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***AFFIRMING THE RIGHT TO PHYSICAL SECURITY
IN INTERNATIONAL LAW: THE CASE OF
PALESTINIAN REFUGEES IN THE OCCUPIED
PALESTINIAN TERRITORIES***

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This research paper was submitted towards the completion of the Refugee Law and Human Rights course at the University of Cape Town. Please send comments to the author on this working paper to Refugee Rights Unit at refugeelawclinic@uct.ac.za

The Gaza Strip and West Bank



*'It was unthinkable that the horrors perpetrated during the war against the Jewish populations in Europe should be repeated or should be reproduced in respect of the Arab population. Such a situation, which was a disgrace to mankind, must be brought to a close.'*¹

¹ UN GOAR, 3rd Sess., 184th Plen. Mtg. p.945-46, UN Doc. A/PV.184 (1949) Mr Schuman

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I INTRODUCTION

Palestinian refugees represent the largest and most protracted case of forced displacement in the world today. Two areas most well-known for their refugee population are the West Bank (including East Jerusalem) and Gaza Strip, which together form the Occupied Palestinian Territories (OPT hereafter), and form the geographic focus of this essay.² It is widely known that the occupation by Israel of the OPT has produced a consistently high level of insecurity for both refugee and non-refugee Palestinians alike. Numerous NGOs and UN agencies have documented, amongst a range of other human rights abuses, the threat to physical security which exists in the OPT. This occurs most often as a result of the actions of the Israeli Defence Force, the Israeli Administration, settler violence, and intra-Palestinian factional violence. Human Rights Watch has regularly highlighted the ‘serious violations of international human rights and humanitarian law in Israel and in the West Bank and Gaza’.³ B’Tselem, conducted an interview with a 16 year old boy living in al-‘Arub refugee camp near Hebron, who described his arrest and detention as follows:

‘[T]he soldiers slapped me a lot, hit me with the barrels of their rifles, and ... kicked me hard in the head ... a soldier came and stepped on my legs and banged my head against the side of the container.’⁴

Threats to physical security are an everyday occurrence in the OPT, particularly for Palestinian refugees who, like other refugees, tend to be very vulnerable. This essay aims to demonstrate and affirm within international law, the existence of the right to physical security in the OPT for Palestinian refugees. To do this, this essay will first define exactly who Palestinian refugees are in the context of the OPT, focusing on the historical background to their creation, and on providing a working definition. Secondly, before moving onto a detailed analysis of the relevant law, this essay will crucially address Israel’s claims that international human rights law and humanitarian law do not apply in the OPT. Having confirmed its applicability, the third section will undertake to identify the right to physical security within relevant international law applicable to Palestinian refugees in the OPT. Finally, this essay will conclude by affirming that the right to physical security, despite its consistent violation by Israel, does clearly exist.

² For an illustration of the OPT see map on p.2.

³ Human Rights Watch *World Report 2011: Israel/OPT* (2011)

⁴ B’Tselem *Human Rights in the Occupied Territories: 2011 Annual Report* (2011) p.22 available at http://www.btselem.org/download/2011_annual_report_eng.pdf accessed 1 June 2013

II DEFINING THE PALESTINIAN REFUGEE

Palestinian refugees form an intrinsic element of the notoriously intractable Arab-Israeli conflict. The marked differences between the Arab and Israeli views relating to Palestinian refugees has been of enormous significance during negotiations between Palestine and Israel, and has represented one of the principal stumbling blocks to resolution of the conflict. The unique character of the circumstances and events which precipitated the creation of Palestinian refugees is essential to being able to define Palestinian refugees.

(a) *Historical background*

The Palestinian refugee population was created during five notable periods. First, during the British Mandate over 150 000 Palestinians were displaced as a result of British support for Zionist colonisation.⁵ The British view was summed up in 1919 when the British Secretary of Foreign Affairs, Arthur Balfour, stated in relation to Palestine that ‘Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land’.⁶

Second, between late 1947 and early 1949, during a period known as the Nakba, between 750 000 and 900 000 Palestinians were forced to flee their homes.⁷ The main catalyst for the Nakba took place on 29 November 1947 when the United Nations General Assembly voted 33-13-10 to adopt the Resolution 181 (II) which recommended that,

‘Independent Arab and Jewish States ... shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948.’⁸

While Jews celebrated the Resolution, Arabs in the region regarded the plan, which gave more than half of Palestine to a foreign Jewish population, as unjust and unacceptable.⁹ In the violent conflict which ensued, the Zionist movement was able to induce the mass exit of Palestinians necessary to create a Jewish state. The massacre of Dayr Yassin on 9 April 1948, in which 250 Palestinian civilians were killed, is one of the most notorious events of

⁵ BADIL Resource Center for Palestinian Residency and Refugee Rights *Survey of Palestinian Refugees and Internally Displaced Persons, 2010-2012 Volume VII* (2012) p.xxi

⁶ Statement by Arthur Balfour, British Secretary of State for Foreign Affairs, *Foreign Office No. 371/4183* (1919), in *The Origins and Evolution of the Palestine Problem 1917–1988*, Part I. New York: United Nations, 1990.

⁷ BADIL (note 5) p.xxv.

⁸ Plenary Meetings of the General Assembly, 16 September – 29 November 1947, vol. 2, UN Doc. A/PV.128, at 1424-1425.

⁹ John Quigley *The Statehood of Palestine: International Law in the Middle East Conflict* (2010) p.95

1948 and ultimately led to an acceleration of the Palestinian's flight.¹⁰ Massacres of villages, rapes, execution killings, bombings of Arab shops and hotels, shelling of Palestinian neighbourhoods, and the systematic destruction of Palestinian villages to prevent return of refugees were fundamental reasons for the creation of the Palestinian refugee.¹¹ Most of the refugees that fled made their way to neighbouring Arab countries and to the West Bank and Gaza Strip, which at the time were under Jordanian and Egyptian control respectively.

The third notable period of exodus occurred between 1949 and 1966. During this time Police raided Palestinian villages, rooting out and expelling refugees who had returned to their homes.¹² 2 500 Palestinians were expelled from the city of al-Majdal in 1950.¹³ 20 000 Bedouin Palestinians were expelled from their tribal lands in the Naqab.¹⁴ Israel during this period displaced another 35 000 – 45 000 Palestinians.¹⁵

The fourth exodus took place during the 1967 Arab-Israeli War when Israel attacked Egypt, Jordan and Syria in an ultimately successful effort to control the remainder of Mandatory Palestine. During this time the Ein el-Sultan and Aqbat Jaber refugee camps in Jericho were bombed by the Israeli Air Force leading to the mass flight of tens of thousands of refugees.¹⁶ By the end of 1967 war, 400 000 – 450 000 Palestinians had been displaced; around half (193 500) were 1948 refugees displaced for a second time.¹⁷

The final period during which Palestinian refugees have been created is from 1967 to the present. The continued occupation by Israel of the West Bank and Gaza Strip has led to a litany of human rights abuses in the OPT, including the right to physical security. The military occupation has led to a situation of apartheid and discrimination against non-Jews in the OPT, creating an environment of extreme insecurity, and in the end leading to further flight of Palestinians seeking an escape.

¹⁰ Quigley (note 9) p.176.

¹¹ Detailed accounts of the events of 1947-1949 are widely available. See generally Benny Morris, Ilan Pappé, and John Quigley.

¹² Benny Morris *The Birth of the Palestinian Refugee Problem Revisited* (2004) p.152.

¹³ Morris (note 12) p.159.

¹⁴ Morris (note 12) p.158.

¹⁵ BADIL (note 5) p.xxvi.

¹⁶ According to UNRWA, the population of Aqbat Jaber refugee camp decreased from 28,008 in June 1967 to 4,991 in September 1967. Likewise, the population of 'Ein el-Sultan refugee camp decreased from 19,042 to 2,310 between June and September 1967.

¹⁷ See generally Ilan Pappé *The Ethnic Cleansing of Palestine* (2004); Janet Abu-Lughod, *The Continuing Expulsions from Palestine: 1948 – 1985* in *Palestine: Continuing Dispossession*, p.32 (Glenn E Perry ed.1986); and Lex Takkenberg *The Status of Palestinian Refugees in International Law* (1998). Oxford, 1998, p. 17.

(b) *Finding a working definition*

Given the complicated and protracted nature of its history, the Palestinian refugee situation is particularly difficult to navigate. It can thus be difficult to provide a definition of the Palestinian refugee, since their status as a refugee depends heavily on the temporal and geographical aspects of their displacement; borders delineating the OPT from Israel have changed over time, and the events provoking flight have also differed in time. Due to the lack of a universally accepted definition and comprehensive registration system, and the frequency of displacement, there is no single authoritative source of data relating to Palestinian refugees.

The United Nations Relief and Works Agency (UNRWA) was established following the 1948 Arab-Israeli war, on 8 December 1949 by the UN General Assembly Resolution 302 (IV)¹⁸ to carry out direct relief and works programmes for Palestine refugees. The General Assembly has repeatedly renewed UNRWA's mandate, most recently until 30 June 2014.

It is important to note that, at the time of the drafting of the UNHCR Statute, it was decided not to include Palestinian refugees being assisted by UNRWA within the mandate of the UNHCR under para.7 of the statute. That UNRWA was only intended to provide humanitarian assistance, and that as a consequence Palestinian refugees would fall outside of the protection of the UNHCR (and later 1951 Convention), was apparently not considered.¹⁹ According to Robinson, one of the reasons for excluding Palestinian refugees from the UNHCR definition was to avoid overlapping competences, and due to a reluctance of Arab states to take on the burden.²⁰ Palestinian refugees therefore cannot be defined in the same way that refugees elsewhere in the world can, as per Art.1D of the 1951 Convention and Para.7 of the UNHCR Statute. For the purposes of this essay, the UNWRA definition will be used.²¹ UNRWA provides for a number of categories of people. First, those who meet their 'Palestine refugee criteria' include those

'whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict. Palestine Refugees, and descendants of Palestine refugee males, including legally adopted children, are eligible to register for UNRWA services.'

¹⁸ UN General Assembly, *Assistance to Palestine refugees*, 8 December 1949, A/RES/302.

¹⁹ Takkenberg 'The Protection of Palestine Refugees in the OPT' (1991) 3 *International Journal of Refugee Law* p.417-18.

²⁰ Nehemiah Robinson *Convention Relating to the Status of Refugees, Its history, Contents and Interpretation* (1953) p.64.

²¹ UNRWA, *Consolidated Eligibility and Registration Instruction* (2009) available at <http://www.unrwa.org/userfiles/2010011995652.pdf>, accessed 1 June 2013

UNRWA also provides for, but doesn't register, persons displaced as a result of the 1967 war and subsequent hostilities, and any other persons whom the Commissioner General identifies as eligible. In this essay, 'Palestinian refugees' will apply the broad version of the UNRWA definition which includes not only 1948 refugees and their descendants, but also 1967 and subsequent refugees who are now living in the OPT. The definition excludes those people who have never been forced to flee, and who receive assistance from UNRWA based only on their humanitarian needs.

In the Gaza Strip, there are an estimated 1 167 572 UNRWA registered refugees, out of a total population of 1 644 293.²² In the West Bank, there are estimated to be 727 471 UNRWA registered refugees, out of a total population of 2 649 020.²³ Different sources report slightly different numbers, but it suffices at this point to note that a significant portion of the population in the OPT, in particular the Gaza Strip, are refugees, some registered, some not.

Aside from providing a working definition of Palestinian refugees in the OPT, this chapter also illuminates what is one of the biggest problems for the protection of human rights of Palestinian refugees. The fact that there is no universally accepted definition, a lack of protection by the 1951 Convention, no single authority on refugee numbers, and a general lack of clarity on the issue, can only lead to an accompanying lack of clarity regarding the applicability of legal protections. Indeed, unless the purported beneficiary of a right is known, the operation of the right will likely be impaired.

III APPLICABILITY OF INTERNATIONAL LAW IN THE OPT

Since Israel's occupation of the OPT in 1967, Israel has consistently denied the applicability of international human rights law (HRL) and, to an extent, international humanitarian law (IHL) in the OPT. This question has generated heated discussion amongst international lawyers, and is of crucial significance to this essay. Indeed, before undertaking a detailed analysis of HRL and IHL in search of the right to physical security as applicable to Palestinian refugees in the OPT, it is necessary to establish their general application in the OPT. This section will briefly outline the arguments at stake before concluding that IHL and HRL are applicable to the OPT, thus allowing for the operation of the right to physical

²² See generally Palestine Central Bureau of Statistics; UNRWA *In Figures* (2012) available at <http://www.unrwa.org/userfiles/20120317152850.pdf>, accessed 1 June 2013

²³ *Ibid.*

security. A full analysis of the applicability of IHL and HRL in the OPT is an immense task, and therefore falls outside of the scope of this essay, and so only a cursory discussion will take place here.

Possibly the most important authority on the subject is that of the International Court of Justice (ICJ) ruling in the case concerning the ‘Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory’²⁴ Three central findings emerged from this case which have a direct bearing on, and ultimately affirm, the existence of the right to physical security for Palestinians in the OPT.

The first issue, which is key to this analysis, was the ‘occupied’ status of the Palestinian Territory. Israel disputes the labelling of the territories as ‘occupied’, arguing rather that they are ‘disputed territories’.²⁵ The ICJ rejected this argument, observing that, in accordance with customary international law,²⁶ territory is considered to be occupied ‘when it is actually placed under the authority of the hostile army.’ The Court ruled therefore that, given the facts, ‘these territories (including East Jerusalem) remain occupied territories and Israel have continued to have the status of occupying power’.²⁷ This characterisation of the Palestinian Territory as occupied is vital, as it allows for the subsequent application of HRL and more specifically IHL.

A second and crucial issue which the Court examines, is the application of IHL in the OPT. Israel’s argument for the non-application of IHL was that since Art. 2 of the Fourth Geneva Convention provides that the Convention only applies to the ‘occupation of the territory of a High Contracting Party ...’, and that the Palestinian Territory does not form a high contracting party.²⁸ For reasons outside the scope of this essay, the Court rejected Israel’s position, concluding that the ‘Convention is applicable in the Palestinian territories which ... were occupied by Israel.’²⁹ This conclusion is in keeping with a large number of UN General Assembly Resolutions³⁰ and Security Council Resolutions.³¹ It is noteworthy

²⁴ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, (Wall Opinion hereafter).

²⁵ Pieter HF Bekker ‘The World Court’s Ruling Regarding Israel’s West Bank Barrier and the Primacy of International Law: An Insider’s Perspective (2005) 38 *Cornell International Journal of Law* p.557.

²⁶ Reflected in Art. 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, *U.K.T.S.*, 1910, No.9.

²⁷ Wall Opinion (note 24) para.78

²⁸ Bekker (note 25) p.560.

²⁹ Wall Opinion (note 24), para.101.

³⁰ See for example GA Res. 56/204, UN GAOR, 56th Sess., Supp. No.49, 90th Plen. Mtg., UN Doc. A/56/49 (2001); GA Res. ES-10/8, UN GAOR 56th Sess. 15th Plen. Mtg., UN Doc. A/56/49 (2001); GA Res. 55/131, UN GAOR, 55th Sess. Supp. No.49, at 211, UN Doc. A/55/49 (2000); GA Res. 54/77, UN GAOR, 54th Sess., Supp. No. 49, 71st Plen. Mtg. at 143, UN Doc. A/54/49 (1999); GA Res. 53/54 UN GAOR 53rd Sess. Supp. No.49, 78th

that most of these resolutions were passed by a very large majority, with only Israel and the United States voting against normally.³² Further support can be found in the opinion of the UN Human Rights Commission,³³ and the International Committee of the Red Cross (ICRC).³⁴

The third relevant issue which was examined in the Court was the applicability of HRL in the OPT. Israel argued against its application in the OPT, taking the view that human rights treaties are designed to operate during peacetime only, and that during situations of armed conflict, only IHL should apply. This position view was rejected by the ICJ, which recalled its ruling in *Nuclear Weapons* that IHL did not operate to the exclusion of the ICCPR.³⁵ Furthermore, the findings of the European Court of Human Rights in *Loizidou v. Turkey*, a case concerning Turkey's occupation of Northern Cyprus, it was held that IHL and HRL both apply, even where an occupying power exercises effective control over a territory.³⁶ This was upheld in the Israeli Supreme Court which ruled that it was clear that Palestinians in the OPT were protected under both IHL and HRL.³⁷ Where applicable, HRL operates as *lex generalis*, while IHL operates as *lex specialis*.³⁸

Three crucial and interrelated facts emerge from this analysis. First, the Court found that the Palestinian territory is not only *de facto*, but also *de jure* 'occupied' by Israel, despite Israel's consistent protestations to the contrary. Second, it concluded that the Geneva Conventions are applicable to the population in the OPT. Third, it concluded that HRL is applicable as complementary to IHL. Given this, it is clear that there appears to be a *prima facie* possibility that the right to physical security can and should be applied to Palestinian

Plen. Mtg. at 133, UN Doc. A/53/49 (1998); GA Res. 52/65, UN GAOR, 52nd Sess., Supp. No.49, 69th Plen. Mtg. at 129, UN Doc. A/53/49 (1997).

³¹ See for example SC Res. 1322, UN SCOR, 55th Sess., 4205th Mtg., UN Doc. S/RES/56 (2000); SC Res. 904, UN SCOR, 49th Sess., 3351st at 108, UN Doc. S/RES/50 (1994); SC Res. 799, UN SCOR, 47th Sess., 3151st Mtg. at 6, UN Doc. S/RES/48 (1992); SC Res. 726, UN SCOR, 47th Sess., 3026th Mtg. at 5, UN Doc. S/RES/48 (1992); SC Res. 694, UN SCOR, 46th Sess., 2989th Mtg. at 2, UN Doc. S/RES/47 (1991); SC Res. 673, UN SCOR, 45th Sess., 2949th Mtg. at 7, UN Doc. S/RES/46 (1990).

³² Ardi Imseis 'On the Fourth Geneva Convention and the Occupied Palestinian Territory' (2003) 44 *Harvard International Law Journal* p.98

³³ HRC *Concluding Observations, Israel* CCPR/C/79/Add.93, 18 Aug 1998; and HRC, *Concluding Observations, Israel*, 21 Aug 2003, para.11, CCPR/CO/78/ISR.

³⁴ See generally, International Committee of the Red Cross *ICRC Annual Report 2011 - Israel and The Occupied Territories* (2011)

³⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p.266, International Court of Justice (ICJ), 8 July 1996.

³⁶ *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 November 1996, available at: <http://www.refworld.org/docid/43de104d4.html>, accessed on 26 May 2013.

³⁷ *Mara'abe v. The Prime Minister of Israel*, HCJ 7957/04, Israel: Supreme Court, 15 September 2005.

³⁸ ECOSOC Sub-Comm. on *Working Paper on the Relationship between Human Rights Law and International Humanitarian Law* para.76, UN Doc. E/CN.4/Sub.2/2005/14 (June 21, 2005).

refugees in the OPT. In the next section the right to physical security will be affirmed as existing in international law through a detailed analysis of the relevant law.

IV THE RIGHT TO PHYSICAL SECURITY

Having above confirmed the applicability of IHL and HRL in the OPT, this section will identify and affirm the right to physical security through an exposition of the relevant international law applying to Palestinian refugees living in the OPT. First, the ability of UNRWA to provide for the right to physical security will be discussed. International refugee law will then be considered, before moving on to international humanitarian law, and then international human rights law.

(a) UNRWA

Unlike the UNHCR, UNRWA's mandate is not conveniently located in a single document; instead it is derived from a number of resolutions.³⁹ As outlined above, UNRWA does not apply the same definition of refugees as the UNHCR, which means that Palestinian refugees do not receive protection under the UNHCR Statute or the 1951 Convention (see below).

UNRWA's role is mainly humanitarian and developmental in nature. Its main areas of focus include health, education, relief and social services, micro-financing, infrastructure and camp improvement.⁴⁰ These activities have been widely praised, notably by the UN General Assembly.⁴¹ While these activities no doubt play a crucial role in ensuring many human rights for Palestinian refugees, including the right to physical security, UNRWA does not create rights. The *de jure* right to physical security cannot be said to emanate from UNRWA, even if it does play a role in the *de facto* protection of the right.

(b) International Refugee Law

International refugee law is founded on the 1951 Convention Relating to the Status of Refugees⁴² (1951 Convention), and the 1967 Protocol Relating to the Status of Refugees⁴³.

³⁹ Lance Bartholomeusz 'The Mandate of UNRWA at Sixty' (2010) 28 *Refugee Survey Quarterly* p.454

⁴⁰ Bartholomeusz (note 39) p.462

⁴¹ See for example, UNGA Res.63/93 5 Dec. 2008, para.17; and UNGA Res.56/56 of 10 Dec. 2001, para.13

⁴² UN General Assembly *Convention Relating to the Status of Refugees* 28 July 1951 United Nations, Treaty Series, vol.189, p.137, available at <http://www.refworld.org/docid/3be01b964.html>, accessed 1 June 2012.

⁴³ UN, *Protocol relating to the Status of Refugees*, taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of November 18, 1966 and taken note of by the General Assembly in

There are currently 145 states party to the Convention, including Israel, which ratified on 1 October 1954. Due to its not being a full member state of the UN, Palestine cannot be party to international agreements. Although the 1951 Convention forms the central instrument of protection for refugees, it is, as mentioned above, questionable whether it applies to the OPT. A question arises as to whether the usage of the term ‘territories’ in the 1951 Convention includes dependent or occupied territories, or if it concerns only metropolitan territory – in other words, do the occupied Palestinian territories form part of Israel, the state party to the convention?⁴⁴ Whatever the answer, it is only of theoretical relevance to Palestinian refugees in the OPT. Of greater importance is Art. 1D of the 1951 Convention which states:

‘This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.’

This was clarified by the High Commissioner for Refugees in 2002 as ‘excluding from the benefits of the 1951 Convention those Palestinians who are refugees as a result of the 1948 or 1967 Arab-Israeli conflicts, and who are receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).’⁴⁵ Paragraph 7(c) of the annex to the UNGA Resolution No 428 (V), on the statute of the UNHCR, confirms that the mandate of the HCR shall not extend to a person who continues to receive from other organs or agencies of the UN protection or assistance. In *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, heard in the European Court of Justice, the court confirmed that Art. 1D did preclude access to the 1951 Convention, but that the article was to be construed narrowly.⁴⁶ The lack of access to the benefits of the 1951 Convention is a major cause for concern for Palestinian refugees as it precludes access to the most important and specialised body of refugee law available. Nevertheless, the right to physical security can be found elsewhere.

(c) *International Humanitarian Law*

Given that international refugee law is of such limited use to Palestinian refugees, it is necessary to turn to alternative branches of law. International humanitarian law, as *lex specialis*, is a

resolution 2198 (XXI) of 16 December 1966, entered into force October 4, 1967.

⁴⁴ Takkenberg (note 19) ‘The Protection of Palestine Refugees in the Territories occupied by Israel’ 3(3) *International Journal of Refugee Law* p.418.

⁴⁵ UN High Commissioner for Refugees, *UNHCR Revised Statement on Article 1D of the 1951 Convention*, October 2009.

⁴⁶ *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Union: Court of Justice of the European Union, 17 June 2010.

particularly important branch of law in the context of the OPT. As discussed above in Section III, IHL is applicable in the OPT. IHL is a body of law whose purpose is to prevent and alleviate human suffering as the result of armed conflict, or in the case of the OPT, belligerent occupation. IHL is comprised of the four Geneva Conventions, the First and Second Additional Protocols to the Geneva Conventions, and Hague Law.

Of particular relevance here is the fourth Geneva Convention, which contains numerous references to the right to physical security; including Art.31 (prohibition of physical coercion), Art.32 (prohibition of murder, torture, corporal punishment, mutilation, and any other brutality), Art.33 (prohibition of collective punishment), and Art.34 (prohibition of hostage taking).⁴⁷

Also of relevance is the First Additional Protocol to the Convention, which pertains to the rights of civilians during armed conflict, and thus of Palestinian refugees in the OPT. Art.51(1) protects civilians from dangers arising from military operations, Art.51(2) prohibits attacks on civilians, and Art.51(4) prohibits indiscriminate attacks.⁴⁸

Given that international humanitarian law is driven by considerations of humanity and the mitigation of human suffering, it is unsurprising that, as in the above examples, the right to physical security is fundamental to IHL. There is no doubt, given all of the above, that Palestinian refugees have a right to physical security stemming from IHL.

(d) *International Human Rights Law*

Human rights law, as *lex generalis* has broader application than IHL. As discussed, it is complementary to IHL in its application to the OPT. Indeed, since international refugee law is silent on the issue of physical security,⁴⁹ it is necessary to ground the right to physical security in what Othman-Chande calls ‘a criss-cross of rules which have some bearing on the issue.’⁵⁰ While Palestinian refugees may have not been granted legal status under the 1951 Convention, certain human rights standards apply to all people, whether refugees or non-refugees.⁵¹ Human rights apply to all people, regardless of where they are, how they got

⁴⁷ ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949.

⁴⁸ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

⁴⁹ James Hathaway *The Rights of Refugees under International Law* (2005) p.448.

⁵⁰ M Othman-Chande ‘International law and armed attacks in Refugee Camps’ (1990) 59 *Nordic Journal of International Law* 153 p.153.

⁵¹ James Darcy, ‘Human Rights and International Legal Standards: What do Relief Workers Need to Know?’ *Relief and Rehabilitation Network*, Paper No.19, (1997).

there, or who governs them.⁵² The right to physical security can be found in a broad range of human rights law. In this section the most relevant and potent instruments will be selected for analysis.

(i) Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), although not legally binding, is generally regarded as the foundation of international human rights law. Israel, as member of the UN, has made an implied pledge to the UDHR. The obligation of states to implement the UDHR has been affirmed in numerous human rights instruments including the Vienna Declaration and Programme of Action of 25 June 1993.⁵³

Art. 3 of the UDHR states that ‘everyone has the right to life, liberty and security of person.’ Art. 5 states the ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ It is clear from this that, while the UDHR does not create legal obligations on Israel, it does provide strongly persuasive support for the right to physical security, albeit inexplicitly. As will be seen, the right to physical security, as outlined in the UDHR, has been codified in a number of legally binding human rights instruments.

(ii) International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) forms part of the International Bill of Rights and is one of the key foundations of the international human rights system.

The right to physical security can be grounded first in Art. 6(1), which states that every human being has the inherent right to life. The Human Rights Committee refers to the right to life as a supreme right, which is basic to all human rights.⁵⁴ The right to life is to be treated not solely as a negative right, but also as a positive right which gives rise to obligations on Israel to ensure that the lives of Palestinian refugees are protected from both

⁵² Amnesty International, *Rights Wherever You Are*, AI-index: POL 33/001/2002, November 4, 2002.

⁵³ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23

⁵⁴ UN Human Rights Committee, “General Comment No.14: Right to life (1984), UN Doc. HRI/GEN/1/Rev.7, p139, para.1.

state and non-state actors, such as Jewish settlers.⁵⁵ As Hathaway points out, a threat to physical security can fall short of a risk to life.⁵⁶

Art. 7 states that no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. Like Art. 6(1), Art.7 entails both a negative and positive obligation on Israel to protect those under its authority, be it from state or non-state actors. Of particular relevance to Israel, is that Art. 7 allows for no limitation of the right for any reason, including public emergencies.⁵⁷

The final article relevant to the physical security of Palestinian refugees is Art. 9(1), which states that everyone has the right to liberty and security of person. Hathaway argues convincingly that this article gives rise to a right to security of person which is independent to the right to liberty, and which gives rise to an independent duty on Israel to take positive measures to protect Palestinian refugees from attacks against their personal integrity.⁵⁸

Since Israel has ratified the Covenant on 1 March 1992, it is legally bound to uphold the rights enshrined in it.

(iii) Convention against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Convention against torture, and other cruel, inhuman, or degrading treatment or punishment (CAT) is affectively entirely dedicated to the protection of the right to physical security. The CAT is arguably one of the strongest instruments of protection for Palestinian refugees in the OPT, due its focus on physical security, and the careful wording which is employed that ensures the applicability of the Convention in all places and times.

Art. 2(1) requires States Parties to take ‘positive legislative, administrative, judicial or other measures to prevent acts of torture on any territory under its jurisdiction.’ Art. 2(2) states the there is absolutely no exceptional circumstance which could be invoked to justify torture, including war or the threat of war.

Since Israel ratified the CAT on 3 October 1991, it is bound in international law to take positive measures to prevent torture on any territory under its jurisdiction, including the OPT.

⁵⁵ Manfred Nowak *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd edition* (1993) p.105

⁵⁶ Hathaway (note 49) p.453

⁵⁷ UN Human Rights Committee “General Comment No. 20: Prohibition of torture, or other cruel, inhuman, or degrading treatment or punishment” (1992), UN Doc. HRI/GEN/1/Rev.7, at p150, para. 2.

⁵⁸ Hathaway (note 49) p.458

(iv) Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) deals specifically with the rights of children and is the most widely ratified of all human rights treaties. The right to physical security of children can be grounded in a number of articles of this convention.

Art. 2 states that States Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction. Art. 6 states that every child has the inherent right to life and obliges States Parties to ensure to the maximum extent possible the survival and development of the child. Art. 19(1) requires that States Parties shall take all appropriate measures to protect the child from all forms of physical violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Art. 37(a) requires that no child shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Israel ratified the CRC on 11 February 1991 and is therefore bound in international law to uphold the above articles. This was confirmed by the ICJ in the *Opinion on the Wall*.⁵⁹ As discussed above, the rights present in the CRC are applicable to children living in the OPT.

It has been shown that the right to physical security undoubtedly exists within a broad range of international human rights instruments. The right is expressed variously as the right to life, the right to not be tortured or treated inhumanly, the right to security of person, the right to physical integrity and so on. It has also been shown that the right to physical security has been consistently violated by Israel; Israel's failure to meet its human rights obligations has been widely documented and highlighted by numerous experts and committees. Israel's violations of the right to physical security are in direct contravention of human rights law and represent an affront to the primacy of international law and to the international community at large. The violation of the right to physical security, one of the most fundamental and basic human rights, are condemnable.

V CONCLUSION

This essay first introduced Palestinian refugees through their long and complex history, and the somewhat complicated definition that applies to them as a result. Having delineated exactly who Palestinian refugees are, this essay moved to locating and affirming the right to

⁵⁹ O'Keefe page 116

physical security that applies to them. It was shown that the overwhelming consensus is that IHL and HRL do indeed apply to the OPT, a rejection of Israel's view that these crucial bodies of law do not apply *de jure* to what they see as 'disputed' territories. Having conclusively confirmed the application of these bodies of law, it was possible to undertake a closer examination of them to determine whether the right to physical security exists therein. Again, the results were clear. The right to physical security, plainly and undoubtedly, exists within IHL and HRL. Given the pervasiveness of the right to physical security within international law, it is evident that the right is considered to carry immense weight within the international legal system. Given this, Israel's frequent and consistent violations of the right in its different forms should be condemned in the strongest possible terms.

Such censure is crucial if the primacy of international law is to be upheld. The consistent and flagrant violation of this important right represents in my opinion a serious affront to international legal order. Aside from this, the right to physical security of Palestinian refugees is important in itself. The dire circumstances under which so many refugees on the OPT live should not be acceptable to the global community.

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