



## AL-HAQ POSITION PAPER: SIXTY YEARS OF NAKBA: ISRAEL'S CONTINUED POLICY OF FORCIBLE DISPLACEMENT

*"You don't simply bundle people onto trucks and drive them away...I prefer to advocate a positive policy, to create, in effect, a condition that in a positive way will induce people to leave."*

Ariel Sharon, 24 August 1988

15 May 2008 marks the 60<sup>th</sup> anniversary of the Palestinian "Nakba," the "catastrophe" that led to the forcible displacement of more than half of the population of Historic Palestine. For 60 years, the Palestinian refugees have been denied their internationally guaranteed right to return to their homes. While the State of Israel is celebrating its independence, the fate of the Palestinian refugees and those subsequently expelled over the course of Israel's 40 years of occupation of the Gaza Strip and the West Bank, including East Jerusalem, remains unresolved.

### 1. Historical Background

The number of Palestinian refugees is estimated at over 6 million,<sup>1</sup> constituting two-thirds of the total Palestinian population and making it the largest single group of refugees worldwide.

Soon after the British mandatory authority transferred the Question of Palestine to the United Nations General Assembly in April 1947, the General Assembly adopted its Resolution 181, known as the Partition Plan. According to this plan, Jerusalem was to be placed under international control and 42.88% of Historic Palestine was allocated to an Arab state while 56.47% was assigned to a Jewish state at a time when Jews represented less than one-third of Palestine's population and owned no more than 7% of the land.

With the expiration of the British Mandate of Palestine, Israel unilaterally declared its independence on 14 May 1948. The subsequent eruption of the Arab-Israeli war resulted in the creation of the State of Israel encompassing 78% of Historic Palestine, the destruction of 531 Palestinian villages, and the emptying of 11 urban neighbourhoods.<sup>2</sup> Between the end of 1947 and early 1949, 750,000 Palestinians, who at the time constituted more than half of the population of Historic Palestine, were uprooted (half of them before the beginning of the 1948 war).

"My husband, children, myself and my two brothers, 'Ismail and Amin, and their families, left the village, taking with us only our identity cards and land documents and leaving behind all that we owned in our houses. We headed to Qalqiliya [...] After ten days of living in Qalqiliya, the Israeli army raided the city, spreading horror and panic among the people, and again we fled, this time in the company of several families, to the al-Mugher village, located north of Nablus city. There we waited and dreamed of returning to our houses and lands. But months passed, during which we received news that the Israeli army now controlled all the coastal cities of Palestine and was deployed around our villages and that death would be the destiny of any person who thought of returning."

**Extract from Al-Haq Affidavit No. 4163/2008**

Given by Sadiqa 'Ali Sirriyya (resident of New 'Askar Camp, Nablus Governorate, West Bank)

<sup>1</sup> BADIL Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons, 2004-2005* (Badil, Bethlehem, 2006), p.vii.

<sup>2</sup> Ilan Pappé. *The Ethnic Cleansing of Palestine*, (Oxford, OneWorld Publications, 2006), p. xiii.

When Israel occupied the remaining territory of Historic Palestine in 1967, the destruction of Palestinian villages, the killings committed by the Israeli army and the threats made against the remaining population led to the displacement of an additional 300,000 Palestinians,<sup>3</sup> half of whom became refugees for the second time.

“On the fourth day, I believe it was 9 June 1967, several people who had fled the village returned. In the evening, my husband came home and said, “the Israelis are in the village and they are calling through loudspeakers.” The Israelis were saying, “all residents of Yalo must leave to Ramallah. Those who don’t will be in danger.” I got my three children ready, but couldn’t carry anything, as I was six months pregnant. We walked to the nearby village of Beit Nouba, only one kilometre from Yalo. As I entered Beit Nouba, I saw several bulldozers guarded by Israeli soldiers razing houses in the village to the ground.”

**Extract from Al-Haq Affidavit 3477/2007**

Given by ‘Aysha ‘Ali Hammad (resident of Bitouniya, Ramallah Governorate, West Bank; originally from Yalo)

Most of the Palestinians expelled from their homes live in crowded refugee camps under humiliating conditions within or outside the Occupied Palestinian Territory (OPT). Many Palestinians reside in camps in the vicinity of their places of origin, but are unable to reach the areas where their homes once stood. Other Palestinians live in the Diaspora, often denied equal civil, political, economic and social rights by their host countries.

Today, Israel’s policies in the OPT continue to lead to the expulsion of Palestinians from their homes. The methods of displacement have changed, but the policy of transferring Palestinians to ensure Israeli territorial and demographic dominance remains.

Since 1967, Israel has maintained a continuous policy of gradual direct and indirect forcible displacement.<sup>4</sup> Since the beginning of the second *intifada* in particular, the Occupying Power implemented this policy through demolishing Palestinian homes and expelling their inhabitants under various pretexts, including residency status<sup>5</sup> or the lack of building permits. The aim of this systematic removal of inhabitants is to appropriate their lands for the construction and/or expansion of settlements, the Annexation Wall or military areas.<sup>6</sup> Additionally, Israeli occupying forces constantly raid Palestinian homes, destroy Palestinian property, and severely restrict Palestinian movement, harshly impacting upon Palestinian family life, their access to education, food, health care and other services. These policies aim at creating facts on the ground that consolidate the suffering of the Palestinian people and induce them to abandon their homes in areas that are particularly adversely affected.

<sup>3</sup> Benny Morris, *Righteous Victims* (Vintage Books, New York, 2001), p. 327.

<sup>4</sup> For details on long-standing Israeli practices of deportation and forcible transfer in the OPT, see the following Al-Haq studies: *Israel’s Deportation Policy in the Occupied West Bank and Gaza* (1988); *An Illusion of Legality: A Legal Analysis of Israel’s Mass deportation of Palestinians in 17 December 1992* (1993); *The Forced Transfer of Kifah & Intissar Ajuri* (2002); *Israel’s Deportations and Forcible Transfers of Palestinians out of the West Bank during the Second Intifada* (2006); *Al-Nu’man Village – A Case Study of Indirect Forcible Transfer* (2006). See also BADIL, *Displaced by the Wall; Forced Displacement as a Result of the West Bank Wall and its Associated Regime* (2006).

<sup>5</sup> For example, the residency of Palestinians holding West Bank identification cards in certain areas that have been *de facto* annexed by Israel, such as al-Nu’man village, is threatened. As West Bank ID holders, the residents of al-Nu’man are considered by Israel to be illegally residing in Israel simply by being in their homes.

<sup>6</sup> For example, the construction of the Har Homa settlement on Abu-Ghneim Mountain, near the Palestinian village of al-Nu’man, began in 1997. The current planned expansion will be built on a portion of the village’s land. Substantial areas of land surrounding the village were also appropriated by Israeli confiscation orders for the establishment of a military area (see Israeli Military Order 30/7/C), as well as a further 30 dunums for the building of Mazmouriyya trade terminal (see Israeli Military Order 155/5/T). In addition, the route of the Jerusalem Ring Road, on which work has already commenced, will cut through the village.

“We feel isolated and under siege. The authorities, so we see, are trying to make things hard for us, to molest us and our children and to cut us off from our entire surroundings all in order to hinder us and to cause us despair on the way to abandoning our village.”

Extract from affidavit given to Labib Habib, Adv., by Youssef Dir’awi, July 2006.

## 2. Forcible Transfer and Deportation under International Law

*“I support compulsory transfer, and I do not see anything immoral in it”<sup>7</sup>*

David Ben-Gurion

### a) The Meaning of Forcible Transfer and Deportation under International Law

International law clearly prohibits both deportation and forcible transfer. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has repeatedly affirmed that:

“Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a state.”<sup>8</sup>

In accordance with the above mentioned definition, this paper refers to “deportation” as unlawful forcible displacements outside territorial borders and “forcible transfer” as unlawful displacement within such boundaries. The term “forcible displacement” is used as a generic term to cover both deportation and forcible transfer.

### b) The Prohibition of Forcible Transfer and Deportation under International Law

Prior to the adoption of the Fourth Geneva Convention of 1949, the prohibition on the transferring of civilians was first codified in the Lieber Code of 1863.<sup>9</sup> This prohibition was not expressly mentioned in the Hague Regulations of 1907, as at the time the forcible transfer or deportation of protected persons “was generally rejected as falling below the minimum standard of civilization and, therefore not requiring express prohibition. To raise the issue of the illegality of the deportation of the population of occupied territories was considered unnecessary; the illegality was taken for granted.”<sup>10</sup> The expulsion of Palestinians from their homes in 1948 violates these norms.

<sup>7</sup> David Ben-Gurion, addressing the Executive Committee of the Jewish Agency, June 1938.

<sup>8</sup> *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Trial Chamber I, Judgement, 2 August 2001, para. 521. This distinction was affirmed in *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Appeals Chamber, Judgment, 22 March 2006, para. 300.

<sup>9</sup> This Code provides that “private citizens are no longer [to be] carried off to distant parts.” See U.S. War Department, General Orders No. 100, 24 April 1863. This manual, prepared on behalf of President Lincoln to govern the Union Army in the American Civil War, was one of the earliest codifications of a set of rules and limitations according to which armed conflict should be conducted, and was later formative in the shaping of the Hague Conventions.

<sup>10</sup> George Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II: The Law of Armed Conflict* (London, Stevens & Sons Ltd., 1968), p. 227.

In the aftermath of World War II and the forcible transfer of millions of civilians under mostly inhumane conditions, the drafters of the Fourth Geneva Convention decided to make the prohibition of forcible transfer explicit in Article 49(1), which states:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”

The *de jure* applicability of the Fourth Geneva Convention to the OPT is almost universally accepted and has recently been confirmed by the International Court of Justice (ICJ).<sup>11</sup> The prohibition of forcible transfer further constitutes customary international law.<sup>12</sup> Article 49 of the Fourth Geneva Convention applies to transfers which are contrary to the free will of the protected persons.<sup>13</sup> In essence, it is the absence of genuine choice by the individuals displaced that makes the displacement unlawful. Whether a transferred person exercised genuine choice depends on the prevailing situation, atmosphere, and all other relevant circumstances, including the victim's vulnerability.<sup>14</sup> The term 'force' is “not to be limited to ‘physical force’<sup>15</sup> but comprises factors other than force itself that render a particular act involuntary, such as “taking advantage of coercive circumstances.”<sup>16</sup>

Accordingly, the creation of conditions that make it practically impossible for people to remain in their homes, and induces them to abandon their homes to move to other areas within the same territory, amounts to indirect forcible transfer.<sup>17</sup> These indirect measures comprise house searches, arrests and physical harassment,<sup>18</sup> and are in violation of international law.

Both in 1948 and 1967 Palestinians were transferred and/or deported from their homes by force, under threat of force, or simply due to coercive circumstances of fear and intimidation created by the Israeli military forces, all of which amount to unlawful displacement under international law.

In light of the above, unlawful forcible displacement also extends to Palestinians who abandon their homes because they are subject to unbearable living conditions created by the occupying forces. Measures such as widespread and systematic property destruction, land appropriation and *de facto* annexation, physical and psychological harassment and restrictions of movement regularly take away any genuine choice of concerned individuals, making their relocation involuntary and thus unlawful under international law.

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<sup>11</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (2004), para. 101.

<sup>12</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge, Cambridge University Press, 2005) p. 257.

<sup>13</sup> ICRC, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War* (Geneva, ICRC, 1958) p. 297.

<sup>14</sup> *The Prosecutor vs. Vidoje Blagojevic and Dragan Jokic*, Case No. IT-02-60-T, Trial Chamber I, Judgement, 15 March 2002, para. 475.

<sup>15</sup> See the *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, Trial Chamber I, Judgment, 2 August 2001, para. 521. This distinction was affirmed by the *Prosecutor v. Miliomir Stakic*, Case No. IT-97-24-T, Appeals Chamber, Judgement, 22 March 2006, para. 300.

<sup>16</sup> See *Stakic*, *ibid.*, para. 279-281.

<sup>17</sup> *The Prosecutor v. Momcilo Krajsnik*, Case No. IT-00-39-T, Trial Chamber I, Judgement, 27 September 2006, para. 729. Art. 8(2)(b)(viii) of the Rome Statute of the International Criminal Court delineates the war crime of forcible transfer and stipulates that the transfer can occur “directly or indirectly.”

<sup>18</sup> See *Krajsnik*, *ibid.*

### 3) The Right of Return under International Law

*"We must do everything to ensure they never do return. The old will die and the young will forget."*<sup>19</sup>

David Ben-Gurion

#### a) The General Right of Return under International Human Rights Law

International human rights law ensures the general right of return of individuals to their country. This is enshrined in both the Universal Declaration of Human Rights (UDHR), which reflects customary international law, as well as the International Covenant on Civil and Political Rights (ICCPR) which further codifies the rights proclaimed in the UDHR. Article 13(2) of the UDHR stipulates that "[e]veryone has the right to leave any country, including his own, and to return to his country." In addition, Art 12(4) of the ICCPR states that "No one shall be arbitrarily deprived of the right to enter his own country."

The right of return applies even in relation to disputed territories, or territories that have changed hands. The scope of the right to return to one's own country is broader than the concept of "country of his nationality."<sup>20</sup> It does not only apply to those individuals directly expelled and their immediate families, but also to their descendants who have "maintained close and enduring connections" with the area.<sup>21</sup> Accordingly, Palestinian refugees displaced in 1948, as well as their descendants (where they have maintained such a connection), have the right to return to their country of origin.

#### b) The Right of Palestinians to Return

##### *(i) International Human Rights Law*

On 11 December 1948 the UN General Assembly affirmed the right of return under human rights law to the specific case of Palestinian refugees forcibly displaced before and during the 1948 Arab-Israeli War, stating in its Resolution 194 that:

"... refugees wishing to return to their homes and live at peace with their neighbours, should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property, which, under principles of international law or in equity, should be made good by the Governments or authorities responsible."

In addition, under the law of nationality as a subset of the larger "law of nations," as applied upon state succession, newly emerging successor states have to allow all habitual residents of the territory undergoing change in sovereignty to exercise their right of return to their homes or places of origin, regardless of where they may have been on the actual date of succession.<sup>22</sup>

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<sup>19</sup> In reference to Palestinians displaced by Israel in 1948, quoted in Michael Bar-Zohar, *Ben-Gurion, The Armed Prophet* (Englewood Cliffs, NJ., Prentice-Hall, 1968), p. 157.

<sup>20</sup> UN Human Rights Committee, General Comment 27 (1999), para. 20.

<sup>21</sup> *Ibid*, para. 19.

<sup>22</sup> See for example GA Resolution 55/153 of 12 December 2000 and the Articles on Nationality of Natural Persons in Relation to the Succession of States reflect binding international law.

## (ii) *International Humanitarian Law*

The right of return of Palestinians forcibly displaced by Israel in 1967 is enshrined in Article 49(2) of the Fourth Geneva Convention, which requires that persons forcibly transferred “shall be transferred back to their homes as soon as the hostilities in the area in question have ceased.” This clearly indicates that protected persons may not be denied return.

In the same vein, the UN Security Council unanimously adopted Resolution 237 (that has been reaffirmed by various subsequent UN resolutions) which placed similar obligations on Israel by calling upon the Israeli Government “to facilitate the return of those inhabitants who have fled the areas since the outbreak of the hostilities.”<sup>23</sup>

## **4) Responsibility of Israel, the UN, and Third States**

### a) Israel

In accordance with Article 14 of the UDHR, Article 12(4) of the ICCPR and General Assembly Resolution 194, Israel’s obligations under international human rights and humanitarian law include the duty to allow and facilitate the return of the Palestinian refugees to their homes<sup>24</sup> and to compensate them for any damages incurred.

Moreover, General Assembly Resolution 273 of 11 May 1949 admitted Israel into the UN on the basis of its assurances to implement General Assembly Resolution 194. The resolution refers to Resolutions 181 and 194 and “the declarations and explanations made by the representative of the Government of Israel before the Ad Hoc Political Committee in respect of the implementation of the said resolutions.”<sup>25</sup> Israel has a responsibility to abide by these declarations, and General Assembly Resolution 273, in good faith.

Under the law of nationality, Israel further has to abide by the “rule of re-admission,” which includes a duty to allow the exercise of the Palestinian right of return – as an obligation owed to all other states.<sup>26</sup>

### b) Responsibility of the UN

The responsibility of the United Nations towards the Palestinian refugees includes the obligation to compel Israel to abide by its obligations under international law, including the obligation to enforce all relevant UN resolutions.

For 60 years, the Security Council has failed to provide a durable and just solution to the fate of Palestinian individuals transferred or deported. The transfer of Palestinians from and the denial of their right to return to their homes constitute a violation of international law and

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<sup>23</sup> UN Security Council Resolution 237, 14 June 1967.

<sup>24</sup> Home is broadly defined and does not necessarily refer to the actual house or building. Especially where this kind of restitution would be materially impossible, home may refer to the place of origin in the sense of original area or land.

<sup>25</sup> General Assembly Resolution 273, 11 May 1949, UN Doc. A/RES/273 (III). For the official records of the proceedings where the declarations were made by Israel’s representative, see UN Doc. A/AC.24/SR.45-48, 50 and 51.

<sup>26</sup> To refuse to readmit them would impose on some other state a resulting obligation to receive or host the non-readmitted individuals.

amount to a threat to international peace and security. The UN has an obligation towards the international community at large to maintain international peace and security. According to General Assembly Resolution 377, *Uniting for Peace*, of 3 November 1950, if the Security Council fails to act in order to maintain peace and security, the matter shall immediately be addressed by the General Assembly “in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression.” Serious violations of international law such as the acquisition of territory by force as well as the denial of expelled persons to return to their homes constitute a threat to international peace and security.<sup>27</sup> Accordingly, the General Assembly should make recommendations to member States on the adoption of collective measures against Israel, including the adoption of economic and diplomatic sanctions.<sup>28</sup>

### c) Third State Responsibility

With regard to forcibly displaced persons falling under the protection of the Fourth Geneva Convention, every High Contracting Party to the Convention – whether party to the conflict or not – has a duty under Article 1 to “ensure respect” for its provisions. Moreover, under international law, all States have the duty not to recognise and not to assist a situation arising from or giving rise to violations of international law.

Acts of unlawful deportation or forcible transfer are war crimes under the Fourth Geneva Convention which may amount to “grave breaches” of the Convention, entailing individual criminal responsibility under Article 147 of the Fourth Geneva Convention.

The Israeli occupying authorities regularly remove Palestinians from their residence or the place where they were present to a place outside that area (*actus reus*)<sup>29</sup> and do so wilfully and knowingly, with the intent that such removal be permanent (*mens rea*).<sup>30</sup> Each case of forcible transfer that satisfies the *actus reus* and *mens rea*, constitutes a grave breach of the Fourth Geneva Convention. Accordingly, the High Contracting Parties to the Fourth Geneva Convention (including Israel) have the positive duty to actively search for the perpetrators of the grave breaches and bring them to justice through effective domestic penal legislation.

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<sup>27</sup> This was confirmed by In UN Security Council Resolution 827 of 1993 with regards to the former Yugoslavia. Security Council Resolution 787 of 1992 affirms that the taking of territory by force is unlawful and that all displaced persons must be enabled to return to their former homes, imposing economic sanctions on the former Yugoslavia.

<sup>28</sup> United Nations General Assembly Resolution 377 of 3 November 1950.

<sup>29</sup> See ICTY, *Prosecutor v. Natellic and Martinovic* (Case No. IT-98-34-T), Judgment, 31 March 2003, para. 211.

<sup>30</sup> In order to prove a crime under criminal law, requisite material and mental elements of the crime must be attributed to the perpetrator. The *actus reus* and *mens rea* constitute the material and mental elements of the crime respectively.

## 5) Conclusion

60 years after the *Nakba*, Israel's forced displacement of Palestinians from their homes and the denial of their right to return continues, in direct violation of international law. The indifference of the international community has allowed Israel to consolidate its policies of gradual population transfer and has led to the systematic denial of the fundamental rights of those Palestinians displaced.

With two-thirds of the worldwide Palestinian population displaced from their homes, their fate lies at the heart of the Israeli-Palestinian conflict. The right of the Palestinian refugees and displaced persons to return to their homes is guaranteed by international law and a practical framework for the fulfilment of this right, by those wishing to exercise it, must be established such that human rights are in no way sacrificed for political expediency. Its respect is a precondition for any durable and just solution of the conflict and thus for international peace and security.

Al-Haq therefore calls upon:

- Israel to end its occupation of the OPT, to allow those displaced to return to their homes both inside Israel and in the OPT and to compensate them in accordance with international law.
- The United Nations General Assembly to invoke Resolution 377, *Uniting for Peace*, and to consider both the implementation of economic as well as diplomatic sanctions against Israel in order to ensure international peace and security.
- Third states to uphold their duty not to recognise the illegal situation created by Israel's continuing violations of the rights of Palestinian refugees and displaced persons; to ensure respect for the rights of Palestinians displaced within and from the OPT in 1967 in violation of the Fourth Geneva Convention; and to exercise all legal means available to prosecute those responsible for the grave breaches of forcible transfer and deportation.

It is only through ensuring the respect of international law that Palestinians expelled from their homes will eventually be allowed to return. The old may die, but the young will not forget...

*"In 1974, I visited Zir'in to see what had happened to it but I did not find any trace of it except one of the mosque's walls, which was still standing and still today serves as a witness to the plight of our people. The Israeli occupiers demolished all of the village's houses and features and planted citrus trees where the houses once stood. Since then, I have not visited Zir'in, but it remains in my imagination and memory.*

*I will never concede my right of return to the place of my birth and childhood. I still have my family's house key. If I die before I return, I will give the key to my son and I will tell him to give it to his children if he dies before he returns to Zir'in."*

**Excerpt Al-Haq Affidavit No. 4151/2008**

Husein Ahmad Matahin, resident of Jenin Camp, Jenin Governorate, West Bank