not render leaving the area a meaningful or “voluntary” choice in any legal sense. Instead, Israel’s policies and practices in East Jerusalem are aimed at, and have begun to accomplish, a specific goal: to restrict Palestinian population growth in favor of Jewish population domination, with all its ramifications on the future character of Jerusalem, in particular, and Israel generally.¹⁹⁴ Over the coming decades we can expect to see Israel progress toward its goal, as population growth speculations show that the Palestinian population will exceed the capacity of the restricted areas of East Jerusalem.

Thus, a process of displacement of a particular ethnicity has begun as a result of institutionalized policies designed to **alter the ethnic, religious or racial composition of the affected population**, by creating a situation in which leaving is not by choice but based on lack of alternative, and rendering the displacement unlawfully *obliged*.¹⁹⁵ The

¹⁹³It should be noted that the Pictet Commentary on Article 27(3) specifically mentions “nationality” as among criteria that may *not* form the basis of discrimination (in addition to race, religion, political opinion, language, etc.). Pictet Commentary, *supra* note 167, p. 45 at 206-7.

¹⁹⁴In his last published report in January 2006, Prof. John Dugard, former Special Rapporteur of the Human Rights Council on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, discussed what he termed the “de-Palestinization of Jerusalem” and “the emergence of a new wave of internally displaced persons.” He stated that “Israel has embarked upon major changes to the character of Jerusalem. In essence, these changes are designed to reduce the number of Palestinians in the city and to increase the Jewish population in the city, thereby undermining Palestinian claim to East Jerusalem as the capital of an independent Palestinian State.” “Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine,” Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Commission on Human Rights, Sixty-second session, E/CN.4/2006/29, 17 January 2006, p. 5, para. 2, p. 13, para. 31.

¹⁹⁵Currently it appears that Israel can be said to be in violation of human rights law for causing displacement by obligation, and thus follows our conclusion to that effect. However, we have purposely refrained from

Palestinians obliged to make this choice are part of the process of unlawful/arbitrary “ethnic displacement” in East Jerusalem.¹⁹⁶ Additionally, in cases in which Palestinians were deported out of the city or refused reentry, Israel has committed the war crime of **forced deportation**.

In sum, Israel’s discriminatory planning and housing policies and practices in East Jerusalem, including administrative home demolitions and discriminatory residency policies (particularly since the start of the Second Intifada), have set into motion a **process of “ethnic displacement”** of parts of the Palestinian population of East Jerusalem – in contravention of international human rights law, and perhaps humanitarian law as well. Should the status quo of policies and practices remain – or worsen – this process of ethnic displacement will only intensify.

A Note on the Impact of Displacement on Family Unification Rights

The process of ethnic displacement of Palestinian East Jerusalemites also impinges on basic family rights enshrined in both international humanitarian and human rights law, namely that family ties must be protected and honored and the family must be allowed to remain together (what is often termed the right to “family unification”). As was mentioned above in section IV(b)(i) on the right to adequate housing, a state’s obligation to protect the family is paramount.¹⁹⁷ The Pictet Commentary on Article 27 of the Fourth Geneva Convention emphasizes the importance of the family unit and obligates the occupying power to ensure that family ties may be maintained.¹⁹⁸

The rights to protection, privacy and the right to live together as a family are found

drawing a determinative conclusion regarding the question of unlawful deportation or transfer – or *forced* displacement. Given the occupation context (and the fact that Palestinians are protected persons obliged to move from one part of the occupied territory elsewhere either within or outside the territory), it is important to consider whether the aggregate effect of Israel’s policies in East Jerusalem could amount to the kind of forcible deportation and transfer of which international humanitarian law conceives.

¹⁹⁶Similarly, in MAY OF 2009, THE CENTRE ON HOUSING RIGHTS AND EVICTIONS SUBMITTED IN ITS SHADOW REPORT TO THE COMMITTEE AGAINST TORTURE THAT THROUGH ITS POLICIES TOWARD EAST JERUSALEM, INCLUDING ADMINISTRATIVE HOME DEMOLITIONS, ISRAEL IS COMMITTING “DISCRIMINATORY FORCED EVICTIONS.” IT IS THIS REPORT’S CONCLUSION THAT THE SLOWLY INCREASING CUMULATIVE EFFECT OF THESE EVICTIONS IS A PROCESS OF ETHNIC DISPLACEMENT. WRITTEN SUBMISSION OF THE CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE) TO THE COMMITTEE AGAINST TORTURE AT ITS 42ND SESSION ON THE OCCASION OF THE PERIODIC REVIEW OF ISRAEL, MAY 2009, SEC. 2.2.

¹⁹⁷Art. 46 of the Hague Regulations and Arts. 26 and 27 of the Fourth Geneva Convention. Reference to the obligation to reunite dispersed families, reinforcing the importance of the right of the family to remain together, is also made in Protocol I of 1977 to the Geneva Convention. However, Israel is not a party to this Protocol.

¹⁹⁸Pictet Commentary, *supra* note 167, p. 45 at 202-3. Article 26 of the Fourth Geneva Convention also emphasizes the obligation to reunite dispersed families.

in all of the major international human rights instruments, including the UDHR, ICCPR, CESCER and CERD,¹⁹⁹ and they have been dealt with at length in the case law of the European Court of Human Rights.²⁰⁰ UN Human Rights Committee General Comment 19 of 1990 emphasizes the state's obligation to adopt laws and policies in order to guarantee "the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."²⁰¹

Home demolitions often cause family separation because those evacuated find themselves in immediate need of shelter and are often forced to split up in order to find homes with family and community members. In cases in which the demolition itself, or the mere inability to find legally available housing, causes a family, or part thereof, to have no option other than to move to the West Bank, this displacement also may lead to the revocation of those family members' status as permanent residents in Israel (as described in sections II(c)(ii) and (iii) above). This is also often the case where East Jerusalem Palestinians marry Palestinians from the West Bank or Gaza and are unable to live together legally in East Jerusalem. Israel's policies denying the right to family unification also result in a process of ethnic displacement. In most cases, the loss of residency status renders Palestinian former East Jerusalemites barred from entry into East Jerusalem and Israel, essentially eliminating their ability to maintain ties with their families and communities, as well as their ability to access holy sites, all of which constitute violations of protected human rights.

A Note on Inhuman Acts and the Crime of Apartheid

Israel's discriminatorily-motivated policies toward the Palestinian population of East Jerusalem approach, but likely do not amount to, the Crime of Apartheid under Articles 7(1)(j) and 7(2)(h) of the Rome Statute, but may constitute a violation of the UN Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 (the

¹⁹⁹See Arts. 16(1) and (3) of the UDHR; Arts. 23(2) and 17 of the ICCPR and their respective General Comments 19 of 1990 and 16 of 1988; Art. 10(1) of the CESCER; Art. 10(1) of the CRC; Art. 5(d)(iv) of the CERD.

²⁰⁰Although Israel is not a part of the Council of Europe, nor is it subject to the jurisdiction of the European Court of Human Rights or the European Convention on Human Rights of 1950, the principles outlined by that convention and court, particularly Article 8 protecting families, are instructive as to the growing acceptance of certain universal human rights.

²⁰¹General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23), 27/07/1990, para. 5. It must be noted that in general the highest protection of the "family" in international law is required for the immediate family – parents and their minor children – rather than extended family such as grandparents, aunts and uncles, and cousins. See, e.g., *id.* at para. 2. However, as the UN Human Rights Committee noted in General Comment 19, some protection must be afforded to all levels of the family. Indeed, in the Palestinian East Jerusalemite context, extended families often live in the same buildings if not the same homes, rendering their separation in some cases as grave as that of the immediate family.

“Apartheid Convention”). According to the Rome Statute, the crime of apartheid is defined as “inhuman acts” that constitute crimes against humanity (including deportation, under Article 7(1)(d)) “committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”

Certainly Israel’s policies and practices vis-à-vis the Palestinian sector in Jerusalem constitute institutionalized discrimination and domination of one population over the other with the intent to perpetuate this domination through strengthening the numbers and socio-economic well-being of one population at the expense of another. Since obtaining building permits in the Jewish sector is a virtual non-issue, and infractions are penalized disproportionately in the Palestinian sector both in frequency and size²⁰² – combined with the fact that in many cases permits are granted for Jewish homes and community buildings on plots formerly held by Palestinians – the result is a clear situation of illegal discrimination, in violation of all of the major bodies of international human rights law mentioned in this report. Housing is of course only one area in which this regime is manifested. Maintaining a static demographic balance, particularly in the face of more rapid population growth by one sector than the other, by definition requires either the displacement of members of that growing sector from the area, or the prevention of entry to the area by additional members belonging to the same group – or both. Needless to say, the maintenance of a demographic balance based on ethnicity or nationality constitutes, *prima facie*, an illegal and repugnant practice of discrimination that is reminiscent of the motivation behind policies of apartheid and “ethnic cleansing”.

That said, the term “inhuman acts” suggests a far more directly physical and brutal approach to the Palestinian population than is currently employed, including the use of increased physical violence against their persons or other forms of severe persecution. Thus, we may conclude that Israel’s actions in East Jerusalem thus far do not rise to the level of the Crime of Apartheid according to the Rome Statute, although it is debatable whether or not they could be considered “inhuman acts” under the Apartheid Convention.

Israel’s policies and practices in East Jerusalem appear to meet the definition of the “inhuman acts” described by the Apartheid Convention, particularly according to those sections of Article 2(c) highlighted below. Article 2 defines the Crime of Apartheid as certain “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over another racial group of persons and systematically oppressing them,” including:

²⁰²In other words, not only are there more fines imposed and demolitions carried out in the Palestinian sector than in the Jewish sector, particularly in proportion to the percentage of violations carried out by Israel in each sector, but the demolitions in the Palestinian sector are of entire homes whereas they are only of parts of homes or businesses in the Jewish sector. See section 2(e)(i) above.

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof (emphasis added).

Another crime, “ethnic cleansing,” is a strong term that has generally been used in cases of widespread violence, murder, rape and pillaging, which are clearly not appropriate descriptions in the present context. Ethnic cleansing is a crime under international criminal law, namely the Statute of the International Criminal Tribunal of the Former Yugoslavia (ICTY), and based on the acts committed during the conflict in the Former Yugoslavia. In 1993 a United Nations Commission defined the state of ethnic cleansing as “the planned deliberate removal from a specific territory, persons of a particular ethnic group, by force or intimidation, in order to render that area ethnically homogenous.”²⁰³ The crime as described in numerous cases in the ICTY²⁰⁴ has typically included acts of rape, torture, imprisonment, and forced deportation in order to dramatically (and quickly) alter the ethnic composition of an area.

The present case of East Jerusalem constitutes a situation *resulting in* the ethnically-motivated *partial* removal of a population of one ethnicity (the Palestinians) in order to preserve a vast majority of another ethnicity (the Jews, and in many cases to replace former Palestinian neighborhoods or homes with Jews), and by a government that is dominated by that same majority ethnicity. While these policies and their results are morally repugnant and constitute violations of international law as discussed above, this

²⁰³Human Rights Questions: Human Rights Situations and Reports of the Special Rapporteurs and Representatives: Situation of Human Rights in the Territory of the Former Yugoslavia, U.N. GAOR, 47th Sess., U.N. Doc. A/47/666-S/24809 (1992).

²⁰⁴For examples, see Case No. IT-95-14/2-A *Prosecutor v. Dario Kordic and Mario Cerkez* (17 Dec 2004) and others available on the ICTY website: <http://www.icty.org/>

report suggests for an abundance of reasons reserving the term “ethnic cleansing” for situations involving far greater levels of violence and intimidation and more comprehensive and forcible removal of an entire ethnic population. Nonetheless, this report will make note that “ethnic cleansing” as it is conceived is not unrealistically far from the situation perpetuated in East Jerusalem, and therefore we warn against the direction that the policies and practices imposed there could take if they become harsher.

We now turn to discuss the legal implications of the results of this ethnic displacement process when it leads to loss of residency, or “residency-less-ness” – or in some cases when that loss directly causes displacement.

4.2.3 Residency-less-ness

In numerous cases, the result of Israel’s policies toward Palestinian residents of East Jerusalem is that many Palestinians are left with no meaningful alternative other than to leave East Jerusalem to live elsewhere. In other cases, normal life circumstances simply lead Palestinians to leave East Jerusalem to live elsewhere – such as work and study opportunities, marriage or family obligations abroad. Many Palestinians choose to live in the West Bank, and others find ways to live in other places around the world, from the United States to the United Arab Emirates. Whatever the case or reason, non-presence in Israel (which according to Israeli law includes East Jerusalem), or the inability to prove that one’s “life center” has been in Israel for the previous seven consecutive years, are grounds for residency revocation. In other words, even when it is not Israel’s policies that drive Palestinians out, in many cases, they *keep* them out.

At the outset, we must preface this discussion with the very basic fact that Israel has made what appears to be a deliberate and strategic choice in its handling of the legal status of East Jerusalemite Palestinians. While it may appear that the Israeli authorities were cognizant of the political sensitivities surrounding legal status in Israel for Palestinians and therefore carved out a special, long-term status option that would not require swearing allegiance to the State of Israel, the choice to equate their status with that of foreign citizens with permanent residency in Israel is entirely inappropriate given the realities of their lives across borders, the fact of occupation, and the rights of individuals (and particularly members of indigenous groups)²⁰⁵ to remain in their home communities. That is to say, Israel’s choice to grant permanent residency status

²⁰⁵To be clear, it is our opinion that a claim may be made regarding the indigenesness of both Jews and Palestinians in Israel. What is relevant is not whether one group is indigenous whereas the other is not. These determinations are neither dependent on one another nor mutually exclusive. What is relevant is that under international law Palestinians, too, have the right to a nationality and to live in and be allowed to return to their native home. For more on the definition of indigenous peoples and their human rights, *see, e.g.* Working Paper by the Chairperson-Rapporteur of the UN Working Group on Indigenous Populations, Mrs. Erica-Irene A. Daes. On the concept of 1 (1996); UN Declaration on the Rights of Indigenous Peoples (2007).

to Palestinians in East Jerusalem has enabled the State to bar many Palestinians from returning.

Therefore, even in cases in which a Palestinian former East Jerusalem resident has not been rendered stateless (or “residency-less” as the case may be) in contravention of international law (as the grounds for revocation were obtaining residency or citizenship abroad), s/he has been barred from returning to her/his place of habitual residence – and in most cases, her/his homeland. This situation constitutes both a violation of the right to return to one’s home under universal human rights law provisions enumerated below, as well as the specific rights of members of indigenous groups.²⁰⁶

The basic right to nationality is enshrined in international human rights law. Of particular relevance is the right to non-discrimination in acquiring and maintaining nationality as expressed in Article 5 of the CERD. Under Article 5(d)(iii) of the same Convention, every individual has the right to nationality. Article 24(3) of the ICCPR, and its corresponding General Comment 17, emphasize the right to nationality for every child. Under Article 5(d)(ii) of the CERD, Article 12 of the ICCPR, and Article 13 of the UDHR every individual has the right to leave any country, including his or her own, and to return to his country. Furthermore, according to Article 12(4) of the ICCPR, “no one shall be *arbitrarily* deprived of the right to enter his own country” (emphasis added).²⁰⁷

In an effort to reduce and combat the prevalence of statelessness in areas of the world that have experienced conflicts that altered borders, such as the region under discussion here, the United Nations General Assembly passed a resolution in 1954 to begin drafting what would become the 1961 Convention on the Reduction of Statelessness, reiterating customary international law regarding stateless persons.²⁰⁸ According to Article 8(1) of the Convention, a state “may not deprive a person of his nationality if such deprivation would render him stateless.” Furthermore, under Article 9, a state “may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”

The majority of East Jerusalem Palestinians are already technically stateless in the sense that they have no Israeli nationality (but rather permanent residency), and possess no other residency or citizenship status. As was explained in section II(c)(ii) above, the Jordanian passports available to Palestinians in the West Bank (including East Jerusalemites) do not grant them any residency or citizenship rights in Jordan; they function merely as *laissez-passer* travel documents. Thus, for them the denial of

²⁰⁶ *See, id.*

²⁰⁷ According to section 3 of Article 12, these rights may only be restricted by law and if “necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

²⁰⁸ Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, entered into force Dec. 13, 1975.

residency in Israel risks the result of statelessness in the sense of having no legal status bearing the right to leave and return to any *state* – and perhaps even *anywhere*. The fact that many Palestinian East Jerusalemites whose residency status is revoked may be granted the ability to reside elsewhere, namely under the PA (which is not a state), does not relieve Israel of its obligation under international law to ensure that it does not render any of its “nationals” stateless (or in our case residents without any nationality, now also without any residency or ability to reenter their home or place of habitual residence).

Israel does not typically conduct such verification before revoking an East Jerusalemite’s residency, most likely due to the fact that in all practical terms the PA will not turn down a Palestinian wishing to reside in either the West Bank or Gaza Strip, even though it cannot issue her/him official residency status.²⁰⁹ In other words, East Jerusalem Palestinians whose residency has been revoked will not be left without any place in which to reside – if not lawfully, then practically. However, it is questionable whether the right to reside in occupied territory – a non-state – could be considered the legal equivalent of an alternative nationality for the purposes of a state’s duty not to render any of its nationals stateless. It is our opinion that it does not.

Indeed, revocation of residency rights from an East Jerusalemite Palestinian in most cases does not change the technical reality of her/his statelessness – in other words, except in cases in which the individual holds another nationality, s/he had no nationality before the revocation and remains without; however, it does radically change the practical reality. One of the central motivations for the creation of international legal instruments to attempt to reduce statelessness is that among the limitations on basic rights experienced by stateless persons is the lack of a “home country” to which all persons are guaranteed a right of return.²¹⁰ In interpreting the right to return to one’s country as enshrined in Article 12(4) of the ICCPR, the Human Rights Committee emphasized in its General Comment 27 of 1999 that the language of the provision, “*no one* shall be arbitrarily deprived of the right to enter his own country (emphasis added),” should be interpreted to include not only nationals of a country but those who cannot be considered mere “aliens” due to “special ties to or claims in relation to a given country.”²¹¹ The Committee specifically mentioned residents of areas whose sovereign has changed hands and permanent residents specifically as having the potential to gain

²⁰⁹ Again, this is due to the fact that the Population Registry in the West Bank and Gaza has been virtually frozen by Israel (with the exception of new births). For more *see* Section II(c)(ii) above.

²¹⁰ *See, e.g.* UN High Commissioner for Refugees on “Stateless People” *available at* <http://www.unhcr.org/pages/49c3646c155.html> (retrieved 2 Jan. 2011).

²¹¹ Human Rights Committee General Comment 27, CCPR/C/21/Rev.1/Add.9 (1999), para. 20, *available at* <http://www.unhcr.ch/tbs/doc.nsf/0/6c76e1b8ee1710e380256824005a10a9?Opendocument> (retrieved 8 Feb. 2011).

such ties. In other words, the right is guaranteed based on the individual's ties to the country, rather than her/his technical legal status in the place.

One of the problems with East Jerusalem residency status to begin with is that it places severe restrictions and conditions on that right – and to people with no other “home country” to which to return. Once residency is revoked, in many cases for exercising what should be the right to leave and return, many experience a different but perhaps equally oppressive fate: either they are trapped outside of Israel (in whatever “foreign” place has become their new “center of life”, including the OPT), or they become trapped in a small geographical area in order to *avoid* statelessness. As was explained in the previous section, since Israel does not regularly deport those whose residencies have been revoked, those wishing to remain in East Jerusalem (in their homes, with their families and communities) simply do so – but at a high cost. They are unable to travel to the rest of the occupied territory without risking being barred reentry into East Jerusalem and Israel; and once in the West Bank, they may be able to exit (for instance for work, study, family obligation or merely for travel), but not to return.²¹² They are therefore either kept *out* of their homes permanently, or trapped *inside* them by the true risk of statelessness – both of which situations constitute a violation of international humanitarian and human rights law.²¹³

According to international law as interpreted by the international community, East Jerusalem and the rest of the West Bank are one contiguous occupied territory. In examining Israel's duties as the occupying power over East Jerusalem, since Israel has merely annexed the territory in contravention of international law, Israel has no authority either to displace, relocate or deport the protected persons either within or outside the occupied territory, and it must ensure their right to move from place to place within the occupied territory.²¹⁴ Recalling the previous section on unlawful displacement, under international law exceptions to this rule may be made only in the interest of the safety and security of the protected persons or based on imperative (and temporary) military necessity, after which protected persons must be allowed to return.²¹⁵ It follows that

²¹²The technical status of such a person is a person whose residency is revoked, and therefore cannot enter Israel (or the Palestinian Authority area through Israeli border controls) without a visa or a permit. While s/he may be granted a permit for several days to enter and resolve her/his status, there is no guarantee that this will occur. The border control is more likely to send her/him back to Amman to the Israeli consulate for a visa, which will be virtually impossible for a person in her/his situation to successfully obtain. Interview with Adv. Jonathan Kuttab, 28 Dec. 2010 (notes on file with author).

²¹³Regarding the violation of international humanitarian law, *see* discussion on displacement and deportation above, and specifically Fourth Geneva Article 49 paras. 1 and 2.

²¹⁴*See* Art. 49 of the Fourth Geneva Convention, especially 49(1), 49(2) and 49(5). *See also* sources of the human right to freedom of movement, *e.g.* Art. 13 of the UDHR and Art. 12 of the ICCPR (including General Comment 27 on the Freedom of Movement).

²¹⁵*See* Pictet Commentary, *supra* note 167, p. 45 at 282-3.

the residency revocation rules, which consider the occupied territories to be “abroad” for purposes of demonstrating the relocation of one’s “center of life”, and thus restrict the Palestinians’ movement from one part of the occupied territory to another, violate international humanitarian law.

Likewise, the residency revocation rules show total disregard for the historical context of the area now called “East Jerusalem” in which artificial borders were drawn between communities over the course of the 20th century by a succession of states – not the least of which was caused by Israel’s occupation and annexation of East Jerusalem and its policies aimed to cut it off from the rest of the occupied territory. The choice to treat Palestinian East Jerusalemites the same as foreign citizens applying for permanent residency in an additional country is all the more inappropriate given the occupation context, and it creates an absurd and unlawful situation in which people who originated in a place are occupied by a foreign power and then themselves (and their children) considered foreigners when they wish to come and go.²¹⁶ After all, there is a fundamental difference between a foreign citizen with permanent residency status in Israel (i.e. a person with citizenship elsewhere) who forms a life in another country and whose Israeli residency is revoked after seven years, and a Palestinian permanent resident who is from East Jerusalem or the surrounding area *originally* and who may not hold any other nationality, and who wishes to live outside Israel for an extended period of time for whatever reason. The latter must be given the right to leave and return to her/his country.

This right is enshrined in several of the human rights law provisions listed at the start of this sub-section. Most East Jerusalem Palestinians were born in East Jerusalem or the surrounding area, as were their parents, and they have no other country – they are indigenous both to the region and in many cases to a particular location. Israel’s assumption that they may simply reside anywhere in the remaining occupied territory under the PA demonstrates a lack of respect for their ties to their histories, families, workplaces and communities in East Jerusalem, as well as a disregard for their well-being. After all, it should be well known to the Israeli authorities that life in the rest of the West Bank and Gaza entails increased hardships, from employment and housing conditions to freedom of movement, association and other basic rights.

What is more, loss of residency by an East Jerusalemite Palestinian who has moved to the West Bank or Gaza typically results in a ban on his or her entry into Israel for purposes of work, visiting family, visiting holy sites and more. Therefore, at the very least, Israel’s residency revocation policies have implications on the right to community

²¹⁶Recall that those whose residencies have been revoked must apply as if they are foreign citizens with no connection to Israel applying for residency or citizenship, and through a long and difficult legal procedure.

and the right to remain in one's community,²¹⁷ the right to an adequate standard of living,²¹⁸ the right to family unification,²¹⁹ the right to freedom of movement,²²⁰ and the right to practice and express one's religion.²²¹ Given that East Jerusalemite Palestinians are protected persons, Israel's policy of residency revocation is also in violation of its obligation to protect the family under international humanitarian law, as was discussed in section IV(b)(ii).

Lastly, it should be noted that the fact that under Israeli law Palestinian East Jerusalemites have the option to obtain citizenship (which cannot be revoked merely for lack of presence) does not relieve Israel of its duty to ensure that Palestinian East Jerusalemites are not rendered stateless. Citizenship is conditioned upon swearing loyalty to the State of Israel.²²² Although the Convention on the Reduction of Statelessness, for instance, recognizes a state's authority to require loyalty as a condition for nationality,²²³ under international law an occupying power may not require that the protected persons swear allegiance or loyalty to it, and thus the option of citizenship as it is currently predicated is not a viable or legal solution to the risk of statelessness based on loss of residency.²²⁴

In sum, the result of Israel's policies regarding residency revocation, which is often directly linked to its discriminatory planning, housing and family unification policies, is that many East Jerusalem Palestinians are either rendered "residency-less" and thus stateless, or are severely restricted in mobility based on the fear thereof, all in contravention of international law. As discussed above, an integral aspect of the human right to nationality is the right to return to one's home. The inability to return to one's home is a sign of statelessness. Given that Israel's own policies do not guarantee PA residents the absolute right to exit and enter the occupied territories, Israel cannot rely on the residency rights that Palestinian former permanent residents of Israel are likely to receive under the PA as a solution to the statelessness problem. The right to a nationality also suggests the right to live in a recognized country that can control the delivery of

²¹⁷See discussion of the right to community in section IV(b)(i) above.

²¹⁸See, e.g., Arts. 6, 7, 11 of the CDESCR.

²¹⁹See discussion of the right to family in section IV(b)(iii) above.

²²⁰See, e.g., Art. 12 of the ICCPR and General Comment 27; Art. 5(d)(i) and (ii) of the CERD; Art. 10(2) of the CRC.

²²¹See, e.g., Arts. 2, 18, 19 of the UDHR; Arts. 18, 27 of the ICCPR; Art. 14 of the CRC.

²²²Sec. 5 of the Citizenship Law, 1952.

²²³Article 8(3) of the 1961 Convention on the Reduction of Statelessness, entered into force in 1975.

²²⁴See, e.g. Article 68 of the Fourth Geneva Convention. Even if citizenship were not predicated on swearing allegiance to Israel, it would be understandable for East Jerusalemite Palestinians to opt not to obtain citizenship both for the political reason of non-recognition of the illegal annexation, and for the practical reason of avoiding putting "facts on the ground" that would potentially alter the occupied territory and the future contours of a Palestinian state.

basic rights to its nationals. It follows that the right to live in occupied territory does not suffice as a replacement for the right to live in a recognized state, and therefore Israel's reliance on the default option of PA residency rights does not satisfy Israel's obligation to ensure that none of its nationals/residents are rendered stateless.

Furthermore, we conclude that in order to meet the criteria under both international humanitarian law and human rights law, the permanent residency status held by Palestinian East Jerusalemites must not be revocable based on extended lack of presence. Firstly, according to international humanitarian law, Israel has no legal authority to bar Palestinians from moving around within the OPT, nor may it deny them reentry, other than for temporary periods based on military necessity or threats to their safety. Secondly, under international human rights law, Palestinians must have the right to return to East Jerusalem no matter how long they have been absent because it is their "country" of origin, and their status there should be treated as an irrevocable nationality. In the case of Palestinian East Jerusalemites, Israeli residency must be treated not as the secondary status as in the case of foreign citizens, but rather as the primary status – equivalent to nationality – that may not be revoked except at the request of the holder or where the holder has committed extreme acts of treason or disloyalty and has been granted full due process rights to challenge the revocation.

We will now turn to discuss the right to development, and how Israel's failure to uphold it influences all of the policies and practices imposed on Palestinians in East Jerusalem.

4.2.4 Violation of the right to development

International Human Rights Law on the Right to Development

The right to development as a stand-alone collective and individual right has been articulated relatively recently; however, it is rooted in the UN Charter, the Universal Declaration on Human Rights and the two human rights covenants (the ICCPR and the CESCR) – which recognize peoples'²²⁵ rights to self-determination and obligate states to create conditions for participation without discrimination in public affairs and the maintenance of an adequate standard of living.

The collective right to development was more clearly stated in "Common Article 1" of both the ICCPR and CESCR, which explicitly defines the right to self-determination of all peoples as including their right to "freely determine their political status and freely pursue their economic, social and cultural development." It should be noted that the

²²⁵There is no official definition of "peoples" under international law, but the term is generally thought to refer to population groups residing in occupied or otherwise disputed territories that aspire to self-determination.

ICCPR and CESCR are two of the principal sources of international human rights law, and Israel is a party to both.

Several United Nations General Assembly resolutions over the last several decades reaffirmed these rights,²²⁶ and in 1986 the right to development was officially declared and defined by the UN General Assembly via the “Declaration on the Right to Development.”²²⁷ According to Article 1 of the Declaration, the right to development is defined as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”²²⁸ While the declaration is not a binding source of law in itself, its legal roots, the history of its development, the fact that it was adopted by the UN General Assembly, and the international legal fora in which it was reaffirmed since its original adoption demonstrate the international consensus regarding the right to development. For instance, the importance of the right was reaffirmed in 1993 in the World Conference on Human Rights held in Vienna, which adopted the “Vienna Declaration and Programme for Action,”²²⁹ as well as in General Comment 21 of December 2009 of the United Nations Committee on Economic, Social and Cultural Rights.²³⁰ According to these reiterations of international law, every state must ensure the proper conditions for – and remove any obstacles to – an individual’s continued participation in her/his community’s life, as well as the collective ability of groups to develop and advance their respective communities economically, socially, culturally and politically, according to their needs.

A state’s duties with regard to the right to development are explicitly delineated. Under international human rights law, Article 2 of the ICCPR and Article 2 of the CESCR each obligate states to take active steps to ensure the realization of all of the rights enshrined in both documents, including the adoption of laws and regulations to that end. This obligation is emphasized in the Declaration on the Right to Development in Articles 2(3) and 3(1), which require the establishment of policies and conditions that “aim at the constant improvement of the well-being of the entire population and of all individuals.”²³¹

²²⁶ See, e.g. Office of the High Commissioner for Human Rights, “Development – Right to Development”, available at <http://www.ohchr.org/EN/Issues/Development/Pages/DevelopmentIndex.aspx> (retrieved 7 Feb. 2011).

²²⁷ Declaration on the Right to Development, 1986, adopted as GA Res. 41/128 available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (retrieved 29 Dec. 2010).

²²⁸ Id.

²²⁹ Available at <http://www2.ohchr.org/english/law/vienna.htm> (retrieved 7 Feb. 2011).

²³⁰ Para. 7. Available among other General Comments at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (retrieved 29 Dec. 2010).

²³¹ Declaration on the Right to Development, *supra* note 227, p. 66.

The Human Right to Participate in Cultural Life

A related right is that of every individual to participate in the cultural life of her/his community. This right is enshrined in many instruments of international human rights law, namely Article 27 of the Universal Declaration of Human Rights,²³² Article 15 of the CESC. Regarding minorities in particular, Article 27 of the ICCPR stipulates that all members of minority groups, as individuals and in community with the other members of their group, must not be denied the right to enjoy and participate in their cultural practices, and Article 30 of the Convention on the Rights of the Child (CRC) stipulates the same regarding minority children in particular. Article 5(e) of the CERD prohibits states from discriminating against any particular group based on national, ethnic or other distinguishing characteristics in ensuring the right to culture and development.

Israel's Obligations Regarding the Right to Development

Israel's obligations therefore are two-fold: Israel must a) ensure that both the physical and legal infrastructure is in place to adequately respond to the population's natural growth and constantly improve its well-being and living conditions; and b) ensure that the Palestinian population, individually and collectively, is able to access, participate in, preserve and cultivate its culture. It may also be inferred from the second obligation that Israel must ensure that all those that wish to remain in their East Jerusalem communities have the ability to do so – a subject that was explored under the rubrics of displacement and denial of residency/statelessness in the sections above.

Israel's Violations of the Right to Development

Certainly Israel's failure to provide a comprehensive urban plan for East Jerusalem that responds to the population size and needs of East Jerusalem Palestinians, regardless of its motivations, cannot be said to meet the standards under international human rights law regarding the establishment of policies and infrastructure for social, cultural and economic development and the continuous improvement of that population's well-being. Israel is neither upholding its obligations to create conditions for development nor is it endeavoring to remove obstacles to development and advancement of the Palestinian population. Not only has Israel neglected since 1967 to expand areas zoned for Palestinian building according to population growth (while continuously increasing Jewish building opportunities), but it also continues to fail to allocate sufficient budget funds to the East Jerusalem Palestinian sector from social services to physical infrastructure,

²³²Art. 27, para. 1, stipulates that "everyone has the right freely to participate in the cultural life of the community."

thereby paralyzing the development and advancement of the population and relegating it to substandard living conditions.

In addition to these omissions, Israel actively places hurdles before the Palestinian population in East Jerusalem, further stunting its development. The stringent building permit requirements, for instance, virtually guarantee that only a small margin of Palestinian society in East Jerusalem will be able to participate in the construction and use of authorized housing. Zoning Palestinian neighborhoods with low plot ratios necessarily means that Palestinians may not engage in the construction of or choose to live in high-rise condominiums, should they opt for this affordable housing option. Restrictions on movement between the West Bank and East Jerusalem, and in some cases even with East Jerusalem, as well as the Ministry of Interior's recently intensified residency revocation activities – in part based on inadequate planning, lack of building opportunities, and widespread demolition – prevent Palestinians who until recently had free and total access to one another, from developing as a community.

What is more, the lack of inclusion of Palestinian East Jerusalemite voices in any of the decision-making processes reflects a failure on the part of Israel to uphold the community's right to participate in public affairs and contribute to its own social, economic, cultural and political development. As a result, **the laws that Israel has established in the area are manifestly unsuitable to the needs of the Palestinian population there**, as can be seen in the results described above (especially lack of housing and the loss of residency). For instance, while the Israeli authorities have justified their zoning policies vis-à-vis the Palestinian sector (such as lower plot ratios than in the Jewish sector) as conforming with the cultural desires of the Palestinian community, the authorities have failed to update these plans according to the current aspirations of the community, whose right it is to steer its own development. Instead, **Israel's policies and practices toward the Palestinian community in East Jerusalem merely stifle development.**

Indeed, Israel's failure to uphold its obligations to ensure East Jerusalemite Palestinians' right to development through the lack of adequate planning is a root cause of much of the violations of international law that are discussed herein – from the denial of the right to adequate housing, to denial of the right to residency, to the process of ethnic displacement.

A Note on International Humanitarian Law and Development

International humanitarian law deals primarily with the rights and obligations of the occupying power vis-à-vis the protected persons, and as such does not contain an explicit right to development on the part of the protected persons. That said, one of the primary duties imposed on the occupying power by international humanitarian law is that contained in Article 43 of the Hague Regulations, which requires the occupying

power to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Article 64 of the Fourth Geneva Convention relates to the penal laws already in place in the occupied territory and empowers the occupying power to change them in order to maintain its security and property, as well as to fulfill its obligations under the Convention and “to maintain the orderly government of the territory.” Article 64 has been interpreted to include non-penal laws regarding civil matters as well, and when read together with Article 43 of the Hague Regulations it stands for the principle that the occupying power may enact new laws and cancel previous laws in order to uphold its duty to maintain public safety, order and security – all without discrimination according to Article 27 of the Fourth Geneva Convention.²³³

Nonetheless, the tension between the occupying power’s duty to maintain the status quo in the occupied territory (presumably, in anticipation of a permanent sovereign quickly assuming control over the territory), and its duty to maintain public order and safety, grows ever more significant in the case of a prolonged occupation, such as Israel’s. It must therefore be kept in mind with regard to the right to development that calling on Israel to create conditions for Palestinians to develop and progress in East Jerusalem is potentially at odds with its obligation to refrain from making legal and physical changes to the territory.²³⁴

4.2.5 Home demolitions as *per se* illegal

The practice of administrative home demolition in East Jerusalem is presented by the Jerusalem Municipality as part and parcel to the enforcement of law and order in the city. Indeed houses and other structures built in violation of planning and building laws (i.e. without proper permits) are regularly demolished around the world, and as long as the demolitions are conducted without any other improper motive under international and domestic law, they are a valid means of maintaining safety and order. Likewise, were East Jerusalem legitimately under Israel’s sovereignty (rather than illegally annexed occupied territory), we would accept this basic premise for the demolitions and critique them only to the extent that they violate Israel’s obligations under international human

²³³Article 27 of the Fourth Geneva Convention relates to non-discrimination between protected persons – in other words between Palestinians. Given that under Article 49(6) of the same convention the transfer of civilians from the occupying power into the occupied territory is illegal, discrimination against protected persons in favor of non-protected persons, and specifically civilians from the occupying power (i.e. settlers), is all the more condemnable and is clearly prohibited.

²³⁴For more discussion of this tension: *See, e.g.* Adam Roberts, PROLONGED MILITARY OCCUPATION: THE ISRAELI OCCUPIED TERRITORIES SINCE 1967, 84 AM. J. INT’L LAW. 44 (1990); Yoram Dinstein The International Law of Belligerent Occupation 89-94, 116-120 (2009); Eyal Benvenisti, The International Law of Occupation 12-18 (2004).

rights law, primarily the areas of law discussed above. However, given that East Jerusalem is occupied territory and an additional set of obligations apply to Israel as the occupying power, we must examine the demolitions in this light as well.

Destruction by the occupying power of real or personal property belonging to protected persons or to the authorities under occupation is prohibited under Article 23(g) of the Hague Regulations and under Article 53 of the Fourth Geneva Convention, both of which provide an exception for military necessity alone. As such, on the surface it would appear that Israel's administrative demolition of Palestinian homes and other structures in East Jerusalem, as well as their contents (i.e. furniture and other personal belongings), is a violation of international humanitarian law, as there can be no military necessity justification for these acts, and may even constitute a war crime. According to the Charter of the International Military Tribunal implemented in the Nuremberg Trials, "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity" constitute a war crime.²³⁵ Furthermore, when such destruction is carried out on a large scale, it may rise to the level of a "grave breach" under Article 147 of the Fourth Geneva Convention ("extensive destruction of property"), subject to penal sanctions under Article 146 of the same.

The situation is complicated, however, in light of the fact that Israel's occupation of East Jerusalem (and the rest of the occupied territories) can no longer be considered temporary, and thus other obligations may be invoked. As was discussed in the previous section, Article 43 of the Hague Regulations defines the occupying power's obligations and rights via public and civil life in the occupied territory. The language of the section seems to create a tension between the occupying power's duty on one hand to do all in its power to maintain safety and order, and its duty on the other hand to avoid intervening with the laws in place "*unless absolutely prevented.*" Article 64 of the Fourth Geneva Convention adds to the occupying power's right to enact penal laws, and according to the Pictet Commentary the occupying power may also enact laws in the civil realm in order to maintain the "orderly government of the territory."²³⁶

In a short-term occupation, this tension would seem to favor leaving the occupied territory and its laws as untouched as possible until such time as a legitimate sovereign assumes power and enacts the necessary laws, policies and practices to maintain safety and order. In such a situation, refraining from creating urban plans for the occupied territory, barring any exigencies, would be considered fulfilling the occupying power's duties under Article 43. However, four decades after a territory has been occupied, leaving its laws including its urban plans as they were at the time of occupation could

²³⁵Article 6(b) of the Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal, available at <http://www.unhcr.org/refworld/topic,4565c22538,4565c25f443,3ae6b39614,0.html> (retrieved 8 Feb. 2011).

²³⁶Pictet Commentary, *supra* note 167, p. 45 at 337.

have detrimental consequences for the protected persons that would violate the occupying power's duties toward them under international humanitarian law and international human rights law. In fact, it is worthy of noting that the common translation of the term used in the original French text of from "l'ordre et la vie publics" to "public order and safety" has been criticized as limiting the original intent of the drafters, where "public life" may include more aspects of civilian life than order and safety. Legislative history of the document shows that the intent of the drafters was to include "social functions, ordinary transactions which constitute daily life."²³⁷ Building homes and other structures certainly falls under the realm of social functions and daily life transactions.

As such, the practice of administrative home demolitions in East Jerusalem must be examined in its context, and international law must be applied accordingly. Where building infractions interfere with safe and orderly public life, it would appear not only to be Israel's right to demolish the invasive structure, but in fact a duty incumbent upon it in order to protect the protected persons. Examples would include: a home or other structure built in the middle of a road thereby blocking traffic; a home or other structure built in close proximity to an electrical power plant such that it constitutes a fire hazard; or, a home or other structure built unstably that threatens to collapse and injure people and property nearby. The threat to safety and order in these cases would have to be weighed against the rights owed the protected persons based on international law, particularly in the areas discussed in the previous sections.

On the other hand, where homes and buildings in an occupied territory do not pose such a threat to the public but are demolished based ON LACK OF building permits, they cannot be justified either by military necessity or by Israel's obligation to maintain safety and order (again, arguably the lack of adequate planning in itself violates that obligation), and thus they constitute a clear violation of the prohibition on property destruction under international humanitarian law. The violation is even clearer when the demolition is part of a larger policy of demographic control, and especially where the demolished structure will be replaced with building by the Jewish population (civilians of the occupying power). In such a case, not only is Israel in violation of the prohibition on property destruction not warranted by military necessity, but it is also in violation of the prohibition on transferring its civilian population into the occupied territory (Article 49(6) of the Fourth Geneva Convention).

It is safe to say that the majority of demolitions conducted in East Jerusalem that are justified by the Jerusalem Municipality as enforcement of building and planning laws in fact are not justified as they are not based on laws that conform with Israel's duties and

²³⁷For a useful discussion on this point, see Marco Sassòli, ARTICLE 43 OF THE HAGUE REGULATIONS AND PEACE OPERATIONS IN THE TWENTY-FIRST CENTURY, International Humanitarian Law Research Initiative of the Program on Humanitarian Policy and Conflict Research at Harvard University (2004), available at <http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf>.

rights under international humanitarian law and cannot be considered military necessity, and thus fall under the latter category of illegal property destruction. That said, there will be exceptions to this rule that fall under the fulfillment of Israel's duties toward the Palestinians as the protected persons, and thus it cannot be said that the practice of administrative home demolitions in East Jerusalem is *PER SE ILLEGAL*. Nonetheless, Israel is in violation of international humanitarian law, and due to the large scale of the violation, it may well constitute a grave breach of international humanitarian law and even a war crime.

5 CONCLUSION

Following close examination of the policies and practices applied to the Palestinian sector of East Jerusalem, it can be concluded that their cumulative result is the imposition of myriad hardships on the lives of Palestinians and, in many cases, their displacement – all in order to preserve Jewish demographic control over the city. Our detailed analysis of these policies and practices under the relevant bodies of international law to which Israel is bound leads to the conclusion that Israel is in violation of at least five major legal obligations/prohibitions which together form the new normative framework presented in this report.

Firstly, based on an analysis of the right to adequate housing, as expressed in both international humanitarian law and international human rights law, Israel's policies and practices are manifestly inappropriate to an entire segment of the population, and they result in the mass violation of the right to adequate housing. **The onus is on the Israeli authorities to show that the clear discriminatory result is not discriminatorily motivated; and regardless of the motivation, Israel is obligated to reform the laws and policies** that are inappropriate for a significant and disadvantaged segment of the population, or that benefit one segment at the expense of another, **in order to ensure the right to adequate housing for the entire population of Jerusalem.**

Secondly, Israel's discriminatory planning and housing policies and practices in East Jerusalem, including administrative home demolitions and discriminatory residency policies (particularly since the start of the Second Intifada), have set into motion a **process of "ethnic displacement"** of parts of the Palestinian population of East Jerusalem – in contravention of international human rights law, and as it creates a situation of *de facto* deportation, perhaps humanitarian law as well. Should the status quo of policies and practices remain – or worsen – this process of ethnic displacement will only intensify. Additionally, Israel is engaging in the war crime of deportation when it deports Palestinians from East Jerusalem or simply by barring reentry of those who have remained outside the area for more than seven years.

Thirdly, the result of Israel's policies regarding residency revocation, which is directly linked to the displacement process, as well as its discriminatory planning, housing and family unification policies, is that many East Jerusalem Palestinians are either rendered **"residency-less"** (in addition to already being stateless), or are severely restricted in mobility based on the fear thereof, all in contravention of international law. It is this report's conclusion that in order to meet the criteria under both international humanitarian law and human rights law, the **permanent residency status held by Palestinian East Jerusalemites must not be revocable based on extended lack of presence**. In the case of Palestinian East Jerusalemites, Israeli residency must be treated not as the secondary status as in the case of foreign citizens, but rather as the primary status – equivalent to nationality – that may not be revoked except at the request of the holder or where the holder has committed extreme acts of treason or disloyalty and has been granted full due process rights to challenge the revocation.

Fourthly, Israel has a duty to ensure Palestinians' right to develop and advance on economic, social, cultural, and political levels, both as individuals and as a collective. Instead, **Israel's policies and practices toward the Palestinian community in East Jerusalem merely stifle development**, and thereby violate its obligations under international law. Indeed, Israel's failure to uphold its obligations to ensure East Jerusalemite Palestinians' right to development through the lack of adequate planning is a root cause of much of the violations of international law that are discussed herein – from the denial of the right to adequate housing, to denial of the right to residency, to the process of ethnic displacement.

Finally, the practice of administrative home demolitions, in many cases, constitutes illegal property destruction under international humanitarian law. Although Israel is also under a duty to maintain public order and safety in the occupied territory, which may in certain extreme cases justify administrative home demolition within the context of enforcing building and planning laws, in most cases Israel's demolition of homes cannot be justified either by this duty or by military necessity. Thus, Israel is in violation of international humanitarian law, and due to the large scale of the violation, it may well be considered to be committing grave breaches of international humanitarian law, and even war crimes.

These practices must be discontinued, and their damage remedied, if Israel is to meet its obligations under international law to guarantee the human rights of Palestinians and uphold their special protections as protected (occupied) persons. Moreover, Israel must discontinue its practices of demographic control in East Jerusalem, as part and parcel to achieving an overall viable, peaceful, and just resolution to the Israeli-Palestinian conflict.

Palestinian and Jewish neighborhood Allowable Building Percentages

ICAHD, Destructive, supra note 29, p. 17 19.

Palestinian Neighborhoods

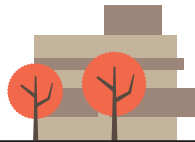
Beit Hanina **50-75%**

Beit Safafa **50%**

Jabal Mukaber **50%**

Issawiyeh **70%**

Shu'fat **75%**



Jewish Neighborhoods

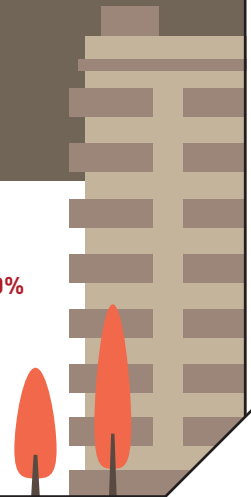
Neve Yakov **90%** / Pisgat Zeev **90-120%**

Gilo **75%**

Armon Hanaziv **75-90%**

French Hill **70%**

Ramat Shlomo **90-120%**



East Jerusalem in Numbers

Association for Civil Rights in Israel, Human Rights in East Jerusalem: Facts and Figures, 41 (May 2010).

Residents 303,429



36% of the Jerusalem population
[December 2009 data]

Education

50% School dropout rate



[2008 data]



children under the poverty line

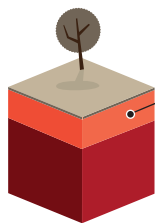
74.4% of the Arab children
45.1% of the Jewish children

Families under the poverty line

65.1% of the Arab families
30.8% of the Jewish families

Expropriated land

Since annexing East Jerusalem, the Israeli government has expropriated **24,500 dunams**



over a third of the area, which were privately owned by Arabs.

Construction

By the end of 2007 **50,197 housing units** had been built on the expropriated land, of which **NONE** for the Palestinian population



Infrastructure

160,000 Palestinian residents



have no suitable and legal connection to the water network.

50 km of main sewage lines are lacking

Home demolitions

In East Jerusalem, in the year 2009

80 homes demolished

300 people without homes.

Postal Service



8 post offices in East Jerusalem

42 post offices in West Jerusalem.