Amicus Curiae Brief

The right to housing of long-term occupants and the competing rights of owners in the case of vulnerable communities.

I. Brief overview

This brief is submitted as part of eviction proceedings undertaken against Palestinian residents of East Jerusalem. The parties seeking the eviction are the trustees of a charitable endowment (in the case herein - the charitable endowment is the Benvenisti charitable endowment and the Respondents, who are tied to the Ateret Cohanim association (hereinafter: Ateret Cohanim), have been appointed its trustees). These parties claim the charitable endowment owns the land on which the property is located. The undersigned are aware that the occupants have weighty arguments with respect to whether these charitable endowments are, in fact, the landowners, as well as with respect to whether the release of the property to the charitable endowment and the appointment of the latter's trustees had been legitimate. **This brief states no position on these important questions. It addresses the legal situation in the event that these arguments are rejected, and a finding is made that the parties seeking the eviction, are, in fact, the landowners. Nothing stated in this brief should be construed as acceptance that the parties seeking the eviction are the lawful owners of the land or that the release of the property and the appointment of the trustees were lawful.**

In this brief, we seek to present an approach that has been recognized in the jurisprudence of various human rights tribunals and relates to the competing rights of property owners stripped of their property or their substitutes (hereinafter: the original owners) and occupants who entered the property pursuant to norms that enabled them to do so, and they or their successors have occupied the property for a protracted period of time (hereinafter: long-term occupants). The competing rights relate to a demand to restore the property to the original owners versus the long-term occupants' expectation to continue residing therein. According to this approach - which is rooted in international human rights law and **emphasizes the context of collective vulnerability and discrimination** in relation to the long-term occupants and the fact that they are subjected to institutional discrimination - in certain circumstances, the long-term occupants' right, stemming from the **human right to housing** and specifically **to live in their home and their family's home**, trumps the right of the original owners or their substitutes to regain possession of the property.

In accordance with the legal approach we seek to present, and which, as noted, has been recognized in international human rights law, the human right to housing includes, inter alia, the right not to be evicted from one's home, even without ownership thereof. This right arises from long-term residency (sometimes for generations) in a property that has become a home, in other words, the center of a person's life and their family's lives. It also stems from the rights to family life, as well as culture and community life. This human

right to housing, **in conjunction with group vulnerability and discrimination**, as noted above, adds a dimension of public law (anchored in constitutional and international law) that may limit the constitutional and international protection afforded to the right to property as recognized in private law and may prioritize the long-term occupants' right to remain in their place of residence.

The conclusions of the brief are as follows:

1. International human rights law recognizes long-term occupants' rights to continue living in their homes pursuant to the rights to housing, family life, community life and culture. In appropriate cases, primarily when the occupants belong to vulnerable, discriminated groups, their right to remain in their home trumps the right of the original owners or their substitutes to demand restitution (as opposed to compensation).
2. Specifically, international human rights law recognizes the long-term occupants' aforesaid right to continue living in a property - particularly in the context of a regime change - where they entered the property in good faith or in keeping with the laws applicable prior to the regime change. In appropriate cases, given the occupants' good faith (see below), these rights supersede the right of the property owner to demand eviction.
3. A demand for restitution creates competing rights (between the original owners or their substitutes and the long-term occupants). There are no absolute rules for a decision between them, but rather, a balance must be struck among various considerations and interests.
4. Among the factors that influence the weight to be given to each side in this competition are the following:
    a. What is the background for the long-term occupants' occupancy of the property? If the long-term occupants entered the property in violation of international law, how severe was the violation and was the norm violated a jus cogens norm? Most importantly in this regard: **Are the long-term occupants complicit in the original owners' dispossession of the property, or are they deemed to have acted in good faith?**
    b. Does the case involve a lone occupant in a single property or someone who is part of an entire community of long-term occupants living in the locality and engaging in community life? If it is a community, is it a vulnerable, discriminated minority, or does it belong to the strong majority?
    c. How long and for how many generations have the long-term occupants been living in the property?
    d. What are the alternative housing options available to the long-term occupants?
    e. Is the original owner demanding restitution a person who lived in the property before the long-term occupants entered it, or are they a descendent of that person?
    f. Is the original owner demanding restitution a private or several private individuals or a corporation, and if it is a corporation, is its interest in the property financial or other?

g. Will restitution or allowing the long-term occupying community to remain in the property impact reconciliation or social disruption?

5. These parameters determine the considerations taken into account for the purpose of balancing between the competing rights and interests of the long-term occupants and the original owner or their substitute. **Nevertheless, it is important to note that the task of balancing addresses individual rights and may be subject to a legal treaty entered into by the legitimate representatives of parties to an international conflict or subject to a regime change. Such representatives, as in the case discussed in further detail below of South Africa's transition from apartheid to democracy, or in the case of German unification and the fate of properties nationalized by the communist regime in the former German Democratic Republic (GDR), may mutually waive individual rights.** This matter lies beyond the scope of this brief. However, it is important to note that the assessment process described both above and below determines rights in the absence of such treaty.

6. The brief further argues that international human rights law acknowledges that **title may arise with respect to a property** as a result of the ties formed by occupants for whom the property serves as a home, particularly in the case of long-term occupancy accompanied by a legitimate expectation for continued unlimited use of the property and particularly where the occupants belong to a vulnerable group that suffers legal discrimination with respect to the enjoyment of property. While such right is not tantamount to ownership, it serves, like the right to housing, as a layer of legal protection for continued use of the property by an occupant for whom the property is home.

7. All eviction applications undertaken with respect to families in Batan al-Hawa in Silwan, including the one filed against the Dweik family, were filed by the trustees of the Benvenisti charitable endowment, a historic Jewish charitable endowment that worked in Silwan a century ago.

8. There appears to be no dispute that the charitable endowment's trustees were appointed thanks to their connection to the Ateret Cohanim association, and the charitable endowment effectively acts as a branch of the association. On this matter, see testimony of Trustee (and Respondent in this case) Avi Schaeferman in CC 60182-10-13 **Zarbiv et al. v. Basbus**, on October 27, 2019, beginning at page 131. In the testimony, Mr. Schaeferman says he himself worked at the association, and that the association took it upon itself to find the properties and has been funding (or fundraising) for the charitable endowment. For background on the appointment of trustees, see remarks made by Honorable Justice Barak-Erez in HCJ 7446/17 **Maher Sirhan et 103 al. v. Administrator General and Official Receiver**, para. 9 (reported in Nevo, November 21, 2018).

9. However, **the system that enabled the Respondents to take over the Benvenisti charitable endowment and the nature of the proceedings that resulted in Ateret Cohanim having control over the Dweik family's property have been created, maintained and facilitated by or by dint of the State and its institutions. The fact that the appointment of trustees was carried out in a cursory proceeding before the District Court, of which the public at large and the occupants, in particular, were not and could not have become cognizant, nor could they make their case prior to**

an appointment with such drastic (and tragic) implications for their homes, stems from the legal order created by all three branches of government of the State of Israel - the legislature, the executive and the courts. These normative, political decisions with respect to the management of East Jerusalem properties were made by the State, not the Benvenisti charitable endowment or Ateret Cohanim, and therefore, the State is effectively a party (even if informally) to the dispute herein.

10. **Given that the State created the system that put the Appellants' rights at risk, inasmuch as the matter concerns obligations towards individuals whose right to housing is in peril, as described in this brief, any such obligations rest with the State not merely in the ordinary sense (as the State is always obligated to protect its subjects' right to housing), but such obligations are distinct and enhanced**.

11. The undersigned believe that applying the aforesaid principles to the demand to evict families in East Jerusalem, where the Jordanian regime housed Palestinians on land owned by Jews prior to 1948, or who had purchased the land or property in good faith, and where the land was released to the owners' substitute in the past decades (through an extremely controversial process) inevitably leads to the conclusion that the Palestinian occupants have a legitimate expectation and a right to continue living in their homes. In the context of a discriminatory normative system of asset expropriation and release and the extreme vulnerability of the group to which the occupants belong, we believe their right supersedes the right of the charitable endowments and associations substituting for the original owners to exercise their title by way of taking possession.

12. Applying these principles to the Dweik case inevitably leads to the conclusion that the family has a legitimate expectation and a right to continue living in its home and that this right trumps the right of the Benvenisti charitable endowment, now controlled by the Ateret Cohanim association, to exercise title to the property by way of regaining possession.

13. This conclusion legally translates into an impediment to eviction and restoration per se, as well as a right to be considered when attempting to strike a balance between competing interests according to domestic law doctrines relevant to the case. It also reinforces the family's claims regarding rights emanating from construction on the property.

14. We end the introduction by noting that the commonly held legal view within the international community is that East Jerusalem is occupied territory where the laws of occupation apply. Since Israel has applied its own laws to this area and the Honorable Court is subject to this act, this brief will not discuss the provisions of the laws of occupation, which further restrict the removal of protected persons from their residences.

II. Required background

A. The proceeding at hand

15. On November 23, 2020, the Jerusalem District Court rendered its judgment in CA 43693-03-20 **Mazen Dweik et al. v. Mordechai Zarbiv et al.** (reported in Nevo, November 23, 2020, Honorable Judges Refael Yaakobi, Moshe Bar-Am and Chana Miriam Lomp) (hereinafter: the District Court ruling), dismissing an appeal against the ruling of the Jerusalem Magistrates Court in CC 3681-10-14 **Mordechai Zarbiv (in trust) v. Mazen Dweik** (reported in Nevo, January 26, 2020) (hereinafter: the Magistrates Court ruling). The Appellants in the former, who are also the Appellants herein, are in possession of a plot of land in the north-eastern section of Parcel 96 in Block 29986, where a four-and-a-half story structure (hereinafter: the property) had been erected. The appealed Magistrates Court ruling had granted an application filed by the Respondents herein to have the Appellants dispossessed of the property.

16. An application for leave to appeal from the District Court ruling has been filed with this Honorable Court, which is the proceeding at hand. In her decision dated January 6, 2021, Honorable Justice Daphne Barak-Erez instructed the Attorney General to consider submitting a brief detailing his position on the questions arising in the matter, including arguments regarding limitations and the various facets thereof, estoppel, the designation of the land which is the subject of the proceeding at hand as public land and the implications of such classification for the dispute.

17. The proceeding herein is the first connected to a group of eviction applications in the neighborhood of Batan al-Hawa, all of which raise similar legal questions, to reach Israel's highest judicial instance. For this reason, to our understanding, the proceeding herein could have a prodigious effect not only on the applicants herein, but on an entire community living in the aforesaid neighborhood, as well as adjacent neighborhoods. The decision made in this case will directly impact all evictions in the neighborhood of Batan al-Hawa, where the property is located. In other words, it will impact the threat of imminent eviction looming over 136 residents and the threat of eviction farther down the line looming over a community of 700.

18. According to information we have received from Peace Now, at the time this report is submitted, at least 15 eviction applications filed by representatives of the Benvenisti charitable endowment (who are, as stated, members of the Ateret Cohanim association) are pending before the Jerusalem courts. These eviction applications concern entire buildings, mostly occupied by large families living in conditions of overcrowding and poverty (see infra, note 98). Since the beginning of 2020, the Jerusalem Magistrates Court has rendered judgments sanctioning the eviction of 19 families, numbering a total of 107 individuals in the neighborhood of Batan al-Hawa.

19. The lower courts have established the following facts with respect to the matter at hand: The Appellants' devisor (hereinafter: the Devisor) purchased the property in 1964 or 1965. According to purchasing agreements from 1965 and 1967 submitted to the court, the Devisor purchased the lot from Mr. Qaid Jaljal and his wife, making payment in full. The two had possession of the property for at least 25 years. Neither the credibility of

the purchasing contracts presented nor the purchasers' good faith was disputed throughout the proceedings. They have lived in the property for 56 years.

20. The Respondents are the trustees of the Benvenisti charitable endowment, which, we are informed, was established in the 19th Century by the Jewish community of Jerusalem as a housing project to assist members of the community, particularly of Yemenite origin. The charitable endowment was founded as a public trust, and its trustees were public figures, community leaders of the time: the Sefardic Chief Rabbi, the Ashkenazi Chief Rabbi and the Alliance School principal. The charitable endowment's property was abandoned in 1938 on the instructions of the British authorities in the area. Thereafter, and for some years, the charitable endowment remained deserted with the exception of delegations sent on behalf of the trustees to periodically check on the houses. This continued until 1946, when properties belonging to the charitable endowment were leased to Mr. Jaljal so that he might care for them. The latter treated the property as its owners, ultimately selling it to the Appellants' devisor two decades later. In other words, the Respondents are presently the substitutes of an owner who lost possession of the property more than 80 years ago.

21. The current trustees of the Benvenisti charitable endowment were appointed by the District Court in a proceeding of which the Appellants could not have become cognizant. The Charitable Endowment Registrar and the Administrator General gave their consent to the trustee appointment without so much as mentioning the existence of the long-term occupants, let alone asking to have them heard.

22. We further note, as background, that until 1967, the property which is the subject of the matter at hand was managed by the Jordanian Custodian of Enemy Property, and, according to the provisions of the Legal and Administrative Matters Law [Incorporated Version] 1970, was handed over to the Administrator General, who released it into the hands of the charitable endowment. The Appellants were unaware of the release proceedings at the time, had no involvement in them, and their position in the matter were not heard. The Supreme Court has opined about the inadequacy of the aforesaid in its judgment in HCJ 7446/17 **Maher Sirhan et 103 al. v. Administrator General and Official Receiver** (reported in Nevo November 21, 2018), paragraphs 46-47.

B. <u>The historical and normative framework relevant to East Jerusalem</u>

23. As is known, the partition of Jerusalem between Israel and Jordan during the war of 1948 resulted in the displacement of Jewish residents living in the city's east and many Palestinian residents living in its west.

24. According to figures collected by civil society organizations, about 35,000 Palestinians in the Jerusalem area lost their homes (in the neighborhoods of Talbia, Katamon, Baqa, Deir Yasin and others); and some 2,000 Jews lost their homes (mostly in the Old City and in Sheikh Jarrah). These figures are based on the estimated number of homes. Most of the Jews who lived in the Jewish Quarter had leasing rights from the Muslim owners of the land, which, in many cases, did not exceed one year. However, in practice, there was an unspoken agreement among Jews not to compete for leases, and so, possession was stable over many years (E. Zamir and E. Benvenisti, **Jewish Lands**, p. 97; see

also, CA 219/88 **Weingarten et al. v. State of Israel** (reported in Nevo, February 28, 1990). All Palestinians displaced during the war became refugees. They did not receive compensation and were housed in refugee camps in the area controlled by Jordan. In contrast, displaced Jews received immediate compensation from state institutions in the form of alternative housing inside the State of Israel (See Arnon Golan, **Spatial Changes - the outcome of the war,** Ben Gurion University Press, 2001).

25. The Absentees' Property Law - 1950 vested properties belonging to Palestinian refugees in the Custodian of Absentees' Property, who transferred most of them to development authorities.

26. In 1968, the Knesset passed the Legal and Administrative Matters Law 1968 (Hebrew) (currently Legal and Administrative Law [Incorporated Version] 1970 (Hebrew)), which regulated several issues in those parts of East Jerusalem where Israeli law was applied in 1967. With respect to Jewish property abandoned in 1948, considered Enemy Property under Jordanian rule and managed by the Jordanian Custodian of Enemy Property, the law stipulated the Administrator General would assume the role of the Jordanian Custodian (Section 5(a)) and release the property to whoever owned it prior to becoming absentees (Section 5(b)).

27. The legal outcome is that one city is home to two populations that lost property in the same war, but only one national group is entitled to restitution of property, while the other, in some cases living just several hundred meters away from its property in the city's west, is unable to receive restitution. **It is a situation of willful, deliberate legal discrimination wherein Jews who had title to property in the city are entitled to have their property restored, while Palestinians with title to property in the city are not entitled to have it restored.** The legal discrimination runs so deep that a former Jewish owner is entitled to have their property restored even if it is occupied by Palestinian residents who lost their homes in the western part of the city and are not entitled to have them restored.

28. In June 1967, about three weeks after the war, the government signed the Law and Administration Ordinance No. 1 - 1967 (Hebrew), which applied Israeli law to some 70,000 dunams east of Jerusalem. No Israelis lived in the annexed area at the time, and its roughly 69,000 Palestinian inhabitants were given permanent residency status, as opposed to citizenship, by Israel. Fifty-four years later, about 227,000 Israelis live in the area annexed to Jerusalem, the absolute majority in large neighborhoods Israel has been building in Jerusalem beyond the Green Line since 1967 (See, Michal Korach, Maya Choshen, **Jerusalem Facts and Trends**, Jerusalem Institute for Policy Research, 2021, pp. 19-20 (Hebrew)).

29. To build these neighborhoods, Israel made extensive use of the Land Ordinance (Acquisition for Public Purposes) 1943, pursuant to which it expropriated about 24,000 dunams (about a third of the area annexed to Jerusalem, see: The Story Behind the Maps, Bimkom) from their rightful owners, the vast majority of whom were Palestinians. Israel

built more than 57,000 housing units in these neighborhoods, including Gilo, Ramot, Pisgat Zeev and others (estimates by Peace Now according to plans and population).[1]

30. While Palestinians lost a great deal of private property as a result of the expropriations, the construction of these Israeli neighborhoods did not displace them from their homes. With one exception, Israel has not displaced Palestinians in East Jerusalem on a mass scale since 1967. This exception occurred on June 10th of that year, when, on the orders of the Minister of Defense and the Mayor, bulldozers razed 135 homes in the Mughrabi neighborhood, the southeast corner of Temple Mount, to make way for the Wailing Wall plaza.

31. Since then, there have been no cases of mass Palestinian displacement in Jerusalem - until the current threat to the communities in Sheikh Jarrah and Silwan. Four neighborhoods in two areas of East Jerusalem are under a genuine threat of mass displacement. Settler organizations, with substantial backing from the authorities, and in some cases the authorities themselves, have filed for the eviction of some 160 Palestinian families - about 60 in Sheikh Jarrah and about 100 in Batan al-Hawa in Silwan. Dozens more families may face eviction applications in the near future. Additionally, about 78 structures housing some 130 families in the Bustan area of Silwan are facing demolition.

C. The chronic disempowerment of Jerusalem's Palestinian community

32. Today, about 360,000 Palestinians live in Jerusalem, making up about 38% of the city's total population.[2] They suffer from discrimination, neglect and marginalization in nearly every aspect of life.

33. **Permanent residency rather than citizenship** - Since 1967, residents of East Jerusalem have been given permanent residency status in Israel, not citizenship. They do not have the right to vote for the Knesset (they may only vote in municipal elections). They do not receive Israeli passports (they rely on laissez-passers issued for short periods of time for travel). In certain circumstances, they may be stripped of their residency status (including, inter alia, if they remain abroad for lengthy periods of time or relocate outside city limits to the West Bank). They are unable to fully exercise their

[1] Until 2007, Palestinians in East Jerusalem were unable to acquire rights in Israeli neighborhoods in East Jerusalem without special permission. According to a decision made by the Israel Land Council, only Israeli citizens (or individuals entitled to immigrate to Israel under the Law of Return) were entitled to acquire rights to state land, while residents (and others) were precluded from doing so except by special request. On May 21, 2007, the Israel Land Council passed Resolution No. 1111, whereby residents may also purchase state land. Due to socio-economic disparities and cultural differences, the neighborhoods remained Israeli: Only about 1.5% of the population in them is estimated to be Palestinian, and most are renters.

[2] Figures from the Israeli Central Bureau of Statistics quoted by the Association for Civil Rights in Israel in **East Jerusalem – Facts and Figures**, 2021, May 2021.

right to family life, as the family unification procedure has been suspended since 2002 with few exceptions. Most East Jerusalem residents are citizens of no country, and their access to Israeli citizenship is extremely limited. As is known, citizenship is key to the realization and protection of all rights, and the exclusion of East Jerusalem residents from central government systems exacerbates the harm they suffer in every sphere, as detailed below.

34. **Ongoing neglect - lack of infrastructure and basic services** - A State Comptroller report that addressed social services provided to the Palestinian population of East Jerusalem found "gaps in most infrastructure and services in East Jerusalem compared to the city's western part: These include gaps in education and higher education, lack of knowledge of Hebrew, as well as gaps in transportation, the number of public structures and spaces, sanitation and municipal services." [3]

35. **Welfare** - The State Comptroller lists a host of failings and deficiencies in the welfare services offered to residents of East Jerusalem: No supports for at-risk children, a shortage in out-of-home care facilities, a shortage in welfare solutions for people in need, a shortage of social workers, a shortage of welfare offices and welfare underbudgeting.[4]

36. **Poverty** - In 2017, some 75% of East Jerusalem families lived under the poverty line (compared to 22% of Jewish residents of Jerusalem), and 86% of children in East Jerusalem lived in poverty, compared to 33% of Jewish children.[5]

37. **Education** - East Jerusalem is short some 1,670 classrooms,[6] meaning children are not admitted into educational institutions in violation of East Jerusalem children's constitutional right to equality in education. About 30% (43,760) of Palestinian children in East Jerusalem are not enrolled in an official educational institution, or their educational institution is unknown.[7] The dropout rate among East Jerusalem students is 26.5% (compared to a national average of 5.4%). Additionally, many parents are forced to pay thousands of shekels every year in tuition at unofficial institutions.[8]

[3] State Comptroller Report, Municipal Services for the Arab Population of East Jerusalem, June 2019: https://www.mevaker.gov.il/sites/DigitalLibrary/Documents/special/2019-Jerusalem/31-services.pdf?AspxAutoDetectCookieSupport=1 (Hebrew).

[4] State Comptroller Report, Ibid., pp. 343-345.

[5] Maya Choshen, Michal Korach, **Jerusalem Facts and Trends 2019**, Jerusalem Institute for Policy Research, 2019.

[6] Response of the Jerusalem Municipality dated August 19, 2020 to a Freedom of Information Application filed by Ir Amim.

[7] Ibid.

[8] State Comptroller Report, Ibid, pp. 340-341.

38. **Child arrests** - In 2020, 443 Palestinian minors were arrested in Jerusalem. They make up 73% of all minors arrested in Jerusalem, and 146 of them were under the age of 15.[9]

39. **Expropriation** - An area covering about a third of East Jerusalem (some 23,000 dunams) has been expropriated from Palestinian landowners by the Government of Israel since 1967 (excluding a small percentage expropriated from Jewish owners). In the expropriated areas, the government planned and implemented the construction of some 57,000 housing units in Israeli neighborhoods.[10] Only 600 housing units have been built by government initiative for Palestinians in East Jerusalem, mostly in the Nuseibah neighborhood of Beit Hanina. (See, Peace Now, "Jerusalem Municipal Data Reveals Stark Israeli-Palestinian Discrepancy in Construction Permits in Jerusalem," September 12, 2019, at: https://peacenow.org.il/en/jerusalem-municipal-data-reveals-stark-israeli-palestinian-discrepancy-in-construction-permits-in-jerusalem).

40. **Lack of planning** - Most of the areas of East Jerusalem that had not been expropriated were zoned in the city's masterplans as open spaces where construction is prohibited. Now, only about 15% of East Jerusalem (and effectively 8.5% of the entire city) is zoned for residential use by the Palestinian population and permitted building percentages in them are extremely low.[11]

41. **Building permits** - Between 2009 and 2017, detailed outline plans (pursuant to which building permits may be issued) were made for about 10,000 housing units in Israeli neighborhoods in East Jerusalem. In contrast, in Palestinian neighborhoods, only localized plans were approved, allowing for only several hundred housing units.[12] Of 57,737 housing units approved for a building permit in Jerusalem from 1991 to 2018, only 9,536 housing units (16.5%) were located in Palestinian neighborhoods. All remaining units were in Jewish neighborhoods east and west of the Green Line.[13]

42. **Demolition of structures built without a permit** - In 2020, 144 housing units and 72 non-residential structures were demolished in East Jerusalem. An additional 122 units were demolished by the owners following demolition orders. This is a dramatic increase from the average of 83 housing units demolished each year from 2015 to 2018.[14]

43. **Overcrowding** - Occupancy in Palestinian neighborhoods in East Jerusalem averages 1.8 persons per room, compared to 0.86 persons per room nationally and one person per

[9] Response of the Israel Police to a Freedom of Information Application by the Association for Civil Rights in Israel dated April 8, 2021.

[10] See Supra, note 1.

[11] Ir Amim and Bimkon, **Deliberately Planned - A Policy to Thwart Planning in the Palestinian Neighborhoods of Jerusalem**, 2017.

[12] Ir Amim and Bimkom, Ibid

[13] Peace Now, **Jerusalem Municipal Data Reveals Stark Israeli-Palestinian Discrepancy in Construction Permits in Jerusalem**, August 28, 2019.

[14] Ir Amim, **House Demolitions in East Jerusalem, Annual Summary**, January 2021 (Hebrew).

room in Jewish neighborhoods in Jerusalem.[15] Since the separation barrier was built, housing prices in Palestinian neighborhoods in East Jerusalem have increased dramatically. Many families are unable to pay the high cost of rent and are forced to move to the crowded, poverty-stricken neighborhoods on the other side of the separation fence (Shu'fat Refugee Camp and Kafr 'Aqeb). The housing crisis in East Jerusalem results in a severe violation of the right to housing, and some families are forced out of the city's municipal boundaries altogether and risk losing their residency status.

44. It is difficult not to see things as they are: Palestinian residents of East Jerusalem are a vulnerable population, suffering from discrimination and dispossession. Its inferiority is legally anchored in the normative framework applicable in the area. They are not citizens and, therefore, lack political rights that are central, sometimes critical, for protecting other rights. They are ineligible to regain any property they left behind in the city's western part, while their Jewish neighbors are eligible to regain property they had in East Jerusalem, and they suffer from chronic neglect and discrimination in all aspects of life. This is true for East Jerusalem's Palestinian community as a whole, and for the Appellants specifically.

III. Long-term tenants' right to continue living in their homes

A. The right to housing in international human rights law

45. The human right to housing was recognized in international human rights law as early as 1948, in the Universal Declaration of Human Rights (Article 25(1)).[16] It is now also enshrined in the main human rights instrument, ratified by the State of Israel, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[17] Additionally, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the European Convention on Human Rights (ECHR) (to which Israel is not party) require States Parties to respect a person's home.[18] The

[15] Maya Choshen, Michal Korach, **Jerusalem Facts and Trends 2020**, Jerusalem Institute for Policy Research, 2020 (Hebrew).

[16] Some experts maintain that all rights enumerated in the UDHR have customary status. See: Hurst Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. Int'l & Comp. L. 287, 323-325 (1995-1996).

[17] See, respectively: International Covenant on Economic, Social and Cultural Rights, Art. 11(1), 16 Dec., 1966, 999 U.N.T.S. 171 (entered into force 3 Jan., 1976); International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5(e)(iii), 21 Dec., 1965, 660 U.N.T.S. 195 (entered into force 4 Jan., 1969).

[18] International Covenant on Civil and Political Rights, Art. 17(1), 16 Dec., 1966, 999 U.N.T.S. 171 (entered into force 3 Jan., 1976); Council of Europe, Recommendation of the Commissioner for Human Rights on the Implementation of the Right to Housing, 5 (30 June, 2009); Council of Europe, European Convention

term "home" in both these instruments has been broadly interpreted to the effect that the right to security of tenure and non-interference with a person's home also applies to situations where the person **does not hold proprietary title to the property**.[19]

46. The right to housing in international human rights law is composed of seven essential elements [20] that can be grouped under three plains of rights:

   a. The human right to a home, i.e., every person's right to an abode;

   b. The human right to adequate housing, i.e., that a person's abode is habitable;

   c. The human right to security of tenure, **including the right not to be evicted**, i.e., a person's right to continue living in their home.

47. **This amicus curiae brief concerns the third plain, or, the human right to continue living in one's home.** The ICESCR is the key document enshrining and protecting the right to housing.[21] Article 11(1) of the ICESCR requires States Parties to recognize the right to housing of every person and their family. As for the matter at hand, back in 1991, the Committee on Economic, Social and Cultural Rights, which is tasked with interpreting the Convention, stated that the right to housing must not be narrowly interpreted as pertaining to shelter, but rather as the right to live in security (meaning also without fear of eviction), peace and dignity.[22] In other words, the right ensures a person **has** a home and that their tenure therein **is protected**. The chief protection afforded by the right to housing/a home in this sense is against eviction, which is considered a core violation of the right.[23]

48. **We reiterate the relevant point to the matter at hand: The human right to housing has been interpreted as encompassing not just the right of the unhoused to housing or the right to adequate housing standards, <u>but also to the right of those who have</u>**

for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols No. 11 & 14, Art. 6, 8, 13-14, 4 Nov. 1950, ETS 5 (entered into force 3 Sep., 1953) (hereinafter: ECHR).

[19] Yordanova & Others v. Bulgaria, App. No. 25446/06 (April 24, 2012), at para 102-103 (ECHR); Human Rights Committee); CCPR General Comments No. 16: Article 17 (Rights to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, ¶5 8 April 1988, HRI/GEN/1/REV.9 (Vol. I).

[20] Jessie Hohmann, The Right to Housing Law, Concepts, Possibilities 21 (2013). See also: United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), ¶7-8 13 Dec., 1991, E/1992/23 (hereinafter: GC 4).

[21] Office of the United Nations High Commissioner for Human Rights (OHCHR), Fact Sheet No. 21, The Right to Adequate Housing, 11 (Rev.21 Nov., 2009).

[22] Supra, note 20.

[23] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions 20 May 1997, E/1998/22 (hereinafter: GC 7).

a home to continue living in it. The following definition was adopted back in 2001 by the UN Special Rapporteur on the right to adequate housing (emphasis added):

> The human right to adequate housing is the right of every woman, man, youth and child to gain **and sustain** a secure home and community in which to live in peace and dignity.[24]

49. According to the Committee on Economic, Social and Cultural Rights, in order to ensure the right to continue living in one's home, States Parties should provide legal protection for permanent tenants, including from eviction, even when the tenant has no legal title to the property.

> [A]ll persons **should possess a degree of security of tenure** which guarantees **legal protection against forced eviction**, harassment and other housing threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.[25]

50. In addition, the Committee found that the protection afforded by the state party to the right to property does not absolve it of its obligation to ensure adequate housing.[26] Therefore, according to the Committee, forced evictions are prima facie a violation of the right to housing. [27] Forced evictions are defined as the permanent or temporary removal of a person, a family or a community from their home or the land on which they live against their will, without providing appropriate legal protections or in violation of the provision of international human rights instruments.[28] Forced evictions without providing adequate alternative housing for the entire community may be permissible only in exceptional cases involving urgent need,[29]. In any event, any forcible eviction decision is subject to the principle of proportionality.[30] In these rare cases, appropriate

[24] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari, submitted pursuant to Commission resolution 2000/9 (25 January 2001) E/CN.4/2001/51, para. 8

[25] GC 4 ¶8(a).

[26] United Nations Committee on Economic, Social and Cultural Rights (CESCR), Alban v. Spain, ¶11.5 (E/C.12/66/D/37/2018) . See also United Nations Committee on Economic, Social and Cultural Rights (CESCR), Pardo v. Spain, ¶9.2 (E/C.12/67/D/52/2018).

[27] United Nations Committee on Economic, Social and Cultural Rights (CESCR), Ben Djazia & Bellili v. Spain, ¶13.3-13.4 (E/C.12/61/D/5/2015). See also Pardo, Supra, note 26, para. 8.2.

[28] GC 7, Supra, note 23, paras. 3, 20.

[29] Human Rights Committee, "I Elpida" – The Cultural Association of Greek Gypsies from Halandri and Suburbs, and Stylianos Kalamiotis v. Greece, ¶12.4-12.5 (CCPR/C/118/D/2242/2013).

[30] Ben Djazia, Supra, note 27, para. 13.3-13.4. See also Pardo, Supra, note 26, para. 8.2.

procedural protections must be guaranteed to those affected.[31] In *Georgopoulos*, a case concerning the demolition of impermanent housing used by members of an unhoused Roma community, who did not receive adequate housing assistance from the state party, the Human Rights Committee, tasked with interpreting the ICCPR, found an occupant's right to housing was violated due to a decision to demolish an impermanent structure built on publicly owned property without providing an opportunity to challenge the decision.[32] The UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context noted that forced evictions, particularly pertaining to refugees, migrants and other marginalized groups without offering permanent housing alternatives constitutes a violation of international human rights law, and that States parties must ensure marginalized groups do not face discrimination with regards to any aspect of the right to housing.[33]

51. International law requires states to incorporate these principles into domestic legislation regarding forced evictions. The obligation to provide legal protections applies to both mass and individual evictions.[34]

52. The significance of the aforesaid is that the right to housing is a standalone right, exercised in and inextricably linked to a property that is the "home." **Most importantly for the matter at hand, this right is independent of any proprietary title to the property by the person using it as a home.** The question that arises is what happens when one person's right to housing in a certain property, based in part on possessory title, conflicts with another person's proprietary title to said property.

53. The right to housing, which, as noted, provides not only that every person is entitled to adequate housing but also that every person is entitled to continue living in their home, is not absolute and does not preclude eviction in any case or situation. Nevertheless, this right does require that any eviction be proportionate, i.e., when balancing between the human right to housing, which is, as recalled, based in part on the occupant's possessory title, and the owner's proprietary title, the need for the eviction must prevail, and consequently, it must meet certain conditions.

54. South Africa provides an example of the domestic application of this doctrine. Article 26(3) of its constitution stipulates:

> No one may be evicted from their home, or have their home demolished, without an order of court **made after considering all the relevant circumstances.** No legislation may permit arbitrary evictions.

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[31] GC 4 ¶8(a).

[32] Human Rights Committee, Georgopoulos et al. v. Greece (CCPR/C/99/D/1799/2008).

[33] Human Rights Council, Visit to France: Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the right to Non-Discrimination in this Context, ¶53, 92(k); A/HRC/43/43/Add.2 (28 Aug., 2020).

[34] GC 7, 3. See also Ben Djazia, Supra, note 27, Ibid.,and ESCR, Art. 2(1).

55. This principle, which prohibits eviction unless it meets the requirement of proportionality as a composite of various considerations, was applied by South Africa's constitutional court in the seminal case of Port Elizabeth Municipality v. Various Occupiers, Judgement of the Constitutional Court of South Africa, 1 October 2004. In this matter, the state sought an eviction order against trespassers who had settled on privately owned land. The court held that, according to the provisions of the constitution, an eviction order will be granted only in cases in which it is just to do so, and the court must take several factors into account, including the availability of housing alternatives for the persons evicted. The constitutional court held that Section 26(3) of the Constitution does, in certain circumstances, condition eviction on offering suitable alternative housing. The court went even further, finding that although the parties facing eviction had been offered two such alternatives, they were unsuitable as the state could not guarantee the occupants would be able to remain in either one long term. The court ultimately dismissed the application for an eviction order.

56. The elements of the relevant proportionality test, as developed in international human rights law, will be addressed in subsection C. Prior to that, it is important to understand the link between the right to housing and other rights recognized under international human rights law.

B. The right to family life, community life and culture as projecting on the right to housing

57. According to the integrative approach accepted by international human rights legal institutions, which sees all human rights as interlinked,[35] the right to housing cannot be considered separately from other rights,[36] including the right to family life and the right to community life.[37] The right to family life is enumerated alongside the right to housing in the same article of the ICESCR; in the ICCPR and in the ECHR.[38] Additionally, ICERD protects equality in the context of civil and social rights, including ones related to family life (marriage, inheritance) alongside the right to housing.[39] As such, it is little wonder that in 2006, the UN Special Rapporteur on the right to adequate housing defined this right as the right to live in safety and dignity in one's home, with one's family and

[35] Human Rights Council, Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on his Mission to the Syrian Arab Republic, ¶73 A/HRC/39/54/Add.2 (11 Sep., 2018).

[36] Hohmann, Supra, note 20, p. 21. See also, GC 4, paras. 8, 13.

[37] Ibid., para. 8 (f-g).

[38] See, the aforesaid conventions respectively, Supra notes 17 and 18, Ibid.

[39] ICERD, Art. 5.

as part of one's community.[40] The Rapporteur noted that in the context of evictions, States must ensure families and communities are not separated after an eviction:

> The Government and any other parties responsible for providing just compensation and sufficient alternative accommodation, or restitution when feasible, must do so immediately upon the eviction, except in cases of force majeure. At a minimum, regardless of the circumstances and without discrimination, competent authorities shall ensure that evicted persons or groups, especially those who are unable to provide for themselves, have safe and secure access to: (a) essential food, potable drinking water and sanitation; (b) basic shelter and housing; (c) appropriate clothing; (d) essential medical services; (e) livelihood sources; (f) fodder for livestock and access to common property resources previously depended upon; and (g) education for children and childcare facilities. **States should also ensure that members of the same extended family or community are not separated as a result of evictions**.[41]

58. Additionally, the Human Rights Committee, which is tasked with interpreting the ICCPR, expressly held that decades of community life is a consideration that must be taken into account when examining the legality of an eviction. In the decision in which it found Greece had violated the right to family life and the right to a home, protected under Article 17 of the ICCPR, when the Athens authorities forcibly evicted a Roma community from **property privately owned by other parties**, the Human Rights Committee noted, "special circumstances such as decades-old community life" must be considered.[42]

59. The right to culture is also directly linked to the right to adequate housing, and it too finds expression in the elements that make up the latter.[43] This right is enshrined in Article 15(1)(a) of the ICESCR. States must ensure that all persons have access to conditions that allow them to lead their lives according to their culture and the culture

[40] Commission on Human Rights, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and to the Right to Non-Discrimination in this Context, Miloon Kothari, ¶10 E/CN.4/2006/41 (21 March, 2006).

[41] Ibid., para. 52 (emphasis added).

[42] I Elpida, Supra, note 29, Ibid.

[43] GC 4 ¶8(g) stipulates cultural adequacy is one of the elements of the right to adequate housing.

of their community,[44] particularly when such persons belong to a minority group.[45] In the context of the right to adequate housing, a residence must allow the occupant to express their culture to a sufficient degree.[46]

60. The aforesaid leads to the conclusion that protecting the right to adequate housing requires the state to protect other human rights as well and to consider the rights to family life, community life and culture when examining the legality of the eviction.[47]

C. The test of proportionality as it relates to the conflict between the right to housing and the right to property or other interests

61. In the context of the rights enumerated in the ICESCR, when the exercise thereof conflicts with opposite interests, the principle of proportionality and the conditions for its application derive from the provisions of Articles 2(1) and 4 of the Convention. In terms of the right to housing and permissible eviction, the following parameters have been set for the test of proportionality: A. The eviction must be determined by law; B. It must promote general welfare in a democratic society; C. It must promote a legitimate purpose; D. It must be necessary (it must be the least injurious measure); E. Its benefit must outweigh the damage it causes (proportionality in the narrow sense).[48]

62. We recall that in matters relating to property in East Jerusalem, the competing rights are those of the property owners, **or rather, the substitute property owners** (the original owners), who were dispossessed of their property and the occupants, who entered the property pursuant to norms enabling them to do so, and, in any event, in good faith, and who have themselves or whose successors have become long-term occupants in the property. We further recall matters detailed in the opening of this brief - East Jerusalem's Palestinian community is **marginalized. It suffers from systemic discrimination, some of which is enshrined in law, and many families in this community have been dispossessed of their property and turned into refugees.** The occupants' disadvantaged status and the ongoing violation of their right to equality provide the background for the balancing task. More on that follows. At this point, we note only that their eviction from properties that have served as their homes for generations would further disadvantage members of this community and deepen the gap between them and Jerusalem's dominant Jewish population, particularly given the severe housing shortage affecting Jerusalem's Palestinian population.

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[44] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21: The Right of Everyone to take part in Cultural Life, ¶3, 6-7 21 Dec. 2009, E/C.12/GC/21 (hereinafter: GC 21).

[45] Ibid., para. 7. Compare also to ICCPR, Supra, note 18, para. 27; Human Rights Committee, General Comments No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/Rev.1/Add.5.

[46] GC 4 ¶8(g); GC 21 ¶16(e).

[47] Miloon Kothari et al., The Human Right to Adequate Housing and Land, National Human Rights Commission 15 (2006).

[48] Pardo, Supra, note 26, para. 9.4.

63. The degree to which the rights of the original owners or their substitutes are violated is, of course, an important consideration, but it is not a decisive one. While the latter's ability to exercise ownership by taking possession of the property is curtailed, in some circumstances, eviction and transfer of possession would produce a violation of the right to housing of the long-term occupants or their successors, who may have lived in the property for many years and consider it their home, so severe that the balance would require its aversion. The sense of loss and displacement the original owners may experience (albeit this is not the case here, as the owner is a charitable endowment and the current trustees are neither the original trustees nor their descendants) would befall the long-term tenants. We must, therefore, put several other conditions to the test of proportionality in the narrow sense.[49]

64. To apply the proportionality subtests listed above, particularly subtests B, C and E, international human rights law requires consideration of the following factors, which are particularly relevant to the matter at hand: The occupants' **good faith** (the circumstances under which they entered the property and the degree to which they complied with the laws in effect at the time, whether the entry into the property is a violation of fundamental norms under international law); **the collective connection** (the impact of marginalization and discrimination between the parties); **the owners' ties to the property** (generational proximity to the property, whether the party is a person or corporation, financial interest vs. personal interest); and, finally, **impact on reconciliation or social disruption.** We detail these considerations below.

65. We note again that equality is a key consideration in the assessment of proportionality, and therefore, will be addressed in a separate section of this brief.

1) Good faith:

66. An occupant's good faith with respect to their entry into the property is taken into consideration in the assessment of proportionality in the narrow sense. So, for instance, the question of whether the occupant entered the property in accordance with the law applicable in the country at the time (as opposed to a temporary arrangement). International law acknowledges that there is no room to seek retribution for possession considered legal under state law, even when the regime is retrospectively thought to be unlawful, so long as possession was taken in good faith.

67. There is a difference between the conscious pilferage of another's property and entry into a property borne out of the occupants' belief in the propriety of their taking possession, in other words, whether the long-term occupant knew they were benefitting from a violation of international law, at the expense of the original owner. Another issue is the possession holder's expectations - whether they had legitimate expectations that the right of possession they received with respect to the property was unlimited, or

[49] Yael Ronen, *The Dispossessed and the Distressed: Conflicts in Land-Related Rights in Transitions from Unlawful Territorial Regimes*, in Eva Brems (Ed.) Conflicts Between Fundamental Rights 521, 545 (2008).

whether they knew that the legal framework under which they were given the right was temporary. In both cases, where the occupant knew that possession was taken in defiance of the law or granted as part of a temporary arrangement - their right to continue living in the home is greatly diminished. In HCJ 1661/05 **Gaza Coast Regional Council et al. v. Israel Knesset et al.**, 59 (2) 481 (2005), which concerned the evacuation of Israeli settlers from the Gaza Strip, the court addressed this temporariness as having compelling weight in the legality of the evacuation throughout the judgment (see, for example, paragraphs 115 and 137).

68. On the other hand, where an occupant acted in good faith, and within the limits of the legal system of the country in control of the area at the time, their expectation to have the transactions they had entered upheld can be respected.

69. An example of this approach can be observed with respect to property seized by the government of the GDR after 1949 at the time of German reunification. Though the reunification treaty generally approved the restitution of property belonging to West Germans, it required extremely compelling expectations. This condition was stipulated in order to protect the interests of East Germans who had built their homes in properties nationalized by the authorities of the GDR. In practice, there was no restitution of property when it was deemed impossible, impractical, unjust, or if the property had been purchased by a third party in good faith. A purchase was deemed not to have been made in good faith when it was made in a manner that was incompatible with the law or practice of the GDR and when the purchasing party was aware or should have been aware of the illegality.[50]

70. Another example of the emphasis placed on good faith occupancy is the finding that whether or not a property is occupied in good faith is relevant to the issue of receiving alternate housing and other social services when an individual is evicted from their home.[51]

71. It is noted that the proportionality of an eviction is not necessarily determined by the issue of good faith, even in cases of illegal invasions where good faith cannot be argued. The remaining factors must also be taken into account, and, as detailed below, there have been cases in which the right to housing was deemed superseding despite a bad faith invasion.

[50] See Article 41 of the Treaty between the, Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, Aug. 31, 1990, BGBI II 889 (hereinafter: German Unification Treaty), which incorporates the provisions of The Statute on the Regulation of Open Property Questions, Annex II, ch. III and XIII of the Unification Agreement. See also: Peter E. Quint, The Constitutional Law of German Unification , 50 Md. L. Rev. 475, 550-554 (1991)

[51] Alban, Supra, note 26, para. 10.1.

2) <u>The nature of the ties the original owners or their substitutes have to the property:</u>

72. Owners' ties to a property may have several manifestations. A critical one, and one that is directly related to protecting expectation, is **<u>time</u>**. **In other words, the interval between the time the original owner was dispossessed of the property and the time the long-term occupant entered it. This feature grows in importance when the results of the violation of the owners' rights are reviewed generations after the fact.**[52] The European Court of Human Rights (ECtHR) emphasized this issue when discussing the demand made by Greek-Cypriot owners of property in Northern Cyprus to have their property restored by the Turkish authorities in the area. In that decision, the court held that a claim regarding a violation of the right to a home under Article 8 of the ECHR might be diminished where a significant amount of time elapsed from the moment the person in question lost their home.[53]

73. Where several decades passed since the property changed hands, an attempt to strike a balance between the rights of the owners and occupants raises significant questions around intergenerational justice.[54] The question of justice is of particular relevance when the original owners (and their descendants) had managed, in the time that elapsed, to find **<u>appropriate living or housing arrangements</u>**.[55] The question is how just it is to place the burden of eviction on the generations that inherited possession of the property and consider it their ancestral home. Examples of this can be found in South Africa's Restitution of Land Rights Act, enacted after the end of apartheid. The law stipulates that when making decisions on land restitution, the Land Claims Court must consider factors beyond ordinary proprietary considerations, for instance: to what degree is it desirable to rectify past human rights violations through restitution; justice and equality

[52] Jeremy Waldron, Settlement, Return, and the Supersession Thesis, 5 Theoretical Inquiries in Law (2004); Jeremy Waldron, Historic Injustice: Its Remembrance and Supersession, in Justice, Ethics and New Zealand Society 139 (Graham Oddie & Roy Perrett eds, 1992); Jeremy Waldron, Superseding Historic Injustice, 103 Ethics 4 (1992).

[53] Case of Demopoulos and Others v. Turkey (Application no. 46113/99) (2010) at para 84, 136-137. The ruling in Demopoulos drew sharp criticism, which we share, for disregarding the inverted power dynamic in the case. The fact that the long-term tenants in that case were members of the ruling group and the property owners were members of the group subjected to discrimination (see, e.g.: Elena Katselli Proukaki, The Right of Displaced Persons to Property and to Return Home after *Demopoulos*, *Human Rights Law Review*, Volume 14, Issue 4, December 2014, Pages 701–732, https://doi.org/10.1093/hrlr/ngu017). Nevertheless, the findings made therein with respect to good faith are relevant to the matter at hand.

[54] Ruti G. Teitel, Transitional Justice 119 (2000).

[55] Yael Ronen, The Dispossessed and the Distressed: Conflicts in Land-Related Rights in Transitions from Unlawful Territorial Regimes, in Conflicts Between Fundamental Rights 521, 545 (Eva Brems ed., 2008).

requirements and the desire to avoid stirring social unrest (more on this follows).[56] Another example of this approach can be found in the peace agreement between the factions in Rwanda. Though never implemented, the agreement recognized refugees' right to return to their property, but also held that in cases in which ten or more years had passed since the owners left, and the property is used by others, compensation in the form of alternate land and assistance with settlement therein would be considered in place of restitution.[57]

74. Another important feature related to the ties the owners or their substitutes have to the property is **the identity of the party demanding restitution** as the property owners. Assessing proportionality in the narrow sense requires consideration of the harm eviction would cause the tenant vis-à-vis the harm failure to evict would cause the owner. [58] When performing this analysis, a distinction must be drawn between different types of property owners, and less protection should be afforded to the property rights of large private bodies than the protection afforded to a property owner who relies on the property as a home:

> The Committee is of the view that the State party should develop a normative framework, in the form of legislation that is compatible with the Covenant, to regulate the eviction of persons from their homes. This framework should stipulate that a judicial or other impartial and independent authority with the power to order the cessation of the violation and to provide an effective remedy **must analyze the proportionality of eviction applications in such situations**. Analyzing the proportionality of an eviction entails examining not only the consequences of the measure for the evicted person, **but also, inter alia, the interests at stake for the person or party with the right to seek the eviction**. The availability of suitable alternative housing, **the personal circumstances of the**

[56] Restitution of Lands Rights Act 1994 (Act. No. 2011 of 1994), Article 33: "(a) The desirability of providing for restitution of rights in land or compensation to people who were dispossessed of their rights in land as a result of or in pursuance of racially based discriminatory laws; (b) the desirability of remedying past violations of human rights; (c) the requirements of equity and justice; (d) the desirability of avoiding major social disruption;" See also Hanri Mostert, Land Restitution, Social Justice and Development in South Africa 119 S. African L.J. 400 (2002).

[57] 1993 Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons, Art. 4 ("The two parties recommend, however, that in order to promote social harmony and national reconciliation, refugees who left the country more than 10 years ago should not reclaim their properties, which might have been occupied by other people. The Government shall compensate them by putting land at their disposal and shall help them to resettle."). Available at http://www.grandslacs.net/doc/2403.pdf.

[58] Alban, Supra, 26, para. 11.5.

> **occupants and their dependents** and whether they have cooperated with the authorities in seeking suitable solutions are crucial factors in such an analysis. **This inevitably involves making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions or other entities**.[12] **The State party will therefore be committing a violation of the right to adequate housing if it stipulates that a person whose rental contract is terminated must be evicted immediately, without regard to the circumstances in which the eviction order would be carried out**.[59]

75. In other words, there is a material difference between owners who had lived in the property and took care of it and, for instance, a corporation with a purely financial interest in the property. The latter cannot claim a violation of its right to housing.

76. Additionally, individuals or communities in possession of a property for many generations should be afforded stronger legal protections:

> Additionally, the eviction decisions were taken and confirmed on the basis of a decision by the urban planning authorities that the Roma housing in that area was illegal and had to be demolished, **regardless of any special circumstances such as decades-old community life**, or of any possible consequences such as homelessness, and in the absence of any pressing need to change the status quo. In other words, **the State party's authorities did not give sufficient weight to the various interests involved** and to protecting the authors from the threat of immediate eviction.[60]

77. As noted above, there may be many cases in which occupants have developed legitimate expectations to continue living in the structure. On this issue, another relevant consideration is whether the party demanding restitution owns multiple properties and does not require the property for residential purposes, whereas for the occupant, the property is home. In such a case, compensation rather than restitution appears to be the appropriate way to balance competing claims. Another factor that should be taken into consideration is whether the party demanding restitution, even if it is a private individual, is, in fact, the person who had lived in the home and has emotional ties to it or this person's successors who had never set foot in the property.

[59] Ibid. (emphasis added). See also: Pardo, Supra, note 26, para. 9.5. See also, paras. , 4.4, 7.5, 9.2, 9.8.

[60] "I Elpida", Supra, note **Error! Bookmark not defined.**, Ibid. (emphasis added).

3) Impact on reconciliation/social disruption:

78. As noted in the context of the South African act that regulates post-apartheid property restitution and the agreement between the factions in Rwanda, the impact of restitution/compensation on social dynamics is factored into the balance between the original or substitute owners' property rights and the right to housing of the long-term tenant. In this regard, international law examines how the risk of social disruption can be minimized, and as part thereof, it is acceptable, and perhaps even desirable, to employ policies designed to create a protected area for minorities where they can maintain their way of life. This relies on the principles of the right to self-determination, respect for minority rights and non-discrimination,[61] addressed in further detail below.

79. Note: This is not a question of possible violent clashes and of giving in to such concerns, but rather concern over social cohesion, increasing social disparities and the opposite - hope for reconciliation and the correction of past injustices.

80. The repatriation of refugees may sometimes cause severe problems associated with social disruption, and, consequently, in some cases, individuals permitted to return would have to live in a different part of the country rather than their original homes.[62] In the case of Cyprus, the racial unrest during the country's short-lived independence played a role in proposals made by two UN Secretary-Generals and the Security Council whereby individual and collective rights would be better protected through a mechanism that prioritizes keeping occupants who had been dispossessed of property in the other part of the island in their homes. This system guaranteed each community an opportunity for self-determination and allowed enjoyment of personal and collective rights.[63]

D. Remark with respect to legality of possession

81. International law recognizes that even if the original owners' rights (a primary norm) were violated as a result of the long-term occupants' entry into the property and its transformation into their home, this does not necessarily require a remedy that provides full recompense for the violation (a secondary norm, in this case, restitution). Private

[61] See General Recommendation No. 21 of 1996 of the Committee on the Elimination of Racial Discrimination, on the Right to Self-Determination, August 23, 1996, Doc. A/51/18, paras 5, 6.

[62] Adam Roberts, More Refugees, Less Asylum: A Regime in Transformation, J. Refugee Studies 375, 389 (1998); see also, Protocol of Agreement between the Government of Rwanda and the Rwandese Patriotic Front, Art. 4, Supra, note 57.

[63] **Report of the Secretary-General on his mission of good offices in Cyprus** 1 April 2003, para 107-111 (S/2003/398); **Report of the Secretary-General on his mission of good offices in Cyprus** 3 April 1992, para 18-23 (S/23780)**;** SC Resolution 774 (1992) of August 25, 1992, para. 2: "Reaffirm[ed] [the SC's] position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as defined in paragraph 11 of the Secretary-General's report of 3 April 1992 (S/23780) in a bi-communal and bi-zonal federation.".

market doctrines, such as marché ouvert, have been imported into international law for reasons of efficiency. As in any legal system, under international law, the distinction between breaches of primary norms and their outcomes as secondary norms stems from the fact that in some cases, a breach of a primary norm creates a reality in which restitution is impossible, unjust or undesirable.[64]

82. So, for instance, despite a finding that the South African occupation of Namibia was illegal, private transactions between local residents carried out under the legal framework applicable at the time were recognized as lawful.[65]

83. One of the arguments made by the applicants in Cyprus v. Turkey was that a great many Greek-Cypriots lost their homes due to the illegal occupation of the area by the Turkish Republic of Northern Cyprus and that the decisions of the judicial system established to consider their restitution claims should be disregarded as they had been made by an unlawful regime. The ECtHR dismissed this argument.[66] The finding that the legality of the regime and its laws (and, by implication, the legality of the occupants' assumption of possession) should be separated from the issue of remedy is relevant to the matter at hand.

84. This approach has been widely supported in practice,[67] including in the jurisprudence of the ECtHR in a number of cases in which it held that the right to property includes possession, even when the property was obtained unlawfully. In these cases, the emphasis was put on the expectations long-term occupants who had planned their lives according to local legal norms had developed. For instance, in a case in which a Turkish citizen had built his home illegally and lived in it for many years while the local authorities were aware of the situation and implicitly approved it, the court ruled that the legal uncertainty created by the Turkish authority with respect to building laws produced expectations on the part of the applicant that amounted to possessory title.[68] The same concern for expectations can be observed in cases involving formerly communist countries, which, in many cases, nationalized houses and transferred occupancy rights to third parties. While the new regimes established in these countries revoked the nationalizations, they refrained from removing the long-term occupants or their successors from the homes and often preferred awarding compensation. The ECtHR accepted this approach and held that contracting parties have wide latitude with respect to redressing the harm and that payment of compensation was a legitimate remedy.[69]

[64] James Crawford, The Creation of States in International Law 167, at 168 (2nd ed., 2006).

[65] Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) [1971] ICJ Rep. para. 125.

[66] Cyprus v Turkey (App. no. 25781/94) (2001), paras. 96-98.

[67] See, Supra note 64.

[68] Case of Öneryildiz v. Turkey (App. no. 48939/99) (2004) paras 128-129.

[69] Case of Brumărescu v. Romania (App. no. 28342/95) (2001), at para. 19-23.

85. Either way, eviction must in no way leave the evicted individual and their family homeless. [70] States must take measures to provide adequate alternative housing[71] and ensure families are not separated as a result of the eviction.[72] These obligations apply regardless of who initiates the eviction - the state or a private entity:

> The State party has a duty to take reasonable measures to provide alternative housing to persons who are left homeless as a result of eviction, **irrespective of whether the eviction is initiated by its authorities or by an individual** such as the lessor. [73]

The above leads to the conclusion that not only does international human rights law recognize the right to housing, but it also provides for balancing tests when the right competes against other rights. Below we argue that these balancing tests **provide special protection to members of marginalized communities.**

IV. The collective context: The right to equality and the reality of marginalization and discrimination as "amplifying" other rights

A. The right to housing through the prism of the right to equality under international norms

86. A person's forced eviction from their home is, on the face of it, a violation of their right to housing. As demonstrated, this has been established in international human rights law. However, this legal branch treats the eviction of a person belonging to a group already subjected to discrimination as a gross violation as it involves preexisting marginality and deepens it.

87. As noted above, international human rights law currently promotes an integrative approach that recognizes the interconnectivity of different human rights,[74] particularly the right to housing and the right to equality.[75] As such, as part of examining conditions B (promoting general welfare in a democratic society) and C, (promoting a legitimate purpose); for the purpose of proportionality, international jurisprudence has established that **equality, including substantive equality**, must be taken into consideration.

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[70] Ben Djazia, Supra, note 27, para. 15.2. See also Alban, Supra, note 26, para. 9.1; Hohmann, Supra, note 20, p. 22; GC 7 ¶16.

[71] Ben Djazia, Supra, note 27, para. 15.2; Alban, Supra, note 26, para. 9.1, 9.3.

[72] Alban, Supra, note 26, para. 9.3.

[73] Ben Djazia, Supra, note 27, para. 15.2.

[74] Human Rights Council, Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on his Mission to the Syrian Arab Republic, ¶73 A/HRC/39/54/Add.2 (11 Sep., 2018).

[75] Miloon Kothari, Supra, note 40 paragraph 9. See also GC 4 ¶9.

88. The UN Special Rapporteur on the right to adequate housing notes that evictions "intensify inequality, social conflict, segregation and 'ghettoization,' and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society, especially (...) minorities."[76] As a result, states must adopt strategies and promote policy designed to provide effective protection for members of groups at risk of discrimination.[77]

89. In this vein, international jurisprudence (including decisions rendered by supervisory international tribunals) has established that when assessing proportionality, attention must be given to whether forced evictions target groups subjected to discrimination.[78]

90. For instance, in the *L.R.* case, the Committee on the Elimination of Racial Discrimination (CERD) found Slovakia in breach of ICERD Article 5, which prohibits discrimination with regards to the right to housing, over the Dobšiná municipality's cancellation of a housing program in order to prevent a Roma community from moving into the town.[79] Although the CERD found the discrimination in this case to be direct, it did stress that the prohibition applies to indirect discrimination (discrimination in fact or effect) as well.[80] Another example illustrating the significant weight international law ascribes to considerations of equality in the context of the right to housing can be found in the *Voknovic* case. In that matter, Croatia stripped a man of his protected tenancy because he had left the residence where he and his family had lived. The family left the residence after receiving death threats as they were Serb, a national minority in Croatia. Although according to the law in Croatia, protected tenants may be stripped of their status if they leave the residence, and although the family in question had been evicted in pursuit of a legitimate purpose (increasing the number of housing units available to families in need), the Human Rights Committee found the eviction to be in violation of Article 17 of the ICCPR due to its discriminatory elements.[81] The Committee found that when considering substantive equality, the difficulties minority groups face in securing alternative housing must be taken into account:

> In particular, evictions should not render individuals homeless. Where those affected do not have the means to acquire alternative housing, States parties must take all appropriate measures to ensure, where possible, that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. […] **States parties should pay particular**

[76] Ibid., Appendix para. 7.

[77] Ibid., Appendix paras. 28-30.

[78] Ben Djazia, Supra, note 27, para. 15.2 ("States parties should pay particular attention to evictions that involve women, children, older persons, persons with disabilities or other vulnerable individuals or groups who are subjected to systemic discrimination.")

[79] Committee on the Elimination of Racial Discrimination, L.R. et al. v. Slovakia (CERD/C/66/D/31/2003).

[80] Ibid., para. 10.4.

[81] Human Rights Committee, Voknovic v. Croatia, ¶2.1-2.2, 8.6-8.7 Comm. No. 1510/2006 (CCPR/C/95/D/1510/2006).

> **attention to evictions that involve women, children, older persons, persons with disabilities or other vulnerable individuals or groups who are subjected to systemic discrimination.** The State party has a duty to take reasonable measures to provide alternative housing to persons who are left homeless as a result of eviction, irrespective of whether the eviction is initiated by its authorities or by an individual such as the lessor.[82]

B. European human rights law: Collective vulnerability as a criterion weighing against or requiring conditions for the eviction of long-term occupants

91. The prohibition on discrimination is enshrined in Article 14 of the ECHR and in Article 1 of Protocol No. 12 thereof (hereinafter: the Protocol).

92. Article 14 is a fundamental norm in the European human rights protection system. It applies to all members of the European Council. No general reservations may be entered with respect to this article, only narrow reservations regarding upholding laws. The Article stipulates as follows:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

93. Article 1 of Protocol No. 12, which is binding on signatories (20 so far), stipulates:

> 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 14 in the jurisprudence of the European Court of Human Rights

94. The ECtHR has ruled, in a host of decisions, that the equality guaranteed in Article 14 and the prohibition on discrimination stipulated in it lack independent status and exclusively supplement the other rights. In other words, Article 14 stipulates a right to enjoy all other rights enshrined in the ECHR without discrimination.[83]

[82] See Supra note 78.

[83] Case of Molla Sali v. Greece (Application No. 20452/14) (2018), at para 123

95. Accordingly, the ECtHR has ruled that the prohibition on discrimination is integral to the fulfillment of all other rights enumerated in the ECHR and that Article 14 applies without distinction to all rights, even if they differ in nature:

> **It is as though the latter** [Art. 14] **formed an integral part of each of the Articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations**, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention. This is, moreover, clearly shown by the very general nature of the terms employed in Article 14 (art. 14): "the enjoyment of the rights and freedoms set forth in this Convention shall be secured."[84]

96. In the case at hand, the violated right is, as noted, the human right to housing, enshrined in Article 8 of the ECHR (defined as protection from interference with the home). The interconnectedness of Articles 8 and 14 was recognized by the ECtHR in a case against Austria involving an eviction following the death of a spouse who had been the renter, despite local law stipulating a surviving spouse has a right to remain in a residence rented by the deceased spouse. The ECtHR ruled Articles 8 and 14 had been breached since the person in question had been evicted because he had been in a same-sex relationship.[85]

97. Additionally, Article 14 effectively allows for an expansion of the rights enumerated in other articles when examined through a discrimination/equality lens, where discriminatory treatment would be considered a violation even in cases that would not necessarily result in a finding of a violation taken on their own and absent discrimination. So, for instance, the ECtHR found that the right to family had been violated when the German court refused to force the mother of a child born out of wedlock to provide the father access to the child, despite the fact that Article 8 itself had not been violated. The ECtHR found the fact that fathers of children born out of wedlock are not afforded the same rights as divorced fathers to be discriminatory.[86] In other words, the incorporation of Article 14 into the remaining articles of the ECHR provides an extra layer of protection beyond those built into each and every article.

98. Article 14 has such potent status that it has been found to apply to private legal disputes as well, rather than only public matters, and it is employed to avoid discriminatory legal situations or interpretations that lead to such even in private disputes.

> Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, i**t cannot remain**

[84] Case of Relating to Certain Aspect of the Laws om the Use of Languages in Education in Belium v. Belgium (MERITS) (Application No. 1474/62) (1968), at para 9 of "the law" part

[85] Case of Karner v. Austria (Application No. 40016/98) (2003), at para 42-43

[86] Case of Sommerfeld v. Germany (Application No. 31871/96) (2003)

> **passive where a national court's interpretation of a legal act,** be it a testamentary disposition, **a private contract**, a public document, a statutory provision or an administrative practice **appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14** and more broadly with the principles underlying the Convention (see Larkos v. Cyprus [GC], no. 29515/95, §§ 30-31, ECHR 1999-I). [87]

Article 1 of the Protocol in the jurisprudence of the European Court of Human Rights

99. Article 1 expands the protection from discrimination afforded by Article 14, stipulating a prohibition on discrimination outside the rights enumerated in the ECHR and applicable to any right set forth in law. The Article protects against discrimination in each of the following four categories: (1) The enjoyment of rights set forth in domestic law; (2) The implementation of obligations incumbent on a public authority by law; (3) The exercise of a discretionary governmental power; (4) By any act or omission in the exercise of any power granted to a public authority.[88]

Article 14 as amplifying the rights of marginalized groups

100. The ECtHR has ruled in numerous cases that in some circumstances, a state's failure to take action to correct factual inequality between groups by treating them differently may amount to a violation of Article 14 (in conjunction with the article pertaining to the relevant right).

> According to the Court's well-established case-law, in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations (see Hämäläinen, cited above, § 108), or an issue will arise when States fail to treat differently persons whose situations are significantly different (see Thlimmenos, cited above, § 44 in fine). On the latter point **the Court reiterates that Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article** (see Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, § 10, Series A no. 6; Stec and Others v. the United Kingdom [GC],

[87] Case of Pla and Puncernau v. Andra (Application No. 69498/01) (2004), at para 59

[88] Case of SAVEZ CRKAVA "RIJEČ ŽIVOTA" AND OTHERS v. CROATIA (Application No. 7798/08) (2010), at para 103-105

> nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI; and Muňoz Diaz v. Spain, no. 49151/07, § 48, ECHR 2009). [89]

101. It follows that equal treatment of unequals could amount to a violation of the right to equality. Consequently, the application of "ordinary" rules to a dispute between a marginalized, disadvantaged group (or individuals belonging to it) and a strong, well-protected group with access to alternative remedies (or individuals belonging to it) may constitute a violation of the right to equality.

102. The ECtHR has ruled that **courts have a duty** to consider the violation of a right in the context of the victim's group vulnerability and to accord special weight to membership in a vulnerable community. Therefore, any judicial inquiry into a litigants' rights that fails to take vulnerability into account could amount to a violation of the right to equality in conjunction with the relevant right.[90]

103. The need to consider the vulnerability of a minority as amplifying other rights has been recognized specifically in the context of the right to housing. In a ruling concerning a French government decision to evict a Roma community that had lived in a certain area for years illegally and in contravention of zoning designations, the ECtHR clarified that the vulnerability of the community facing eviction was an important consideration that must be taken into account in all regulatory, planning and enforcement decisions. The ECtHR emphasized that this consideration should play a role in assessing proportionality and striking a balance between the competing interests on questions such as the permissibility and necessity of the eviction, its timing, the method used and the housing alternatives offered. The court ultimately ruled that the proportionality of the eviction had not been adequately assessed and, therefore, the applicants' right to housing under Section 8 had been violated:

> In addition, it is necessary, as the government have accepted, to take into account the fact that the applicants belong to a vulnerable minority. The court would refer to its previous finding that the vulnerable position of Gypsies and travelers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases (see Connors, cited above, §84; Chapman, cited above, §96; and Stenegry and Adam, cited above). It has also stated in Yordanova and Others (cited above, *§§129 and 133)* that, in cases such as the present one, the applicants' specificity as an underprivileged social group and their resulting needs must be taken into account in the

[89] Case of Taddeucci and Mccall v. Italy (application no. 51362/09) (2016), at para 81

[90] See, for instance, a ruling in which the ECtHR found a violation of Article 14 when domestic courts failed to consider the vulnerability of a sex worker from Nigeria who lived lawfully in Spain when reviewing complaints she had made about her treatment by police officers: Case of B.S. v. Spain (Application No. 40016/98) (2012), at para 62

> proportionality assessment that the national authorities are under a duty to undertake, not only when considering approaches to dealing with their unlawful settlement but also, if their removal is necessary, when deciding on its timing and manner and, if possible, arrangements for alternative shelter. [91]

104. Notably, in a partly dissenting opinion, one member of the presiding panel found the court should have separately examined a possible violation of Article 14 in conjunction with Article 8, given that the applicants were a vulnerable minority. The judge maintained that when the state becomes aware of unacceptable treatment of a vulnerable minority, it must examine whether discrimination, direct or indirect, is at play. The judge added that more openness on the part of the court to perform such an examination would encourage state authorities to pay closer attention to the procedural requirements of Article 14, which are vital to the struggle for the elimination of discrimination.[92]

105. ECtHR jurisprudence on the rights of Roma communities has included a finding that contracting parties are under an obligation to create conditions that would allow these communities to maintain their special way of life.[93,94] In one case, the court explicitly stated that vulnerable communities may sometimes need help in order to enjoy the same rights as the majority, and that given Article 14, in the context of Article 8, **vulnerability must play a key role when considering how to address illegal settlement (in that case, on state land):**

> In general, **the underprivileged status of the applicants' group must be a weighty factor in considering approaches to dealing with their unlawful settlement** and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. This has not been done in the present case. [95]

106. Recognition that vulnerability requires special protection and, as such, should be included in the assessment of balance and proportionality is well established in the ECtHR's jurisprudence,[96] **which bolsters protection against violations of the rights of members of communities that have been historically subjected to discrimination and marginalization.**

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[91] See a case concerning a French government decision to evict a Roma community that had lived in a certain area for decades, illegally and in contravention of zoning designations: Case of Winterstein and Others v. France (Application No. 27013/07) (2013), at para 160, 167.

[92] Case of Winterstein and Others v. France (Application No. 27013/07) (2013), Partly Dissenting Opinion of Judge Power-Forde.

[93] Case of Connors v. The United Kingdom (Application no. 66746/01) (2004), para 84.

[94] Case of Chapman v. The United Kingdom (Application no. 27238/95) (2001), para 96.

[95] Case of Yordanova and Others v. Bulgaria (Application no. 25446/06) (2012), at para 129 and 133

[96] See, e.g.: Case of Orsus and Others v. Croatia (Application No. 15766/03) (2010), at para 147

107. A similar principle has been enshrined in the African Charter on Human and Peoples' Rights (1986), where the right to equality is set forth in Article 2. In the principles and guidelines for the Charter's implementation, the African Commission on Human and People's Rights stipulated a heightened obligation to provide protection to members of vulnerable groups (emphasis added):

> In ensuring effective equality in the enjoyment of economic, social and cultural rights, **Member States must pay particular attention to members of vulnerable and disadvantaged groups**. Such individuals are often disproportionately affected by a failure of the State to ensure economic, social and cultural rights and/or are direct victims of discriminatory laws, policies and customary practices.

V. Conclusion regarding proportionality in the context of competing rights between long-term occupants and owners or their substitutes

108. The aforesaid leads to the following legal conclusions regarding the position international human rights law takes with respect to addressing a dispute involving a party with proprietary title to land that wishes to evict the occupant of a home built on said land.

109. First, international human rights law recognizes the **right to housing** as a person's right to continue living in their home. It is a fundamental right, which is no different from other non-absolute rights recognized in international law, including the right to property.

110. When the right of long-term occupants to continue living in their home conflicts with the property owner seeking their eviction, a balance must be struck while considering the following factors:

a. The long-term occupants' good faith (the circumstances under which they came to occupy the property serving as their home);

b. The identity of the property owner -

   i. Whether it is someone with personal and/or generational ties to the property - the closer and more personal the ties to the property, the stronger the right to possession thereof;

   ii. Is it a private individual or a corporation? A private individual has stronger rights than a corporation;

   iii. What type of interest does the title owner have in the property? An economic interest would shift the balance toward a financial remedy rather than eviction.

c. **The effect eviction would have on reconciliation or, conversely, its potential for social disruption:**

i. When the eviction of entire communities is at stake, the ramifications extend beyond any private property dispute between owners and occupants. Mass evictions of this kind affect social cohesion, pre-existing rifts and the chances of encouraging reconciliation, or, conversely, driving the rift further and inducing unrest;

ii. These questions are particularly relevant to vulnerable communities. Mass evictions are carried out against these communities almost exclusively. As the UN Special Rapporteur on the right to adequate housing noted, evictions exacerbate social inequality, segregation and separation and intensify social conflicts, especially between the majority and minority groups;

iii. For this reason, mass evictions have a direct and immediate impact on social rifts and their potential exacerbation. Therefore, this significant social consideration must be factored into policy alongside other considerations pertaining to the conflicting rights of owners and occupants.

d. **The collective connection, discrimination and vulnerability in the parties' relationship:**

i. Belonging to a vulnerable, marginalized and discriminated group, particularly one with a long history of discrimination and deprivation in the society in question, amplifies the right to housing of those bearing it, giving it considerable additional weight;

ii. If an entire community is in danger of eviction, and if this community is vulnerable and underprivileged, as noted, protection from eviction is also amplified, given the violation of the right to community life and culture it would involve.

111. On this issue, it is relevant to recall that the task of balancing to which this amicus curiae brief refers and which addresses individual rights may be subject to a legal treaty entered into by the legitimate representatives of the parties to an international conflict or to a regime change. Such representatives may mutually waive individual rights.[97] As noted in the introduction to this amicus curiae brief, this matter lies beyond the scope of this brief. However, it is important to note that the assessment process described both above and below determines rights in the absence of such treaty.

VI. The right to housing as a property right in international law

A. General

112. Alongside the human right to housing, which is a standalone right as elucidated above, international human rights law acknowledges that in certain circumstances, the ties long-term occupants have to a property that has served as their home for many years **produces**

[97] See German Unification Treaty, Supra note 50, which stipulated that despite the principle that property taken by the previous regime should be restored to its original owners, in certain conditions, individuals who had legally purchased a property relying on the prevailing laws in the area could keep it and the owners would receive compensation.

title to the property. It is not a right of ownership, nor does it negate the owner's title. However, it does provide an added layer of protection for possession and use of the property by the long-term tenants and produces competition not just between ownership rights and the right to housing, but also between two proprietary rights - the owners' proprietary title and the occupants' right to continued possession and use of the property.

113. The jurisprudence of the Inter-American Court of Human Rights and the ECtHR shows the legal ties between a long-term occupant and the property serving as their home are recognized as a proprietary right when the occupant has a legitimate expectation for said ties to be of unlimited duration, particularly in the context of long-term occupants that belong to a vulnerable, discriminated population.

114. While the ICCPR and the ICESCR, to which Israel acceded, do not recognize proprietary rights directly, as Prof. José Alvarez, former president of the American Society of International Law, illustrates in his seminal paper on this topic, broad recognition of the right to property in regional human rights instruments, and recognition of the prohibition on discrimination with respect to property in other international instruments (also acceded to by Israel), do lead to the conclusion that many countries that acceded to the latter recognize international law acknowledges the right to property.[98]

115. Perceptions regarding the human right to property and its status have developed extensively in recent years, mainly through topical human rights instruments. For instance, the Convention on the Elimination of All Forms of Discrimination against Women protects property in the context of discrimination against women, while the International Convention on the Elimination of All Forms of Racial Discrimination protects it in the context of racial discrimination. This has been made necessary by the failure of domestic and international law to achieve equality on property matters for women and racialized groups (as the term is defined in ICERD). This concept, which underscores equality in property, is central to the struggle for gender and race equality, but also to how international human rights law conceptualizes protection for property.[99]

116. This approach to the right to property, which is a slight departure from the legal/judicial individual approach taken by many countries, necessitates a reexamination of the right to property alongside other rights pertaining to equality and enshrined in various conventions. In fact, according to this approach, the right to property should be given the same status and seen in the same way as other rights that promote equality for vulnerable groups.[100]

117. This approach also sheds light on the manner in which various domestic laws (for instance, land registry regimes, family laws, inheritance laws, and the likes) impact vulnerable groups and how devastating property violations are for such groups in particular (poverty, homelessness and more).[101]

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[98] José E. Alvarez, The Human Right of Property, 72 U. Miami L. Rev. 580, 653 (2018)

[99] Kerry Rittich, *The Properties of Gender Equality*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 87, 89

[100] See Supra note 98, pp. 661-662.

[101] Janet Walsh, *Women's Property Rights Violations in Kenya*, *in* HUMAN RIGHTS AND DEVELOPMENT, *supra* note 43, at 133.

B. The human rights to property in the jurisprudence of regional human rights tribunals

118. The ECtHR has recognized proprietary rights as emanating from long-term possession in the context of legitimate expectation for use and possession for unlimited duration.

119. Under the heading, "Protection of Property," Article 1 of Protocol No. 1 to the ECHR sets forth as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

120. In a number of cases, the ECtHR interpreted the term "possessions," a requisite for the application of the article, as including possession without formal ownership,[102] subject to several conditions: occupants have had possession for many years with the state's awareness and without objection; occupants acted as owners would (for instance, paid taxes) and entered the property in good faith. When all these conditions are satisfied, the court ruled, the party in possession my develop title to the property, protected under the article.[103]

121. So, for example, in a case concerning an internally displaced family from Georgia that had lost its property during the war and received the state's permission to live in a certain house, the ECtHR found that the long-term possession of the property (more than ten years); the good faith entry thereto; the state's awareness of the occupant's possession of the property and the fact that he treated it as an owner would (a feature that was accorded particular importance); as well as the monetary aspect of possession (economic interest) all together amounted to "possessions" for purposes of the application of Article 1 of the Protocol and proprietary protection and status for the applicant's right.[104]

122. In another case, in which a holiday home was demolished 37 years after construction and 10 years after the state notified the owners the building was illegal, the ECtHR held that the 27 years in which the state made no claim in the matter, and during which the owners paid taxes on the property as legally required, coupled with the added 10 years the state took to demolish it substantiated the owner's proprietary interest to the enjoyment of the property. This interest was found to be substantive and to fall under the definition of "possessions" protected under Article 1 of the Protocol. The court

[102] Case of Hamer v. Belgium (App. No. 21861/03) (2007), at para 75
[103] Case of Saghinadze and Others v. Georgia (App. No. 18768/05) (2010), at para 108
[104] Ibid. paras. 104-108.

added that the applicant had developed legitimate expectations to continue enjoying the possession.[105]

123. In a similar case, the court likewise held that a structure built without a legal permit constituted a "possession" and was therefore entitled to proprietary protection, since the state had not made any claim of illegality for a protracted period of time.[106]

124. The Inter-American Court of Human Rights has also recognized that long-term occupants' ties to property or land may, in some circumstances, amount to title.

125. Under the heading, "Right to Property," Article 21 of the American Convention on Human Rights sets forth:

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

126. The Inter-American Court has interpreted the Article extremely broadly as going beyond the "classic" meaning of property.[107] Several justifications are put forward for this interpretation:

a. Firstly, Article 21 uses vague language, referring to enjoyment of one's property and failing to mention **private property**, although previous versions of the article did include the term **private property**. This leads the court to conclude that the drafters intended for the Article to apply to all types of property rather than just private property in the classic sense of the term.[108]

b. Secondly, the court found that human rights treaties are living, developing instruments whose interpretation must be adjusted to suit evolving times and specific current living conditions.[109]

c. Thirdly, the court ruled that according to Article 29(b) of the Inter-American Convention, the provisions therein may not be interpreted as restricting the enjoyment of rights guaranteed in other conventions or under domestic law.[110]

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[105] Supra, note 102, para. 76.
[106] Case of Keriman Tekin and Others v. Turkey (App. No. 22035/10) (2016), at paras 40-43
[107] sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 120 (Mar. 29, 2006).
[108] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 145 (Aug. 31, 2001).
[109] Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judg-ment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 125 (June 17, 2005).
[110] Supra, note 108, para. 147.

d. Finally, the court relied on the need for a systematic interpretation of conventions in keeping with the provisions of the Vienna Convention on the Law of Treaties, and therefore, interpreted Article 21 in light of the ICCPR, the ICESCR, the Declaration on the Rights of Indigenous Peoples, and their interpretations by the competent bodies.[111]

127. Given this broad interpretation and where other appropriate elements are satisfied, the Inter-American Court has recognized indigenous peoples' ownership of certain areas despite the absence of an official title deed.[112]

128. The court has also ruled that this property right held by indigenous peoples could, in certain cases, trump the property rights of private individuals or corporations, who would receive monetary compensation for the land,[113] including in cases in which the official owners were a third party that purchased the land in good faith.[114]

C. Conclusion and application

129. Hence, as stated, the perception of property rights as a tool for dispossession and discrimination has developed in recent years, along with the complementary development of protection for the ties vulnerable groups have to property as title in certain circumstances. These developments are part of a trend towards promoting equality and suppressing mechanisms that drive societal disparities.

130. In their jurisprudence, both the Inter-American Court of Human Rights and the ECtHR have recognized title arising from long-term, good-faith possession coupled with legitimate expectations for continued, uninterrupted possession.

131. It is possible to infer from these rulings that the long-term occupants in the case at hand - who suffer from discrimination in nearly every aspect of life, with particular attention to the fact that the normative framework protecting property inherently discriminates against them - have title to the property that is their home.

VII. The application of the doctrine to the case at hand

132. As demonstrated in the first part of this brief, the Palestinian residents of East Jerusalem are clearly underprivileged in terms of status and rights. While this is partly the result of law and partly the result of policy, it is wholly institutional and grounded in historical, deeply ingrained, chronic discrimination.

133. The Dweik family, who are the subject of the eviction application addressed herein, are not alone. About 700 residents in the Silwan neighborhood of Batan al-Hawa are under threat of removal from their homes due to various eviction applications that have been filed and are currently in different stages of litigation. In other neighborhoods of East

[111] Saramaka People v. Suriname, Preliminary Objections, Merits, Repara-tions and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 93–95 (Nov. 28, 2007)
[112] Supra, note 107, para. 128.
[113] Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 147–49 (June 31, 2005).
[114] Supra, note 107, para. 138.

Jerusalem, such as Sheikh Jarrah, hundreds more Palestinian residents are under threat of eviction.

134. All eviction applications against families in Batan al-Hawa in Silwan were filed by members of the Ateret Cohanim association who had been appointed trustees of the Benvenisti charitable endowment, a historic Jewish charitable endowment that worked in Silwan a century ago. **The system that enabled the appointment of trustees for the Benvenisti charitable endowment and the unique proceeding applied to assets in East Jerusalem, which resulted in trustees who adhere to an ideology that favors the removal of occupants and their replacement with Jewish families having a claim over the Dweik family's property, have been created, maintained and facilitated by or by dint of the State and its institutions. The fact that the appointment of trustees was carried out at the District Court whilst the occupants could not have known that the charitable endowment existed or that an application to appoint trustees for it had been made, and certainly were not given the right to make their case prior to an appointment with such drastic (and tragic) implications for their homes, stems from the legal order created by all three branches of government of the State of Israel - the legislature, the executive and the courts. The release of assets from their status as absentee property, as carried out, without hearing parties liable to be impacted in an asymmetric, discriminatory manner, stems from the legal order created by all three branches of government of the State of Israel - the legislature, the executive and the courts.**

135. **These normative, political decisions with respect to property in East Jerusalem were made by the State, not the Benvenisti charitable endowment or Ateret Cohanim, and therefore, the State is a significant, active party (even if informally) to the dispute herein.**

136. **Hence, inasmuch as the matter concerns obligations toward persons whose right to housing is in peril, as described in this brief, the State bears enhanced and unique obligations, exceeding the ordinary (the State is always obligated to protect the fundamental rights of its subjects) since it is the State that laid the infrastructure that put the Appellants' rights at risk, including through the following:**

a. **Sanctioning the Administrator General's wrongful policy of releasing property automatically without inquiries with all parties concerned;**

b. **Creating a normative framework that enables the release of assets to pre-1948 Jewish owners, and their substitutes, even when they are not successors or private individuals;**

c. **Creating a normative framework that precludes the symmetrical release of assets to pre-1948 Palestinian owners and their substitutes;**

d. **The fact that the District Court, the Charitable Endowment Registrar and the Administrator General allow the appointment of trustees for charitable endowments predating Israel's establishment in a non-public process that does not allow interested parties from the general public to make their case and/or nominate themselves for trustees, and without parties potentially affected by these appointments being aware of same;**

e. **The fact that the Administrator General releases assets to charitable endowments in a secret process and without allowing those potentially affected by the appointment to be heard prior to the release;**

f. **The fact that the Administrator General employs a policy of releasing assets by way of restoring rights thereto in actuality rather than considering granting compensation in place of restoring property rights;**

g. **The fact that the judicial system approved all the aforementioned.**

We note that in this brief, we do not seek to impugn the validity or legality of the aforesaid practices, but to have them considered as part of the relevant background when striking a balance and as producing enhanced obligations on the part of the State to protect the Appellants' rights. **In fact, the aforesaid proves the inaccuracy of the view that the eviction proceedings concern a dispute between the occupants and the owners' substitutes and demonstrates the dispute must be seen as involving the State and its authorities.**

137. As noted in the factual background, 15 eviction applications filed by the charitable endowment are currently pending, and, since the beginning of 2020, judgments have been issued for the eviction of 19 families in the neighborhood.[115]

138. As noted, in this state of affairs, the Appellants' vulnerability must be treated as an element impacting the balance between various factors relevant to the proportionality of the eviction. Additionally, the assessment must also consider the State's contribution to the vulnerability of the community to which the Appellants belong and the discrimination against it rather than focusing solely on the role played by the Benvenisti charitable endowment or Ateret Cohanim. These factors must be given significant weight.

139. We now turn to an examination of these factors as relating to the case at hand, relying exclusively on the facts determined by the lower courts in this case and in other cases concerning relevant issues.

140. We note that the analysis is performed with respect to the right to housing. However, as clarified above, we believe that, beyond this right, there is an added layer of protection in the form of a proprietary right to possession and use of the property by the occupants.

[115] They include, inte alia, the following: CC 60182-10-13 Zarbiv v Basbus; CC 1496-03-15 Schaeferman v. Abu Nab; CC 37827-05-15 Schaeferman v. Rajabi; CC 40939-06-15 (expedited procedure) Schaeferman v. Basbus; CC 27537-09-15 Sirhan v. Schaeferman; CC (expedited procedure) 11330-12-15 Schaeferman v. Burqan; CC (expedited procedure) 55978-12-15 Schaeferman v. Rajabi; CC (expedited procedure) 67449-12-15 Schaeferman v. Rajabi; CC 41560-02-16 Schaeferman v. Jit; CC (expedited procedure) 44060-02-16 Ralbag v. Rajabi; CC (expedited procedure) 11184-03-16 Ralbag v. Shehadeh; CC 35534-02-16 Ralbag v. Shweiki; CC 19509-11-16 Ralbag v. Odeh; CC 34592-02-16 Ralbag v. Abu Rammuz; CC (expedited procedure) 26172-02-16 Ralbag v. Rajabi; CC 3681-10-14 Ralbag v. Dweik (case herein).

A. Good faith

141. The Appellants' devisor purchased the property in 1964 or 1965. According to purchasing agreements dating 1965 and 1967 submitted to the court, the Devisor purchased the lot from Mr. Qaid Jaljal and his wife, making payment in full. The two had possession of the property for at least 25 years. Neither the credibility of the purchasing contracts presented nor the purchasers' good faith was disputed throughout the proceedings. They have lived in the property for 56 years. The undersigned understand that after roughly 15 years, ownership is still a matter of dispute among the parties and do not wish to delve into this issue. Nevertheless, on the issue of good faith, in previous proceedings in the case as part of CC (Jerusalem District) 9403-07 **Rabbi Yizhak Ralbag v. Mazen Dweik** (reported in Nevo, May 25, 2012) (hereinafter: previous District Court case), Honorable Justice Farkash found the Devisor had purchased the property in good faith in exchange for payment (paragraph 42 of his judgment). Honorable Vice President of the Supreme Court (as was her title at the time) Miriam Naor, repeated the finding on the matter of good faith in her judgment in CA 5522/12 **Mazen Dweik v. Rabbi Yizhak Ralbag**, paragraph 3 of her judgment (reported in Nevo, July 27, 2014).

142. Aside from the judicial findings, the occupants' actions on the one hand and the actions of the authorities in control of the area on the other, further substantiate the former's good faith. For more than 40 years, until the first action brought against them in 2007, the Appellants lived in the property without their rights being questioned. As established in the proceeding, the Appellants paid municipal taxes both to the Jordanian and the Israeli authorities, which were aware of their occupancy and made no claim against them with respect to ownership. The sole claim made was in relation to unapproved building additions constructed by the Appellant's father, for which he served an eight-month prison sentence as he was unable to raise the funds to pay the fine issued against him (previous District Court case, paragraph 9(c)).

143. The Appellants had not been aware of the competing title claim until 2007, and as noted, they had purchased the property, lived in it and built their lives in and around it for many decades - all in good faith. With respect to the proportionality test - there is no doubt, nor can there be any doubt, that the Appellants acted in complete good faith and had developed a legitimate expectation to continue living in their home.

144. On the other hand, the Ateret Cohanim association and the State of Israel, which, as explained above, aided the former's acquisition of control over the charitable endowment, have engaged in conduct that can hardly be described as honest or as having been undertaken in good faith. The proceedings undertaken by the association vis-à-vis the Charitable Endowment Registrar - for trustee appointments - and the Administrator General - for release of the property - were **all** carried out without informing the occupants, without examining the propriety of the charitable endowment, without exploring limitations arguments and with the help and encouragement of state authorities. As argued above, and as emerges from the facts, this is not a private real estate dispute but a programmatic move towards "Judaizing" the neighborhood, led by the Respondents. **This is also presumably the reason state authorities have aided it.** In any event, this development could not have occurred without the State's contribution.

145. To conclude this particular issue, as ruled, the finding that the occupants entered the property in good faith remains standing in their favor, and, in any event, a **fourth** generation of the Dweik family is currently occupying the property. With regards to the good faith of the party seeking eviction, all that can be said is that it maneuvered in a manner designed to take the occupants by surprise and present them with a fait accompli by undertaking proceedings that shut them out entirely, a pursuit in which it was aided by the State. This casts a shadow on its good faith.

B. The nature of the ties to the property

146. **The time dimension:** On the one hand, we have the Appellants, who have lived in the property for nearly 60 years, alongside many other families, all of which are at risk of eviction, and all of which together form a community for whom Batan al-Hawa is a home and center of life. The persons currently occupying the property are the great grandchildren of the Devisor who purchased the property in the 1960s - in other words, four generations who have had no other home.

147. On the other hand, we have the Respondents, trustees of a charitable endowment established in the 19th Century, whose property was abandoned as far back as 1938 on the instructions of the British authorities in the area. This continued until 1946, when properties belonging to the charitable endowment were leased to Mr. Jaljal so that he might care for them. The latter treated the property as its owners, ultimately selling it to the Appellants' devisor (previous District Court case, paragraph 10(d)). In other words, the present Respondents are the substitutes of an owner who lost possession of the property more than 80 years ago.

148. **The identity of the parties and their ties to the property:** As noted, the Appellants are private individuals, the fourth generation of a family for whom this property is home. Without delving into the details specifically relating to the Appellants, we generally note that they belong to a social group, namely Palestinian residents of East Jerusalem, that, according to the data presented in the opening section of this amicus curiae brief, has no access to alternative housing and suffers from exceptionally severe development distress. Forced evictions of numerous families within this group means, for a great many of them, not just the loss of a home, but, in high probability, a descent into homelessness and the disintegration of community life (more on the matter of community and culture follows).

149. On the other hand, we have the Benvenisti charitable endowment, a public, rather than a private or family endowment, which had, for all intents and purposes, ceased to exist until members of Ateret Cohanim revived it. The Benvenisti charitable endowment trustees on behalf of Ateret Cohanim, were appointed by the District Court. This is their **sole** connection to the charitable endowment. They are not, in any way, continuing the path of the charitable endowment, established, as noted, to help the poor. In other words, the party seeking restitution is not an owner who may have a deep emotional connection to a home from which they were expelled. It is, in fact, an association with purely political interests.

150. It is further noted that, according to the Guidestar website, the association is well established financially with a financial cycle surpassing 8 million ILS in 2018. The association has purchased and manages many properties worth tens of millions more. Therefore, in the balance between the harm the eviction would cause the Appellants and the harm caused the Respondents in its absence, the scale is patently tipped in favor of the Appellants.

151. The chasm created by the considerations favoring the occupants in the case herein, inasmuch as the identity of the parties and their ties to the property is concerned, is so deep, that there is no choice but to continue demonstrating the extent to which there is no justice nor will there be any justice in evicting the Appellants from their home in favor of the Respondents. As noted, the Benvenisti charitable endowment was established by the Jewish community of Jerusalem as a housing project to assist Jews of Yemenite origin in particular. The charitable endowment was founded as a public trust and the trustees were public figures, community leaders of the time: the Sefardic Chief Rabbi, the Ashkenazi Chief Rabbi and the Alliance School principle. **In other words, the original owners were never a private individual who had lived in the property and seeks to return to it.** It should be noted that **the trustees of the charitable endowment themselves, even 100 years ago, never lived in the properties** but rather rented them to the poor.

152. As noted above, the charitable endowment's assets **were abandoned as far back as 1938**. There is no dispute that the homes belonging to the charitable endowment were left on the instructions of the British authorities in 1938, and had grown further and further dilapidated thereafter. Nor is there any dispute that the **charitable endowment properties were destroyed in the 1940s** (save one structure of which the charitable endowment had possession after the families living in it had been evicted). Even if a private individual had lived in the property, in the case at hand, the property itself is gone, and any tie to the home and the site is much weaker.

153. And if all this were not enough, the association fighting on behalf of the charitable endowment for "justice" denied a Jewish charitable endowment, **is not serving its goals.** The endowment's trustees are, in fact, working in the service of Ateret Cohanim in pursuit of its programmatic settlement goals, with absolutely no connection to the true purpose of the charitable endowment, which is to assist the poor. During testimony (in CC 60182-10-13 **Zarbiv et al. v. Basbus**, on October 27, 2019), a trustee of the charitable endowment, Mr. Avi Schaeferman, testified the charitable endowment did not have its own bank account or an independent cash reserve and that the rent income is collected by Ateret Cohanim, which also determines to whom the property is leased and under what conditions.[116] In other words, the current trustees have no ties to the public offices listed in the endowment's founding documents as trustees, and they follow the instructions of the Ateret Cohanim association.

154. It is difficult to imagine a case in which the identity of the parties and their connection to the property tips the balance so clearly and patently in favor of the occupants.

[116] Following these discoveries and an originating summons filed by Batten al-Hawa residents against the Charitable Endowment Registrar (OS 5792-06-20 **Ir Amim et al. v. Charitable Endowment Registrar**), the Registrar announced on September 23, 2020, that he had launched an audit of the charitable endowment.

C. Impact on reconciliation/social disruption:

155. Another feature that should be examined is the broad impact the outcome of this particular case, as well as all other cases in Batan al-Hawa and East Jerusalem as a whole, would have on reconciliation or, to the contrary, unrest in the area.

156. The Honorable Court lives within Israeli reality and knows how sensitive the peoples living here are to changes in the status quo in Jerusalem. Indeed, fears over the eviction of several families from their homes in the neighborhood of Sheikh Jarrah was a contributing factor in recent rising tensions in Jerusalem and the launch of Operation Guardian of the Walls.

157. As noted, these repercussions are relevant to the task of striking a balance between the right of the original owner or their substitutes to evict the occupants and receive possession of the property and the long-term occupants' right to housing. Aside from the risk of deepening social rifts and causing disruption, international law instructs consideration must be given to the need to create areas where minorities facing discrimination are safe and where they are able to engage in community life. More on this follows.

D. The right to community life, family and culture

158. Forced eviction harms the Appellants on several plains.

159. **In terms of the family unit**, the harm is obviously severe and it seems no further explanations are required. Uprooting a family from its home would rip it apart and cause trauma that would require a great deal of financial and emotional resiliency to overcome. We stress that given the housing situation in East Jerusalem's Palestinian community, there is concern the family would not be able to access suitable alternative housing, or that it would be forced to separate into several housing solutions. Given the cost of housing in the city, there is also concern that the family might have to move to the other side of the separation fence, into the poverty-stricken neighborhoods of Shu'fat Refugee Camp or Kafr 'Aqeb, and suffer from harsh living conditions and difficulties accessing Jerusalem. The family might even be forced out of Jerusalem's city limits altogether, in which case there would be real concern over the potential loss of Israeli residency, with all that this entails.

160. **In terms of the rights to community and culture**, the eviction discussed herein and additional Batan al-Hawa evictions pending before the courts could cause community disintegration if no alternative housing is offered to the community as a unit. As noted above, international law imposes a duty on states to ensure families and communities are not split apart as a result of evictions. The process underway in East Jerusalem in the past two decades, which has now come to a head (hence this amicus curiae brief), is aimed at severly undermining the social and cultural fabric of the Palestinian community and may disintegrate a community that has lived in the area for decades. Uprooting the Appellants and other families facing eviction applications will obliterate Batan al-Hawa's community life.

E. The Appellants' vulnerability and the State's responsibility

161. The power gap between the Appellants, the Dweik family, and the parties seeking their eviction - the Respondents on behalf of Ateret Cohanim - is unmistakably clear and cannot be denied. The Dweik family belongs to a vulnerable group suffering from discrimination and political and legal disadvantage, as demonstrated at the beginning of this brief. Ateret Cohanim enjoys the support of the State of Israel and has access to its infrastructure and all state authorities, which have aided in the promotion of its political agenda both normatively and through judicial and administrative decisions.

162. As noted, the fact that the Appellants belong to a vulnerable minority group and the inherent power gap between them and the parties seeking their eviction carries weight in all proportionality tests described above, and impact the overall considerations that form the basis for said tests. We recall that these considerations include the principle that the eviction must promote general welfare in a democratic society; must promote a legitimate purpose; must be necessary (and must be the least injurious measure); and its benefit must outweigh the damage it causes (proportionality in the narrow sense). **The fact that the Dweik family (and many other families in the same predicament) belongs to a vulnerable minority group reinforces the conclusion that these considerations are, in fact, absent, that their eviction will not promote welfare, that it is not the least injurious measure and that the damage will outweigh the benefit.**

163. Evicting the Dweik family will not promote welfare since when it comes to historically, institutionally discriminated minorities without political power, the tendency is to offer little to no assistance. Eviction is certainly not the least injurious means. Even if the charitable endowment is found to be the lawful owners, and therefore, the Respondents on behalf of Ateret Cohanim and the charitable endowment are entitled to manage the property, because it is a corporation, monetary compensation would provide an appropriate remedy and prevent severe harm to the Dweik family and to other families in the area. As noted, evicting families from vulnerable communities will do more harm than good as their prospects of minimal damage and swift rehabilitation are lower, while the risk of descending further into poverty and hardship is higher.

164. As aforesaid, the State bears responsibility due to its clear involvement in creating the legal and administrative infrastructure that enables the mass eviction of East Jerusalem families as part of normative-political decisions made with respect to properties in East Jerusalem. **In our view, the involvement of the State, as described, and its consequent responsibility, in conjunction with the vulnerability of the community in question, including its economic vulnerability, require that inasmuch as a finding is made that the Respondents are entitled to monetary compensation, the State should bear the burden.**

VIII. Conclusion

165. **The undersigned believe that, given everything noted in this brief, and when analyzing the issue according to the norms of international human rights law , the**

Appellants' right to housing in the property which is their home supersedes the right of the Benvenisti charitable endowment, inasmuch as it is proven, to evict the Appellants and take possession thereof.

166. **The undersigned state no opinion on the question of whether the owners of the property would be eligible for compensation should the Honorable Court accept our position and quash the eviction order. Nevertheless, they are of the opinion that should the Honorable Court find the owners of the property are entitled to compensation, the obligation to pay said compensation rests with the Government of Israel due to its part in and responsibility for the practice and the legal framework that led to the dispute discussed herein. Just as the State made sure to give individuals who lost property in East Jerusalem possession of property left behind by Palestinian residents shortly after the establishment of Israel, including in West Jerusalem, long-term occupants in East Jerusalem must not be burdened with the obligation to compensate Jewish owners of properties located in East Jerusalem.**

Signatures:

Prof. Eyal Benvenisti Prof. Orna Ben-Naftali Dr. Natalie Davidson Prof. David Kretzmer