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Palestinian Private Property Rights in Israel and the Occupied Territories

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NOTES

Palestinian Private Property Rights in Israel and the Occupied Territories

ABSTRACT

As the birth pangs of an emerging Palestinian state rage on, one question bars settlement, reconciliation, and peace: who is entitled to the land? On a macrocosmic level, this question has and will be answered through diplomatic negotiations, political pressure, and violence. The microcosmic question of the disposition of private property, however, must be taken into consideration before any lasting peace agreement can be reached.

The rights and interests of Palestinian refugees and Israeli settlers with respect to the land they have an interest in must be balanced with national needs for territorial continuity and peace. By tracing the transfer of private land from Arabs to Jews in the past 100 years, and by examining the law governing occupied territories, current treaties, and humanitarian law, one can suggest where title should rest.

This note argues that in most cases Palestinians have superior rights to land taken from them since the birth of Israel. Simply giving this land back to Palestinians, however, is not a viable option because it would cast serious doubt on the legitimacy of the state of Israel. Instead, Palestinians with property rights should be compensated for their property and for the inability to exercise their right to return.

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I. INTRODUCTION

[Private property] is one of the most fundamental institutions of mankind and there is no workable substitute for it. It is the perennial antagonist of centralized power. Without private property there can be no prosperity, no peace and no freedom. And justice itself will be a haphazard and occasional thing. Private property is "the guardian of every other right," as the 18th century Virginian Arthur Lee said.¹

Land ownership is and has always been the key issue in the Palestinian-Israeli conflict. Discussion and disputes over land usually take place on the macrocosmic level of national territory and borders. Exacerbating the Middle East conflict, the Holy Land² has been prized above all others for thousands of years because of its historical and religious significance. The specific issue of Palestinian's *private property rights* in Israel and the occupied territories, however, is critical to a lasting solution to the conflict in the Middle East.³ Many feel that this issue is insurmountable and continually threatens to destroy the peace process.⁴

A nation is ultimately made up of individuals, so perhaps private land ownership is the microcosmic embodiment of the entire Palestinian-Israeli conflict. As Eyal Benvenisti states:

1. Tom Bethell, *The Millennium That Was: Property, Prosperity and 1,000 Years of Lessons*, ASIAN WALL ST. J., Dec. 30, 1999, 1999 WL 3092879.

2. Since the very name of the general territory in question, be it "Israel" or "Palestine," is a disputed issue, at many points I will refer to it as the "Holy Land," because of its importance to the world's three large monotheistic religions: Judaism, Islam, and Christianity.

3. Tracy Wilkinson, *Toughest Phase of Mideast Peace Talks Underway*, L.A. TIMES, September 14, 1999, at A1.

4. *Id.* Many doubt that a solution can be found, Wilkinson writes: "[a]n opinion poll released this week and conducted by the Nablus, West Bank-based Center for Palestinian Research and Studies found that despite overwhelming support for the peace process, more than half of those polled—55.2%—believed a solution 'acceptable to both parties' cannot be found." *Id.*

The private claim to repossess a plot of land is immediately translated into a communal right to return, a right whose implementation may bring about far-reaching social and political repercussions. Therefore, those private claims raise one of the major stumbling blocks to Israeli-Palestinian reconciliation.⁵

Many Palestinians displaced for up to fifty years still hold title certificates to homes where Israelis have put up their book shelves, planted gardens and raised their children. The breakdown of the peace process, the eruption of war-like violence, and the many lives lost in the past few months evidence the near impossibility of formulating a final settlement plan. This paper does not attempt to address the issue of borders or answer hard questions such as the status of Jerusalem. It simply suggests that because private property was taken *from individuals*, a successful settlement must involve *individuals*.

This paper will analyze the Palestinians' legal and equitable claims to private property in Israel and suggest a property settlement that can best accommodate both parties. Part II of this note will give background history of the Holy Land leading up to the present, with special emphasis on the displacement or transfer of populations within the region and the reasons behind these movements. Part III will explain the various laws that can and should govern refugees in an occupied territory. Finally, Part IV will apply this law to the historical facts and present considerations in an effort to reach a workable solution.

II. HISTORICAL BACKGROUND

It is difficult to understand the complexity of the Palestinian-Israeli conflict without at least a rudimentary understanding of the history of the region. This sketch outline is meant to frame the current dispute over private land ownership. Special attention is given to the questions of who the Palestinians are, who the Israelis are, and what demographic and land ownership shifts have taken place in the Holy Land in the past one hundred years.

A. *The Ottoman Empire's 500 Years of Control Over the Holy Land*

Numerous rulers have controlled the Holy Land in the past three thousand years.⁶ For the purpose of this discussion, modern history

5. Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L. L. 295, 295 (1995).

6. Dominion over the Holy Land has passed from these groups: Jews, Babylonians, Persians, Romans, Jews, Romans, the Byzantine Empire, and finally the

begins almost 500 years ago when the Ottoman Empire took dominion of the Holy Land.⁷ The Ottoman Turks controlled the Holy Land from 1517 to 1917.⁸ Their Empire, ruled from what is now Turkey, extended from the Balkans to Vienna, through most of the Middle East, and from Egypt to Algeria.⁹

The Ottomans, as Muslims, believed that law was derived of revelation from God.¹⁰ The entire Muslim system of law is believed to be of divine origin.¹¹ Non-Muslim members of Muslim states were divided into two groups: (1) heathens and (2) Jews or Christians (collectively known as "people of the book").¹² The Sultan, or ruler of the Ottoman Empire, granted special charters to the "people of the book."¹³ Rights conferred in the charter depended on the importance of the community.¹⁴

By the nineteenth century, different regions within the Ottoman Empire began noticing that their rulers were doing nothing to protect them from the suppression of European colonial powers.¹⁵ With European nationalism as a model, the people of these regions began yearning for their own independent states.¹⁶ Naturally, this was a strain on the Empire's unity.¹⁷

World War I signaled the fall of the Ottoman Empire. The Allied Forces promised Arab peoples sovereignty over their territory if they assisted them in defeating the Central Powers.¹⁸ The Arabs formally accepted this bargain in negotiations between Sherif Husain, Emir of Mecca,¹⁹ and Sir Henry McMahon, British High Commissioner of

Ottoman Empire (listed chronologically). THE PERENNIAL DICTIONARY OF WORLD RELIGIONS 379 (Keith Crim ed., 1981) [hereinafter WORLD RELIGIONS].

7. *Id.*

8. See EDOARDO VITTA, CONFLICT OF LAWS IN MATTERS OF PERSONAL STATUS IN PALESTINE 1 (1947).

9. WORLD RELIGIONS, *supra* note 6, at 355.

10. VITTA, *supra* note 8, at 1. The Prophet Muhammad himself, founder of Islam, largely dealt with legal issues and made law. *Id.* The Qur'an, the Muslim "Bible," is both a religious and a legal text. *Id.*

11. *Id.*

12. *Id.* at 2.

13. *Id.*

14. *Id.*

15. WORLD RELIGIONS, *supra* note 6, at 357.

16. UNITED NATIONS, THE ORIGINS AND EVOLUTION OF THE PALESTINIAN PROBLEM PART I: 1917-1947 3 (1990).

17. *Id.*

18. *Id.* at 5.

19. *Id.* Sherif Husain held the important status of the keeper of Islam's most holy cities. *Id.*

Egypt.²⁰ The British, however, dubiously contended that Palestine had been excluded from the agreement.²¹

In 1916, when the fall of the Ottoman Empire was imminent, negotiations began between Britain, France, Russia, and Italy to divide up the Empire among the European colonial powers.²² Since it was home to important religious sites, the Allied powers attempted to place Palestine under international control.²³ Despite this, the League of Nations ultimately decided to place Palestine in the hands of Great Britain under the Mandate system. In theory, the Mandate was supposed to be a temporary and transitory phase to usher Palestine into independent statehood.²⁴

B. *The Zionist Movement into the Holy Land*

As a result of increased anti-Semitism in the late nineteenth century, Zionism emerged as a European-wide political movement.²⁵ Its purpose was to aid Jews in escaping persecution in Europe by establishing a national homeland.²⁶ The first important leader of this movement was Theodore Herzl, the editor of an influential newspaper in Vienna.²⁷ Initially, Zionism was a relatively secular movement.²⁸ Early Zionists considered several sites, including Uganda, for the

20. *Id.* Sherif demanded "independence of the Arab Countries," and McMahon confirmed that "Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca." *Id.*

21. UNITED NATIONS, *supra* note 16, at 6. The committee on the Husain-McMahon correspondences found that promises were made for Palestinian independence. *Id.*

22. *Id.* The resulting document was the Sykes-Picot agreement. *Id.* These negotiations claimed to be a plan for the specific recognition of an "independent Arab State," or "confederation of Arab states." *Id.* Some Arab Kingdoms, such as Saudi Arabia and Yemen, were granted outright independence as national entities, while others, ironically compromising the most sophisticated and culturally advanced Muslim populations of the Middle East (i.e. Palestine, Lebanon, Iraq, Syria, Egypt, and Iran) were carved into spheres of influence under the League of Nations mandates. WORLD RELIGIONS, *supra* note 6, at 357.

23. UNITED NATIONS, *supra* note 16, at 3.

24. *Id.*

25. JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 3 (1990). Jews had been persecuted in Europe for hundreds of years. The French revolution helped the Western European Jews, but the Eastern European Jews in Poland and Russia were limited in what they could do for a living and where they could live. *Id.* In 1881, Tsar Alexander III made the situation even worse for the Jews, denying them the right to vote, be professionals, live in cities and more. Additionally, severe attacks against Jews called pogroms took place in the late 19th century. Consequently, many Jews immigrated. Most went to America, but some went to Palestine. *Id.*

26. *Id.*

27. *Id.* at 4.

28. *See id.*

Jewish State.²⁹ Palestine, however, was ultimately Zionism's target because of its historical ties to the Jewish people.³⁰

The acquisition of land in Palestine was essential to the Zionist dream.³¹ Zionist propaganda stated that Palestine was "a land without people for a people without land."³² Some individuals bought land for themselves, but a larger portion of the land was bought by a fund set up for the purpose of acquiring land.³³ "The Fund" would then lease the land to individual Jews, who were forbidden to sublease or employ non-Jews.³⁴ Naturally, Arabs were displaced, but Herzl believed that taking land and the expulsion of Arabs were complementary aims if Zionism were to succeed in achieving its primary goal.³⁵

The Zionist plan did not go unnoticed by the Arabs.³⁶ Unfortunately, the Ottomans instituted a land registration system in the late nineteenth century that led to wealthy Turks gaining legal title to land in Palestine through questionable means.³⁷ Consequently, the Arab family farmer who may have owned the land for generations retained possession, but became a tenant of the wealthy absentee owner.³⁸ "The Fund" usually bought property from the wealthy absentee owners, giving the farmer no choice but dispossession.³⁹ Sometimes, Palestinian Arabs refused to leave their land, so Turkish authorities would physically evict them at "The Fund's" request.⁴⁰

29. *Id.* at 6.

30. Jews were displaced from Palestine in the second century c.e., and very few Jews lived there until modern times. WORLD RELIGIONS, *supra* note 6, at 379.

31. QUIGLEY, *supra* note 25, at 4.

32. UNITED NATIONS, *supra* note 16, at 11.

33. QUIGLEY, *supra* note 25, at 4-5. "The Fund" was created through an international conglomeration of Jews wishing to see a Jewish Palestine. *Id.*

34. *Id.* at 5. "The Fund" thought it could keep the land in Jewish hands forever. *Id.*

35. *Id.* Herzl said "We shall try to spirit the penniless population across the border by procuring employment for it on the transit countries, while denying it any employment in our own country Both the process of expropriation and the removal of the poor must be carried out discreetly and circumspectly." *Id.*

36. QUIGLEY, *supra* note 25, at 6.

37. *Id.* at 5-6.

[I]n the late nineteenth century Turkey had instituted a land registration system that led to wealthy absentees gaining legal title to land, often by questionable means. After this occurred, the family farmers continued in possession—as tenants—and considered themselves to retain their customary right to the land, although that was no longer legally the case.

Id. at 5.

38. *Id.*

39. *Id.* at 6.

40. *Id.* It should also be noted that indigenous Arab Muslims and Arab Jews alike opposed the immigration and land purchase of the European Jews. They formed

When Herzl died in 1904, Chaim Weizmann took over the Zionist movement.⁴¹ Weizmann had a position in the British admiralty during World War I.⁴² He tried to persuade a contact, Lord Balfour, then British foreign secretary, that Britain should sponsor a Jewish state in Palestine because the Jews could civilize the country and guard the Suez Canal.⁴³ By 1917 Weizmann had convinced Balfour to propose a policy statement⁴⁴ to the British cabinet supporting Zionism. The statement was approved, and Balfour wrote a famous letter to Lord Rothschild known as the Balfour Declaration, stating:

[Britain] viewed with favor the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.⁴⁵

Pursuant to the Balfour Declaration, the British government made promises to both the Zionists and the Palestinian Arabs, sowing the seeds of prolonged conflict in Palestine.⁴⁶ Zionists saw the Balfour Declaration as a contract between Jews and Great Britain for Palestine.⁴⁷ Three implications of the Balfour Declaration warrant attention. First, it ran contrary to the spirit of pledges for independence given to Arabs both before and after the declaration was issued.⁴⁸ Second, Palestine's fate was determined by unilaterally consulting the Zionists, thus completely ignoring the rights and interests of the native Palestinians.⁴⁹ Third, the British had no right to dispose of Palestine because the declaration was made when the land was still officially a part of the Ottoman Empire.⁵⁰

C. Rule Under the British Mandate 1917-1948

After World War I, President Wilson's "fourteen points" outlining the peace agreement to be negotiated demonstrated his liberal anti-

committees to prevent this land purchase, and appealed to the Turks not to sell their land. *Id.*

41. QUIGLEY, *supra* note 25, at 7.

42. *Id.*

43. *Id.* at 8.

44. *Id.* This statement was drafted by Weizmann and Lord Rothschild, the head of the Zionist Federation of Britain. *Id.*

45. *Id.*

46. UNITED NATIONS, *supra* note 16, at 8.

47. *Id.* at 17. The Declaration, however, also espoused criticism from Jews that for various reasons opposed a Jewish State. *Id.*

48. *Id.* at 19.

49. *Id.*

50. *Id.*

colonial stand.⁵¹ Accordingly, the mandate system was thought to be a stepping stone between colonialism and the birth of the state.⁵² Turkey was forced to renounce its claim to the Ottoman Empire in the Treaty of Sevres and the Treaty of Lausanne in 1920.⁵³ The administration of Palestine, Transjordan, and Mesopotamia (Iraq) was given to Great Britain in April of 1920.⁵⁴

The Mandate for Palestine asked the World Zionist Organization to create an agency to conduit the immigration and settlement of Jews in Palestine.⁵⁵ In the 1920s, however, Jews were only a small fraction of the population in Palestine.⁵⁶ To provide land for the new settlers, "The Fund" continued to purchase land, primarily from absentee owners.⁵⁷ Although the British initially helped remove Palestinians from land bought by "The Fund," they eventually recognized Arab displacement as a problem and passed an ordinance that required the purchasers to compensate the evicted tenants.⁵⁸

Naturally, tensions rose during this period, resulting in many violent encounters between Jews and Palestinians.⁵⁹ The Shaw Commission, appointed to investigate these incidents, reported that the conflict stemmed from the "two fold fear of the Arabs that by Jewish immigration and land purchase they may be deprived of their livelihood and in time pass under the political domination of the Jews."⁶⁰ The Commission also observed "an acceleration of a process which results in the creation of a large discontented and landless

51. UNITED NATIONS, *supra* note 16, at 20. Wilson stated: "The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development. . . ." *Id.*

52. *Id.* at 21. The theory was that territories under the "tutelage . . . of advanced nations" formed "a sacred trust of civilization." *Id.* The territories were classified A, B, and C depending on the amount of tutelage the League of Nations felt it needed. *Id.*

53. *Id.*

54. UNITED NATIONS, *supra* note 16, at 22. All of the Mandated Territories except Palestine became fully independent states. *Id.* On December 9, 1917, British General Allen issued a proclamation placing Jerusalem and all the British occupied territory in Palestine under martial law. VITTA, *supra* note 8, at 6. By October 1918 they had extended this rule to all of Palestine. *Id.*

55. QUIGLEY, *supra* note 25, at 16. The mandate document that "an appropriate Jewish agency shall be recognized as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may effect the establishment of the Jewish national home." *Id.*

56. *Id.* at 12.

57. *Id.* at 18. When tenant Arab farmers refused to leave the land, Jews petitioned the British to remove them, which they did. *Id.*

58. *Id.*

59. QUIGLEY, *supra* note 25, at 18. In 1929, one conflict over access to Jerusalem's Holy Places resulted in the death of 133 Jews. *Id.* at 19.

60. *Id.*

class," in addition to noting that "no further land [was] available which [could] be occupied by new immigrants without displacing the present population."⁶¹ The Shaw Commission recommended that limits be placed on Zionist land purchases and immigration.⁶²

Regardless of the Shaw Commission's recommendations and other similar committee recommendations, Britain allowed even higher levels of immigration and land purchase. The Jewish population of Palestine doubled between 1931 and 1935.⁶³ "The Fund" purchased tracks of land in close proximity to create clusters that it hoped could become a geographical nucleus for the impending state.⁶⁴ The Jewish Agency called for by the mandate was becoming a state within a state in Palestine.⁶⁵

By 1936, the Mandate System began to break down.⁶⁶ The Arabs began to organize in both violent and non-violent groups aimed at halting the immigration and land purchases by Jews.⁶⁷ Zionist military groups like the Haganah and the terrorist Irgun group emerged, raiding Arab villages, planting bombs, and causing civilian deaths.⁶⁸

The British Peel Commission tasked with investigating the escalating organized violence recommended partition into separate Jewish and Arab States.⁶⁹ One problem with the proposed plan was that 225,000 Arabs would have to move from Jewish-occupied lands, but only 1250 Jews would have to move from Arab-occupied lands.⁷⁰ The British rejected this recommendation in 1938 because they thought it would be unfair to force such a plan upon the Palestinian Arabs.⁷¹ Instead, in May 1939, the British announced that they wanted a single independent state, within ten years, which would be "governed in such a way as to ensure that the essential interests of each community is safeguarded."⁷² Accordingly, they limited Jewish

61. *Id.*

62. *Id.*

63. *Id.* at 20.

64. QUIGLEY, *supra* note 25, at 22. In the 1930s "The Fund" bought a great deal of land in Haifa, along the Jerusalem-Tel-Aviv road, Tel-Aviv, and along the Galilee. They established stockade and watchtower settlements to facilitate the establishment of a state. *Id.*

65. *Id.*; see also *supra* note 44 and accompanying text.

66. QUIGLEY, *supra* note 25, at 24. A British official described a "filthy tin-can settlement where the evicted Arab peasants huddled under the orange trees." *Id.*

67. *Id.* at 23.

68. *Id.*

69. *Id.* at 24.

70. *Id.*

71. QUIGLEY, *supra* note 25, at 27.

72. *Id.*

immigration.⁷³ As a result, the Jewish Agency began organizing an army to fight the British.⁷⁴

In the wake of increased tension between Britain and the Zionist, leader David Ben-Gurion realized that the Zionist cause must now align with the United States.⁷⁵ During World War I, both Jews and Arabs began stockpiling weapons.⁷⁶ When the war ended, the Jewish Agency began a campaign to get Britain out of Palestine.⁷⁷ Frustrated with its inability to create peace, Britain announced that it was leaving Palestine and turned the problem over to the United Nations in April 1947.⁷⁸

D. 1948: *The Creation of the State of Israel*

By 1947, Jews were over thirty percent of the population of Palestine.⁷⁹ The Mandate System had failed by not creating an independent Palestinian State, and instead pursuing a half-hearted attempt at establishing a Jewish homeland.⁸⁰ The U.N. General Assembly gathered to discuss the fate of Palestine in April of 1947.⁸¹ A Special Committee was called to prepare a report on what should be done with Palestine.⁸² After visiting Palestine they reported:

The Atmosphere in Palestine today is one of profound tension. In many respects the country is living under a semi-military regime. In the streets of Jerusalem and other key areas barbed wire defenses, road blocks, machine gun posts and constant armored car patrols are routine measures.⁸³

73. *Id.* The British limited Jewish immigration to 75,000 per year for the next five years, with allowed increases subject to the Arab community's approval. Soon after the adoption of this policy, the Irgun bombed the Palestinian Broadcasting Service and attacked the immigration office. Jewish attacks were also launched because of what was perceived as an abandonment of the Zionist cause. *Id.*

74. *Id.*

75. QUIGLEY, *supra* note 25, at 29. Ben-Gurion went to the United States and established a businessman's group that sent arms to the Haganah. *Id.*

76. *Id.*

77. Three Jewish military groups coordinated attacks on bridges, railways, and British personnel. *Id.* at 31. This movement culminated with the bombing of the British headquarters located in the King David Hotel in July of 1946. *Id.*

78. *Id.*

79. UNITED NATIONS, *THE ORIGINS AND EVOLUTION OF THE PALESTINIAN PROBLEM PART II: 1947-1977 1* (1990) [hereinafter UNITED NATIONS II].

80. *Id.* at 1. All other countries under the mandate system were now independent. *Id.*

81. *Id.* at 2.

82. *Id.* at 3.

83. *Id.* The Committee visited Palestine, Lebanon, Syria, Transjordan and some of the displaced persons camps in Europe filled with Holocaust survivors. LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* 11 (1998).

The United Nations' majority proposal was a partition plan that would create an independent Jewish State and an independent Arab State.⁸⁴ Jerusalem would be placed under an International Trusteeship System.⁸⁵ The proposal was passed on November 29, 1947.⁸⁶ The Jewish Agency accepted the resolution despite some dissatisfaction.⁸⁷ The Arab population did not accept this plan because they felt it violated the U.N. Charter, which states that the United Nations grants people the right to decide their own destiny.

Although the United Nations intended to create an armed militia to carry out its partition plan, increased violence caused this plan to become impractical.⁸⁸ In the months before British withdrawal, the Zionist movement realized a plan that was to occupy as much territory as possible beyond the boundaries assigned to the Jewish State.⁸⁹ Israel unilaterally declared its independence on May 14, 1948.⁹⁰

On May 15th, the day the mandate ended, full-scale war broke out.⁹¹ Military units from neighboring Arab states began crossing into Palestine in the weeks before the end of the mandate.⁹² They were concerned about their own borders and the growing amount of Palestinian refugees pouring into their countries.⁹³

By the spring of 1949 Israel had concluded individual armistice agreements (not peace treaties) with Egypt, Lebanon, Transjordan, and Syria.⁹⁴ Israel retained the land it had taken by military force with few adjustments. Israel held seventy-seven percent of Palestine, which included everything except the Gaza Strip (which was to be administered by Egypt) and the West Bank of the river Jordan (which was to be administered by Jordan).⁹⁵ In March 1949 Israel submitted

84. UNITED NATIONS II, *supra* note 79, at 15.

85. *Id.* at 16.

86. *Id.* at 29.

87. TAKKENBERG, *supra* note 83, at 12.

88. UNITED NATIONS II, *supra* note 79, at 30. In the first three months after the partition plan was adopted the casualty toll was 869 dead and 1,909 injured. *Id.*

89. *Id.*

90. *Id.* at 44. Two Zionist lawyers said that the "international decision [of partition] had preceded the emergence of the state and thus may be said to have been its legal foundation." QUIGLEY, *supra* note 25, at 64.

91. TAKKENBERG, *supra* note 83, at 12.

92. *Id.*

93. UNITED NATIONS II, *supra* note 79, at 46. In a cable to the United Nations the Arab League declared that "in order to fill the vacuum created by the termination of the Mandate and the failure to replace it by any legally constituted authority, the Arab Governments found themselves compelled to intervene for the sole purpose of restoring peace and security and establishing law and order in Palestine." *Id.*

94. QUIGLEY, *supra* note 25, at 89.

95. *Id.*

an application for membership to the United Nations for the second time, and was finally accepted as a member.⁹⁶

E. *The Refugee Problem*

1. Persons Displaced in 1948

No one is certain how many Palestinians were made refugees in 1948. Israeli officials say 520,000, an Arab spokesman says 900,000, and the U.N. Economic Survey Mission estimates about 726,000.⁹⁷ Today, the number of Palestinian refugees registered with U.N. Relief and Works Agency for Palestine Refugees (UNRWA) has grown to 3.6 million.⁹⁸

The Palestinians and Israelis have two different versions of how these people became refugees. The classic Palestinian position is that the expulsion was part of a carefully crafted Israeli plan to drive the Arabs from Palestine.⁹⁹ The classic Israeli position is that the Palestinians were told to leave by their Arab leaders.¹⁰⁰ Regardless, it is clear that there were expulsions,¹⁰¹ massacres,¹⁰² and voluntary evacuations of Palestinians in 1948.

Anecdotal evidence paints perhaps the best picture of what happened. In Jerusalem on May 15, 1948, Haganah loudspeaker vans warned the Arab population to leave.¹⁰³ They said "take pity on your wives and children and get out of this bloodbath, . . . surrender to us with your arms. No harm will come to you. Or get out by the Jericho road, that is still open to you. If you stay you invite

96. *Id.* As war raged on between Arabs and Jews, Israel continually applied to the United Nations for membership but was rejected until 1949. *Id.* at 87.

97. TAKKENBERG, *supra* note 83, at 18-19.

98. Wilkinson, *supra* note 3, at A1. This number is partially due to population growth. *Id.* World-wide, there are about 6.9 million Palestinians. TAKKENBERG, *supra* note 83, at 20.

99. Justus R. Weiner, *The Palestinian Refugees' "Right to Return" and the Peace Process*, 20 B.C. INT'L & COMP. L. REV. 1, 15-16 (1997).

100. *Id.* at 22. A more complex theory is that in 1947, when hostilities escalated, the Palestinian elite (lawyers, doctors, businessmen, and other professionals) left as instructed by Arab leadership. *Id.* The absence of these community leaders caused the collapse of the Palestinian political institution, and because of fear and confusion, the remaining Palestinian masses also left Israel. *Id.* at 22-23.

101. *Id.* at 24. Israeli historian Benny Morris has written extensively about Israel's culpability in the creation of the refugee problem. He has written, for example, about the expulsion of 60,000 Arab residents from Ramle and Lydda. *Id.* at 25.

102. One such massacre was in the Arab village of Deir Yassin. Weiner, *supra* note 99, at 16. The village was attacked by the Irgun and Stern Israeli military groups on April 9, 1948, and resulted in many civilian deaths. *Id.*

103. QUIGLEY, *supra* note 25, at 82.

disaster.”¹⁰⁴ Edgar O’Balance, a historian of the war wrote: “wherever the Israeli troops advanced into Arab country, the Arab population was bulldozed out in front of them.”¹⁰⁵ Avnery writes: “[it] typically sufficed to fire a few shots in the direction of Arab villages to see the inhabitants, who had not fought for generations, take flight.”¹⁰⁶ Fear tactics were also used to move the populations as Israeli forces spread rumors about disease in Arab villages.¹⁰⁷

To ensure that the populations would not return, the Israelis often destroyed the empty houses.¹⁰⁸ The Israeli government then formalized a policy *against* destroying Arab houses, instead planting land mines around the empty villages and bringing in Jews to settle abandoned areas.¹⁰⁹ By the end of 1949, half of the indigenous Palestinian population, or about 750,000 people, were displaced into neighboring countries.¹¹⁰ In response to the influx of these refugees, the respective Arab governments sent about 500,000 Middle Eastern Arab Jews to Israel.¹¹¹

Like many people forced to leave their homes in times of war, the displaced Palestinians expected to return shortly.¹¹² Despite intense international pressure to repatriate the Palestinians, the Israeli government decided to bar return.¹¹³ The fragile new government could not stomach the return of hundreds of thousands of openly hostile Palestinians.¹¹⁴ By mid-1949, the possibility of return became virtually impossible. Developments contributing to this included:

The gradual destruction of the abandoned Arab villages, the cultivation and/or destruction of Arab fields and the share-out of the Arab lands to Jewish settlements, the establishment of new settlements on abandoned lands and sites and the settlement of Jewish immigrants in empty Arab housing in the countryside and in urban neighborhoods. Taken together, they assured that the refugees would have nowhere, and nothing to return to.¹¹⁵

104. *Id.*

105. *Id.* at 82-83.

106. *Id.* at 83.

107. *Id.*

108. *Id.* at 84.

109. QUIGLEY, *supra* note 25, at 83-84.

110. *Id.* at 86.

111. UNITED NATIONS II, *supra* note 79, at 33; *see also* TAKKENBERG, *supra* note 83, at 14.

112. *Id.* at 16.

113. TAKKENBERG, *supra* note 83, at 14.

114. *Id.* at 17.

115. *Id.*

2. Persons Displaced after 1967

The second major displacement was the result of the 1967 Arab-Israeli war, also known as the Six-Day War, during which Israel took the West Bank, Gaza Strip, and East Jerusalem.¹¹⁶ Nearly 177,500 refugees fled from the West Bank and the Gaza Strip to Jordan.¹¹⁷ They were joined by 240,000 former residents of the West Bank or Gaza Strip fleeing for the first time.¹¹⁸ Palestinians within Israel's pre-1967 borders represented a minority. After 1967, however, when half a million Palestinians fled their homes, the 1.2 million Palestinians that remained found themselves under Israeli control for the first time.¹¹⁹

Power struggles and skirmishes erupted between the Jordanian Army and the Palestinian Liberation Organization (PLO) because such a large proportion of the Jordanian population was Palestinian. The PLO was eventually forced to relocate to Lebanon.¹²⁰ Consequently, Lebanon became the focus of Middle Eastern conflict in the mid-to-late 1970s and the early 1980s.¹²¹

Additionally, many Palestinians became refugees for the first time because of land takings used to build Jewish settlements in the West Bank.¹²² This process began as early as 1967, but greatly increased in the mid-to-late 70s.¹²³ By the late 80s, the Israeli

116. *Id.*

117. *Id.*

118. *Id.*

119. TAKKENBERG, *supra* note 83, at 41.

120. *Id.* at 18.

121. *Id.* at 17. Although it is beyond the scope of this paper, Lebanon is also demanding compensation for property taken in 1948, along with reparations for aggression and suffering. *Lebanon to Demand Compensation for Property Confiscated by Israel*, AGENCE FRANCE-PRESSE, February 12, 2000, 2000 WL 2731986. From 1972 on, Israeli forces have attacked refugee camps along the Lebanese border in retaliation against raids in its territory. TAKKENBERG, *supra* note 83, at 18. One reporter describes a the life of a Palestinian refugee in Lebanon as follows:

Reaching home requires stepping over puddles that have spilled from gutters of raw sewage. Water is drawn from communal taps and heated on an oil stove for bathing. At 49, Qadi looks 60 as he sits hunched over on a mattress cradling a 2-year-old, his emaciated face lighted by a candle during one of the camp's frequent power outages.

Mark Matthews, *Peace Plans Bypass Refugees in Lebanon: Palestinians' Future Looks Bleak No Matter How Talks Turn Out*, BALT. SUN, Feb. 15, 2000 at A1, 2000 WL 4858653.

The Lebanese civil war lasted from 1976 to 1991, and resulted in the displacement of over 100,000 Palestinians. TAKKENBERG, *supra* note 83, at 18.

122. QUIGLEY, *supra* note 25, at 220.

123. *Id.* at 221.

government took about forty percent of the West Bank.¹²⁴ These takings will be discussed in greater detail in the Occupier's Law section of this paper.

3. The *Intifada*

Until the events beginning in September 2000, the *intifada* (uprising) was the last major conflict concerning refugees.¹²⁵ In December of 1987, a demonstration in Gaza erupted into a riot throughout the Gaza Strip and West Bank.¹²⁶ Stores closed in resistance to occupation, committees formed to ensure basic needs, and Palestinians dramatically cut their consumption of Israeli products.¹²⁷ Palestinian workers inside Israel left their jobs to protest.¹²⁸ An underground leadership emerged directing people through Arabic messages painted on walls in the middle of the night.¹²⁹ Children began to throw stones, and consequently were beaten and shot by Israeli soldiers.¹³⁰

The *intifada* was the result of living under occupation for over twenty years, being deprived of any political role, having land taken at a rate approaching total dispossession, destroyed economies, and no hope for the younger generations.¹³¹ Seeing small children being shot to death on television shocked the world. The U.N. Human Rights Commission declared Israel's behavior unlawful, and stated that "the uprising of the Palestinian people against Israeli occupation since December 8, 1987 is a form of legitimate resistance."¹³²

III. GOVERNING PRIVATE PROPERTY LAW

International law regarding dispossessed private property owners will be discussed within three separate but overlapping legal frameworks. This paper will first consider the Declaration of Principals, the treaty signed by representatives from Israel and the Palestinians in May of 1993. Next, relevant portions of Occupier's Law will be discussed in connection with its application in the occupied territories. Finally, Human Rights law, including U.N. resolutions, will be analyzed to determine what rights Palestinians

124. RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 5 (1985).

125. QUIGLEY, *supra* note 25, at 203.

126. *Id.*

127. *Id.* at 204.

128. *Id.* at 203.

129. *Id.*

130. *Id.* at 204.

131. QUIGLEY, *supra* note 25, at 203.

132. *Id.*

have in dispossessed property. This list is by no means exhaustive,¹³³ but provides effective frameworks with which property rights may be further examined.

A. *The Declaration of Principals*

The most significant breakthrough in Israeli-Palestinian peace negotiations took place in 1993 when representatives of both sides signed the Declaration of Principals on Interim Self-Government Arrangements (D.O.P.).¹³⁴ The miracle of this agreement was that parties moved beyond the destructive belief that either the Jews should be pushed into the Sea or that Palestinians should “go home” and live in other Arab countries.¹³⁵ *Both parties* acknowledged that *both parties* have an identity and a right to national autonomy.¹³⁶ Building on the Camp David Framework, and adopting U.N. Security Council Resolutions 242 and 338, this agreement intended to pave the way for both parties to:

... put an end to decades of confrontation and conflict, recognize [each others'] mutual and legitimate and political rights, and strive to live in peaceful co-existence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.¹³⁷

More specifically, the agreement called for a five-year plan leading to an independent Palestinian state.¹³⁸ This five-year period was to begin with the withdrawal of Israeli troops from the Gaza Strip and Jericho areas.¹³⁹ Permanent status negotiations were to begin no later than three years after the beginning of the interim period, or May 1996.¹⁴⁰ A more extensive Interim Agreement was written that fleshed out the procedures and details for the generalities called for in the D.O.P.¹⁴¹ Certain major issues, however, were intentionally undecided, including: the status of Jerusalem,

133. *Id.*

134. Declaration of Principles on Interim Self-Government Arrangements, September 13, 1993, 32 I.L.M. 1525, 1534 [hereinafter D.O.P.].

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. D.O.P., *supra* note 134, at 1534. The final status negotiations did not substantively begin until September 1999. Wilkinson, *supra* note 3, at A1. “Two previous attempts to begin negotiations on these outstanding so-called final-status issues went nowhere, in part because of the ascension to power in May 1996 of hard-line Israeli Prime Minister Benjamin Netanyahu.” *Id.*

141. D.O.P., *supra* note 134.

refugees, settlements, security arrangements, borders, relations with other neighbors, and other issues of common interest.¹⁴²

For the purposes of the D.O.P., the West Bank and Gaza Strip were considered one territorial unit.¹⁴³ The agreement allowed for the Palestinians to elect a governing Council to replace the Palestinian Liberation Organization (PLO). Once elected, this Council was to receive authority in Jericho and the Gaza Strip over education, culture, health, social welfare, direct taxation, tourism, and the development of a police force.¹⁴⁴ The interim agreement called for the same measures to be taken in the West Bank, but in stages.¹⁴⁵ Eventually, the Council was to have jurisdiction in all matters in the West Bank and Gaza Strip, except for those matters that would be negotiated for in the permanent status negotiations.¹⁴⁶

The D.O.P. specifically reserved the issue of resolving private property conflicts for the dispossessed for permanent status negotiations.¹⁴⁷ The D.O.P. provides no framework for deciding what is to be done with private property, except stipulating that any solution must be acquired through negotiations.¹⁴⁸ The D.O.P., however, specifically adopted U.N. Security Council Resolutions 338 and 242.¹⁴⁹ Resolution 338, in relevant part, "calls upon" all parties to cease fire, "calls upon" all parties concerned to implement Security Council Resolution 242, and "decides" that negotiation shall be "aimed at establishing a just and durable peace in the Middle East."¹⁵⁰ Resolution 242 affirmed the necessity "for achieving a just settlement of the refugee problem."¹⁵¹ These resolutions merely state that the solution must be just and must contribute to an enduring peace.¹⁵²

Today, eight years after the D.O.P. was signed, much of the interim agreement has been carried out.¹⁵³ Unfortunately, both

142. *Id.* Art. V, no. 3.

143. *Id.* Art. IV.

144. *Id.* Art. VI, no. 2.

145. *See id.*; see also Rotem M. Giladi, *The Practice and Case Law of Israel in Matters Related to International Law*, 29 *ISR. L. REV.* 506, 521 (1995).

146. D.O.P., *supra* note 134, Art. VI, no. 2; see also Giladi, *supra* note 145, at 521.

147. D.O.P., *supra* note 134.

148. *Id.*

149. *Id.* Art. I.

150. G.A. Res. 338, U.N. SCOR, 22nd Sess., U.N. Doc. S/RES/242 (1967), reprinted in *RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL (1946-1989)* 462 (Karel C. Wellens ed., 1991).

151. G.A. Res. 242, U.N. SCOR, 22nd Sess., U.N. Doc. S/RES/242 (1967), reprinted in *RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL (1946-1989)* 462 (Karel C. Wellens ed., 1991).

152. Res. 338, *supra* note 150.

153. Wilkinson, *supra* note 3, at A8.

parties have failed to complete permanent status negotiations.¹⁵⁴ May of 1996 came and went without any permanent status negotiations.¹⁵⁵ Likewise, the revised deadline for an outline for the final status negotiations, the February 13, 2000 deadline passed by without any progress.¹⁵⁶ PLO leader Yasser Arafat had promised to declare the establishment of an independent Palestinian state on September 31, 2000,¹⁵⁷ but this date also passed.¹⁵⁸ The timetable for peace in the Middle East seems elusive at best, and given the current violence, non-existent at worst.

The D.O.P. and related U.N. documents do not settle the issue of what should be done with private property in Israel and the Occupied Territories.¹⁵⁹ Although not particularly instructive, these documents do make clear that private property is an important issue to be settled and provide a basic framework within which negotiations can take place.¹⁶⁰

B. Occupier's Law and Its Application in the Occupied Territories

1. Overview of Occupier's Law

Occupier's Law is included within the law of war, which is one of the oldest bodies of modern international law.¹⁶¹ The law of war was first promulgated by custom and usage among military personnel, declarations by individual governments, private conferences, and academic codes.¹⁶² Since the mid-nineteenth century, however, the laws of war have become more specific and binding through the use of international agreements and conferences.¹⁶³

The most important rules of war were defined at the two peace conferences at Hague in 1899 and 1907.¹⁶⁴ The more recent and

154. *Id.*

155. *Id.*

156. *World Wide*, WALL ST. J., Feb. 14, 2000 at A1.

157. Wilkinson, *supra* note 3, at A1.

158. Danny Rubinstein, *Troubles in His Own Back Yard: Alongside the Crisis in the Talks Between Israel and the Palestinians, the Rift Between Yasser Arafat and the Leadership of the Palestinian Authority is Deepening*, HA'ARETZ DAILY NEWSPAPER (TEL AVIV), Feb. 7, 2000, 2800 WL 7217755.

159. *See supra* note 121 and accompanying text.

160. *See supra* text accompanying notes 121-24.

161. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY . . . A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 3 (1957).

162. *Id.*

163. *Id.*

164. Gerhard von Glahn states:

[t]he 1899 Convention with Respect to the Laws and Customs of War on Land laid the basis for most of the principals currently guiding armies in the lawful

complete convention regarding the law of war comes from the four Geneva conventions of 1948, and the two additional Protocols of 1977.¹⁶⁵ As of 1994, 185 states are parties to the four 1949 Geneva Convention, including almost all U.N. member states. Additionally, over 120 states are bound by the two 1977 Protocols.¹⁶⁶ The laws described in this note are taken from these two sets of treaties because of their broad International acceptance.

Occupier's Law provides a wide range of safety features for the populations of occupied territories, yet it also strives to leave the occupying state with enough flexibility to maintain its dominance.¹⁶⁷ Occupier's Law, as provided by the Hague and Geneva Conventions, can be summarized into four key points.¹⁶⁸ The first comes from Article 43 of the Hague Regulations and states that the occupant's power is of a *de facto* nature.¹⁶⁹ Military occupation does not give

occupation of enemy territory. The later (1907) Fourth Convention Respecting the Laws and Customs of War on Land and its annexed Regulations, particularly Articles 23g, 23h, and 42-56, embodied the rules which have been adopted officially by most nations of the world into their military manuals.

VON GLAHN, *supra* note 161, at 9.

165. TAKKENBERG, *supra* note 83, at 199.

166. *Id.*

167. *Id.* at 202. Roberts summarizes the purpose behind the law of occupation into eight points:

1. Ensuring that those who are in the hands of an adversary are treated with humanity.
2. Harmonizing these humanitarian interests with the military needs of the occupant.
3. Preventing the imposition of disruptive changes in the occupied territory, and preserving the rights of the sovereign there.
4. Preserving military discipline among the occupying forces.
5. Reducing the risk that relations between occupant and occupied will get out of hand and lead to renewed conflict.
6. Improving the chances that, if an occupant finds part of its own territory occupied, its population will in turn be treated with due regard to international norms.
7. Helping to maintain friendly relations between the occupying power and foreign states—whether allies, adversaries, or neutrals.
8. Facilitating the prospects for an eventual peace agreement.

Id. (citing A. Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 25, 27 (E. Playfair, ed. 1992)).

168. *Id.* at 202 (citing C., Greenwood, *The Administration of Occupied Territory in International Law*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 25, 27 (E. Playfair ed., 1992)).

169. *Id.* Article 43 reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." *Id.*

sovereignty to the occupying power.¹⁷⁰ The occupier has only temporary and *de facto* authority, subject to various limitations, which should only be used to protect its security interests.¹⁷¹ One implication of this principal is that the occupying power may not bring in its own population and must leave the existing population in the occupied territory as it finds it.¹⁷²

A second principal is that the occupying power is required to administer the territory it occupies.¹⁷³ The Fourth Geneva Convention imposes specific obligations including: education,¹⁷⁴ food and medical supplies,¹⁷⁵ maintenance of medical hospitals,¹⁷⁶ and relief efforts where needed.¹⁷⁷ The occupying power may also take measures which are necessary to protect its armed forces and preserve its military position.¹⁷⁸

Article 43 of the Hague Regulations gives a third principal: "unless absolutely prevented," the occupying power has a duty to respect existing law.¹⁷⁹ The rationale is that international law does not recognize the legislative confidence of the occupying power, consequently, existing laws should not be changed unless absolutely required for the needs of the occupation.¹⁸⁰

The final principal, found in the Fourth Geneva Convention, places specific requirements on the occupant to provide a minimum level of humanitarian protection for the existing population.¹⁸¹ These minimum standards include the prohibition of collective punishment, hostage taking, torture, deportation, slave labor, *wholesale seizure of property*, and forcing individuals to perform work assisting the military.¹⁸²

Specifically regarding immovable property of the enemy, Article 55 of the Hague Regulations of 1907 states:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied

170. *Id.* at 203.

171. W. THOMAS MALLISON & SALLY MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 241 (1986).

172. TAKKENBERG, *supra* note 83, at 204. Article 49 of the Fourth Geneva Convention states that "[t]he Occupying Power shall not . . . transfer parts of its own civilian population into the territories it occupies." *Id.*

173. *Id.* at 204.

174. *Id.* at Art. 50.

175. *Id.* at Art. 55.

176. *Id.* at Art. 56.

177. *Id.* at Art. 59-62.

178. TAKKENBERG, *supra* note 83, at 204.

179. *Id.*

180. *Id.*

181. *Id.* at 204-05.

182. *Id.* at 205.

territory. It must safe guard the capital of these properties and administer them according to the rules of usufruct.¹⁸³

One of the clearest features of Occupier's Law is that the occupying power has no authority to disturb private property rights.¹⁸⁴

From this general overview of the international law of occupation, this note will examine how Occupier's Law has manifested itself in the Israeli-occupied territories. Although the Palestinians are slowly gaining autonomy, until the final status negotiations are complete, the West Bank and Gaza Strip are residually controlled by the Israeli military government.¹⁸⁵ Therefore, Occupier's Law governs the occupied territories.¹⁸⁶ In fact, the Israeli Military Government has governed the occupied territories since 1967.¹⁸⁷

2. Predecessors to Occupier's Law in Israel

Three relevant time periods predate Israeli occupation of Palestinian land.¹⁸⁸ Without an understanding of the governing law in these periods, it is difficult to understand how Israeli control altered the property rights of the Palestinians.¹⁸⁹ The relevant time periods are: Ottoman rule (Pre 1920), rule under the British mandate (1920-1948), and Jordanian rule (1948 to 1967).¹⁹⁰

The governing land law in the West Bank¹⁹¹ is the Ottoman Land Code (Land Code), as modified and developed by the British, Jordanians, and Israeli Military Authority.¹⁹² According to the Land Code, all land within the West Bank falls into one of the following three categories: (1) *wakf* lands, (2) *mulk* lands, and (3) *miri*, *matruke*, or *mawat* lands.¹⁹³ *Wakf* lands are dedicated to pious purposes, like charity and houses of worship. *Mulk* lands are private property, which were given out by the Ottoman conquerors of the

183. Convention Respecting the Laws and Customs of War on Land, *reprinted in* VON GLAHN, *supra* note 161, app. 1, at 295.

184. MALLISON & MALLISON, *supra* note 171, at 240. This does not apply to state property. *Id.*

185. Giladi, *supra* note 145, at 511.

186. *Id.*

187. 1967 marks the Six Day War, where Israel captured the West Bank and Gaza territories from Jordan and Egypt respectively. Most of the land taken from Egypt in 1967 was given back in exchange for peace.

188. *See supra* notes 150-51 and accompanying text. This is because Occupier's Law is not supposed to alter the previous law unless necessary. *Id.*

189. *Id.*

190. *See supra* Part II.

191. Although this discussion focuses on the West Bank, the Gaza Strip has had almost the same experience.

192. SHEHADEH, *supra* note 124, at 23.

193. *Id.*

area.¹⁹⁴ As for the third category, the commonality between the three types of land is that the Emir or Sultan had a residual right to the land although he did not use it.¹⁹⁵ *Miri* land is similar to a Lord's land in the English feudal system.¹⁹⁶ *Matruke* land was given by the Sultan for public purposes such as building roads, cemeteries, etc.¹⁹⁷ The third category, *mawat* land, was considered "dead land" because it lay far from the village.¹⁹⁸

All regimes until 1967 recognized the right of the village to use the surrounding land for either a common pasture or future development of the village.¹⁹⁹ The village inhabitants knew amongst themselves what land was owned by each family and what land was considered common.²⁰⁰ Therefore, they generally had no opportunity or need to register their land.²⁰¹

The British mandate government introduced land registration to Palestine, and the Jordanian government continued it.²⁰² Due to the slow pace of the process, however, only about one-third of West Bank's land was registered by 1967.²⁰³ After 1967, virtually no more land was registered because Israeli military authorities stopped the operation of the Settlement of Disputed Land Law by which land was registered.²⁰⁴

Under the Land Code there was no category for state or public land.²⁰⁵ The British mandate government introduced this category through the 1922 Order of Council.²⁰⁶ Article 2 of this document defined "public lands" as "all lands in Palestine which are subject to the control of the government of Palestine by virtue of Treaty, Convention, Agreement or Succession and all lands which are or shall be acquired for the public service or otherwise."²⁰⁷ The Sultan's position as ultimate theoretical owner was transferred to the High

194. *Id.*

195. VITTA, *supra* note 8, at 195.

196. SHEHADEH, *supra* note 124, at 23. *Miri* is the land that the Sultan did not give out as *mulk* or dedicate to *wakf*. Instead he would grant the land to people to use under certain conditions. *Id.* When a Sultan would initially conquer a land he would allow the conquered peoples to use some of the land as tenants. This land was *miri*. See VITTA, *supra* note 8, at 195.

197. SHEHADEH, *supra* note 124, at 24.

198. *Id.* The Land Code describes this land as further "than the human voice could be heard." *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. SHEHADEH, *supra* note 124, at 24.

203. *Id.*

204. *Id.* at 23.

205. *Id.* at 24.

206. *Id.*

207. *Id.* This definition consisted of land restricted to government use, and included land taken by expropriation. *Id.* at 23-24.

Commissioner (over the third category of land: *miri*, *matruke*, or *mawat* lands).²⁰⁸ Accordingly, the High Commissioner was vested with all rights of the public land as a trustee for Palestine.²⁰⁹

Jordan also had laws that allowed the government to acquire land for public or military purposes, but it was strictly limited.²¹⁰ Article 11 of the Jordanian Constitution forbade expropriation of private property for public benefit unless fair compensation was paid.²¹¹ It also required a statement of the intent to expropriate to be published in a local newspaper, and gave the owner the right to appeal the decision in the courts.²¹² Jordanian law removed the differences between *miri* and *mulk* lands,²¹³ declaring that all *miri* (or Sultan's) lands falling in municipal areas were to be transferred into *mulk* (private property) lands.²¹⁴

Only about thirteen percent of the land in the West Bank was registered in the name of the state by 1967. Israeli Military rule, however, made it easier and easier to declare land state land.²¹⁵ Before 1993, Israel had taken about forty percent of the West Bank.²¹⁶

3. Occupier's Law in Israel

The Israeli-Palestinian manifestation of Occupier's Law affected private property rights in several ways.²¹⁷ Initially, the law allowed for the seizure of land from Palestinians for Military purposes only.²¹⁸ After 1979, with the rise in power of the Likud party, large tracks of

208. SHEHADEH, *supra* note 124, at 25.

209. *Id.* The courts during the British mandate did not interpret *miri* lands to be state lands. *Id.* at 26.

210. *Id.* at 25.

211. RAJA SHEHADEH, *THE WEST BANK AND THE RULE OF LAW* 61 (1980) [hereinafter SHEHADEH II].

212. *Id.*

213. SHEHADEH, *supra* note 124, at 24 (citing Jordanian law No. 49 of 1953).

214. *Id.*

215. *See id.* at 25-26.

216. *Id.* at 5.

217. It should be noted that in addition to the ways discussed below, a small percentage of the land in the West Bank used for settlement was bought. SHEHADEH, *supra* note 124, at 39. Most of this property was bought during the period of the British mandate, and kept under the Jordanian Custodian of Enemy Property from 1948 to 1967. *Id.* Jordanian law severely restricted land sale to non-Jordanians (all Palestinians in the West Bank are Jordanian citizens). *Id.* Sale could not be done without permission of the Council of Ministers. *Id.* After 1979 the Military Commander of the West Bank, assuming all the legislative and governmental powers under Jordanian law, removed the restrictions on the purchase of land in the West Bank by individual Jews. *Id.* The sale of land by Palestinians to Jews in the West Bank, however, may be considered an act of treason by the community because it contravenes the basic need of the Palestinians for their own state. *Id.* at 39-40.

218. SHEHADEH, *supra* note 124, at 117.

land were taken for state purposes.²¹⁹ Additionally, policies were enacted to retain property left behind by refugees.²²⁰

a. Acquisition of Land for Military Purposes and the *Elon Moreh* Case

Possession of land taken for military purposes resides in the occupier, but ownership remains in the original landowner.²²¹ From the beginning of occupation to 1979, the most common way for the Israeli government to acquire land in the West Bank was through requisition for military purposes.²²² After 1979, political changes in the Israeli government and the decision in the *Elon Moreh* case changed the rate and method by which land was expropriated.²²³

The facts of the *Elon Moreh* case are as follows. Israel's Ministerial Settlement Committee decided to find land to settle the *Elon Moreh* nucleus of Israeli citizens.²²⁴ It tried to find land in the West Bank that was not privately owned, but was not successful.²²⁵ The Committee found privately owned land and sought to appropriate it through the military under the guise of military security.²²⁶ On June 7, 1979, Mustafa Duweikat and sixteen other land owners in the village of Rujeib were surprised when they found settlement operations taking place on their land.²²⁷ Three days later the village elders were told of the appropriations and informed to pass the word along to the landowners.²²⁸

219. *See id.* at 27.

220. *Id.* at 34.

221. *Id.* at 37.

222. *Id.* at 17. The progression took place as follows: In accordance with United Nations Security Council resolution 242 of November 22, 1967, Israel began annexing areas in East Jerusalem and along the Jordan rift to establish more secure boundaries. TAKKENBERG, *supra* note 83, at 221. In 1977 the more conservative Likud party ousted the Labor party, and began to create settlements in the West Bank according to their belief that the West Bank belonged to Israel as part of the ancient Hebrew Kingdom. *Id.* Military Orders have declared some areas in the West Bank to be "closed" areas. *See SHEHADEH, supra* note 124, at 37. These lands are requisitioned on the grounds that they are "security zones" needed by the Israeli military for training grounds and firing ranges. *Id.* Restricted Military areas cover about 1.11 million *dunumms* of seized territory in the West Bank (or 1.11 billion sq. meters, about fifty-three percent of taken land in the West Bank). *Id.*

223. *Id.* at 18-22.

224. *Id.* at 19.

225. *Id.*

226. SHEHADEH, *supra* note 124, at 19. The requisition was approved, the Military Order stating "on the basis of my authority, as Commander of the area and being of the opinion that the measure is required for security needs, I hereby command . . ." *Id.*

227. *Id.* at 20.

228. *Id.* at 18-20.

Mustafa Duweikat and the others appealed to the Israeli High Court challenging the military necessity of the seizure.²²⁹ The Elon Moreh Jewish settlers did not rely on the militaristic justification for taking land, instead claiming a right to the land based on ideological and religious grounds.²³⁰ Israeli Justice Landau decided that the land was being taken for reasons stemming from the Zionist worldview, not military security.²³¹ Furthermore, he saw an insurmountable legal obstacle in taking possession of land for permanent settlement without confiscating ownership.²³² Ultimately, the court ruled that international law prohibits the taking of private property.²³³ The court also implied, however, that if *the property seized was not private property, then it would hold differently.*²³⁴

In order to take land after the *Elon Moreh* case, military authorities had to find property that was not private property, and create a tribunal to settle disputes over the ownership of land.²³⁵ Although at first blush this ruling seemed to be a victory for Palestinians, its execution robbed many of any hope of maintaining their property rights.²³⁶ Before the *Elon Moreh* case, land ownership was conclusively determined and settled in the land registry through a court.²³⁷ By 1967, only about one-third of the titles had been settled and registered, leaving two-thirds of the land in the West Bank officially in dispute.²³⁸ Under Military Order No. 291, individuals who wanted to prove title had to do so by oral testimony, purchase agreements, tax receipts and other forms of inconclusive evidence.²³⁹ If the Arab landowner could not meet this high burden, he would lose his land.²⁴⁰

229. *Id.* at 20.

230. *Id.*

231. SHEHADEH, *supra* note 124, at 20.

232. *Id.* at 21. Israel only obtained possession of lands taken for military purposes, not title, which remained in the original landowner. *Id.* at 37.

233. *Id.* at 21.

234. *Id.* The court imposed two limitations on cases of land seizures for military purposes:

- 1) Only seizures of privately owned land could be prevented or reversed by recourse to the High Court, and
- 2) The High Court was not prepared to intervene in any disputes over ownership status in land.

Id.

235. SHEHADEH, *supra* note 124, at 21. The *Elon Moreh* settlement was later built on "state" land. *Id.* at 22. For a more detailed look at the *Elon Moreh* case, see SHEHADEH, *supra* note 124, at 18-22.

236. *See id.* at 22-23.

237. *See id.* at 22.

238. *Id.*

239. SHEHADEH II, *supra* note 211, at 61.

240. *Id.* at 62.

b. Declaring Land State Land for Acquisition Purposes

In 1979, the newly empowered Likud government was seeking land for their plans of Jewish settlement in the West Bank.²⁴¹ Palestinian employees of the Survey Department, the Land department, and the Office of Custodian and Absentee Property conducted a through survey and found that most of the land in the West Bank was not registered and was *miri*, *matruke*, or *mawat* lands.²⁴² Going against the British and Jordanian policies predating Israeli rule, the Israeli government decided to deem the land in these three categories state land.²⁴³

The most common means by which land in the West Bank was acquired for settlement began when the Ministerial Settlement Committee decided to establish a new settlement in the West Bank, or enlarge an existing one.²⁴⁴ After going through several organizations for approval, the Custodian of Absentee and State Lands pointed out the land that would be declared state land to the *mukhtar* (village elder).²⁴⁵ The *mukhtar* then had the responsibility to tell anyone who he thought owned plots within that area.²⁴⁶ The landowners were told that they could appeal to the Military Objection Committee (the Committee).²⁴⁷ Due to the vague identifications of the land to be taken, and the fact that many villagers were not on good terms with the *mukhtar*, who was often appointed by the

241. SHEHADEH, *supra* note 124, at 27-28.

242. *Id.* at 28.

243. *Id.* The justification for this policy is found in Military Order No. 59, promulgated in 1967. *Id.* at 27-28.

243. *Id.* The order defines "state property" as:

- (i) All property which on the specified date (i.e., 6 June 1967) pertained to one of the following:
 - (a) the enemy state;
 - (b) a juridical body in which the enemy state possessed any right, whether directly or indirectly, and whether this right referred to control or not;
- (ii) Property which was registered on the specified day in the name of one of the above two;
- (iii) Property in which one of the above two was a partner on the specified date;
- (iv) Property which on the specified date was one of the two mentioned in (i) above was either an owner in partnership, a registered owner, or was in possession.

Id. at 26.

This definition was taken to include all property that could not be conclusively proven to be private property. *Id.* at 27.

244. SHEHADEH, *supra* note 124, at 28-29.

245. *Id.* at 29.

246. *Id.*

247. *Id.*

military authorities, the first sign that one's land would be taken was often a bulldozer plowing up privately-owned property.²⁴⁸

If a Palestinian landowner wanted to appeal the seizure of his land, the first step was to find out the exact location of the area in question.²⁴⁹ The appellant had the burden of proving that the land was not state land.²⁵⁰ Within forty-five days of receiving notice that the land would be taken, the appellant had to submit a survey map of the whole area prepared by a licensed surveyor and a sworn statement declaring the basis upon which ownership was based, accompanied by all documents on which the appellant based his claim.²⁵¹ The appellant could not use receipts for tax payments or registration with the tax department as proof of ownership, and it was extremely difficult to prove ownership by use.²⁵²

The Committee could order an injunction against development until the appeal process was complete, but this did not happen in practice.²⁵³ Palestinians feared the near completion of the settlements as the appeals process continued prejudiced the outcome.²⁵⁴ This fear was well-founded because even if the appellant met the high standard of proof required, Military Order No. 59 article 5 provided that:

[E]very transaction made in good faith between the Custodian and another person concerning property which the Custodian considered, at the time of making the transaction, to be state property, shall not be cancelled and shall continue to be binding even if it is proven that the

248. *Id.* Under Jordanian law, Palestinian land owners had notice, appeal, and compensation rights. SHEHADEH II, *supra* note 211, at 61. Under Israeli Military authority, however, there is little to no notice requirement, and any right to appeal or compensation is limited to the will of the Objections Committee alone. SHEHADEH, *supra* note 124, at 38. Furthermore, there are severe punishments for those who refuse to vacate their property—five years imprisonment, a heavy fine, or both. *Id.* Expropriation law has been used to obtain land for settlements and for roads to lead to settlements. *Id.*

249. *Id.*

250. *Id.* at 30.

251. *Id.* Claims are often over land the size of two square miles, so the expense of surveying is very high. *Id.*

252. SHEHADEH, *supra* note 124, at 31.

The custodian has available to him the aerial photographs of the West Bank, which have been taken periodically. These are often presented to the Committee as proof that the land has not been continuously cultivated. As the authorities have refused to grant permits to Palestinian farmers for the drilling of artesian wells, agriculture, in most cases, is dependent upon the irregular and often insufficient rainwater.

Id.

253. *Id.* at 30.

254. *Id.*

property in question was not state property at the time when the transaction was made.²⁵⁵

The high burden of proof and the great expense of fighting land takings ensured that appeals to the Committee would yield a low success rate.²⁵⁶

c. Absentee Property

Military Order No. 58 governed what was to be done with absentee property in the Occupied Territories.²⁵⁷ This order defined an "absentee" as anyone who left the area of the West Bank before, on, or after June 7, 1967.²⁵⁸ The Order called for the appointment of a Custodian who was to hold the property in trust for the absentee until his return.²⁵⁹ The Custodian's approval was needed to transfer immovable property.²⁶⁰ The justification for this rule was to enable the Custodian to discover who the absentee owners were.²⁶¹ Today, over thirty years later, the absentee owners are known but the rule stays in place.²⁶²

Military Order No. 58 differs from its predecessor, the Israeli Absentee Property Law of 1951, in its broader definition of "absentee."²⁶³ The previous definition included persons that on certain dates were in an Arab country with which Israel was at war. Military Order No. 58, however, only considered whether the person had left the country, without considering where the absentee was, or that person's status within the country which they lived.²⁶⁴ Immigration between the West Bank and other countries has always been substantial, but under this definition of "absentee," a person leaving the West Bank even temporarily had the potential of becoming an "absentee."²⁶⁵

Israeli Military law regarding absentees essentially allowed the Custodian to use absentee property with a freedom equivalent to

255. *Id.* at 31.

256. *Id.* The expenses involved, including payment for professional services of the surveyor and lawyer, are often much higher than those an average villager in the West Bank can afford. *Id.*

257. SHEHADEH II, *supra* note 211, at 59.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 59-60.

263. SHEHADEH II, *supra* note 211, at 60.

264. *Id.*

265. *Id.* This strict definition is usually not applied to residents of friendly countries, but there have been occasions where Palestinians holding American passports were not allowed to transfer land because they were considered absentees. *Id.* at 61.

absolute ownership.²⁶⁶ The law allowed the custodian to transfer the land to the "Development Authority."²⁶⁷ The property could not be sold or transferred, so it was instead utilized through long-term leases.²⁶⁸ When some owners returned to claim their land, legally ceasing to be absentees, they were offered only nominal compensation for land that had already been disposed of.²⁶⁹

About forty percent of the land in the West Bank has been expropriated, often in one of the manners described above.²⁷⁰ Some of this land was used for military purposes, but most of it was used for Jewish settlements.²⁷¹ Today, over 180,000 Israelis live in settlements in the West Bank and Gaza Strip.²⁷²

C. Human Rights Law

Many comment on human rights in the West Bank and Gaza Strip without reference to Israeli occupation policy.²⁷³ This omission suggests an acceptance of the occupation framework laid down by the Israeli Military.²⁷⁴ Human rights law, however, can complement Occupier's Law.²⁷⁵ In fact, the U.N. General Assembly, along with its Secretary General, has stated that human rights instruments are applicable to occupations.²⁷⁶

Human rights law can be seen as moving beyond generalized rules for "occupied populations," "stateless persons," and "refugees," and instead focusing on both the Palestinian individual and the Palestinian people.²⁷⁷ Specifically, many consider it customary international law that the individuals have a right to return to their

266. *Id.*

267. *Id.*

268. Benvenisti & Zamir, *supra* note 5, at 300.

269. SHEHADEH II, *supra* note 211, at 61. One such scheme was the 1973 Absentees' Property (Compensation) Law, which was enacted for the purpose of compensating Palestinian absentees of property in East Jerusalem. Benvenisti & Zamir, *supra* note 5, at 300. The law turned many of the absentee Palestinians living in East Jerusalem into residents. *Id.* Then the law allowed compensation for Israeli "residents" who's property was in the Custodian of Absentees' Property. *Id.* The compensation offered, however, was not considered adequate, so few absentees used this right. *Id.*

270. SHEHADEH, *supra* note 124, at 5.

271. SHEHADEH II, *supra* note 211, at 61.

272. See Wilkinson, *supra* note 3, at A1.

273. Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 *ISR. L. REV.* 24, 30 (1992) [hereinafter Benvenisti II].

274. SHEHADEH, *supra* note 124, at 106.

275. See Benvenisti II, *supra* note 273, at 30.

276. *Id.* at 28. "Some claim that when armed conflict erupts, most 'peacetime' human rights are temporarily superceded by the humanitarian laws of war, which alone determine the rights of the occupied population." *Id.*

277. TAKKENBERG, *supra* note 83, at 229.

homeland.²⁷⁸ All four of the 1949 Geneva Conventions suggest that people protected by the conventions are guaranteed a right of return (or repatriation).²⁷⁹ The right to return is in most if not all modern human rights instruments.²⁸⁰

1. The Right to Return and Compensation Before 1967

Specific international law regarding Palestinian rights to property can be found in U.N. documents as early as 1948.²⁸¹ A progress report to the United Nations from U.N. Mediator for Palestine, Count Folke Bernadotte, recommended:

The right of the Arab refugees to return to their homes in Jewish controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations Conciliation Commission²⁸²

The use of the word "affirmed" instead of "established" suggests that Count Bernadotte believed that international law already provided refugees with the right to return to their homes.²⁸³

The U.N. General Assembly accepted his recommendations by adopting Resolution 194.²⁸⁴ This resolution contains a plan to deal with the on-going conflict in Palestine and established a Conciliation Commission for Palestine.²⁸⁵ Paragraph 11 of Resolution 194 deals specifically with property left behind, taken or destroyed, and reads:

the General Assembly . . .

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

Instructs the Conciliation of compensation, and to maintain close relations with the Director of the United Nations and Works Agency for

278. *Id.* at 232. Most international treaties do not address specific private property rights, but there is a right to leave and return to one's homeland. *Id.*

279. *Id.* at 232-33.

280. *Id.* at 234. Article 13 paragraph 2 of the Universal Declaration on Human Rights states "Everyone has the right to leave any country, including his own, and to return to his country." *Id.*

281. TAKKENBERG, *supra* note 83, at 242.

282. *Id.*

283. *Id.* at 242-43. The day after he submitted this report Count Bernadotte was assassinated by Jewish terrorists. *Id.* at 243.

284. TAKKENBERG, *supra* note 83, at 243.

285. *Id.* at 243.

Palestinian Refugees and, through him, with the appropriate organs and agencies of the United Nations.²⁸⁶

Several features of this resolution should be noted. First, return or compensation is conditional upon "liv[ing] at peace with their neighbors."²⁸⁷ Initially the Arab world rejected Resolution 194 because they did not want to live in peace with a people they believed had no right to be in Palestine.²⁸⁸ Palestinians, however, soon became Resolution 194's strongest supporters.²⁸⁹ Second, returning refugees are given a choice between returning to their homes or receiving compensation.²⁹⁰ This idea was reaffirmed in Resolution 513, adopted by the General Assembly in 1952, which endorsed both this program and another proposed by the UNRWA.²⁹¹ Finally, the resolution demands that this policy should be implemented "at the earliest practicable date."²⁹² The creation of the State of Israel, however, has made it increasingly impractical for Palestinians to ever return to their homes.²⁹³ Israel's Law of Return of 1959 and the Nationality Law of 1952 gave all Jews a right to become Israeli citizens, while denying this right to Palestinians that fled in 1948.²⁹⁴ The General Assembly annually reaffirmed Resolution 194 between 1952 and 1967, but the resolution's implementation became increasingly impractical.²⁹⁵

286. *Id.* (quoting Paragraph 11 of United Nations General Assembly Resolution 194, promulgated in 1948). The United Nations accordingly created a three-member Conciliation Commission consisting of Turkey, France, and the United States. John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L. J. 171, 183 (1998) (hereinafter Quigley II). The Conciliation Commission's job was to implement Resolution 194. *Id.* Israel admitted 8,000 Palestinians on the basis of reuniting split families, and offered to admit 100,000 more. *Id.* at 183-84. When the Commission pushed for more, however, Israel withdrew the offer. *Id.* at 184. Frustrated, the Commission reported that Israel's "attitude to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment toward [the Palestinian] refugees is morally reprehensible Her position as conqueror demanding more does not make for peace." *Id.* at 184.

287. TAKKENBERG, *supra* note 83, at 243.

288. *Id.* at 245 (discussing liberation theory, which is the idea that Palestinians should possess Israel); see also As'ad 'Abd-al-Rahman, *Resolution 194 Is a Compromise Solution*, WORLD NEWS CONNECTION, Dec. 23, 1999, 1999 WL 30771176.

289. TAKKENBERG, *supra* note 83, at 244.

290. *Id.*

291. *Id.* at 243.

292. *Id.* at 244.

293. *Id.* at 245 (such as taking Arab land and moving in Israelis).

294. *Id.* at 245-46.

295. *Id.* at 246.

2. The Right to Return and Compensation After 1967

Many Palestinians displaced by the 1948 war were again displaced by the 1967 war, increasing the complexity of return.²⁹⁶ The General Assembly dealt separately with the 1948 refugees and the new 1967 displaced populations.²⁹⁷ For example, Resolution 2452A of 1968, regarding the 1967 refugees, called for Israel "to take effective and immediate steps for the return without delay of those inhabitants who have fled the areas [occupied by Israel] since the outbreak of hostilities."²⁹⁸ Resolution 2452B, concerning the 1948 refugees, continued the same policy of Resolution 194 regarding the right of return.²⁹⁹

In 1969, the General Assembly added to the right of return a right for Palestinian self-determination.³⁰⁰ Resolution 2535B of 1969 begins by stating "the problem of the Palestinian Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights."³⁰¹ This resolution is the first to make reference to the "people of Palestine."³⁰²

Later resolutions, such as 2649 and 2672C, explicitly recognized a right of Palestinian self-determination.³⁰³ Resolution 3236 of 1974 is the first resolution to stop referring to Palestinians as refugees, signifying that the Palestinian problem is one of people being denied their national rights, not a refugee problem.³⁰⁴ Also in 1974 a resolution of the Palestinian National Committee (PNC) made two important declarations.³⁰⁵ The PNC first declared that the right to return was "at the forefront" of Palestinian rights, and then declared that Palestinian Arabs demanded a Palestinian state.³⁰⁶ The second declaration suggested for the first time that the PNC was advocating a Palestinian state in only part of Palestine, allowing the possibility of peaceful co-existence with Israel.³⁰⁷

296. TAKKENBERG, *supra* note 83, at 246.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 247.

301. *Id.*

302. *Id.* It is psychologically important to be acknowledged as a people with a state.

303. TAKKENBERG, *supra* note 83, at 247.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 248-49.

IV. FINDING AN EQUITABLE SOLUTION

In the emerging nation of Palestine, secure property rights have yet to be established. Aid agencies continue to imagine that cash transfers solve economic problems, when all they do is empower heads of state.³⁰⁸ Property has long been insecure in the Arab world, and if this is not corrected in a Palestine-to-be, the restless energies of its many unemployed young men will seek an outlet in war with the more prosperous neighbors.³⁰⁹

The final settlement will be a product of compromise, with many factors coming into play as each party lays their cards out on the table. Many of the relevant factors are beyond the scope of this note.³¹⁰ What this note *is* discussing is the legal rights of individual Palestinians, whether refugees, displaced persons, foreign residents or other, concerning their private real property, whether that be property in the occupied territories, Israel proper, or elsewhere.

The analysis in the following section will proceed by addressing four issues: (1) what both parties in this conflict have to gain and lose from a final property settlement; (2) what legal rights the Palestinians have to repossess their land; (3) how practical is the exercise of these rights; and (4) what kind of compensation is appropriate.

A. Policy Issues—What the Parties Have to Gain and Lose

1. What Do the Israelis Have to Gain and Lose?

Before seriously considering the right of Palestinians to return to their land, the Israelis have several urgent concerns. The first is an existential security issue.³¹¹ The Israelis are worried about changing

308. Bethell, *supra* note 1.

309. *Id.*

310. Some of these are (1) Jewish property left in Arab Countries, (2) the final status of Jerusalem, (3) water rights, (4) the refugee problem, (5) Jewish settlements in the West Bank, (6) reparations and (7) borders. Property abandoned by Jews leaving Arab countries will most likely play a part in the final settlement. Elli Wohlgeleirter, *Playing the Property Card*, JERUSALEM POST, Oct. 29, 1999, 1999 WL 9009965. It is the opinion of the author of this paper that Jewish repatriation or compensation is a separate issue. Palestinians should not be a bargaining chip between Israel and Arab countries. See TAKKENBERG, *supra* note 83, at 246. Due to the size of the refugee problem, multiple solutions will have to be applied, and several countries will have to absorb these people. For example Iraq intends to settle 500,000 and as a good faith gesture has given Palestinian refugees the right to own property in Iraq. Nali 'Ali and 'Abbas al-Badri, *Kurdish Sources: Iraq Preparing to Settle Palestinians In Karkuk*, WORLD NEWS CONNECTION, Feb. 11, 2000, 2000 WL 13794851.

311. Joseph Alpher et al., *Concept Paper: The Palestinian Refugee Problem and the Rights of Return*, MIDDLE EAST POLICY, Feb. 1, 1999, at 15, 1999 WL 14924069.

the Jewish character of the state of Israel.³¹² If Palestinians were to reclaim their land within the borders of Israel, the enormous amount of land and people involved would substantially alter the demographics in Israel.³¹³ In fact, Israel would like to annex part of the West Bank to maintain most of their settlements.³¹⁴

Israel is also concerned about accepting responsibility for the refugee problem.³¹⁵ As stated before, there are two different narratives about how and why the Palestinians left their homes in the 1948 and 1967 wars.³¹⁶ To accept the Palestinian narrative would raise doubts about the legitimacy of the state of Israel.³¹⁷

Israel also wants peace, and knows that this cannot happen if the refugee problem is not ameliorated.³¹⁸ They admit the existence of the right to fair compensation, but want to link the Palestinian right of fair compensation to compensation of Jews that were forced to leave Arab countries to settle in Israel.³¹⁹ They also want to compensate on a collective and not an individual level.³²⁰

2. What Do the Palestinians Have to Gain and Lose?

The refugee problem has come to signify the historical injustice that has been done to the Palestinian people.³²¹ Palestinians want Israel to recognize their share of guilt in creating the refugee problem and to acknowledge a political and moral, if not actual, right to return.³²² These admissions could provide a fertile basis for which claims of compensation and reparations could be settled.³²³

The Palestinians also want some sort of individual compensation for taken property.³²⁴ This compensation should not necessarily be monetary, and could instead take the form of new land and dwellings, or some other physical means of bettering Palestinian life. Palestinians also seek self-representation, not representation by other Arab countries, or an international organization.³²⁵

312. *Id.*

313. *Id.*

314. Wilkinson, *supra* note 3, at A1.

315. Alpher et al., *supra* note 311, at 15.

316. *See supra* notes 103-06 and accompanying text.

317. Alpher et al., *supra* note 311, at 15.

318. *Id.*

319. *Id.*; *see also* Wohlgeleinter, *supra* note 310. This issue is beyond the scope of this note.

320. Alpher et al., *supra* note 311, at 15.

321. *Id.* at 14.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 14-15.

Finally, like Israelis, Palestinians want continuous territory for their own state.³²⁶ Ideally, they want the borders that existed before 1967, with Jerusalem as the capital.³²⁷ Palestinians expect to make few territorial concessions because they will be expected to absorb many of their refugees within these borders.³²⁸

B. *Do Palestinians Have a Legal Right of Return to Their Homes?*

The Palestinian "Right to Return" is so psychologically important and pervasive in Palestinian culture that many say it is at the core of the Palestinian-Israeli conflict.³²⁹ Both Palestinians and Israelis are bound by a belief that they have the right to settled their respective diasporas in the Holy Land.³³⁰ This analysis focuses more specifically on the legal rights of Palestinian landowners to repossess their land in Israel and the occupied territories.

1. Occupier's Law

a. Does Occupier's Law Apply to Israel and the Occupied Territories?

Is Israel bound by the international norms on belligerent occupation found in Hague Regulations and the Fourth Geneva Convention?³³¹ The Hague Regulations are considered by Israel's Supreme Court to be declaratory of customary International law.³³² Likewise, Israel is a contracting party to the Geneva conventions, so

326. *Id.*

327. Wilkinson, *supra* note 3, at A1.

328. Alpher, *supra* note 311, at 15. For a more detailed illustration of what Palestinians might realistically settle for in a final settlement, see Mohammad Fadhel, *Anti-corruption Manifesto Expresses Palestinians' Feeling, Says Abdelshafi*, MIDEAST MIRROR, Dec. 2, 1999, vol. 13-233, 1999 WL 10277560.

329. *Palestinian Paper Cites Statements by Refugees Committee Unattributed Report from Nabulus*, WORLD NEWS CONNECTION, Jan. 22, 2000, 2000 WL 10334224; see also Weiner, *supra* note 99, at 1-2; Quigley II, *supra* note 286, at 171-72.

330. Jews base this belief on the Hebrew tradition that places Jews in the Holy Land over two thousand years ago, and Palestinians base their belief on the illegality of being dispossessed.

331. The international norms on belligerent occupation come from Articles 42-56 of the 1899/1907 Hague Regulations, and from the fourth Geneva Convention of 1949. See *supra* note 161-87 and accompanying text.

332. Yoram Dinstein, *The International Legal Dimensions of the Arab-Israeli Conflict* (citing Yoram Dinstein, *The Application of Customary International Law Concerning Armed Conflicts in the National Legal Order*, in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 29, 31-33 (M. Bothe ed., 1990)).

it too is fully binding.³³³ Therefore, Occupier's Law applies to Israel.³³⁴

Do these laws apply to Israel's occupation of the West Bank and Gaza Strip?³³⁵ Some argue that the Fourth Geneva Convention's Occupier's Laws do not apply to the West Bank and the Gaza Strip because these territories did not legally belong to another state before the occupation.³³⁶ According to Article 2 paragraph 2 of the Geneva Conventions, certain provisions regarding occupied territory are only applicable in the case of an armed conflict between two High Contracting Parties.³³⁷

Jordan, Egypt, and Israel are all High Contracting Parties, but the West Bank and Gaza Strip were not necessarily part of these States at the time of occupation.³³⁸ Jordan annexed the West Bank in 1950, but annexation was only recognized by Great Britain and Pakistan.³³⁹ The relationship between the West Bank and Jordan seems to be ambiguous, and most accurately described as a trusteeship.³⁴⁰ Egypt did not claim the Gaza Strip was part of its territory, but instead openly administered it as a kind of trust.³⁴¹

Sovereignty over an occupied territory always remains vested in the ousted sovereign.³⁴² In other words, the Occupier's Law does not transfer title but instead gives the occupying power a temporary right of possession.³⁴³ The Israeli argument claims that because the West Bank and Gaza Strip were not part of Jordan and Egypt respectively, they had no ousted sovereign, so sovereignty vested in Israel.³⁴⁴

The major flaw in this argument is that it assumes there was a vacuum in title of this land between the end of the British Mandate and 1967.³⁴⁵ There can be no vacuum in title, however, so one must assume that sovereignty was conferred to the inhabitants of the occupied territory.³⁴⁶ Assuming, *arguendo*, that the Jordanian 1948

333. *Id.* at 151.

334. *Id.* at 151-52.

335. MALLISON & MALLISON, *supra* note 171, at 253.

336. Michael Bothe, *Israeli Measures in Occupied Territories in the Light of International Humanitarian Law*, in THE LEGAL ASPECTS OF THE PALESTINIAN PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM 213 (Hans Kochler ed., 1995).

337. *Id.*

338. *Id.* at 214.

339. Joseph H. H. Weiler, *Israel, The Territories and International Law: When Doves are Hawks*, in ISRAEL AMONG THE NATIONS 381, 385 (Alfred E. Kellermann et al., eds., 1998).

340. *Id.* at 385-88.

341. Bothe, *supra* note 336, at 214.

342. Weiler, *supra* note 339, at 386.

343. Dinstein, *supra* note 332, at 150.

344. Weiler, *supra* note 339, at 386-87.

345. *Id.* at 387.

346. *Id.*

occupation and 1950 annexation were illegal, Jordan still became the sovereign because it took over where the Mandate power left off.³⁴⁷ The Palestinians allowed annexation, which combines Palestinian sovereignty with that of Jordan.³⁴⁸ Thus, the land was taken from a High Contracting party, and should be returned.

Another argument for Jordanian sovereignty over Palestinian territories is that although most countries did not formally recognize annexation, the international community recognized annexation *de facto*.³⁴⁹ One manifestation of this view is the almost universal condemnation by the United Nations of Israeli settlements in the West Bank.³⁵⁰ Even Israel itself demonstrated recognition of Jordanian sovereignty in policy when it applied the Jordanian or Egyptian legal systems in the two respective Palestinian territories.³⁵¹

Regardless, the international community has rejected Israel's argument that Occupier's Law does not apply to Palestinian land.³⁵² The ICRC and many legal writers have criticized Israel's argument.³⁵³ Article 1 of the Fourth Geneva Convention states that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."³⁵⁴ '[I]n all circumstances' is intended to include declared or undeclared war, recognized or unrecognized state of war, partial or total occupation with or without armed resistance, and even certain circumstances when the occupied is not a contracting party.³⁵⁵ The Convention does not require that the ousted power is the legitimate sovereign of the territories lost.³⁵⁶ Therefore, Occupier's Law applies to Israel in general *and* the occupied territories specifically.³⁵⁷

b. Does Occupier's Law Confer a Right to Return?

Occupier's Law confers a right to return in three different ways. First, it directly confers a right to return to those who were not with their property when occupation began.³⁵⁸ Another right to return to one's property comes from the illegality of land takings.³⁵⁹ For

347. *See id.* at 384.

348. *Id.*

349. *Id.* at 387.

350. *See* TAKKENBERG, *supra* note 83, at 222.

351. *See* Dinstein, *supra* note 332, at 151.

352. *See* TAKKENBERG, *supra* note 83, at 212-214.

353. *Id.* at 214.

354. TAKKENBERG, *supra* note 83, at 214.

355. *Id.*

356. *Id.*

357. *See id.* at 212.

358. SHEHADEH, *supra* note 124, at 32-36.

359. *Id.* at 22.

example, when land is taken from an owner illegally, the taking should be void and the owner should have the right to repossess.³⁶⁰ Finally, some land takings under occupation took possession only, with the title remaining in the owner.³⁶¹ When the occupation is over or the military need for the land is gone, the owner should be able to reclaim possession.³⁶²

Several propositions in Occupier's Law support the belief that Palestinians who left their land in the 1948 war or afterwards have a right to reclaim their land.³⁶³ First, the Hague Regulations require the occupying power to respect the public life of the territories.³⁶⁴ This requirement, when coupled with the international norm of respecting the occupied population's private property rights, naturally leads to the proposition that those who left should be able to return to their property.³⁶⁵

Likewise, the 1949 Geneva Civilian Convention, which Israel is party to, directly addresses the repatriation of absent nationals and residents.³⁶⁶ The Convention requires the Occupying Power to ensure the rights of "protected persons."³⁶⁷ It defines "protected persons" as "those who, at a given moment and in any manner whatsoever, find themselves . . . in the hands of a[n] . . . Occupying Power of which they are not nationals."³⁶⁸

As discussed previously, Palestinians have never actually been allowed to return. After the 1948 war ended, Israel received great international pressure to allow the refugees to return.³⁶⁹ In June of 1948, however, the Israeli government decided to bar return.³⁷⁰ Even Palestinians that did not flee the territories could not reclaim their property because they were considered "internal absentees."³⁷¹ Since then, measures have been taken to make the return of refugees even more difficult.³⁷²

Illegal takings for settlements also confer upon Palestinians a right to return to their property.³⁷³ Israel's policy of land acquisition

360. *Id.* at 22-33.

361. *Id.* at 37.

362. *Id.* at 37.

363. Quigley II, *supra* note 286, at 197-98.

364. *Id.*

365. MALLISON & MALLISON, *supra* note 171, at 241; *see also* Quigley II, *supra* note 286, at 197-98.

366. Quigley II, *supra* note 286, at 198.

367. *Id.*

368. *Id.*

369. TAKKENBERG, *supra* note 83, at 16.

370. *Id.*

371. SHEHADEH, *supra* note 124, at 34.

372. *See supra* notes 108, 113, 115, 259-60, 266-69 and accompanying text.

373. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, Article 49, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 271, 288 (Adam Roberts & Richard Guelff eds., 1989) [hereinafter Geneva Convention].

in the occupied territories has mainly worked to promote Jewish settlements.³⁷⁴ Land takings for settlements between 1967 and 1977 served a quasi-military purpose establishing new, more secure boundaries.³⁷⁵ After 1977, however, the Likud party began increasing their taking of much larger tracts of land for settlements on the basis that the West Bank belonged to Israel as part of the ancient Hebrew kingdom.³⁷⁶

Land taking for settlements was in violation of Article 49 of the Fourth Geneva Convention, which states in relevant part: “[t]he Occupying power shall not . . . transfer parts of its own civilian population into the territory it occupies.”³⁷⁷ The international community generally considers Israel’s settlement activities to be illegal under the Fourth Geneva Convention.³⁷⁸

Finally, Palestinians have a right to reclaim their land because Israel only had possessory rights in the land taken for “military purposes.”³⁷⁹ Privately-owned land can be taken if it is needed for “vital and immediate military requirements.”³⁸⁰ Assuming that there was a true vital and immediate military purpose that required land taking,³⁸¹ upon the end of occupation, possession should revert to the Palestinian owners who theoretically never lost title.³⁸² Accordingly, the land taken for settlements and other purposes under the guise of “military necessity” should be returned to its true owners.³⁸³

In all three of these categories, existing law disallowed the land to be taken from the lawful possessor.³⁸⁴ Israel has not respected the crucial tenet of Occupier’s Law that provides that the occupying

374. George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 530 (1994).

375. *Id.* at 530-31; *see also* TAKKENBERG, *supra* note 83, at 221. This was in line with the clause in Security Council resolution 242 recognizing Israel’s right to secure and recognize boundaries.

376. Bisharat, *supra* note 374, at 532; *see also* TAKKENBERG, *supra* note 83, at 221.

377. Geneva Convention, *supra* note 373, at 288.

378. Wilkinson, *supra* note 3, at A1. The U.N. security council unanimously adopted a resolution in 1980 that states: “Israel’s policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva convention . . .” TAKKENBERG, *supra* note 83, at 222. In 1982 the U.N. General Assembly stated that it “strongly condemns” this settlement practice as a violation of the Fourth Geneva Convention. *Id.*

379. SHEHADEH, *supra* note 124, at 37.

380. *Id.*

381. *Id.* at 45. Shehadeh writes there are “sworn statements from Israeli military personnel who argued that in fact civilian settlements in the West Bank would be detrimental to security and in the event of war.” *Id.*

382. *Id.* at 37.

383. *Id.*

384. *See supra* notes 374, 378 and 380.

power must respect existing law “unless absolutely prevented.”³⁸⁵ Occupier’s Law supports the existence of the right of Palestinians to reclaim their private property because Palestinians were dispossessed of their property in contravention to Occupier’s Law allowing absentees to return, through illegal takings, and through only temporary “military necessity.”³⁸⁶

2. Human Rights Law

a. Does Human Rights Law Bind Israel’s Conduct in the Occupied Territories?

The body of Human Rights law includes not only norms contained in the Hague Resolutions and the Geneva Conventions, but also other Conventions and documents promulgated by the United Nations.³⁸⁷

Human Rights conventions usually define their own territorial scope. This scope is typically related to either (1) the national territory of the state party to the convention, or (2) the area under the state party’s jurisdiction. Either way, occupied territories of a party to a convention fall within the definition. Consequently, Israel, typically a party to these conventions, is bound to implement human rights conventions in the occupied territories.³⁸⁸

Israel has been a member of the United Nations since 1949.³⁸⁹ Israel’s U.N. membership was conditional on its acceptance of Resolution 194.³⁹⁰ Israel accepted Resolution 194 when it joined the United Nations, but has not complied with it to date.³⁹¹

b. Does Human Rights Law Confer a Right to Return?

i. Conventions

The Universal Declaration of Human Rights states that “[e]veryone has the right to leave any country, including his own, and

385. See *supra* text accompanying note 169. It is at least arguable that the military orders that changed existing law were not “absolutely prevented.” Land was taken to enlarge the existing state of Israel, but not for the military needs of Israel or for the maintenance of occupation. See *supra* text accompanying notes 181, 183, and 199.

386. See generally SHEHADEH, *supra* note 124.

387. These include General Assembly and Security Council Resolutions.

388. Benvenisti II, *supra* note 273, at 33-35.

389. See Issam Mufid Nashashibi, *Israel Must Remember the Golden Rule*, SAN DIEGO UNION-TRIB., Sept. 22, 1999, pg. B-9: 1, 7, 8; B-11:2; B-13:3.

390. *Id.*

391. *Id.*

to return to his country.”³⁹² Many, if not all, modern Human Rights treaties affirm this sentiment.³⁹³ This statement, however, is complicated when applied to Palestinians. One must consider whether Palestinians are exempt because they have no country, and whether this right means that dispossessed landowners have the right to return to their land.³⁹⁴

First, the term “ones own country” can be read broadly to include one’s homeland or the state to which one has some connection.³⁹⁵ Considering this issue, the International Court of Justice interpreted “own country” in the *Nottenbohm* case.³⁹⁶ There, the judge found that links with a country rather than formal citizenship were decisive.³⁹⁷ In his paper on the immigration of Soviet Jews to Israel, Knisbacher applies the *Nottenbohm* court’s findings in claiming that “tradition, his establishment, his interests, his activities, his family ties, [and] his intentions for the near future” are relevant in determining what constitutes “ones own country.”³⁹⁸ Given this broad interpretation, one can reasonably conclude that the Palestinian people have a right to return to their land.

Does this right to return extend to a right to repossession of one’s property? The wording of the main international instruments regarding human rights do not seem to confer this specific right, but other U.N. instruments do.³⁹⁹

ii. General Assembly Resolution 194

U.N. General Assembly (UNGA) Resolution 194, promulgated December 11, 1948, directly deals with the right of Palestinians to return to their homes and receive compensation.⁴⁰⁰ Again, the text states that the General Assembly:

Resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for property of those choosing not to return and for the loss of or damage to property which, under principals of international law or in equity, should be made good by the governments or authorities responsible.⁴⁰¹

392. MALLISON & MALLISON, *supra* note 171, at 176.

393. TAKKENBERG, *supra* note 83, at 234.

394. *Id.*

395. *Id.* at 236.

396. *Id.* at 237.

397. *Id.*

398. *Id.*

399. TAKKENBERG, *supra* note 83, at 243 (quoting Paragraph 11 of United Nations General Assembly Resolution 194, promulgated in 1948).

400. *Id.*

401. *Id.*

This resolution, read plainly, gives Palestinians a conditional right to reclaim their property.⁴⁰² Some have claimed, however, that Israel's position is consistent with Resolution 194 because of the resolution's ambiguity. Five arguments have been put forward refuting the need to comply with Resolution 194. They are: (1) Palestinian repatriation is conditional on final settlement, (2) it only applies to Palestinians who are willing to "live in peace with their neighbors," (3) since Resolution 194 does not give a specific date it does not confer a right, (4) the resolution is couched in discretionary language, and (5) subsequent U.N. actions demonstrate that they do not view repatriation as a right.⁴⁰³ All of these arguments can be refuted.

Repatriation was not meant to be contingent upon a final settlement.⁴⁰⁴ Implementation was supposed to be immediate, as evidenced by the creation of the Conciliatory Commission.⁴⁰⁵ Furthermore, when the resolution was being debated, the addition of a clause proposed by Guatemala stating that repatriation would occur "after the proclamation of peace by the contending parties in Palestine, including the Arab states," was rejected.⁴⁰⁶ Several delegates were concerned that the Palestinians would be made pawns in the negotiations for final settlement.⁴⁰⁷

Resolution 194 applies to Palestinians wishing to "live at peace with their neighbors."⁴⁰⁸ Analysts that focus on the "live at peace" language in Resolution 194 typically believe that only Israelis have the right to judge whether and which Palestinians can live in peace with Israelis.⁴⁰⁹ This language, however, was not explained in the debates surrounding the adoption of Resolution 194, so it is open for interpretation.⁴¹⁰ Subsequent UNGA resolutions stating the same message as Resolution 194 have omitted the "wishing to live in peace" language, suggesting that Palestinians may return to their homes as a matter of right.⁴¹¹

402. See *supra* note 401.

403. Quigley II, *supra* note 286, at 185.

404. *Id.* at 186-87.

405. *Id.* at 186-87. The Commission's purpose was to oversee the implementation of Resolution 194.

406. *Id.* at 186.

407. *Id.* at 186.

408. *Id.* at 187.

409. QUIGLEY II, *supra* note 286, at 187.

410. *Id.* One interpretation is that the language augments the "choice" part of the resolution, suggesting that many might "choose" to live abroad and would accept compensation rather than repossession.

411. *Id.* One such resolution is Resolution 3236 which refers to "the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted." *Id.*

The resolution states that repossession shall take place at the "earliest practicable date."⁴¹² This language is consistent with the approach the Conciliation Commission used and the mediation efforts designed to get Israel to comply with the resolution.⁴¹³ The General Assembly assumed that the logistics of repossession would take time.⁴¹⁴ During the negotiations, the term "possible" was replaced with "practicable" partially because of the concerns the Israeli delegates expressed that a return would create security problems.⁴¹⁵ When this change was made it was only made in the English text and not in the French text, implying that the change was not significant enough to warrant change in the French text.⁴¹⁶

Resolution 194 uses the prefix "should" in paragraph 11, however the resolution's drafter called the provision a "precise directive."⁴¹⁷ Only Israel questioned repatriation as a right in the first committee debate.⁴¹⁸ Regardless, subsequent resolutions have expressly stated that Palestinian repossession is a right.⁴¹⁹

The United Nations continues to support Resolution 194 and the right of the Palestinians to return.⁴²⁰ Every year since 1948, the United Nations has reaffirmed Resolution 194.⁴²¹ The United Nations also passed Resolution 513 regarding refugee resettlement in Arab countries.⁴²² Resolution 513 is best interpreted as a complement to Resolution 194.⁴²³ The U.N. Conciliatory Commission reported that the longer refugees remained abroad, the greater the chance that many of them would opt for compensation rather than

412. *Id.* at 188.

413. MALLISON & MALLISON, *supra* note 171, at 179-80.

414. Quigley II, *supra* note 286, at 188.

415. *Id.*

416. *Id.*

417. *Id.* at 188-89.

418. *Id.* at 189.

419. For example, General Assembled Resolution 3236 "[r]eaffirm[ed] also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and call[ed] for their return." *Id.* at 189. Regarding other U.N. bodies, scholar John Quigley states:

Secretary-General U Thant said: "people everywhere, and this certainly applies to Palestinian refugees, have a natural right to be in their homeland." The United Nations Commission on Human Rights determined that human rights norms required Israel to allow the displaced Palestinians to return. In a 1987 resolution, the Commission found a "right of the Palestinians to return to their homeland Palestine and their property, from which they have been uprooted by force." There would be little basis for concluding that the United Nations does not view a Palestinian return as legally required.

Id. at 189-90.

420. QUIGLEY II, *supra* note 286, at 192-93.

421. *Id.* at 190.

422. *Id.*

423. *Id.*

repossession.⁴²⁴ Thus, Resolution 513 had the purpose of facilitating the settlement of refugees choosing not to return to their homes.⁴²⁵ Many subsequent resolutions cited for this argument contain the phrase “without prejudice to provision 11 of General Assembly Resolution 194,” affirming rather than contradicting the U.N. commitment to Resolution 194.⁴²⁶

Some see Resolution 242, which was accepted by both the PLO and Israel as a basis for the final status negotiations, as an abandonment of the right to return.⁴²⁷ Resolution 242 calls for a “just settlement.”⁴²⁸ Opponents of Resolution 194 argue that “just settlement” cannot mean the plan called for in Resolution 194 because Israelis do not find it just.⁴²⁹ Resolution 242, however, should be read in light of previous U.N. resolutions.⁴³⁰ “Just settlement” refers to the entire Middle East conflict, of which repossession is merely a part.⁴³¹ If this language means anything specifically, “just settlement” should be interpreted to affirm the United Nations’ consistent position that the Palestinians should have a right to choose between compensation and repossession.⁴³² For these reasons, U.N. Resolution 194 confers a right to the Palestinian people to choose between compensation and repatriation.

Human Rights Law and Occupier’s Law apply to Israel and the Occupied Territories.⁴³³ Each set of laws leads to the conclusion that Palestinians have a right to return to their land.⁴³⁴ In many ways, the Palestinian belief in their right to return is at the heart of the Palestinian-Israeli conflict.⁴³⁵ Therefore, it is imperative that Israel acknowledges that the right to return exists, even if this means that Israel admits that it has violated international law.

C. *Will Palestinians Ever Exercise a Right to Return to Their Homes?*

The amount of movable and immovable property that was expropriated by Zionists in 1948 is shocking. Over eighty percent of Israel’s total area was previously Palestinian land.⁴³⁶ When it was

424. *Id.* at 191.

425. *Id.* at 190-91.

426. *Id.* at 191.

427. D.O.P., *supra* note 134.

428. Resolution 242, *supra* note 151.

429. Quigley II, *supra* note 286, at 192.

430. *Id.*

431. *Id.*

432. *Id.* at 192-3.

433. *See supra* notes 332 and 389 and accompanying text.

434. *See text* accompanying notes 170-72, 393-95.

435. Alpher, *supra* note 311, at 14.

436. Fawaz Turki, *The Thorniest Issue in Final Status Talks*, MIDDLE EAST NEWSFILE, Sept. 2, 1999, 1999 WL 9685731.

taken, about a quarter of this land was being cultivated.⁴³⁷ This amounts to 4.5 billion square meters of cultivated land taken. The Conciliatory Commission, established by Resolution 194, estimated in 1950 that the amount of cultivatable land taken from Palestinians in 1948 was about two-and-a-half times that of all land owned by Jews at the end of the mandate.⁴³⁸

Three hundred and fifty of the 370 settlements established between 1948 and 1953 were founded on Palestinian absentee land.⁴³⁹ By 1954, one-third of the Israeli population lived on absentee Palestinian property.⁴⁴⁰ About one-third of the 250,000 new Jewish immigrants arriving in Israel in this same time period moved into fully furnished homes in urban areas that had belonged to Palestinians.⁴⁴¹

Palestinians left behind 338 entire towns and villages, including Lydda, Ramleh, Jaffa, Acre, Baysan and Majdal.⁴⁴² Parts of ninety-four other towns were also left behind.⁴⁴³ Additionally, refugees left 10,000 shops and businesses, 120 million square meters of citrus holdings, and vast olive groves.⁴⁴⁴ As international scholar Don Peretz stated in a paper delivered to an American think tank in Washington: "It is questionable whether Israel would have been able to bring in so many new immigrants so rapidly had it not taken over and used abandoned Arab property."⁴⁴⁵

What would happen if all this property and the forty percent of the West Bank that was taken by Israel after 1967 was repossessed?⁴⁴⁶ Repossession would result in the destruction of the state of Israel. Given the mass quantities of land that could potentially be repossessed, it is not surprising that former Israeli Prime Minister Ehud Barak has taken the position that "there will be no return of the refugees to Israel, but the rest is negotiable."⁴⁴⁷ Besides the sheer volume of land that could be repossessed, other factors make the prospect of repossession unrealistic. These factors include the difficulty in identifying property owners,⁴⁴⁸ the need for

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. Turki, *supra* note 436.

444. *Id.*

445. *Id.*

446. SHEHADEH, *supra* note 124, at 5.

447. Hisham Abdallah, *Israeli-Palestinian Peace Talks Hit New Stumbling Block Over Refugees*, AGENCE FRANCE-PRESSE, Jan. 10, 2000, 2000 WL 2709964.

448. Regarding the complexity in proving property title, Eyal Zamir and Eyal Benvenisti write:

territorial consistency,⁴⁴⁹ and the maintenance of state character.⁴⁵⁰

It seems impractical to insist on repatriation for Palestinians that have rights to property in Israel. This is not to say that Palestinians should not exercise their rights to land in the occupied territories, nor is it to say that limited repatriation should not be allowed in order to reunite Palestinians with their families living in Israel.⁴⁵¹ This is also not to say that the Palestinian right to return to their homes is wholly unfeasible. If total repatriation is not possible in the scheme of a final peace settlement, then alternatives must be explored.

D. *Compensation for Property and Compensation for the Inability to Exercise a Right*

Above all, U.N. Resolution 242 requires a just settlement.⁴⁵² Dislocating a large portion of the Israeli population would not be fair, nor would it be fair to ignore the property rights that Palestinians cannot exercise. Compensation is the natural alternative, but in what form? Perhaps the original solution proposed in U.N. Resolution 194 can spark a compensation scheme that balances the needs for territorial unity and individual rights.

. . . in areas where there was no orderly system of registration and the substantive provisions of the property law were archaic and complicated, as in Palestine/Eretz Yisrael consisted of antiquated Ottoman legislation and a few British ordinances. Needless to say, only a small number of Israelis and Palestinians are familiar with the authoritative Turkish texts. Moreover, land registration was very sparse, and the boundaries of those plots which were registered during the Ottoman period (until 1917) were described only verbally, without reference to maps. Therefore, those plots are very hard to locate. Furthermore, local usage of land cultivation and rules of succession resulted in joint ownership of large unregistered plots by several owners, each holding only a fraction of the title.

Benvenisti & Zamir, *supra* note 5, at 337.

Considering that most of the land taken was taken over fifty years ago, determining what belongs to whom will be a difficult but necessary task. Actual repossession, as opposed to compensation, would require the determination of specific boundaries as opposed to more generalized ownership rights. This specific determination would require an unimaginable amount of research and bureaucracy.

449. Additionally, if there will be separate states of Israel and Palestine, it is illogical to have half of the Palestinian population in Israel. Furthermore, most of the population of Israel would be displaced. Currently there are about 6.1 million Israelis and 3.5 Palestinian refugees. See Samar Assad, *Israel Rejects Palestinian Demand*, ASSOC. PRESS, Jan. 10, 2000, 2000 WL 3304851.

450. The demographic shift that Israel would sustain by absorbing all these refugees would destroy its Jewish character, thus challenging the nature of the state itself. See Alpher et al., *supra* note 311, at 15.

451. These topics are beyond the scope of this paper.

452. Resolution 242, *supra* note 151.

Resolution 194 gives a choice to absentee landowners between compensation and repossession.⁴⁵³ Resolution 194, first and foremost, affirms the right of the dispossessed to reclaim their property.⁴⁵⁴ In essence, the dispossessed either get compensation, repossession, and a choice between the two.⁴⁵⁵ Resolution 194 also compensates (through money or repossession) on an individual level.⁴⁵⁶ Finally, Resolution 194 acknowledges the right of the individual Palestinian to exist as part of a state and to live in peace with his neighbors.⁴⁵⁷

These principals lay the foundation of a practical compensation scheme where repossession is not possible. The Israeli government can acknowledge the moral and political right of the dispossessed Palestinians to return, if not the actual exercise of this right.⁴⁵⁸ Palestinians must be compensated for this choice because the dispossessed effectively lose the choice between compensation and repossession. Put another way, compensation to Palestinian landowners must have a premium because they lose the choice to repossess. Since compensation can also take place on an individual level, the dispossessed should also have autonomy over the money they receive for their land.⁴⁵⁹ Finally, the Palestinian people can have their own state, and must live in peace with their neighbor Israel.

1. Acknowledgement of a Right to Return

As stated before, the Palestinian right of return is at the core of the Middle Eastern conflict.⁴⁶⁰ Many Palestinians have joined to oppose Arafat's position in the negotiations because of his willingness to forgo the right to return.⁴⁶¹ If actual repatriation is impossible,

453. TAKKENBERG, *supra* note 83, at 243 (quoting Paragraph 11 of United Nations General Assembly Resolution 194, promulgated in 1948).

454. *Id.*

455. *Id.*

456. *See generally id.*

457. *Id.* at 244.

458. One plan proposed by Palestinian negotiators suggested that the recognition of the right to return would be enough. *See* Dana Budeiri, *Arafat Makes Peace Offer*, ASSOC. PRESS, Jan. 26, 2000, 2000 WL 9751122.

459. Alpher et al., *supra* note 311, at 14. Palestinians want to be compensated on an individual, rather than a collective level. *Id.*

460. Weiner, *supra* note 99, at 1.

461. Rubenstein, *supra* note 158. The Israeli version of this extreme position can be seen in an article by Yehuda Ari'el stating that ". . . we are strengthening the Palestinians, who are constantly continuing to plunder and steal our property, they are weakening us to the point of the danger of siege and elimination of our settlements." Yehuda Ari'el, *Baraq Causing Israel's 'Self Destruction,'* WORLD NEWS CONNECTION, Feb. 7, 2000, 2000 WL 13793016.

then the least Israel can do is recognize, in principal, the right of the Palestinians to return to their homes in what is now Israel.⁴⁶²

The right to return is a political issue.⁴⁶³ A diplomatic concession by Israel that it is largely responsible for the refugee problem, and that the nation was built on property that did not belong to it, could lay the foundation upon which negotiations could successfully continue.⁴⁶⁴ A possible scenario may be that the Palestinians give up their actual right to return to their homeland, while Israel gains the assurance of Jewish sovereignty by making this concession.⁴⁶⁵ What Israel may lose, however, is a sense of legitimacy.⁴⁶⁶ An acknowledgement that the land belonged to the Palestinians implicitly contradicts the Zionist notion that Palestine was "a land without a people, for a people without a land."⁴⁶⁷ The recognition of the Palestinians' right to return to their property, however, is a small price to pay for the continued existence and security of the Israeli nation.

2. Compensation for the Choice

The choice between compensation and repatriation was a separate right granted to the Palestinians in Resolution 194.⁴⁶⁸ Since Palestinians would not only give up the right to repatriation, but also the right to choose repatriation, they should be compensated not only for their property, but also for the right to choose.

This measure would give Palestinians the peace of mind that Resolution 194 has been carried out, in some form. Although Israelis see Resolution 194 as inflexible and extremist, Palestinians see it as a compromise solution.⁴⁶⁹ If this "compromise" solution, affirmed every year by the United Nations,⁴⁷⁰ is carried out, Israel saves face with the international community.⁴⁷¹ Palestinians would simultaneously get satisfaction in the implementation of Resolution 194.

462. Budeiri, *supra* note 458.

463. Alpher et al., *supra* note 311, at 14.

464. Budeiri, *supra* note 458.

465. Alpher et al., *supra* note 311, at 15. One of Israel's gravest concerns is that the return of refugees would create a "fifth column" that would destroy the state's Jewish character. See Abdallah, *supra* note 448, at 3.

466. See generally Alpher et al., *supra* note 311.

467. See *supra* note 35 and accompanying text; see also Alpher et al., *supra* note 311, at 15.

468. TAKKENBERG, *supra* note 83, at 243 (quoting Paragraph 11 of United Nations General Assembly Resolution 194, promulgated in 1948).

469. 'Abd-al-Rahman, *supra* note 288.

470. Nashashibi, *supra* note 389.

471. The international community has condemned Israel's refusal to implement Resolution 194. Quigley II, *supra* note 286, at 184.

3. Individual Compensation for Property

While many have advocated collective compensation between the two governments, Resolution 194 does not.⁴⁷² Resolution 194 has created an expectation that individuals will be compensated.⁴⁷³ The main advantage of collective compensation is ease, since only a single figure must be negotiated.⁴⁷⁴ Private property owners lose out, however, because their individual rights are bartered without consent.⁴⁷⁵ Palestinians should not be made pawns in a final settlement negotiation.⁴⁷⁶

One writer compares the Palestinians' desire for individualized compensation to the World Jewish Restitution Organization's efforts to return Jewish owned property confiscated by Nazis and Communist regimes.⁴⁷⁷ He quotes Knesset speaker Avraham Burg, stating, "What we are talking about is principal. We are not into the price of business. What we want is that not one piece of property which belonged to a Jew will remain in non-Jewish hands."⁴⁷⁸

4. Living in Peace With Its Neighbors

Finally, and most importantly, regardless of which settlement is decided upon, peace must exist between neighbors. Although the nations visualized in Resolution 194 where Arabs and Jews live next door to each other will probably not be realized in the near future, both parties must act as good neighbors during the negotiations process and beyond. If this peace materializes, the great sacrifices necessary will be worth it.

V. CONCLUSIONS

This note has focused on the rights of Palestinian landowners to reclaim their property in Israel and the Occupied Territories. Without secure property rights, a new Palestinian state cannot exist. Additionally, unless past injustices are rectified, the population of

472. TAKKENBERG, *supra* note 83, at 243 (quoting Paragraph 11 of United Nations General Assembly Resolution 194, promulgated in 1948).

473. *Id.*

474. *Id.*

475. Nashashibi, *supra* note 290.

476. Quigley II, *supra* note 286, at 171 n.11 (quoting Dean Rusk, Summary records of Meetings 21 September-8 1948, U.N. GAOR, 3d Sess., pt.1, C.1, at 909, U.N. Doc. A/C.1/SR.226 (1948)). For this reason, both Palestinians and Jews dispossessed of land in Arab countries oppose collective compensation. Nashashibi, *supra* note 389.

477. Nashashibi, *supra* note 389.

478. *Id.*

this Palestinian State will not be able to live in peace with its Israeli neighbor.

The history of the region shows that no one people can own the Holy Land. Since recorded history many have occupied this land, but few have managed to retain a lasting control. The Ottomans held the Holy Land for 500 years, but even this came to an end. Yet, because the modern world has revalued the dignity of human life through law, many Israelis have chosen not to act on what some feel is their Biblical right to the occupied territories. Instead, in the name of peace with their neighbors, and in compliance with international policy, they have opted to make concessions.

This paper considered both Occupier's Law and Human Rights law in Part III. Although Israel has complied with most of Occupier's Law, there are several notable violations. Israel has taken property in contravention to international law, and settled parts of its own population in the occupied territories. Israel has also violated Human Rights law by denying hundreds of thousands of Palestinians return to their homeland. Finally, Israel has failed to comply with U.N. General Assembly Resolution 194, although their admission into the United Nations was conditioned upon accepting this resolution.

Israel has had a hard time trying to create a state in a hostile and volatile part of the world. Unfortunately, Israel's success has led to suffering and injustice for Palestinians. A lasting peace will require concessions from both sides.

One solution that satisfies both law and equity is to implement the principals embodied in U.N. General Assembly Resolution 194. This would call for Israel to recognize, in principal, the Palestinians' right to return to their homes. The refugees' choice in 194 should be exchanged for a premium on the compensation they will receive for their property. This compensation should be paid individually, and not collectively. Finally, Palestinians must live in peace with Israel. Implementation of a plan based on these principals would be a "just settlement" as called for in U.N. Resolution 242.

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