

# Revocation of Residency of Palestinians in Jerusalem

## Prospects for Accountability

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One of the major outcomes of the 1948 Arab-Israeli war was the division of Jerusalem into two parts. The western part of the city came under Israeli control, while the eastern part was controlled by Jordan.<sup>1</sup> Borders were demarcated by the Rhodes Armistice Line of 1949,<sup>2</sup> forming the legal basis for the admission of Israel into the United Nations, via UN General Assembly Resolution 273 on 11 May 1949.<sup>3</sup> On 22 June 1967, almost immediately after the occupation of the remainder of the land of historical Palestine, the Knesset adopted amendments to the Laws and Administration Ordinance providing that the “law, jurisdiction and administration of Israel should apply to any area of Eretz Yisrael designated by the government by order,” including Jerusalem, constituting the initial step in “legalizing” the annexation of the eastern part of the city.<sup>4</sup> The de facto annexation of East Jerusalem was completed on 28 June when the Knesset amended the 1950 Basic Law on Jerusalem to reflect the newly defined municipal boundaries and extend Israeli law officially to the eastern part of the city.<sup>5</sup> Immediately thereafter, the Israeli government issued orders that united both parts of the city under the jurisdiction of the existing Jerusalem municipality.<sup>6</sup> This annexation was thereafter judicially authorized by the Supreme Court, which held that both parts of Jerusalem had become an integral part of Israel.<sup>7</sup>

The annexation of East Jerusalem is illegal under international law in light of the inadmissibility of the acquisition of territory through the use or threat of use of force, as codified into article 2(4) of the UN Charter.<sup>8</sup> Accordingly, the international community has never recognized the annexation and has declared it null and void, including through UN General Assembly Resolution 2253 and UN Security Council Resolution 242.<sup>9</sup> These

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and many other resolutions called upon Israel to withdraw from the recent occupied territories and rescind all measures and refrain from taking any further measures to change the status of East Jerusalem in light of their invalidity. Despite these many resolutions, in 1980 the Knesset passed Basic Law: Jerusalem, Capital of Israel, stating in article 1, “Jerusalem, completed and united, is the capital of Israel.”<sup>10</sup> This completed the de jure annexation of East Jerusalem. In response, UN Security Council Resolution 478 affirmed that its enactment constitutes a violation of international law, declared the law’s enactment null and void, and decided not to recognize it.<sup>11</sup>

The annexation of East Jerusalem enabled the Israeli government to institutionalize a system that collectively serves to “Judaize” the city. This strategy is based on two main premises: maximizing the number of Jews and reducing the number of Palestinians through a gradual process of colonization, displacement, and dispossession.<sup>12</sup> The maximization of the number of Jews is planned to take place by attracting local and international migration to and settlement in East Jerusalem and reducing negative migration, and by developing the tourism sector, as well as higher education and high-tech industries, thus envisaging a reduction in poverty through the creation of at least 375,000 additional fulltime jobs, exclusively for Jews.<sup>13</sup> Simultaneously, the reduction of the number of Arabs in the city is undertaken through a myriad of measures, including house demolitions, house evictions, revocations of residency, and imposition of limitations on registration of newborns.

This article will take a closer look at the revocation of residency measure in East Jerusalem from 1967, exploring possible avenues to remedy the human rights violations that this measure entails. Ultimately, this examination seeks to assess the effectiveness of utilizing international human rights law and international criminal law to promote access to justice for Palestinians whose residency was revoked. The article will commence by describing the legal system that enables revocation of residency. The second part will outline the human rights violations that emanate from the revocation of residency of Palestinians in East Jerusalem, assessing the applicability of international human rights law and its available uses and shortcomings to promote Palestinians’ access to justice. The final section will take a closer look at and assess international criminal law and particularly the International Criminal Court as an alternative accountability avenue. The choice to focus on revocation of residency stems from the egregious discriminatory human rights violations that it entails, including infringing not only on residency rights but also on legal status, as well as inflicting inhuman and degrading treatment.

## **Legal Framework of Revocation of Residency**

The legal framework governing revocation of residency is multifaceted and intricate. After the 1967 war and annexation of East Jerusalem, Israel conferred the status of “permanent residents” on Palestinians, instead of granting them citizenship status.<sup>14</sup> A census was conducted, and 65,857 persons were registered in the population registry. Those who were not present in the city at the time of the census lost their right to reside in East Jerusalem. In order to regain this right, their families had to apply for family unification, a protracted

and highly complicated process.<sup>15</sup> Despite the connotation of the term permanent, this residency may be revoked. Revocation of residency is currently taking place through two methods: by the “center of life” standard and as a punitive measure.

The legislation relevant to revocation of residency includes the Entry into Israel Law of 1952 and its accompanying regulations of 1974.<sup>16</sup> Regulation 11(c) states, “a permanent residency permit expires if the holder leaves Israel and settles in another country.” Regulation 11(a) clarifies the term “settles in another country” as having lived for more than seven years in another country, having received the status of a permanent resident in a foreign country, or having become a citizen of a foreign country.<sup>17</sup> Residency in the West Bank or Gaza Strip was not considered settlement outside Israel at that time.<sup>18</sup>

In 1995, Israel changed the revocation rules without warning and without the introduction of any official legal amendment. A new criterion known as the “center of life” was introduced and used to interpret a person’s residency.<sup>19</sup> In 1995, the interpretation of the term “leaves Israel” in regulation 11(c) was expanded to include residency in the West Bank and Gaza Strip, effectuated through a directive issued by the legal advisor of the Ministry of Interior to the East Jerusalem office.<sup>20</sup> Accordingly, Palestinian residents of East Jerusalem must continuously prove that Jerusalem is their “center of life” to avoid revocation of their residency. This is demonstrated through submitting a high standard of proof, such as house ownership papers or rent contracts, electricity, water and telephone bills, payment of municipal taxes, salary slips, proof of receipt of medical care, and certificate of children’s school registration.<sup>21</sup>

The “center of life” policy, which effectively treats Palestinian residency rights in East Jerusalem as a revocable privilege rather than a human right, received judicial affirmation even before its official introduction. In the case of Mubarak Awad in 1988, the Israeli Supreme Court made reference to the “center of life” criteria when it held that since Awad received permanent residency and later citizenship in the United States following the completion of his studies and marriage, his residency permit expired: “This new reality reveals that the petitioner uprooted himself from the country and rooted himself in the U.S.A. His *center of life* is no longer the country, but the U.S.A.”<sup>22</sup>

Rigorous legal advocacy and challenges to the “center of life” policy by Israeli civil society organizations prompted the Ministry of Interior to slightly rectify this situation through the issuance of the Sharansky Declaration in 2000. Named after then Minister of Interior Natan Sharansky, who issued the declaration, it provided for the reinstatement of residency status on a case-by-case basis under a rigorous set of criteria, including the period of absence of the residents, retention of connection with East Jerusalem during absence, reasons for obtaining citizenship or residency of another country, and years of residency in East Jerusalem after return.<sup>23</sup> It is worth noting that this measure led to the reinstatement of the residency of only a few hundred people in East Jerusalem.<sup>24</sup>

The impact of the “center of life” policy is further compounded in mixed families, where one of the spouses holds Jerusalem residency and the other holds West Bank or Gaza Strip residency. Until 1991, residents of the West Bank and Gaza Strip could live with their East Jerusalemite spouses and children without needing any special permits. This changed during the Gulf War, when spouses with West Bank or Gaza Strip

residencies were required to obtain Israeli entry permits to reside with their families. A family unification procedure that came to be known as the “gradual process,” whereby applicants were given an annually renewable temporary permit, was introduced in 1995. The permit would be upgraded to temporary residency after 27 months; this residency would be renewed annually for a period of three years, after which the applicant would receive permanent residency. The gradual upgrading process was contingent on the proof of Jerusalem as the individual’s “center of life” throughout the process.<sup>25</sup>

To the detriment of Palestinian family life, the Israeli government issued order number 1813 on 12 May 2002, which effectively froze the gradual reunification process. In 2013, the order was incorporated into what was meant to be a temporary piece of legislation called the Citizenship and Entry into Israel Law.<sup>26</sup> However, the validity of the law has been extended periodically, most recently in June 2016. The law effectively prohibits the Minister of Interior from granting citizenship or residency status to Palestinians in the West Bank and Gaza Strip. The law imposes very high standards for the acquisition of temporary residency, including restrictions based on the age and criminal or security records of the applicant, as well as those of his or her family members, including his or her spouse, parents, children, siblings, and in-laws. The law also sets the ceiling at acquisition of temporary permits, preventing the applicant from ever receiving permanent residency status.

Furthermore, in 2012 the High Court of Justice upheld the constitutionality of the legislation, in a vote of 6 to 5.<sup>27</sup> Justices Cheshin, Grunis, and Naor held that the law does not violate the constitutional right to equality, while Justices Adiel, Rivlin, and Levy contended that it does. However, Justices Adiel and Rivlin found that this violation was justified so long as it was proportional, while Justice Levy justified it by security considerations.<sup>28</sup>

This legal framework leaves mixed families with the following options: live separately in the unrealistic hope that their application would be accepted without delay; live “illegally” in East Jerusalem and risk being caught; or leave Jerusalem to live together and risk revocation of their residency in light of relocating their “center of life.”<sup>29</sup> An additional option would be to maintain two households, one within the municipal boundaries of Jerusalem to continue to comply with the standard, and another in the West Bank. This is an option open to only a very limited percentage of Palestinians in East Jerusalem, in light of the staggering levels of poverty, which stand at 80 percent.<sup>30</sup> The number of Jerusalem residencies revoked between 1967 and 2015 reached at least 14,565, more than 11,000 of which took place after the introduction of the “center of life” policy.<sup>31</sup> This number excludes dependent children, which would bring the total number to over 86,000.<sup>32</sup>

A fairly recent method used to revoke residency status emerged in 2006, when the Israeli Ministry of Interior decided to revoke the residency of three newly elected members of the Palestinian Legislative Council and the Palestinian Minister of Jerusalem Affairs. The Ministry of Interior rationalized its decision in light of the residents’ political affiliation with Hamas, arguing therefore that they had “severely violated their minimal obligation of loyalty to the State of Israel.”<sup>33</sup> In the wake of this alarming precedent,

several human rights organizations filed a petition to the Israeli Supreme Court requesting the cancellation of the revocations, which have been pending ever since.

In mid-October 2015 against the backdrop of an outbreak of violence in the West Bank, Israel's security cabinet decided to revoke "the permanent residency rights of terrorists" without providing a definition or criteria of who constitutes a terrorist, despite the serious human rights violations this decision entailed.<sup>34</sup> This decision enabled Israeli authorities to revoke residencies without awaiting the verdict of the Supreme Court. One week later, four Palestinians, three of whom were accused of throwing stones, were notified that the Minister of Interior was considering using this discretionary power. Their residencies were effectively revoked three months later,<sup>35</sup> ushering in the introduction of an "allegiance" requirement for maintaining residency rights.

## **Revocation of Residency: A Multitude of Human Rights Violations**

The process and measure of revocation of residency violate multiple internationally recognized human rights. Two levels of violations are observed in this sense. The first is the denial of the enjoyment of several rights codified into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), both of which Israel ratified on 3 October 1991.<sup>36</sup> On the level of civil and political rights, these include freedom from inhuman and degrading treatment (ICCPR article 7), freedom of movement and residency rights (ICCPR article 12), equality before the law (ICCPR article 14), protection from retroactive adjudication (ICCPR article 15), recognition as a person before the law (ICCPR article 16), and protection of families (ICCPR article 23). The denial of the right of recognition as a person before the law subsequently leads to denial of a number of economic and social rights, including employment (ICESCR article 6), social security (ICESCR article 9), assistance and protection of families (ICESCR article 10), adequate standard of life (ICESCR article 11), highest attainable standard of mental and physical health (ICESCR article 12), and education (ICESCR article 13).

The second level is the crosscutting of discrimination into the process of revocation of residency and the implementation of the "center of life" policy. Discrimination in civil status can be traced back to 1967, when Palestinians were granted residency status instead of citizenship status following the census. This discrimination has continued up until the present day. Furthermore, Israeli citizens, including settlers in East Jerusalem, can live anywhere in the world for an unlimited period of time without losing their citizenship or any of the social, political, and legal rights that it entails.<sup>37</sup> The most striking facet of discrimination remaining is that around 500,000 Israelis hold U.S. citizenship and still retain their Israeli civil status.<sup>38</sup>

One debatable issue in this context is the applicability of international human rights law – including the ICCPR and ICESCR – to occupied Palestinian territory, including East Jerusalem. One legal premise that supports the inapplicability of international human rights law is the *lex specialis* principle, used to resolve conflict resulting from the application

of two conflicting rules in a singular situation. The rule states that priority is given to the rule, or in this case body of law, that is more specific.<sup>39</sup> The definition of occupation, as provided in article 42 of the Hague Regulations, applies to the West Bank, including East Jerusalem.<sup>40</sup> As such, the more relevant body of law would be international humanitarian law instead of international human rights law.<sup>41</sup> Conversely, other scholars argue that international human rights law applies simultaneously with international humanitarian law, filling in any gaps and thereby increasing protection of civilians, which is the main purpose of international humanitarian law. Thus, arguably, the application of international human rights law complements that of international humanitarian law.<sup>42</sup>

Furthermore, article 2(1) of the ICCPR defines the scope of application of the covenant as “to ensure to all individuals within its territory and subject to its jurisdiction.”<sup>43</sup> The primary interpretation of this article specifies that the scope of application extends to persons *both* within the state’s territory *and* subject to its jurisdiction.<sup>44</sup> However, the interpretation of this article has evolved, such that the UN Human Rights Committee (CCPR) asserted in its General Comment 31 that states parties are required “to respect and to ensure the Convention rights . . . and to all persons subject to their jurisdiction.”<sup>45</sup> Also, the International Court of Justice, in its ruling on Israel’s separation wall, emphasized the applicability of international human rights law, including both the ICCPR and ICESCR, to the occupied territories, citing the first concluding observations of the Committee on Economic, Social, and Cultural Rights (CESCR) to the State of Israel in 1998, which emphasized the applicability of the covenant to occupied Palestinian territory, including East Jerusalem.<sup>46</sup> Alternatively, even in the case of the non-applicability of international human rights law, non-discrimination has evolved to earn the status of customary international law, giving rise to legal obligations for states.<sup>47</sup> The Israeli courts endorse this view, such that the Military Justice Law of 1955 states that customary international law is automatically incorporated into Israeli law.<sup>48</sup>

Despite the myriad violations that the revocation of residency entails, legal accountability is limited within the framework of international human rights law. Despite the accession of Israel to the ICCPR and ICESCR, it is not a party to either of the two optional protocols of the ICCPR, nor that of the ICESCR.<sup>49</sup> This eliminates the possibility of individual communications and inquiry missions serving as accountability mechanisms. Accordingly, Israel’s legal obligations are limited to submission of periodic reports to the monitoring committees of both covenants, whereby the committees review the state report and alternative non-governmental or shadow report(s), and issue concluding observations highlighting issues of concern and those that need improvement. Naturally, over the years, and as recent as the latest concluding observations issued, the CCPR of the ICCPR has deplored and expressed concern over the revocable status of residency of Palestinians in East Jerusalem, as well as the adverse impact this has on protection of families, highlighting specifically the role of the Citizenship and Entry into Israel Law and the upholding of its constitutionality.<sup>50</sup>

Notwithstanding these efforts, these legal mechanisms are essentially recommendatory instead of enforceable, and thereby do not contain any implementation mechanisms to ensure respect for human rights and non-discrimination. However, both Palestinian and

Israeli civil society organizations have diligently made use of the limited options available at their disposal and have submitted shadow reports for consideration by the committees at every reporting cycle. A similar case applies to the Universal Periodic Review, a platform organized by the Human Rights Council that gives states the chance to review practices of other states and recommend measures and steps to ensure upholding of human rights. In Israel's latest Universal Periodic Review in 2013, states such as Brazil, Mexico, and Norway have explicitly warned against the severe impact of discrimination and the revocable residency status of Palestinians in East Jerusalem.<sup>51</sup> Despite the bleak prospects of enforcement, this legal advocacy work could strategically contribute to altering international public opinion on issues of legal accountability. This gives rise to another set of questions on whether international criminal justice serves as an alternative avenue for accountability.

## **International Criminal Justice: Added Value?**

The State of Palestine lodged a declaration accepting the jurisdiction of the International Criminal Court on 1 January 2015, granting the court retroactive jurisdiction to 13 June 2014.<sup>52</sup> This was made possible through the upgrading of the status of Palestine to non-member observer state at the UN through General Assembly Resolution 67/19.<sup>53</sup> Consequently, and as a matter of policy, the Office of the Prosecutor (OTP) opened a preliminary examination into the situation in Palestine.<sup>54</sup> The preliminary examination establishes whether the criteria set forth in article 53(1) of the Rome Statute for opening an investigation – jurisdiction, admissibility, and interests of justice – are met.<sup>55</sup> Currently, the examination is focusing on subject matter jurisdiction.<sup>56</sup> The subject matter jurisdiction of the court, as per article 5 of the Rome Statute, includes the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>57</sup>

The elaborate system by which Palestinians' residency in East Jerusalem is revoked illegalizes their presence and leads to their forced transfer, irrespective of whether Israeli authorities physically transfer them. Further, the acts themselves fulfill both the forcible transfer portion of the crime against humanity outlined in Rome Statute article 7(1)(d) ("deportation or forcible transfer of population") and the unlawful transfer portion of the war crime set out in Rome Statute article 8(2)(a)(vii) ("unlawful deportation or transfer or unlawful confinement"). The relevant elements include: the act of transfer itself; the lawful presence of the transferred persons in the area; the protected status of the transferred persons under one of the Geneva conventions; the widespread, systematic character of the conduct directed against a civilian population; and the occurrence and association of the conduct with an international armed conflict.<sup>58</sup>

The application of these elements of crime to the revocation of residency in East Jerusalem fulfills the jurisdictional requirement for shifting the preliminary examination into a full investigation. However, several obstacles still confront access to justice in this respect, such as fulfillment of the admissibility and interests of justice requirements, as well as the extradition of the defendants. Additionally, one should thoroughly consider the

nature of justice served within this avenue and assess whether it is sufficient and effective within the wider context of the Palestine question. Whereas the purpose of the court is to end impunity and prevent international crimes, the referral, investigation, and prosecution of international crimes is a highly politicized process. This can be clearly observed in terms of admissibility and interests of justice requirements, as well as the extradition of defendants. Article 17 of the Rome Statute specifies the admissibility requirements as complementarity and gravity.<sup>59</sup> Consequently, if a state has the willingness and the ability to investigate and (possibly) prosecute those who have committed the most serious crimes of international concern, in conformity with articles 17(2) and 17(3) on willingness and ability criteria, then the complementarity requirement of admissibility would pose an obstacle toward opening an investigation.

Gravity, the second admissibility requirement, is contentious, as the statute gives large discretionary power to the OTP in its estimation and qualification. This was the main premise against which the OTP found the case of the Mavi Marmara flotilla inadmissible. This conclusion was reached by employing a comparative disadvantage test to the case. Despite strong evidence of war crimes committed by Israel, the OTP was grappling with cases from Africa that included hundreds of thousands of victims, as compared to nine victims on the vessel.<sup>60</sup> Within the temporal jurisdiction of the court, extending to Palestine from 13 June 2014 onward, only 195 residencies were revoked, excluding dependent children, of which 191 were administrative “center of life” measures and four were punitive measures.<sup>61</sup> A quantitative comparison with cases witnessed in Côte d’Ivoire, for example, could prove to be the main challenge to opening an investigation.<sup>62</sup> However, quantitative assessment is not the only method to determine gravity; instead, a qualitative assessment could and should be employed. In this sense, the fact that the aforementioned measures are in line with a state policy, coupled with the discriminatory facets of the measures, and the number of persons at risk in light of the current legal and political frameworks, are factors that could qualify the gravity of the situation.

An even more contentious issue is that of interests of justice. The Rome Statute and Elements of Crime do not provide a definition or at least the constituents of interests of justice, leaving the OTP vast discretionary power.<sup>63</sup> As the OTP has never employed this criterion previously, its potential to preclude an investigation is difficult to determine. Moreover, an unheeded international arrest warrant for the extradition of Omar al-Bashir, president of Sudan, to the International Criminal Court in June 2015 demonstrates that the court essentially lacks the necessary political power to see through the effectuation of justice.<sup>64</sup>

On a different level, certain legal constraints need to be taken into account to assess feasibility of effectuating justice. This is a particularly contentious issue in light of the subjectivity of the personal dimension of identification with issues pertaining to justice, thereby compromising objectivity and consensus on the nature and characteristics of justice. The temporal jurisdiction of the International Criminal Court to Palestine extends only from 13 June 2014 onward. Accordingly, this restricts accountability to those who committed or ordered, solicited, induced, aided, abetted, or assisted the commission of the crime(s) in question within this timeframe.<sup>65</sup> Furthermore, in light of the limited

resources of the International Criminal Court and vast scale of terrible crimes taking place around the world, it is not feasible for the court to prosecute every single person who was involved in committing or commissioning crimes within its jurisdiction.<sup>66</sup> This is in line with the practice of ad hoc tribunals, including those of the former Yugoslavia and Rwanda that prosecuted those who bore greatest responsibility for committing and commissioning war crimes and crimes against humanity. This translates in the Palestine context to the prosecution of the most senior officials who were responsible for the execution of such crimes, and would very possibly exclude all minor perpetrators and participants, including within the wider context settlers, low ranking soldiers, and the like. This gives rise to questions of whether justice effectuated through these avenues would be sufficient in and of itself within a wider framework of transitional justice. As such, an inclusive, participatory, bottom-up process that crystallizes the vision of the Palestinian people regarding the features and characteristics of justice is imperative.

## **Conclusion**

Both international human rights law and international criminal law are being utilized as legal avenues to promote accountability and access to justice for the benefit of Palestinians in East Jerusalem whose residencies have been revoked. Each, naturally, has advantages and disadvantages. The abundance of legal instruments and bodies monitoring compliance with international human rights law standards is one of its strongest assets. Notwithstanding its lack of enforceability – possibly its strongest disadvantage – legal advocacy within this avenue could serve strategically to transform international public opinion. In contrast, international criminal law is enforceable and presents a clear vision on promoting access to justice and remedy for victims. However, politicized processes of referral, investigation, and prosecution, and highly limited temporal jurisdiction pose serious considerations as to the nature of justice served by this avenue.

Access to justice for Palestinians in East Jerusalem is an integral part of the wider Palestinian struggle for the realization of inalienable rights. In this context, the effective expansion of the struggle to all available legal avenues and instruments is crucial. Notwithstanding the importance of employment of all available means – legal and otherwise – the Palestinian polity should ensure the preservation of the political, as opposed to humanitarian and legal, character of the struggle toward this end.

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