THE HOLY CITY IN HUMAN DIMENSIONS
The Partition of Jerusalem and the Right to Social Security

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Abstract

In the failed final-status negotiations that Israel and the Palestinian Authority held in 2000, the sides reached agreement on the main parameters of a solution on the question of Jerusalem. However, both sides ignored the fact that according to these parameters, East Jerusalem Palestinians would be denied almost completely their social security entitlements under the Israeli social security system. This article argues that, regardless of what will be agreed in any future agreement, according to international human rights law, Israel would continue to bear at least some responsibility for ensuring the right to social security of Palestinian Jerusalemites, even though they live outside its territory. Moreover, a sweeping denial of social security benefits would also be deemed a violation of the right of property under Israeli constitutional law.

1. INTRODUCTION

Jerusalem has been at the heart of the Israeli-Palestinian conflict, at least since Israel annexed the eastern part of the city in 1967. Israeli governments have for decades declared that 'united Jerusalem is the eternal capital of Israel'. Meanwhile, Palestinian leaders have consistently claimed that a peace agreement is not feasible unless it provides for the establishment of a Palestinian State, with East Jerusalem its capital.

In the framework of the peace process between Israel and the PLO that led to the signing of the Declaration of Principles, in September 1993, Jerusalem was listed as one of the permanent-status issues to be dealt with in the last stage.[1] Final-status

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1 Israeli-Palestine Liberation Organization, 'Declaration of Principles on Interim Self-Government Arrangements', Article 5(2), 13 September 1993, *International Legal Materials*, Vol. 32, 1993, p. 1525.

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negotiations were initially held in July 2000 in Camp David, but the sides failed to reach agreement.

Despite the overall failure of the final-status negotiations, the sides managed during their talks to agree upon the main parameters of a deal on the question of Jerusalem: the Palestinian State would be granted sovereignty over the Palestinian neighbourhoods in East Jerusalem, and in exchange, the Palestinians would recognise Israel's annexation of the Jewish settlements ('neighbourhoods' in Israeli parlance) that have been established in East Jerusalem since 1967.[2] The same formula is apparently the basis for the new round of final-status negotiations between Israel and the Palestinians, initiated in November 2007 at the Annapolis summit.[3]

However, one particular problem likely to emerge from an arrangement based on the Camp David parameters has been, and still is, consistently ignored by the parties: East Jerusalem Palestinians would lose almost totally their entitlement to social security benefits they had acquired, or are in the process of acquiring, under the Israeli social security system. This entitlement arose by virtue of their status as residents of Israel, and as a result of the compulsory contributions they made over the years. According to Israeli social security laws, the National Insurance Institute (NII), which is the body responsible for implementing the legislation, shall not pay any benefit to a person residing outside Israel for more than six consecutive months.[4]

To illustrate the problem: a 60-year-old man who made social security contributions for more than 30 years, would find, if the agreement is implemented, that his right to receive an old-age pension from the NII upon retirement has been revoked; a couple with young children, both of whom are working and making their NII contributions, would lose their family allowance, on which they relied to help bear the expenses inherent in raising their children; a woman living in a Palestinian community in East Jerusalem who continued to work in West Jerusalem after the partition and was later fired from her job would find that she is not entitled to unemployment benefits.

These situations are unjust for three interrelated reasons. First, while the rule denying social security benefits to persons living abroad may be justified in the case

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2 Klein, Menachem, *Shattering A Taboo: The Contacts Towards A Permanent Status Agreement In Jerusalem 1994–2001*, Jerusalem Insitute of Israel Studies, Jerusalem, 2001, pp. 43–56 (in Hebrew); Ben Ami, Shlomo, *A Front Without A Regard: A Voyage To The Boundaries Of The Peace Process*, Miskal, Tel Aviv, 2004, Chapters 9–11 (in Hebrew). At the time of the Camp David summit, Shlomo Ben Ami was Minister of Foreign Affairs and head of the Israeli delegation at Camp David. According to both authors, the main issue that prevented the sides from reaching an agreement on the question of Jerusalem involved sovereignty over the Temple Mount/Haram Al-Sharif.

3 Israel's Vice Premier Haim Ramon, for example, declared recently that 'Israel has an interest to get recognition of all of Jerusalem's Jewish neighborhoods, and to hand over control of Arab neighborhoods to the Palestinians. When we speak of a diplomatic horizon, these are the subjects we are referring to'; *Jerusalem Post*, 7 October 2007.

4 National Insurance Law (Consolidated Version), Section 324, *Seffer Hachukim*, Vol. 1522, 1995, p. 210 (hereinafter: National Insurance Law). For a more detailed analysis of this provision, see *infra* section 1.2.

of persons who, for whatever reason, emigrated, this justification is not applicable here, in that the persons being denied benefits did not move one meter from the city and the house in which they lived prior to the change of authorities. In fact, it is the state, and not the individual, that 'emigrated'.

Second, neither of the sides in the peace process has asked the opinion of the residents of the area being negotiated. The legitimacy of the negotiators, on both sides, stems from the elected governments they represent, which are supposed to reflect the will of the majority. However, Palestinian Jerusalemites have an ambiguous status in both the Palestinian and Israeli societies, so their voice is hardly heard, even in this loose sense.[5]

Third, given the weak institutional and economic infrastructure of the current Palestinian Authority (PA), a comprehensive social security system is not likely to emerge in the statehood era. Several studies dealing with the building of social security institutions in a future Palestinian State agree that only a modest system providing primarily old-age pensions could be economically viable.[6] Therefore, the loss of NII entitlements would not be offset by inclusion in a fairly similar system in the Palestinian State.

But would denial of social security benefits in these cases raise a human rights issue? Should not the provision of such benefits be left to the discretion of the States, without the burden of international constraints?

The main goal of a social security system is to provide individuals with an income in situations in which they are unable to earn a living, or their income is insufficient to cover their basic needs. As such, it serves as an essential tool for States to guaranty that no person is compelled to live in humiliating conditions. In addition, as stated by the UN Committee on Economic, Social and Cultural Rights, 'the right to social security plays an important role in supporting the realization of many of the rights in the Covenant [on Economic, Social and Cultural Rights]…'[7]

The enjoyment of social security is thus intrinsically linked to human dignity. The Universal Declaration of Human Rights (UDHR), adopted in 1948, recognises the right to social security and reflects the international community's acknowledgement of this link.[8] In subsequent years, the human right to social security was enshrined in several

5 On the one hand, Palestinian Jerusalemites lack Israeli citizenship, and are thus not entitled to vote in Israeli national elections (see *infra* section 2). On the other hand, although they are formally allowed to vote in the elections to the Palestinian Legislative Council due to the severe restrictions stipulated in the Israel-Palestinian agreements, only a small minority is able to exercise its right to vote.

6 Sayre, W. and Olmsted, J., 'Structuring a Pension Scheme for a Future Palestinian State', in: Cobham, D. and Kanafani, N. (eds), *The Economics of Palestine; Economic Policy and Institutional Reform for a Viable Palestinian State*, Routledge, London, 2004, pp. 143–171.

7 UN, Committee on Economic, Social and Cultural Rights, General Comment 19, 'The Right to Social Security (Article 9)', UN Doc. E/C.12/GC/19, 4 February 2008.

8 Universal Declaration of Human Rights, Articles 22 and 25, GA Res. 217A, p. 71, UN GAOR, 3rd session, 1st plen. mtg., UN Doc. A/810, 12 December 1948.

international law instruments.[9] Therefore, while the modality for the implementation of this right remained a matter of policy choice, ensuring that some form of social security is available to the people became a legal obligation for every State.

The purpose of this article is to explore the relevance of human rights law, international and domestic, to the unusual situation just described. I will attempt to answer to what extent a sweeping denial of social security benefits, as posed above, would be legal under international human rights law (IHRL) and Israeli constitutional law. In other words, do these two bodies of law provide a means to address the injustice that will emerge from this situation?[10]

This enquiry could be of interest to persons involved in the Israeli-Palestinian peace process, and not only to human rights scholars and practitioners. On the Israeli side, for example, the attorney general has reason to consider and evaluate the extent to which the denial of social security benefits resulting from the agreement would withstand judicial scrutiny. The negotiators on behalf of the PA would benefit from a better understanding of the interests of one of its important constituencies, and of the legal tools to advance these interests. The Quartet, whose members are seeking to advance the peace process *via* the Road Map, surely would not wish to bear responsibility for supporting and legitimising an agreement that undermines human rights.

The first section of this essay examines three central aspects of Israel's social security system: the role of the NII, the nature of the benefits it provides, and the territorial principle that governs its application.

Section two provides a brief explanation of the legal status of East Jerusalem and its Palestinian inhabitants after 1967, and a discussion of Israel's policies towards this population. This section describes in detail the changing policies of Israeli governments regarding the entitlement to social security benefits of Palestinian Jerusalemites who moved to another community in the Occupied Palestinian Territories.

Sections three and four deal with the relevant legal arguments. Section three analyses the extent to which the social security provisions of IHRL imposes obligations on States regarding persons living outside the territory of the State. In this context, I review relevant jurisprudence of the UN Committee on Economic, Social and Cultural Rights and the UN Human Rights Committee and consider its usefulness in our case. This section also examines provisions of ILO law dealing with the social security rights of persons moving from one State to another and their applicability to the situation discussed in this article.

9 See section 3.

10 The implications of an agreement on Jerusalem on the health insurance of Palestinian Jerusalemites are beyond the scope of this article. Although health insurance is usually a component of the social security system, from the perspective of human rights law, health insurance comes within the right to health more than the separate and independent right to social security.

Section four addresses the problem from the perspective of the right of property under Israeli constitutional law. In this framework, I explore whether social security benefits are property, and, if so, whether the denial of these benefits in our case violates this right?

The concluding section summarises the main findings of the essay and offers recommendations to the peace negotiators.

2. ISRAEL'S SOCIAL SECURITY SYSTEM

2.1. THE NATIONAL INSURANCE INSTITUTE

The NII is the principal State institution administering Israel's social security system. It was created in 1953 with the purpose of implementing the National Insurance Law (hereafter: the Law), which had been enacted by the Knesset earlier that year. The original version the Law included only four branches: old-age, survivors, work injuries, and maternity. Over the years, it was amended dozens times and additional branches were added.[11]

Under the Law, every resident of Israel aged 18 and over must be insured by the NII and pay into the system. Contribution rates are based on the person's income and status (employee, self-employed, unemployed, student, *etc*.).[12]

The system is based on a 'pay as you go' scheme. In contrast to fully-funded systems, under this scheme, contributions currently collected are not saved for the insured persons in personal accounts, and later paid to them in benefits, but are paid to current beneficiaries. The NII is also heavily funded by the government's general budget. The few 'non-contributory' branches are entirely funded by the government, whereas the 'contributory branches' entail a fixed participation rate as specified in the Law.

One way to map social security programmes is by identifying the underlying principle of allocation. According to Atkinson there are three main principles of allocation, each reflecting different social aims and entailing different requirements: social assistance, social insurance, and categorical transfers.[13]

Social assistance is designed to relieve poverty. These benefits are generally dependent on a means test and are non-contributory. To ensure that the benefits do

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11 In 1995, the Knesset reorganised the National Insurance Law of 1953 to reflect the changes introduced during the last 40 years, enacting the National Insurance Law, *supra* note 4. The 1995 legislation has been subsequently amended several times. Below, reference to the Law is to the consolidated version of 1995.

12 For example, the contribution rate for an employee is 11.5 percent of his total wages.

13 Atkinson, Anthony, *Poverty and Social Security*, Harvester Wheatsheaf, New York, 1989, p. 100.

not provide a negative incentive to integrate in the labour market, the benefits granted under this principle are generally lower than the minimum wage.[14]

Social insurance type of benefits is intended to provide security and spread income over a person's lifecycle. Two main conditions, borrowed from the private-insurance realm, characterise benefits stemming from this principle: an entitling event must occur (reaching a certain age, losing a job, having an accident, *etc*.), and a qualifying period of making contributions must be met. In contrast to private insurance, social insurance is compulsory and regulated by law and not by contract, and contributions are based on the person's income and not on the risk.[15]

Categorical transfers seek to redistribute income among specific groups. Entitlement is not subject to a means test, as is the case with social assistance, or to the payment of contributions, in accordance with the insurance principle. The only requirement is that the person belongs to a particular social category (families with children, disabled persons, *etc*.).

The NII runs 19 social security programmes addressing the needs of the elderly, the disabled, the unemployed, families with young children, and the poor. Some programmes reflect more purely than others one of the principles of allocation mentioned above. The following are among the largest programmes, both in terms of number of beneficiaries and amounts of benefits paid:

- Social security for the elderly is provided primarily through the old-age programme. This programme is contributory and reflects primarily the social-insurance principle, with some social-assistance components. At age 70 (for men) or 65 (for women), a person who paid in 60 months of contributions receives a uniform pension. Men between the age 65–70 and women between 60–65 are eligible if they pass a means test.[16]
- The general disability programme is the largest programme targeting the disabled. Although a contributory programme, the high eligibility threshold adds a social-assistance component. Benefits are generally granted to persons who, due to a physical or mental impairment, earn less than 25 percent of the average wage.[17]
- The unemployment programme is clearly based on the social-insurance principle: eligibility follows paid-in contributions over a qualifying period of 360 days prior

14 Gal, John, *Social Security in Israel*, Magnes, Jerusalem, 2004, p. 19 (in Hebrew).

15 Becker, Ulrich, 'The Challenge of Migration to the Welfare State', in: Benvenisti, E. and Nolte, G. (eds), *The Welfare State, Globalization and International Law*, Springer, New York, 2003, pp. 1–31, at p. 9.

16 Pension rates are set as a percentage of the average national wage (16 percent for a single person and 24 percent for a couple). See National Insurance Institute, National Insurance Programs in Israel, January 2007 (hereinafter: NII Programs). Accessible at: www.btl.gov.il/NR/rdonlyres/BCACBC95-D989–4969–8FD0–93273F434116/0/charte07.pdf (last accessed on 15 April 2008).

17 NII Programs, *supra* note 16, pp. 12–13. The NII runs as a work injury and accident injury programmes, which more clearly reflect the social-insurance principle; see *ibidem*, pp. 24–26.

to the date of loss of employment; and benefits are based on the wage the person received during the qualifying period.[18]

- Two programmes are specifically intended to assist families: the maternity programme, which offers a grant and an allowance, and the child allowances programme. While the maternity allowance is based purely on the social-insurance principle,[19] the other two benefits reflect the categorical-transfer principle.[20]
- The income support programme functions as a safety net ensuring that persons have a minimum income to meet their subsistence needs. It is non-contributory and clearly reflects the social-assistance principle, given that eligibility is exclusively established through a means test.[21]

2.2. THE TERRITORIAL DIMENSION

Entitlement to benefits under Israel's social security system is based, as a rule, on residence rather than citizenship. This method is common practice in most systems throughout the world.

According to one study, residence is usually perceived as a strong 'sign of belonging', and therefore constitutes a means 'to ensure that benefits are not paid to certain unworthy groups in society amongst whom may feature those leaving the country'.[22]

As a rule, a persons must be a 'resident of Israel' to be eligible for NII programmes. However, the Law does not explicitly define 'resident of Israel'. The labour courts have interpreted the term on numerous occasions, but have refrained from establishing a precise definition. In a case from 1985 relating to the denial of benefits on grounds of an alleged lack of residency, the president of the National Labor Court stated that

> [i]t would be inappropriate to make an inclusive formulation that meets all the situations in which the question arises as to whether a particular individual is a resident of Israel, whether he acquired such a status, or lost that status. The answer will be found in the entirety of the circumstances (…) We shall only emphasize that, in the final analysis, the link to Israel will be determined; a linkage that is not temporary or provisional, one that proves a location within Israel is the place 'in which he lives', where 'this is his home'.[23]

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18 It is contributory programme, entails a ten-month qualifying period and the benefits are set at 96 percent of income; *ibidem*, pp. 34–35.

19 *Ibidem*, pp. 22–23.

20 None of them require a qualifying period or a means test and their amount is not linked to the beneficiaries' previous income; *ibidem*, pp. 20–21.

21 NII Programs, *supra* note 16, p. 16.

22 Bolderson, Helen and Gains, Francesca, 'Comparison of Arrangements for Exporting Benefits relating to Age, Disability and Widowhood in Twelve OECD Countries', in: *Migration: A Worldwide Challenge For Social Security*, International Social Security Association, Geneva, 1993, p. 71.

23 National Labour Court 04–73/MH, *Iyada Sanuqa* vs *National Insurance Institute*, *Labour Court Judgments,* Vol. 17, pp. 79–85, at p. 84. This case is repeatedly cited in the labour court cases involving the criteria for determining whether a person is a resident.

In another case related to a denial of benefits on similar grounds, the District Labour Court added that

> where an Israeli resident acquires a place of residence abroad, receives a permanent work permit, works at a fixed location for a significant period of time, or where there is a break of any economic tie with Israel, all these cases, and others, can indicate, in certain circumstances, the lack of a connection to Israel and movement of the center of life and the home to a location abroad.[24]

The interpretation of residency as 'centre of life', adopted by the NII on the basis of the labour courts' case-law, clearly differs from the meaning given to the term in other legal instruments and by other State agencies. According to the Interior Ministry, for example, a 'resident of Israel' is a person registered in the population registry who has the legal right to stay in Israel. In other words, a person living abroad may be considered a 'resident of Israel' by the Ministry of Interior but not by the NII.

Indeed, for the purposes of the Law, the distinction between citizens and other types of residents is irrelevant. Moreover, according to the NII's definition, even persons who are not registered in population registry, but live for long periods in Israel could theoretically be entitled to benefits.[25]

Even if a person is deemed a 'resident of Israel' within the meaning of the Law, Section 324 of the Law explicitly states that 'a person located outside of Israel for more than six months shall not be paid an allowance for the period following the first six months, except upon the consent of the Institute [the NII]'.

However, the Law recognises a conspicuous exception to this rule, affecting old-age benefits. An amendment enacted in 1969 stipulates that, 'the Institute [NII] shall continue to pay the pension to a person who is no longer a resident'.[26] In the explanatory notes of the proposed amendment to the law, the legislator points out that due to 'changes in economic and social conditions' the previous situation 'infringed the rights of persons who have paid in contributions for years and had to leave the country after retirement, often for reasons beyond their control'.[27]

The NII, based on the interpretation given to the amendment by the labour courts and the HCJ, recognises the right of a person who permanently leaves the country,

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24 National Labour Court 0–286/NV, *Zafrir Abayiov* vs *National Insurance Institute* (unpublished), para. 8.

25 To prevent such expanded coverage, the Knesset amended the Law in 2002 to explicitly deny benefits to persons staying in Israel under certain types of visas. See, State Economy Arrangements (Legislative Amendments to Achieve Budget and Economic Policy Goals for the 2003 Fiscal Year), section 24, *Seffer Hahukim*, Vol. 1882, p. 175. This amendment was incorporated in the Law, *supra* note 4, Article 2(A).

26 This amendment, introduced in 1969, was incorporated in the National Insurance Law, *supra* note 4, section 244(E).

27 Proposed Law: National Insurance Law (Amendment 2), Explanatory Notes, section 11, 1969.

to continue receiving his pension, provided that the entitling event (*i.e.*, reaching retirement age) occurred while he was a resident of Israel.[28]

This restriction was challenged at the HCJ by Michael Halamish, an Israeli who at age 60 moved to the United States, and the NII therefore denied his claim for an old-age pension.[29] Although the HCJ rejected the petition, holding that the petitioner's request had no legal basis under existing legislation, it ordered the Minister of Social Affairs *to consider* issuing new regulations to enable Israelis who completed the required qualifying period of contributions to claim an old-age pension while living abroad. Following this judgement, the Minister of Social Affairs appointed a commission to consider the matter. The commission recommended the change, but the Minister rejected the recommendation, claiming budgetary constraints.[30]

3. ANNEXATION AND SOCIAL SECURITY IN EAST JERUSALEM

3.1. ANNEXATION AND ITS ANOMALIES

On 27 June 1967, following the results of the Six Day War, the Knesset enacted a statute stating that 'the law, jurisdiction, and administration of the State shall apply to all territory of the Land of Israel that the government proclaims by Order'.[31] The next day, the Government of Israel issued an order declaring an area of about 70 square kilometres around West Jerusalem as territory in which the law, jurisdiction, and administration of the State apply.[32]

Immediately afterwards, the Interior Minister issued an order incorporating that area within the municipal boundaries of (West) Jerusalem.[33] Interestingly, of those 70 square kilometres, only six were part of the municipality of East Jerusalem during the Jordanian rule; the remaining 64 square kilometres belonged to 30 adjacent

28 HCJ 6051, *Rekanat* vs *National Labour Court*, *Piskei Din*, Vol. 51, No. 3, p. 346 (in Hebrew); and HCJ 7618/97, *Scheinberg* vs *National Insurance Institute* (unpublished).

29 HCJ 890/99, *Halamish* vs *National Insurance Institute*, *Piskei Din*, Vol. 54, No. 4, p. 423 (in Hebrew).

30 This decision was later challenged by a person in the same situation of *Halamish*, but the Court rejected the petition, claiming that the decision was reasonable (HCJ 8313/02, *Izen* vs *National Insurance Institute, Piskei Din*, Vol. 58, No. 2, p. 607 (in Hebrew).

31 The Law and Administration Ordinance (Amendment No. 11) Law, section 11(B), *Laws of the State of Israel*, Vol. 21, 1967, p. 75.

32 Law and Administration Order (No. 1), *Kovets Ha-Takanot*, Vol. 2064, p. 2690, 28 June 1967 (in Hebrew).

33 Issuance of this order was possible after the Knesset amended The Municipalities Ordinance (Amendment No. 6) Law, *Laws of the State of Israel*, Vol. 21, 1967, p. 75. This Law empowered the Interior Minister to extend the boundaries of a municipality to include an area falling within the definition of section 11(B) of the Law and Administration Ordinance, *supra* note 31.

Palestinian towns and villages.[34] Nonetheless, the entire area became known as East Jerusalem.[35]

In July 1980, the Knesset enacted the Basic Law: Jerusalem, Capital of Israel, which stated, in Section 1, that 'Jerusalem, complete and united, is the capital of Israel'. In 2000, an amendment to the Basic Law was adopted, prohibiting the transfer of powers over any part of the city to a foreign body, unless such transfer is approved by an absolute majority of the Knesset (61 Knesset members).[36]

This legislation set the legal framework for the annexation of East Jerusalem to Israel. Despite the initial argument raised by the Israeli Government, according to which the 1967 legislation did not constitute annexation but only 'administrative and municipal integration', the HCJ established in a number of decisions that under Israeli law, East Jerusalem became part of the State of Israel.[37] It is worthwhile noting, however, that the new situation gave rise to significant anomalies.

First, the annexation blatantly violated international law; in particular, it breached the prohibitions on acquiring territory by force,[38] and changing the law in occupied territory.[39] As a result, it has never been recognised by a majority of members of the United Nations. The UN General Assembly and the Security Council adopted numerous resolutions condemning the Israeli steps in East Jerusalem and declaring the annexation unlawful and void.[40]

Second, while the annexation created a sharp legal distinction between East Jerusalem and the rest of the West Bank, which remained occupied territory, the daily reality hardly reflected this distinction. East Jerusalem was the heart of a contiguous and densely populated Palestinian metropolis, extending from Bethlehem in the south to Ramallah in the north, and was the informal capital of the West Bank. It

34 B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories (hereinafter: B'Tselem), *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem*, B'Tselem, Jerusalem, 1997, p. 17.

35 For the sake of simplicity, this term will be used below also to refer to the entire area annexed into Israel and the Jerusalem Municipality in 1967.

36 The Basic Law: Jerusalem, Capital of Israel (Amendment No. 1), *Laws of the State of Israel*, Vol. 34, 1980, p. 209.

37 Lapidoth, Ruth, 'Jerusalem – Some Jurisprudential Aspects', *Catholic University Law Review*, Vol. 45, No. 3, 1996, pp. 661–686, at p. 668.

38 This prohibition is considered customary international law and is reflected in numerous UN resolutions, one being General Assembly Resolution 2625, entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States'.

39 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Article 43, 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, entered into force 26 January 1910.

40 See S.C. Res. 478, UN SCOR, 35th sess., 2245th mtg, p. 14, UN Doc. S/INF/36, 20 August 1980; GA Res. 35/169E, UN GAOR, 35th sess., supp. no. 48, pp. 208–2209, UN Doc. A/35/48, 15 December 1980; S.C. Res. 673, UN SCOR, 46th sess., 2949 mtg. at Res. & Dec. 7, UN Doc. S/INF/46, 24 October 1990.

served as the centre for employment, health, education, religion and culture.[41] The city's municipal boundaries, which were also Israel's boundaries, were (until recently) not physically demarcated, and Palestinians could cross them relatively freely.[42] The situation began to change significantly only in 2003, following the construction of the separation wall around the city.[43]

The boundary between the two areas became blurred, in large part, by the migration of tens of thousands of Palestinians from East Jerusalem to the suburbs (in the West Bank), as a result of the housing shortage in the city.[44] Although these residents formally moved outside Israel, the change of residence barely affected their daily life, and they continued working, studying, receiving medical care and maintaining social and family ties in East Jerusalem.

Third, some anomalies are evident even from a narrow Israeli domestic-law perspective. By virtue of a law adopted by the Knesset in 1970, for example, special arrangements were applied in East Jerusalem on some matters, such as the educational system (the Jordanian *curriculum* continued to be taught) and the official currency (the Jordanian *dinar* continued to be legal tender, in addition to the Israeli *shekel*).[45] Moreover, as we shall see in the following section, even the legal status of East Jerusalem's inhabitants became anomalous.

3.2. THE STATUS OF PALESTINIAN JERUSALEMITES

In September 1967, following annexation, Israel conducted in East Jerusalem a census and issued Israeli identity cards to some 66,000 Palestinians who were recorded in the population registry.[46] The Israeli Government enabled the inhabitants to obtain Israeli citizenship, provided they met certain conditions, including relinquishing citizenship elsewhere and demonstrating some knowledge of Hebrew.[47] Persons granted citizenship were required to swear loyalty to the State. For political reasons, only a small minority opted for citizenship. Most Palestinian Jerusalemites held

41 Kimhi, Israel *et al*., *Arab Settlement in the Metropolitan Area of Jerusalem,* Jerusalem Institute of Israel Studies, Jerusalem, 1986.

42 In 1993, Israel imposed a 'general closure' on the West Bank, which still remains in force, prohibiting the entry of West Bank residents into East Jerusalem, unless they have a personal permit. However, given the geography of the city, this restriction was loosely implemented.

43 See B'Tselem, *The Separation Barrier around Jerusalem*, available at: www.btselem.org/English/Separation_Barrier/Jerusalem.asp (last accessed on 15 April 2008).

44 The International Peace and Cooperation Center, Strategic Planning Team, 'Jerusalem Profile', in: Khamisi, R. and Nasrallah, R. (eds), *Jerusalem Urban Fabric: Demography, Infrastructure and Institutions*, The International Peace and Cooperation Center, Jerusalem, 2003, pp. 33–35.

45 Legal and Administrative Matters (Regulations) Law (Consolidated Version), *Laws of the State of Israel*, Vol. 24, 1969–1970, pp. 144 -152.

46 Benvenisti, Meron, *The Torn City*, University of Minnesota Press, Minneapolis, 1976, pp. 163–164.

47 The Citizenship Law, *Seffer Hahukim*, Vol. 95, 1952, p. 146, section 5 (in Hebrew).

Jordanian citizenship at the time. However, in 1988, the King of Jordan issued an order that de facto revoked their citizenship, making them stateless.[48]

The legal significance of the Israeli identity card granted to East Jerusalem Palestinians was not clarified until 1988, when a petitioner challenged the revocation of his identity card after he moved to the US and obtained American citizenship.[49] In its judgement, the HCJ held that the status of East Jerusalem Palestinians was based on the Entry into Israel Law, according to which they are considered 'permanent residents' of Israel.[50] Unlike citizens, permanent residents are not allowed to vote in national elections. Also, the status expires if the holder settles in another country.[51]

The social security legislation, by contrast, makes no distinction between the rights and duties of citizens and those of non-citizen residents.[52] Therefore, since the 1967 annexation, Palestinian Jerusalemites living within the boundaries of Jerusalem have been entitled to the full range of NII benefits.

However, establishing whether a person was living in East Jerusalem was, in many cases, far from self-evident: Jerusalem's boundaries were not physically demarcated and thousands of Palestinians holding Israeli ID cards were living between East Jerusalem and the rest of the West Bank (see above), creating a complex reality. The different ways in which Israel related to this reality in determining entitlement to social security benefits were closely linked to the government's ultimate policy goals regarding Jerusalem. Therefore, before mentioning the specific criteria for entitlement to NII benefits, I shall briefly discuss Israeli governmental policy on Jerusalem.

3.3. DEMOGRAPHIC BALANCE

The Israeli national Government is directly involved in setting policy guidelines for Jerusalem. The Ministerial Committee for Jerusalem Affairs (hereafter: the Ministerial Committee), formed in 1969, has been the main governmental body charged with this task. The decisions of the Ministerial Committee, which is generally headed by the Prime Minister or by the Interior Minister, have the status of Cabinet decisions.[53]

48 Lapidoth, Ruth, 'The Status of East Jerusalem Arabs', in: Ramon, A. (ed.), *The Jerusalem Lexicon*, Jerusalem Institute of Israel Studies, Jerusalem, 2003, p. 264 (in Hebrew).

49 HCJ 282/88, *Mubarak Awad* vs *Yitzhak Shamir et al., Piskei Din*, Vol. 42, No. 2, p. 430 (in Hebrew).

50 For a critical review of this decision, see Herling, David, 'The Court, the Ministry and the Law: Awad and the Withdrawal of East Jerusalem Residence Rights', *Israel Law Review*, Vol. 33, No. 1, 1999, pp. 67–105.

51 Section 11(c) of the Entry into Israel Regulations stipulates, *inter alia*, that 'a person living for more than seven years in a foreign country shall be deemed to have settled in a foreign country'.

52 For further details, see section 1.2.

53 Merhav, R. and Giladi, R., 'The Ministerial Committee for Jerusalem', in: *The Jerusalem Lexicon*, Jerusalem Institute of Israel Studies, Jerusalem, 2003, pp. 269–272 (in Hebrew).

In addition, several permanent and *ad hoc* committees were established by the government over the years to set up policy guidelines on specific issues.[54] The 'Gafni Committee', established in 1973, determined that a 'demographic balance of Jews and Arabs must be maintained at its level at the end of 1972' that was 73.5 percent Jews and 26.5 percent Palestinians.[55] All Israeli governments, through the Ministerial Committee, have adopted this goal in Jerusalem matters.[56]

Ostensibly, the principal way to cope with the rapidly increasing Palestinian population and preserve the 'demographic balance' has been to provide incentives to encourage Jews (both veteran Israeli and new immigrants) to settle in Jerusalem. In addition to these incentives, Israeli governments, together with the Jerusalem municipality, have implemented discriminatory policies encouraging Palestinians to leave the city, for example:

- Systematic discrimination in planning and building, which led to a severe housing shortage, based on two major components: massive confiscation of Palestinian land that was then allocated for the construction of Jewish neighborhoods, and zoning of extensive areas as 'open landscape' areas, where construction is forbidden.[57]
- Systematic discrimination in municipal-budget allocations, which led to a huge disparity between West and East Jerusalem in infrastructure and service.[58]
- Placement of impediments on, and prohibition of family unification between Palestinian residents and their non-resident spouses (generally from the West Bank), a policy that was implemented through both legislation and bureaucratic practice.[59]

Despite these policies, the original goal was never achieved. Because of the high natural birth-rate of the Palestinian population, the demographic balance in Jerusalem was gradually 'eroded'. By the end of 2006, of Jerusalem's total population of 733,300, 34.4 percent (252,400) were Palestinians.[60]

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54 *Idem*.

55 State of Israel, Inter-ministerial Committee to Examine the Rate of Development for Jerusalem, *Recommendation For A Coordinated And Consolidated Rate Of Development*, State of Israel, Jerusalem, 1973, p. 3 (in Hebrew).

56 Cheshin, Amir *et al.*, *Separate And Unequal- The Inside Story of Israeli Rule in East Jerusalem,* Harvard University Press, Cambridge, 1999, pp. 57–64 (Amir Cheshin, the main author of this book, served as Senior Adviser on Arab Affairs to former Jerusalem Mayor Teddy Kollek (1967–1993) and was among the architects of this policy).

57 See *ibidem*, pp. 22–66; B'Tselem, *op.cit* (note 34); and Bollens, Scott, *On Narrow Grounds – Urban Policy And Ethnic Conflict In Jerusalem And Belfast,* SUNY Press, Albany, 2000, pp. 65–95.

58 See Cheshin *et al.*, *op.cit.* (note 56), pp. 23–26 and 62–69; and Bollens, *op.cit.* (note 57), pp. 92–95.

59 B'Tselem and Hamoked, Center for the Defense of the Individual (hereinafter: Hamoked), *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, B'Tselem, Jerusalem, 2004.

60 Central Bureau of Statistics, Population Statistics, 2006.

3.4. ENTITLEMENT TO NII BENEFITS AFTER MOVING TO THE WEST BANK

Among the first major governmental projects in East Jerusalem was the reconstruction of the historical Jewish Quarter in the Old City, and the transfer of Israeli settlers to live there.[61] Implementation of the project required the evacuation of Palestinians living in the planned area. To provide a housing solution for the families to be evacuated from the Old City, the Ministerial Committee decided to establish a housing project in Al-Eizarria, a West Bank village adjacent to Jerusalem.[62]

Desiring to encourage these families to move voluntarily to Al-Eizarria, thus avoiding the need to evict them, the Ministerial Committee decided, in February 1973, to entitle East Jerusalem Palestinians relocating in the West Bank to NII benefits.[63] This decision (hereafter: the 1973 decision) would form the basis for Israel's social security policy for the next 25 years as regards:

> A person who, as a resident of Jerusalem, holds an Israeli identity card, and continues to make regular payments to the NII – will continue to benefit from national insurance rights even if he moves outside the municipal borders of Jerusalem.[64]

With the demographic-balance policy in mind, it appears evident that the Ministerial Committee selection of Al-Eizarria, a town in the West Bank, as the site for the new neighbourhood was not by chance, but to advance that agenda. A similar motivation was apparently the reason for the Committee to apply the 1973 decision to any Palestinian leaving Jerusalem, and not only those living in the Old City.

However, despite its significant financial consequences, clear rules for implementing the 1973 decision were not issued until 1987. As a result, NII clerks alternated inconsistently between two different interpretations.[65] According to the straightforward interpretation, Palestinians who moved to the West Bank were entitled to continue to receive NII benefits, as if they had never left the city. According to the other, narrow interpretation, those who left the city were to receive only those

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61 For an historical review of Israeli settlement policy in the Old City, see Dumper, Michael, 'Israeli Settlement in the Old City of Jerusalem', *Journal of Palestine Studies*, Vol. 21, No. 4, 1992, pp. 32–53.

62 See Cheshin *et al.*, *op.cit.* (note 56), p. 149.

63 *Idem*.

64 Decision 15/YM, of 13 February 1973. Although not explicitly stated, the words 'outside the municipal borders of Jerusalem' referred to persons moving to the West Bank and not to the Gaza Strip.

65 Attorney Amir, oral presentation on behalf of the Association for Civil Rights in Israel, based on extensive correspondence with the NII, before the Labour and Welfare Committee of the Knesset (Protocol No. 73, 16 March 1993) (in Hebrew).

benefits to which they were previously entitled, and not benefits for which the entitling event occurred after they left.[66]

Under the pressure of a petition filed in the Supreme Court against the NII, and given the lack of clear guidelines, the Minister of Social Welfare, issued regulations for the implementation of the 1973 decision, which took force on 1 January 1987 (hereafter: the regulations).[67] The regulations enshrined in law the narrow interpretation of the 1973 decision, whereby Palestinians who moved from Jerusalem to any place in the Occupied Territories would continue to receive already acquired NII benefits, but would not be allowed to submit new claims for benefits to which they were not previously entitled.[68]

The regulations also provided an exception regarding old-age benefit: persons who on the date the regulations took force completed the qualifying period, but had not reached the requisite age may submit their claims within two years after attaining that age.[69] In another exception, residents who moved to the Occupied Territories and later returned to Jerusalem, became entitled, two years after their return, to NII benefits.[70]

Despite the improper motive in issuing them, the regulations set a relevant precedent for the issue discussed in this essay, by providing an intermediate status – between resident and non-resident – for entitlement to social security benefits. This intermediate status was tailored especially to meet the atypical reality in which East Jerusalem Palestinians lived.

In February 1998, a decade after they entered into force, the regulations were repealed by the Knesset as part of a lengthy law dealing with dozens of economic measures.[71] The NII immediately stopped all payments to East Jerusalem residents living in the West Bank and new claims were not accepted. In addition, the NII began for the first time to investigate carefully the applicant's place of residence in almost every claim filed by Palestinian Jerusalemites.[72]

66 *Idem*.

67 National Insurance Regulations (Rights and Obligations under the National Insurance Law for Non-Residents of Israel), *Kovets Ha-Takanot*, Vol. 5022, pp. 747–750, 1 April 1987 (in Hebrew).

68 *Ibidem*, Articles 2 and 3.

69 *Ibidem*, Article 4.

70 *Ibidem*, Article15(a).

71 Increasing Growth and Employment and Achieving Budgetary Objectives for the 1998 Fiscal Year (Legislative Amendments) Law, section 9, *Seffer Hahukim*, Vol. 1645, 1998, p. 57 (in Hebrew).

72 B'Tselem and Hamoked, *The Quiet Deportation Continues: Revocation of Residency And Denial of Social Rights of East Jerusalem Residents*, B'Tselem, Jerusalem, 1998, p. 2.

4. THE RIGHT TO SOCIAL SECURITY IN INTERNATIONAL LAW

The two Basic Laws adopted by the Knesset in the 1990s – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation – contributed greatly to the constitutional protection of human rights in Israel.[73] However, neither has explicitly recognised economic and social rights, the right to social security in particular.

In a few cases, the Supreme Court held that the protection provided by the right to dignity, enshrined in section 2 of the Basic Law: Human Dignity and Liberty, may include some aspects of the right to social security.[74] However, according to the President of the Court, 'the question of the normative status and the scope of the right to social security (…) in our judicial system are yet to be determined'.[75]

In contrast, the right to social security is explicitly recognised as a human right under international human rights law (IHRL). The UDHR, of 1948, establishes that everyone 'has the right to social security',[76] and that everyone has 'the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.[77]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966 and the Convention on the Rights of the Child (CRC) adopted in 1989, also grant the right to social security. Article 9 of the ICESCR prescribes: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'.[78] An identical formula was adopted in article 26(1) of the CRC, where the word 'everyone' was replaced by the words 'every child'.[79] Paragraph 2 of the same article adds that 'the benefits should, where appropriate, be granted, taking into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child'. Both

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73 Basic Law: Human Dignity and Liberty, *Seffer Hahukim*, Vol. 1391, 1992, p. 150; and Basic Law: Freedom of Occupation, *Seffer Hahukim*, Vol. 454, 1994, p. 90 (in Hebrew).

74 Civ. App. Sup.4905/98, *Gimzo* vs *Ishaiahu*, *Piskei Din,* Vol. 55, No. 3, p. 360 (in Hebrew). See also, Halamish, *supra* note 29; and HCJ 5578/02, *Manor* vs *Minister of Finance*, *Piskei Din,* Vol. 59, No. 1, p. 729 (in Hebrew).

75 HCJ 494/03, *Physicians for Human Rights* et al. vs *Ministry of Finance* et al., *Piskei Din,* Vol. 59, No. 3, p. 323 (in Hebrew).

76 Universal Declaration, *supra* note 8, Article 22.

77 *Ibidem*, Article 25(1).

78 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 *United Nations Treaty Series* 3, GA Res. 2200A(XXI), 21 UN GAOR, UN Doc. A/6316, entered into force 23 March 1976.

79 Convention on the Rights of the Child, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49), p. 167, UN Doc. A/44/49, 1989, entered into force 2 September 1990.

instruments were ratified by Israel in 1991.[80] The status of the right to social security as a human right was further enhanced by the adoption of other instruments forbidding discrimination in implementing this right.[81]

Due to its distinct historical evolution and institutional setting, International Labour Organization (ILO) law is not generally considered part of IHRL. Nonetheless, it significantly contributed to the advancement of social and economic human rights. In the field of social security, no less than 21 conventions and 14 recommendations were adopted by the ILO over the years.[82] The most comprehensive instrument in this field is Convention 102: Social Security (Minimum Standards) adopted in 1952 and ratified by Israel in 1955.

This section analyses the extent to which the social security provisions of IHRL and ILO law, are relevant in the case of a transfer of East Jerusalem to a Palestinian entity. In other words, can these provisions of international law be understood to impose on Israel legal obligations to persons who, following an international agreement, are located outside its territory?

4.1. THE INTERNATIONAL DIMENSION OF THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The ICESCR, the main IHRL instrument enshrining the right to social security, has no clause specifying its scope of application. The CRC, in contrast, establishes in Article 2(1) that States shall respect and ensure the rights provided in the convention to 'each child within their jurisdiction'. The exercise of State jurisdiction over an area or a person is mentioned, in different formulations, as conditioning the application of other human rights instruments, among them the International Covenant on

80 For reasons of economy I will limit the discussion in this section to the applicability of the ICESCR only. Nonetheless, in principle, almost all the arguments are relevant in regard to the applicability of the CRC as well.

81 The International Convention on the Elimination of All Forms of Racial Discrimination, 660 *United Nations Treaty Series* 195, Article 5(e)(iv) (hereinafter: ICERD). Israel ratified this convention in 1979; The Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN GAOR Supp. (No. 46), p. 193, UN Doc. A/34/180, entered into force 3 September 1981, Article 11(1). Israel ratified this convention in 1991.

82 A full list of the ILO social security conventions and recommendations is available at: www.ilo.org/ilolex/english/subjectE.htm#s13 (last accessed on 15 April 2008).

Civil and Political Rights (ICCPR),[83] the Convention against Torture,[84] and the International Convention on Elimination of All Forms of Racial Discrimination.[85] Can one therefore assume that the existence of State jurisdiction is a condition to the application of the ICESCR as well?

As we shall see, this is not necessarily the case. As explained by one commentator, the lack of mention of the words 'territory' or 'jurisdiction' as delimiting criteria for the covenant's scope of application indicates that 'a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty'.[86]

This international dimension is clearly reflected in the interpretative work of the UN Committee on Economic, Social and Cultural Rights (hereafter: the Committee), through its general comments on the ICESCR's provisions. While not legally binding, this work is usually considered the most authoritative interpretation of the covenant. While most general comments say that some State duties are limited to persons 'under the jurisdiction of State Parties',[87] they usually include a section specifying the 'international obligations' of State parties. These obligations derive from Article 2(1) of the ICESCR, which provides for the implementation the Covenant, *inter alia*, 'through international assistance and cooperation'.[88]

In General Comment No. 19, which was entirely devoted to the right to social security, the Committee establishes that, as part of these obligations, 'states parties should ensure that the right to social security is given due attention in international

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83 International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 *United Nations Treaty Series* 175, GA Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16) 49, UN Doc. A/6316, entered into force Jan. 3, 1976. Article 2(1) of this Covenant establishes the duty of each State party to apply the Covenant in regard to 'all individuals within its territory and subject to its jurisdiction'. This ambiguous provision has opened a debate whether the two conditions, territory and jurisdiction, are conjunctive or disjunctive. As noted by McGoldrick, while the conjuctive (narrow) interpretation is 'undoubtedly the more natural, literal one', the disjunctive interpretation, which enables the broadest scope of application, is dominant. See McGoldrick, D., 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in: Coomans, F. and Kamminga, M.T. (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp/Oxford, 2004, pp. 41–72. See also UN, Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CPR/C/21/Rev.1/Add.13, 26 May 2004.

84 Similar to the CRC, Article 2(1) of the CAT avoids the ambiguity of the ICCPR and obliges States parties to prevent torture in 'any territory under its jurisdiction'.

85 *Supra* note 81. Article 3(1) of the ICERD obliges States to apply the convention in 'territories under their jurisdiction'.

86 Coomans, Fons, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in: Coomans and Kamminga, *op.cit.* (note 83), pp. 183–200, at p. 185.

87 See, for example, General Comment No. 18, The Right to Work (Article 6), UN Doc. E/C.12/GC/18, 6 February 2006, para. 12(b), 35; General Comment No. 15, The Right to Water (Articles 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003, paras 12(c) and 53; General Comment No. 14, 2000, The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, 11 August 2000, paras 12(b) and 51.

88 See, for example, General Comment No. 18, para. 30; General Comment No. 15, paras 31, 33 and 34; and General Comment No. 14, para. 39, all *supra* note 87.

agreements'.[89] Accordingly, they 'should take steps to ensure that these instruments do not adversely impact upon the right to social security'.[90]

Based on this statement, one can safely assume that an agreement leading to a total denial of NII rights of East Jerusalem Palestinians, would be considered by the Committee as incompatible with Israel's obligations under Article 9, in conjunction with Article 2(1), of the ICESCR.

However, what are, according to this General Comment, the positive obligations of States *vis-à-vis* the realisation of the right to social security of persons living in other countries? First, States have to *respect* the right to social security by refraining from actions that interfere with its enjoyment in other countries.[91] Second, 'states parties should extra-territorially *protect* the right to social security by preventing their own citizens and national entities from violating this right in other countries'.[92] Thirdly, 'depending on the availability of resources, States parties should *facilitate* the realization of the right to social security in other countries, for example through provision of economic and technical assistance'.[93]

Unsurprisingly, the duty to *fulfill* the right to social security ('to take the necessary measures (…) towards the full realization of a right')[94] and the duty to *provide* this right 'when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realize that right themselves within the existing social security system',[95] are not mentioned in the General Comment as part of the 'international obligations' of States parties.

One can infer from this omission that the duties to fulfill and to provide the right to social security are applicable only regarding persons under the jurisdiction of State parties. Given that the nature of the measures Israel would be required to take in order to prevent the denial of the NII rights in a partition scenario (*i.e.*, legislative and budgetary measures) belong precisely to these categories of duties, the relevance of these provisions in the General Comment is only limited.

The international dimension of the ICESCR is reflected also in another section of the General Comment, dealing with the right to social security of non-nationals:

> Article 2(2) prohibits discrimination on ground of nationality and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should

89 General Comment No. 19, *supra* note 7, para. 56.
90 *Ibidem*, para. 57.
91 *Ibidem*, paras 44 and 53 (emphasis in original).
92 *Ibidem*, para. 54 (emphasis in original).
93 *Ibidem*, para. 55 (emphasis in original).
94 *Ibidem*, para. 47.
95 *Ibidem*, para. 50.

be able to benefit from that contribution or retrieve their contributions if they leave the country.[96]

Although the second half of this statement looks at first glance as a kind of solution to the problem discussed in this essay, an attempt to apply it may raise two difficulties. First, this 'solution' seems to be relevant, according to the Comment's text, only in the context set in the first half of the statement: the prohibition of discrimination on grounds of nationality. However, as explained in section 1.2, the provision in Israeli legislation preventing the payment of NII benefits to persons staying outside Israel is equally applicable to nationals and non-nationals.[97] Therefore, even if inadequate, this provision can hardly be considered discriminatory. Second, given that most NII programmes, including those defined as 'contributory', are heavily funded by the government, the retrieval of contributions may compensate only to a limited degree for the loss of acquired benefits.

Considering the limitations of the so-called 'international dimension' of the ICESCR in dealing with the problem posed in this essay, it seems appropriate to ask whether, in exceptional circumstances, persons living outside the territory of a State could be considered 'within the jurisdiction' of that State *vis-à-vis* the implementation of a particular right?

All UN treaty bodies have unanimously established that IHRL is applicable in an area outside the territory of a State provided that such area is under its effective control.[98] However, given that in the situation posited in this essay, whereby, following a peace agreement, Israel loses effective control over East Jerusalem, the above view is not directly relevant.

The jurisprudence developed by the Human Rights Committee (HRC) on the admissibility of individual complaints about violations of the ICCPR (a mechanism inexistent regarding the ICESCR) may provide useful guidance in exploring the jurisdictional reach of the ICESCR.

96 *Ibidem*, para. 36.

97 See *supra* section 1.2.

98 For a discussion on the rationale of this conclusion and its applicability to the Israel's control of the territories it occupied in 1967, *see* Ben-Naftali, Orna and Shany, Yuval, 'Living in Denial: the Application of Human Rights in the Occupied Territories', *Israel Law Review,* Vol. 37, No. 1, 2003–2004, pp. 17–118. This view was expressed several times regarding the applicability of the respective treaties to Israel's actions in the territories occupied by Israel in 1967. See especially Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, UN Doc. E/C.12/1/Add.90, 23 May 2003, para. 15.

4.2. THE HUMAN RIGHTS COMMITTEE ON EXTRATERRITORIALITY

Two prominent cases handled by the HRC involved allegations that the security services of Uruguay kidnapped Uruguayan nationals living in Argentina (*Lopez Burgos* vs *Uruguay*),[99] and in Brazil (*Celiberti de Casariego* vs *Uruguay*),[100] arbitrarily violating their right to liberty. In both cases, the HRC rejected the Government of Uruguay's argument that, given the ICCPR was designed to cover only violations that occurred in the territory of the particular State party, the complaints should be considered inadmissible. Using identical language in both cases, the HRC noted that,

> [t]he reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.[101]

The holding is clear: the *nature of the relationship* between the State and the individual, and not the location of the individual, is decisive. In these cases, the nature of the relationship was such that one side (the individual) was completely subject to the control of the other (the State).

The HRC justified this view by invoking Article 5 (1) of the ICCPR, which states that the Covenant should not be interpreted 'as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant'. Therefore, the committee reasoned, 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[102] This provision appears in identical wording in Article 5(1) of the ICESCR.

A similar approach was adopted in *Vidal Martins* vs *Uruguay*.[103] The complainant was a citizen of Uruguay residing in Mexico. When her requests to renew her passport or obtain a new one at the Uruguayan consulate in Mexico were systematically rejected, she claimed that her right to freedom of movement had been violated. This complaint, too, was found to be covered by the Covenant:

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99 Comm. R. 12/52, *Lopez Burgos* vs *Uruguay*, UN. Doc. CCPR/C/13/D/52/1979, 29 July 1981 (hereinafter: Lopez Burgos).

100 Comm. 56/1979, *Casariego* vs *Uruguay*, UN Doc. CCPR/C/OP/1, 29 July 1981 (hereinafter: Casariego).

101 Lopez Burgos, *supra* note 99, para. 12.2; and Casariego, *supra* note 100, para. 10.3.

102 Lopez Burgos, *supra* note 99, para. 12.3; and Casariego, *supra* note 100, para. 10.3.

103 Comm. 57/1979, *Vidal Martins* vs *Uruguay,* UN Doc. CCPR/C/15/D/57/1979, 29 July 1981.

> The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose. Moreover, a passport is a means of enabling him 'to leave any country, including his own', as required by article 12 (2) of the Covenant. It therefore follows from the very nature of the right that, in the case of a citizen resident abroad, it imposes obligations both on the State of residence and on the State of nationality. Consequently, article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.[104]

The reasoning is slightly different than in the previous cases. The central notion here is not the nature of the relationship, but the *nature of the right*. Inferentially, in some exceptional cases, the contours of State jurisdiction may vary from one right to another, thus warranting extra-territorial application of a specific provision in the Covenant. The HRC's conclusion that Uruguay exercised jurisdiction over Vidal Martins was in fact strictly limited to the implementation of the right to freedom of movement across international borders, and cannot support a claim of State responsibility regarding the enjoyment of other rights.

Although it does not explicitly refer to them, the HRC's decision in *Gueye* et al. vs *France* reflects both the nature-of-the-relationship approach and the nature-of-the-right approach.[105] *Gueye*, which is somewhat similar to the case explored in this essay, was submitted by 743 Senegalese who had retired from the French military forces. They were living in Senegal and receiving pensions from France. France subsequently enacted a law freezing the amount of their pensions, but not the pensions of retired soldiers of French nationality, which continued to be updated, regardless of their place of residence. Although the right to a pension is not specified in the ICCPR, the complainants argued that the new legislation violated their right to equality before the law, contending racial discrimination.

As in the complaints filed against Uruguay, discussed above, the Senegalese complainants were living outside the territory of France when the alleged violation occurred. However, in contrast to the Uruguayan complaints, this case does not involve any form of physical encounter between the complainants and the State agents. Nonetheless, the HRC found that in those circumstances the complainants were under French jurisdiction, and therefore held that the case was admissible. In explaining its decision, the HRC noted that '…they [the complainants] rely on French legislation in relation to the amount of their pension rights'.[106] *Gueye* is instructive, showing that legitimate 'reliance' of a person on the state may, in itself, place the person under the State's jurisdiction.

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104 *Ibidem*, para. 7.

105 Comm. 196/1985, *Ibrahim Gueye* et al. vs *France*, UN Doc. CCPR/C/35/D/196/1985, 6 April 1989.

106 *Ibidem*, para. 9.4. The HRC concluded that the said legislation constituted prohibited discrimination, in violation of Article 26 of the ICCPR; however, it held that the discrimination was based on 'other status' and not on racial grounds.

In *Kindler* vs *Canada*, the HRC used a different perspective in dealing with the issue of extra-territorial applicability of the Covenant.[107] Joseph Kindler, an American citizen who was convicted of murder and sentenced to death in the United States, escaped from custody and fled to Canada, where he was later apprehended by the Canadian authorities. Pursuant to the extradition treaty between the two States, and following judicial proceedings, he was extradited to the United States. The complainant argued that Canada's decision to extradite him violated, *inter alia*, the right to life and the prohibition on cruel, inhuman or degrading treatment or punishment.[108]

In its response, Canada argued that the ICCPR 'does not impose responsibility upon a State for eventualities over which it has no jurisdiction'.[109] In this case, Canada stated, 'the allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the laws and actions of the authorities of the United States'.[110] The HRC rejected this proposition and decided that the complaint was admissible.[111] The committee noted that

> [i]f a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant (…) The forseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.[112]

This view suggests that jurisdiction has, in addition to a territorial dimension, a temporal dimension. The interplay of the two dimensions imposes on States the duty to adopt a forward-looking approach in making decisions that may affect the enjoyment of human rights, even outside its territory.

4.3. REASONING BY ANALOGY

This limited review of HRC jurisprudence points to three notions relevant in understanding the scope of application of ICCPR: the nature of the relationship between the individual and the State, the nature of the right in question, and the forseeability of consequences of State acts. This jurisprudence is apparently based on

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107 Comm. 470/1991, *Kindler* vs *Canada,* UN Doc. CCPR/C/48/D/470/1991, 18 November 1993.

108 *Ibidem*, para. 3.

109 *Ibidem*, para. 4.3.

110 *Ibidem*, para. 4.2.

111 However, on the merits of the case, the majority held that Canada's decision to extradite Kindler did not violate the Covenant. The Committee noted that, 'the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances.' *Ibidem*, para. 14.6.

112 *Ibidem*, para. 6.2.

the premise that, given the universality of human rights, protection vacuums should be avoided where possible. These notions can be extrapolated to apply to the right to social security under the ICESCR and aid in analysing our case. This methodology can be grounded on the currently widely-accepted idea that all human rights are indivisible and interdependent.[113]

Regarding the right to social security, what, then, is the nature of the relationship between Palestinian Jerusalemites and Israel? Three facts are particularly relevant. First, the annexation of East Jerusalem in 1967 and the subsequent integration of its residents into the Israeli social security system created strong expectations of social security benefits in the future. Moreover, for many years, Israeli governments exploited these expectations to encourage Palestinian Jerusalemites to move to the West Bank.[114]

Second, the paid-in contributions and the seniority acquired in Israel's social security system are not transferable, except pursuant to agreement between Israel and the other State. Given the reciprocity is a crucial element in this type of agreement, it is very unlikely that Israel and a future Palestinian State will come to such an arrangement.

Third, a major gap in the institution-building process of the Palestinian Authority since its founding in 1994 is in the field of social security.[115] No comprehensive social security legislation or administration exists. The emergence of a comprehensive social security system in the visible future is unfeasible.[116]

This combination of strong expectations and lack of a reasonable alternative is crucial in understanding the nature of the relationship between Israel and the Palestinian Jerusalemites in the situation analysed here. To put it simply, these individuals would rely totally on the discretion of the State for the purpose of fulfilling their right to social security. In other words, for that specific purpose, Palestinian Jerusalemites will be completely at the mercy of Israel, and therefore under its jurisdiction, even though they will be living in another State. Just like Lopez Burgos, Casariego and Vidal Martins, who were under the jurisdiction of Uruguay even though they lived elsewhere, and just like Gueye and 742 other former soldiers, who lived in Senegal yet found themselves under French jurisdiction.

With regard to the 'nature of the right', social security is rather unique in being simultaneously a past and future-oriented right. Several branches of the NII link entitlement to events that occurred in the past, such as the completion of a qualifying period or the occurrence of an entitling event. Similarly, for most people, the present enjoyment of the right to social security means they are protected from an eventuality

113 See Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14–25 June 1993, para. 5, UN Doc. A/CONF.157/24 (Part I), 1993, p. 20.

114 See *supra* section 2.4.

115 See Sayre and Olmsted, *loc.cit.* (note 6), p. 143.

116 See *supra* note 6.

that may or will occur in the future. Therefore, the idea that a State may suddenly and unilaterally interrupt this link between the past and the future, on the sole grounds that the person is no longer in its territory, contradicts the very nature of this right.

The notion of forseeability of consequences, too, is connected to the temporal dimension of the right to social security, although in a different manner. It implies that, when signing an agreement transferring an area under its control to another State, Israel must consider the ramifications on the enjoyment of human rights by the persons living in the transferred territory. Moreover, as established by the Committee on Economic Social and Cultural Rights, such an obligation is implicit in Article 2(1) of the ICESCR.[117]

Applying this notion to our case leads to the conclusion that Israel would be obliged to adopt all reasonable measures to prevent such an agreement from infringing the human rights of persons living in East Jerusalem, including the right to social security. In this regard, it is important to make clear that maintenance of the *status quo* in East Jerusalem, although it would avoid the infringement on the right to social security resulting from a partition of the city, is problematic given the numerous resolutions by the UN Security Council and General Assembly, establishing that the annexation of East Jerusalem to Israel constitutes a continuous violation of international law.[118]

To summarise, if we apply these three HRC approaches on the extra-territorial scope of the ICCPR to the realm of the right to social security under the ICESCR, Israel would continue to bear at least some responsibility for the provision of social security to Palestinian Jerusalemites, who, following a peace agreement, find themselves outside its territory. However, given the uniqueness of this situation and the lack of precedents, the precise scope of such a responsibility would remain debatable.

4.4. THE ILO LEGISLATION

Does ILO legislation support the conclusion drawn from the jurisprudence of the Committee and the HRC? If so, can it contribute in defining in more precise terms the content of the state duties in the situation discussed here?

The answer to the first question seems to be, according to Convention 102: Social Security, which is the most comprehensive instrument in this field, negative.[119] Article 69(a) of the Convention authorises State parties to suspend the payment of benefits to a person who would otherwise be entitled 'as long as the person concerned is absent from the territory of the Member'.[120]

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117 See *supra* note 89 and accompanying text.

118 See *supra* note 40 and accompanying text.

119 ILO Convention No. 102, Social Security Minimum Standards, 1952.

120 This article appears in part XIII, titled Common Provisions, of the convention and is therefore applicable to the ten branches covered by it.

However, the discretion granted to States by this provision was significantly restricted in Convention 118: Equality of Treatment (Social Security), which was ratified by Israel in 1965, and deals with the social security rights of persons moving across national borders (hereafter: the Convention).[121]

Regarding 'acquired' benefits, that is payments to which a person was entitled before moving abroad, Article 5(1) of the Convention prescribes that member parties 'shall guarantee both to its own national and to the nationals of any other Member (…) when they are resident abroad, provision of invalidity benefits, old-age benefits, survivors' benefits and death grants, and employment injury pensions…' In addition, Article 6 obliges member parties to guarantee the payment of family allowances to its residents, in respect of children residing in the territory of any other member State.

According to the Israeli social security legislation, employment injury, old-age, and survivor's benefits may, under certain conditions, be payable to Israelis living abroad.[122] However, residency conditions do apply regarding invalidity benefits, death grants and child allowances. In relation to these three branches, Israeli legislation contradicts the Convention. Indeed, in the 1996 report of the ILO Committee of Experts on the application of Convention 118 by Israel,

> the Committee drew the Government's attention to the need to lift, as far as above-mentioned benefits are concerned, the restriction of section 146 [currently section 324, E.L.] of the National Insurance Act concerning the suspension of pensions in case of persons residing abroad for more than six months. It recalls that under the Convention, benefits should be paid abroad (…) without condition of residency.[123]

This observation provides firm support for the claim that the denial of the above mentioned three benefits to Palestinian Jerusalemites, as a result of a partition of Jerusalem, on grounds that they reside outside Israel would be unlawful. However, the Convention is silent regarding those who, as a result of such change, would lose acquired social security benefits that are not covered by Articles 5 and 6, such as unemployment, income support, family (except when only the child is abroad) mobility, accident injury and long-term-care benefits. Regarding these benefits, Israel could claim that, according to Article 69(a) of Convention 102, it may suspend their payment.

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121 The Convention restates and expands norms set as long ago as 1935 by Convention 48: Maintenance of Migrants' Pension Rights. Although Israel ratified it, the ILO declared Convention 48 outdated ('shelved'). In 1982, the ILO adopted Convention 157: Maintenance of Social Security Rights, which further elaborates the principles laid down by the two previous conventions. However, since this convention has not been ratified by Israel and it is not considered customary law I shall not rely on it.

122 For further details, see section 1.2.

123 CEACR, Individual Observation concerning Convention No. 118, Equality of Treatment (Social Security).

What about social security benefits in the course of acquisition? Does the Convention protect also persons who have paid into the social security system, and the change in sovereignty occurs before the 'entitling event'? According to Article 7 of the Convention, member States

> shall, upon terms being agreed between the Members concerned (…) endeavor to participate in schemes for the maintenance of the acquired rights and rights in course of acquisition under their legislation…Such schemes shall provide, in particular, for the totalisation of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits.

Although very relevant in principle, this provision would become legally binding only once the future Palestinian State becomes a member party to the Convention. Even then, given the difficult economic conditions facing that state, its participation in 'schemes for the maintenance of rights in course of acquisition', as recommended by the Convention, seems highly unlikely.[124]

In sum, the ILO Convention provides a significant, albeit partial, contribution, in specifying the duties that Israel will carry on *vis-à-vis* the right to social security of East Jerusalem Palestinians following a partition-of-the-city scenario.

5. SOCIAL SECURITY BENEFITS AS PROPERTY

As argued above, the right to social security is well recognised in IHRL, but not in Israeli constitutional law. With regard to the right of property, the situation is just the opposite. With the exception of the UDHR, the right of property is not enshrined in any other universal human rights instrument. In Israel, in contrast, since the adoption of the Basic Law: Human Dignity and Liberty, in 1992, (hereafter: 'the Basic Law') and perhaps before that, the right of property has been an integral part of Israeli constitutional law.[125] Section 3 of the Basic Law states: 'There shall be no violation of the property of a person'. The protection given by this provision is considered sufficiently broad to include any interference with property, and not just confiscation, as stated in the Fifth Amendment to the US Constitution.[126] The Basic Law, however, like other constitutional instruments, does not define property, thus leaving much room for interpretation.

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124 See *supra* note 6 and its accompanying text.

125 Dagan, Hanoch, 'Towards a New Era in the Israeli Discourse of Property', in: Rosen-Zvi, A. (ed.), *Yearbook on Israeli Law*, Papirus, Tel Aviv, 1996, pp. 652–690 (in Hebrew).

126 Weisman, Yehoshua, 'Constitutional Protection to Property', *Hapraklit,* Vol. 42, No. 2, 1994, pp. 258–275, at p. 265 (in Hebrew).

In this section, I shall explore whether social security benefits can be considered property and, if so, the extent to which the denial of benefits in the circumstances analysed in this essay violates the right of property under section 3 of the Basic Law.

5.1. THE DIFFERENT DIMENSIONS OF PROPERTY

The right of property is portrayed in mainstream philosophical and legal thought as a type of negative freedom (freedom from state interference).[127] However, this understanding is not exclusive. Some legal theories emphasise the distinction between property, on one hand, and ownership on the other.[128] The critical question about property, according to these theories, is not how to define the limits of State interference with ownership, but 'what kind of interests or relations, respecting what kinds of valued objects, fall within the category of protected interests or relations that we call property?'[129] Accordingly, State interference with ownership violates the right of property only insofar as it undermines the values on which property is based.

According to Charles Reich, due to the radical changes in the economic structure of American economy since the adoption of the Constitution, the right of property lost its original protecting individual autonomy.[130] While in the past, traditional forms of property (a land or a house) ensured the material basis of freedom, with the growth of the modern State, individual wealth became increasingly linked to governmental activity: contracts, franchises, licenses and welfare benefits. This reality enabled the rise of a new form of feudalism, in which access to resources administered by the State became more often than not a privilege rather than a vested right.[131]

To illustrate this situation, Reich refers to *Flemming* vs *Nestor*.[132] Ephram Nestor came to the US in 1913, and in 1955 became eligible for old-age benefits under the Social Security Act. During a long working life, Nestor and his employers had contributed payments to the government, which went to a social security fund. For a few years, Nestor was a member of the Communist Party. Long after his membership ceased, Congress passed a law, which applied retroactively, making membership in the Party cause for deportation, and another law making it grounds for loss of old-age benefits. In 1956, Nestor was deported and payment of benefits to him ceased. In a 5–4 decision, the Supreme Court held that the termination of Nestor's benefits was not unconstitutional.

127 Rawls, John, *Political Liberalism*, Columbia University Press, New York, 1993, p. 298; Berlin, Isiah, 'Two Concepts of Liberty', in: *Four Essays on Liberty*, Oxford University Press, Oxford, 1969.

128 Michelman, Frank, 'Property as a Constitutional Right', *Washington & Lee Law Review*, Vol. 38, No. 4, 1981, pp. 1097–1114.

129 *Ibidem*, p. 1099.

130 Reich, Charles, 'The New Property', *Yale Law Journal*, Vol. 73, No. 5, 1964, pp. 733–787.

131 *Ibidem*, p. 768.

132 363 U.S. 603, 1960.

Denouncing the profound injustice of the decision, Reich stressed the urgency of recognising social security benefits as a type of 'new property':

> No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied [on?] and more often thought of as property. No form is more vital to the independence and dignity of the individual.[133]

Joseph Singer conceptualised property as intrinsically linked to the ability of people to rely on social relationships.[134] This linkage, according to Singer, is actually reflected in several legal doctrines applied in the American legal system and elsewhere, such as adverse possession, public rights of access to private property, tenants' rights, equitable division of property upon divorce and social security rights.[135] These doctrines protect economic interests and expectations not explicitly set forth in contracts or promises, but firmly based on the reliance generated by long-standing relationships.

Due to the influence of free-market ideology, Singer claims, the linkage between reliance and property is sometimes blurred, and the problem of determining property rights in particular resources is reduced to the identification of 'the owner'. However, in many cases, it is not only difficult to identify a single owner of a given resource, but also meaningless for the purpose of determining rights.[136] Moreover, when well-established relationships break up, 'the legal system requires a sharing or shifting of property interests from the "owner" to the "non-owner" to protect the more vulnerable party to the relationship'.[137]

Margaret Radin offers another approach to property, which focuses on its relationship with personhood.[138] Its main premise is that 'to achieve proper self-development – to be a person – an individual needs some control over resources in the external environment'.[139] Relying on Hegelian philosophy, Radin argues that certain objects – 'personal property' in her terminology – are closely bound up with personhood because 'they are part of the way we constitute ourselves as continuing

133 Reich, *loc.cit.* (note 130), p. 769.

134 Singer, Joseph, 'The Reliance Interest in Property', *Stanford Law Review*, Vol. 40, No. 4, 1988, pp. 611–750.

135 *Ibidem,* pp. 663–700.

136 *Ibidem,* p. 639.

137 *Ibidem,* p. 623.

138 Radin Margaret, 'Property and Personhood', *Stanford Law Review*, Vol. 34, No. 4, 1982, pp. 957–1015.

139 *Ibidem*, p. 957.

personal entities in the world'.[140] This type of property should be distinguished from 'fungible property', which is comprised of objects fully replaceable by other objects of identical market value. Radin contends that only personal property deserves constitutional protection.[141]

These critical approaches on the constitutional dimension of right of property are not strange to the Israeli HCJ. Although they are still far from being part of the mainstream case-law, echoes can be found in several rulings of the HCJ.

For example, in a landmark case on the right of property, the president of the HCJ defined property broadly enough to include, at least theoretically, social security benefits:

> Property is any interest having economic value. Thus, property covers not only 'property rights' (in the meaning given the term in private law – such as ownership, tenancy, and beneficial rights) but also to the rights and obligations having possessive value according to public law.[142]

Two years latter, Reich's approach was explicitly discussed by the HCJ in a petition challenging the revocation of a state subsidy to a business. Although the petition was rejected, the HCJ pointed out that it was 'ready to leave open the possibility that the right to an incentive from the state or from another public body could be considered, in special circumstances, a property right as conceived by the Basic Law'.[143]

5.2. IS THE RIGHT OF PROPERTY VIOLATED?

Assuming that the entitlement to social security benefits can be considered property for constitutional purposes, and that this conception is not incompatible with Israeli HCJ case-law, would the denial of such benefits in the circumstances posited in this essay infringe the right of property under section 3 of the Basic Law? Given a positive answer, would such infringement be lawful under the 'limitation clause' as set forth in section 8 of the Basic Law?

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140 She uses a wedding ring to illustrate the difference between personal and fungible property: if stolen from a jeweler, the insurance payment can fully compensate him; if stolen from a loving wearer, replacing it will not restore the status quo, and perhaps no amount of money can do so; *ibidem*, p. 959.

141 *Ibidem*, p. 960.

142 Civil Appeal 6821/93, *United Mizrahi Bank* et al. vs *Migdal Village* et al., 49(4) P.D. 428. In this case, the Supreme Court considered for the first time the constitutionality of a statute forgiving a portion of the debt owed by agricultural cooperatives to the banks, following a lower-court decision that the statute constituted a violation of the right of property. See also *Anderman* vs *District Appeals Commission*, where the president of the HCJ explained why the right of property includes a dimension of social responsibility, which may justify land expropriation without creating necessarily a right to compensation (Civil Appeal 8797/99, *Takdin Elion,* Vol. 2001, No. 4, p. 536).

143 HCJ 4806/94, *Deshe* vs *Minister of Finance, Takdin Elyon*, Vol. 98, No. 2, p. 941 (in Hebrew).

As mentioned in section one, one of the main rationales for linking entitlement to social security benefits and residency is the exclusion of 'unworthy groups', such as those that choose to live elsewhere.[144] However, the element of choice is completely lacking in our case. Unlike a person who voluntarily decides to leave the country,[145] Palestinian Jerusalemites will find themselves 'abroad', although they made no decision or took any action for that purpose, were not asked their opinion on the matter, and had no realistic possibility to prevent the transfer.[146] They would lose their entitlement to NII benefits because of an event completely beyond their control.

Precisely this rationale was invoked by the Knesset to justify amending the provision totally denying old-age benefits to Israelis who relocated abroad after they began to receive a pension.[147] Accordingly, the deliberate denial of income in our case must be deemed a violation of the person's right of property.

While this conclusion applies to all types of social security benefits, the violation of the right of property is especially blatant in the case of benefits based on the social-insurance principle.[148] As pointed out by Reich, the denial of this type of entitlement, acquired through lengthy periods of contributions, based on a change in the legal status of the person, is inherently arbitrary and reminiscent of feudalism. Arbitrary State actions diametrically oppose individual autonomy, which, as shown above, is inherent in the concept of property.

The sweeping revocation of benefits in our case conflicts also with the 'reliance interest', as conceptualised by Singer. The great majority of Palestinian Jerusalemites are in the low-income class.[149] For these families, and the many families living slightly above the poverty line, NII benefits are crucial for survival. Reliance on these benefits has historically been a significant factor in shaping their lives. As discussed above, tens of thousands of Palestinian Jerusalemites, encouraged by Israeli policies, have moved over the years to West Bank suburbs of the city, enabling many families to improve their housing conditions. The Government's promise of 1973 that moving would not result in revocation of acquired benefits was certainly part of 'the deal'.[150] Subsequently, policies implemented by Israel since the mid-1990s, which included

144 See Bolderson and Gains, *loc.cit.* (note 22) and accompanying text.

145 The word 'voluntarily', as used here, is not intended to deny the fact that most decisions taken by person are constrained, in one way or another, by different factors and circumstances. Instead, it points out that such a decision includes also, even to a limited extent, an element of free will.

146 See discussion in Introduction.

147 See *supra* note 27 and accompanying text.

148 See section 1C.

149 According to the NII's latest data, 63.5 percent of the families in this group and 76.5 percent of the children live on an income below the poverty line. Letter of 11 December 2005 from Galit Gabai, of the NII, to the author.

150 See section 2.4.

denial of NII benefits to Palestinians who moved to the West Bank, led to a reverse migration.[151]

This background further validates the reliance interest of Palestinian Jerusalemites on NII benefits. Not only does reliance play a significant role in the present (helping families to survive), it also is a significant factor in forcing people to make hard decisions, such as moving back to the city and worsening their housing conditions.

Considering their significant role in providing the material conditions necessary for personhood, NII benefits also come within the meaning of 'personal property' in Radin's definition, making them worthy of constitutional protection. Accordingly, a sudden and sweeping denial of NII benefits in our case would infringe the right of property.

Some long-term benefits deserve the label of 'personal property' in another sense as well. This is true of benefits linked to significant and permanent changes in the lives of persons that affect their identity: becoming a parent, becoming disabled, or reaching old age. This perception, too, supports the conclusion that denial of benefits would affect the core of individual autonomy and, therefore, violates the right of property.

Having shown that a sweeping denial of NII benefits in our case would infringe the right of property, I shall now examine the extent to which the infringement passes the test of the limitation clause of the Basic Law. This section prohibits any infringement of the rights enshrined in the Basic Law, 'except by a law, befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required' To pass this test, an infringement must fulfill all four conditions.

For reasons of economy, it would suffice to say that the infringement in our case does not meet the fourth condition, commonly known as the proportionality test. According to President Barak, this test contains three subtests: first, the infringement 'must rationally lead to the realization of the objective'; second, it 'must injure the individual to the least extent possible'; and third, the damage caused to the individual 'must be of proper proportion to the gain brought about by that means'.[152]

In our case, the trigger to the infringement of the right would be the transfer of sovereignty over East Jerusalem to a Palestinian State. The aim behind the transfer would arguably be the achievement of a peace agreement. Denial of social security benefits is clearly unnecessary to achieve this aim, and would, therefore, not meet the first (rational means) and the third (proportionate to the gain) subtests. It is readily apparent that, unless special provisions are enacted, the *total* denial of benefits is the antithesis of proportionality in the sense of the second subtest.

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151 Amon, Ramon and Kobi, Michael, *A Fence Around Jerusalem*, Jerusalem Institute of Israel Studies, Jerusalem, 2004, pp. 70–75 (in Hebrew).

152 HCJ 2056/04, *Beit Sourik Village Council* et al. vs *Government of Israel* et al., *Piskei Din*, Vol. 58, No. 5, p. 840 (in Hebrew).

6. CONCLUSIONS

The main conclusion of this article can only be phrased in negative terms: a sweeping denial of social security benefits to East Jerusalem Palestinians following partition of Jerusalem in the framework of a peace agreement would not be compatible either with IHRL and ILO law, or with Israeli constitutional law.

Under an interpretation of IHRL in the spirit of the human rights ideal, Israel would continue to be responsible, at least to some extent, for the implementation of the right to social security of Palestinian Jerusalemites, even though they live outside its territory and beyond its effective control. Also, denial of acquired benefits in four central branches of social security on grounds of lack of residency would be incompatible with the provisions of ILO Convention 118.

A sweeping denial of NII benefits also violates the right of property enshrined in Israeli constitutional law. This conclusion is based on the theory that the right of property not only protects a 'negative freedom', but also justifies redistribution, protects reliance on longstanding relationships and safeguards personhood. Infringement of the right of property in our case does not meet the conditions of the limitation clause in the Basic Law: Human Dignity and Liberty.

Human rights law does not provide precise policy prescriptions but general principles to be considered in policy making. This fact is true in the case of the right to social security and the right of property. Thus the 'negative' nature of the discussion: showing that the denial of social security benefits would violate human rights law, rather than discussing the particular arrangement required by this law.

This nature was dictated as well by two additional factors. First, as other social and economic rights, and perhaps more that other, the right to social security has been historically marginalised, in the case-law of national courts, in the decisions of UN treaty bodies and in academic writing. This situation has prevented the emergence of a more solid jurisprudence on the content and scope of this right. Second, seeking acceptable arrangements by reliance on case law or historical precedent is problematic because of the uniqueness of the situation discussed here.

Nonetheless, having identified the relevant legal norms and having a clear idea of the actions that would be incompatible with human rights law, I offer five practical suggestions that may help avoid human rights violations that would otherwise result from a partition of Jerusalem:

1. Following the precedent set by the 1987 Regulations and pursuant to the obligations stemming from ILO law, Israel recognises the right of Palestinian Jerusalemites living in the Palestinian state to continue receiving NII benefits, for the entire period covered by the particular benefit, where the 'entitling event' occurred while they were Israeli residents. This arrangement will apply only to the long-term contributory programmes. For example, a person whom the NII recognised as

permanently disabled would maintain her entitlement to a disability pension until she reaches retirement age; parents would continue to be paid child allowances for their children born before the partition of Jerusalem, until they turn 18.

2. Follow the 1987 Regulations in designing an arrangement regarding the old-age and survivors' benefits of persons who, at the time of the sovereignty transfer, completed the qualifying period but the entitling event had not yet occurred. Accordingly, a period of time following the transfer should be set, during which the occurrence of an entitling event makes these persons eligible for benefits. For example, a man who, at the time of the partition of Jerusalem, completed the relevant qualifying period but was then only 60 years old, would be entitled to old-age benefits when he turns 70.
3. Regarding non-contributory, means-tested benefits (mainly income-support benefits), set a transitional adjustment period following the partition of Jerusalem, during which persons receiving the benefits continue to receive them. New claims are not accepted. At the end of that period, the Palestinian State bears full responsibility for supporting the poor.
4. The social security institution of the new Palestinian State, once established, takes into account the periods in which East Jerusalem Palestinians were insured under the Israeli social security system, regarding the branches in which their entitlement to benefits was lost as a result of the transfer of sovereignty. This suggestion applies to branches in which contributions are required over the course of a qualifying period. To achieve this, both sides agree to coordinate the exchange of information between them.
5. Palestinian Jerusalemites who, after the partition of Jerusalem, live in the Palestinian State but continue working in the western section of the city under Israeli sovereignty are entitled to be covered (*i.e.* pay contributions and receive benefits) by the NII work-related branches, such as unemployment, maternity, work injury and old-age, as if they were Israeli residents.

As pointed out by Bell, 'while the connection between human rights and peace may seem obvious and is acknowledged in human rights instruments, in practice the precise nature of the connection is problematic and controversial'.[153] The Israeli-Palestinian peace process, as it evolved during the 1990s, clearly did not incorporate within it a human rights framework and did not create human rights enforcement institutions or mechanisms.[154]

Many reasons are given to explain the breakdown of the peace process. Clearly, the failure to deliver tangible improvement in the human rights situation contributed

153 Bell, Christine, *Peace Agreements and Human Rights*, Oxford University Press, Oxford, 2000, p. 5.

154 *Ibidem,* p. 200. See also B'Tselem, *Oslo: Before and After: The Status of Human Rights in the Occupied Territories*, B'Tselem, Jerusalem, 1999.

to its collapse.[155] This collapse teaches us, among other things, that the belief of the relevant constituencies that peace will bring with it a better life is an essential condition in generating political support, without which any peace process would remain inherently fragile. This lesson should serve as a reminder for persons engaged in the advancement of peace – particularly those who remain unconvinced of the intrinsic value of human rights – that the proper handling of social security issues following a transfer of sovereignty over East Jerusalem to the future Palestinian State is their problem too.

155 Kaufman, Edy and Bisharat, Ibrahim, 'Introducing Human Rights into Conflict Resolution: the Relevance for the Israeli-Palestinian Peace Process', *Journal of Human Rights,* Vol. 1, No. 1, 2002, pp. 69–105.