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### Restitution as a Remedy for Refugee Property Claims in the Israeli-Palestinian Conflict

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# RESTITUTION AS A REMEDY FOR REFUGEE PROPERTY CLAIMS IN THE ISRAELI-PALESTINIAN CONFLICT

*Michael Kagan\**

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## I. INTRODUCTION

Property restitution has posed a significant challenge for international law since the end of the Cold War, particularly as the international community has worked to resolve conflicts that involved substantial population displacement along ethnic lines. Although restitution has deep roots in international law, recent cases of conflict resolution have produced a refined understanding of the legal basis and challenges to restitution, and has led to an effort to develop more detailed rules to guide its application. Recent literature assessing the restitution process in Bosnia and Herzegovina has noted that in the mid-1990s restitution was seen essentially as a means to achieving refugee return, but came to be seen as an autonomous right.<sup>1</sup> The conceptual transition to a rights-based approach to restitution shifted focus away from ethnically linked return and toward allowing individual displaced people to make free choices about their

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1. Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT'L L. & POL. 441, 451-52 (2005); Charles B. Philpott, *From the Right of Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia-Herzegovina*, 18 INT'L J. REFUGEE L. 30, 32 (2006).

property and homes.<sup>2</sup> This aided the implementation of international law by de-politicizing the refugee return process,<sup>3</sup> but it also “de-bundled” restitution from return.<sup>4</sup> As a result, “the return of property to people has not always resulted in the return of people to property.”<sup>5</sup> In short, rather than being forced to return to their original homes in order to reverse ethnic cleansing, refugees were free to decide to sell lost properties and restart their lives elsewhere. While many refugees did return home, many others chose not to.

The development of a rights-based approach to property restitution has significant implications for shaping a law-based resolution to the world’s largest and most difficult unresolved case of ethnic displacement and violence: the Israeli-Palestinian conflict. Palestinian refugees, who now number in the millions, have long sought restitution along with the right to return to homes inside Israel that belonged to them before the establishment of the State of Israel in 1948. There is also property in the occupied Palestinian territories (West Bank, East Jerusalem, and the Gaza Strip) that was owned by Jews before 1948.<sup>6</sup> As in the Balkans, the Palestinian claim to restitution has long been linked to return, which Israel has continually refused. During the Taba negotiations in January 2001, the Palestine Liberation Organization (PLO) called for restitution of lost refugee property, but Israel rejected the idea.<sup>7</sup>

Previous legal studies of the property issue have assumed that the main remedy for private property losses in the Israeli-Palestinian context will be compensation, and have generally ignored restitution claims.<sup>8</sup> This

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2. Philpott, *supra* note 1, at 33.

3. *Id.* at 75; Williams, *supra* note 1, at 553.

4. Philpott, *supra* note 1, at 75.

5. Williams, *supra* note 1, at 445.

6. On a small scale, private land claims have also become relevant in the 2005 dismantling of Israeli settlements in the Gaza Strip. There is a small portion of land owned by Jews from before the 1948 war inside one of the settlements that Israel built after occupying Gaza in the 1967 Middle East War. At the time of this writing, the Palestinian Authority is attempting to decide how to handle potential property claims by these original owners. See Cynthia Johnston, *Sensitive Land Dilemma Faces Palestinians in Gaza*, REUTERS, June 4, 2005.

7. See European Union “Non-Paper” prepared at Taba in Jan. 2001 [hereinafter EU “Non-Paper”], available at PLO Negotiations Affairs Department web site, [http://www.nad-plo.org/inner.php?view=nego\\_nego\\_tabo\\_ntabap](http://www.nad-plo.org/inner.php?view=nego_nego_tabo_ntabap) (last visited July 10, 2007). For an overview of the parties’ respective positions on refugee property issues in Israeli-Palestinian peace negotiations, see MICHAEL R. FISCHBACH, *THE PEACE PROCESS AND PALESTINIAN REFUGEE CLAIMS* 85-105 (2006).

8. See, e.g., Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT’L L. 295 (1995); Rex Brynan, *Financing Palestinian Refugee Compensation*, Workshop Paper July 14-15, 1999, available at <http://www.arts.mcgill.ca/MEPP/PRRN/brynen.html> (last visited July 10, 2007); Stacy Howlett, *Palestinian Private Property*

assumption was not based on any thorough legal analysis, but seemed to reflect an unwritten understanding that the refugee right of return would not be fully implemented and restitution would thus be irrelevant. Indeed, Israel's resistance to refugee return poses a major obstacle to achieving a peace settlement that complies with international law.<sup>9</sup> Yet, at time of writing (April 2006), the two-state solution that was envisioned during the 1990s appears quite distant at best. Given this pessimistic atmosphere, it is useful to question long-standing assumptions about how peace should be achieved, and look again at what international law has to say on the most contentious issues in the conflict.

Historian Michael R. Fischbach notes that one point of consensus between Israel, the Palestinians, the United States, and the United Nations has been that refugee property claims cannot be addressed without resolving larger questions of whether the refugees will return to Israel or be resettled in the Arab world or elsewhere.<sup>10</sup> A mutually assumed linkage between restitution and return, and thus between compensation and non-return, has traditionally led Israel and the United States to favor compensation and the Palestinians to reject it.<sup>11</sup>

The connection between restitution and return is natural, and in some respects valid. Refugees will not be able to freely choose whether to return to their homes unless they have the option of reasserting ownership of their homes. Likewise, restitution cannot be achieved in full if owners are not permitted to return, and are hence denied the option to enjoy the use of their own property. Yet, recent developments have illustrated that return and restitution are complimentary but nevertheless independent rights. Assuming a rigid equation between return and restitution can artificially constrain the options available to resolve the refugee problem. Understanding the autonomous nature of the right to restitution helps to expand the range of choices that can be offered to displaced persons, which can in turn help facilitate not just a bilateral agreement but the actual emergence of a lasting peace. I will return to this point in the conclusion of this Article.

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*Rights in Israel and the Occupied Territories*, 34 VAND. J. TRANSNAT'L L. 117 (2001); Yoav Tadmor, *The Palestinian Refugees of 1948: The Right to Compensation and Return*, 8 TEMP. INT'L & COMP. L.J. 403 (1994).

9. This Article does not aim to explore the legal issues behind the Palestinian refugees' right of return, which has been analyzed extensively elsewhere. See generally John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171 (1998); Gail Boling, *Palestinian Refugees and the Right of Return: An International Law Analysis*, Badil Resource Center for Palestinian Residency and Refugee Rights (Jan. 2001).

10. FISCHBACH, *supra* note 7, at 68.

11. *Id.* at 16-17, 69.

My goal in this Article is to examine restitution as an autonomous human right for refugees displaced in the Israeli-Palestinian conflict, and to assess the implications of taking such a rights-based approach. I conclude that the refugees have a strong legal claim to restitution. In international law, compensation is relevant only when restitution is materially impossible, where property has been damaged or declined in value so that restitution is not a complete remedy for the victim's loss or where a refugee chooses not to seek restitution. Current empirical research about land usage in Israel indicates that a great deal, and possibly the majority, of lost refugee property inside Israel is essentially vacant, and should still be available for restitution with little legal obstacle.

However, as in the Balkans, taking a rights-based approach has important implications for the way an abstract right will be implemented in actual practice. The most difficult cases for restitution in the context of a negotiated settlement between Israel and the Palestinians will involve properties that have been used and developed by secondary occupants, in this case mainly Israeli citizens. Cases of secondary occupation essentially present a situation of conflicting rights between returning refugees and secondary occupants. Both rights can in most cases be accommodated by providing one party compensation or alternative property, but the question will be whether the original property should go to the returning refugee (usually a Palestinian), or remain with the secondary occupant (usually an Israeli Jew or Israeli institution).

The trend in international law is to allow restitution and provide secondary occupants alternative housing or compensation. Yet, because Israel has been a recognized sovereign state for more than fifty years, private property acquired legally under Israeli law may be entitled to more protection than was afforded secondary occupants in the Balkans. Israel may also be able to offer defenses to restitution in cases where property was used for military necessity or for genuine public purposes that were free of discrimination.

At the end of this Article, I analyze how such conflicting rights may be measured and balanced. The resolution of such conflicts will depend in many cases on how much emphasis an eventual peace agreement places on actual return. As Rhodri C. Williams wrote recently about Bosnia and Herzegovina: “[o]ne of the main obstacles to coherent implementation of post-conflict property restitution in Bosnia . . . is ambiguity regarding the legal source and justification for the right to post-conflict property restitution.”<sup>12</sup> Williams advises that peace settlements need to address “uneasy questions regarding the relationship between restitution and

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12. Williams, *supra* note 1, at 447.

return.”<sup>13</sup> I argue that in the Israeli-Palestinian context the key question will be whether an eventual peace settlement makes reversing ethnic population displacement a high priority.

### A. *Defining Restitution*

In general, restitution is a form of restorative justice “by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position.”<sup>14</sup> In the case of housing and land, and especially in the case of refugee repatriation, restitution is normally understood as return of the property itself, so that a returning refugee reacquires title and actual possession. Restitution is to be distinguished from compensation, in which a victim is paid money in exchange for his or her injury.<sup>15</sup>

There is an additional remedy, a hybrid between compensation and restitution, in which the state provides an alternative property of equivalent value. Alternative property can conceivably be provided either to a refugee who is denied restitution or to a secondary occupant who is displaced by restitution. Like compensation, this option is an alternative when actual restitution is impossible, and has been used extensively in other conflict resolution settings. This article will not explore this possibility in detail because I conclude that actual restitution is the primary remedy for property losses under international law. However, provision of alternative property should be understood as an important possible means of compensation when restitution is impossible.

In other conflict resolution situations, the negotiated settlement sets out general rules defining who may claim restitution, standards for determining whether restitution should actually be granted, and a mass claims procedure and tribunal system to adjudicate such claims. The primary aim of this article is to lay out the principles of international law

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13. *Id.*

14. Paulo Sergio Pineheiro, *The Return of Refugees' or Displaced Persons' Property* 11 (Comm'n on Human Rights, Sub-Comm'n on the Promotion and Protection of Human Rights, 54th Sess. Working Paper No. E/CN.4/Sub.2/2002/17 (June 12, 2002)).

15. In some private law contexts restitution is used as a measure of monetary compensation, especially with moveable property. In the common law, different forms of restitution are based in part on distinction between personal restitution (*in personam*) and proprietary restitution (*in rem*). See PETER JAFFEY, *THE NATURE AND SCOPE OF RESTITUTION* 279 (2000); ANDREW BURROWS, *THE LAW OF RESTITUTION* 52-53 (2d ed. 2002). However, the property at issue here is mainly immovable property (land and homes). Most relevant sources of international law and policy on focus on actual property return and consider monetary compensation to be an alternative and separate remedy. Actual return of property raises unique legal dilemmas because it pits the rights of returning refugees against secondary occupants of the property.

that should govern these private property cases in the Israeli-Palestinian situation.

### B. *Summary of Legal Analysis*

The body of this Article is divided into four parts. The first section is factual. It summarizes how Palestinian refugees were dispossessed of their property inside Israel through a combination of Israeli force and Israeli law, as well as the disposition of Jewish property that fell under Jordanian and Egyptian control in the West Bank, Jerusalem, and Gaza Strip between 1948 and 1967. I will focus more on Israeli seizures of Palestinian property both because they were vastly larger in scale, and because there is more information available about them. Israel began seizing Arab property by force in an arbitrary fashion during the 1948 war, and quickly followed these seizures by creating a legal regime that transferred Arab land to institutions controlled by Jews. Israel's nascent government attempted to retroactively legitimize its actions and facilitate further seizures and transfers through legislation enacted during the first five years of Israel's existence. These actions, at first *ad hoc* and later organized, had a pronounced discriminatory aspect. Land that had been held by Arabs came to be owned and controlled by Jews and mainly for the benefit of Jews.

The second section argues that most of these seizures and transfers were illegal under international law except where they were justified by military necessity, and constitute a continuing violation of international law today. This is an essential conclusion to reach because restitution is generally available only if the original confiscation was illegal. A strong argument can be made that Israeli property seizures represented illegal plunder, a violation of international humanitarian law and customary international law. The seizures also violated non-derogable norms prohibiting racial discrimination. Having been illegal at their birth, Israel's land policies toward refugee property (which are still in force today) became continuing violations of human rights law after the advent of the International Bill of Rights in the 1960s.

Having established that the property confiscations were and remain illegal, the third and fourth sections discuss remedies. As victims of continuing violations, refugees may seek remedies according to international law as it stands today, even though the violation began decades ago. It is a general principle of international law that restitution is the preferred remedy for violations of law, particularly in cases concerning property and refugee repatriation. This principle has been recognized by



the International Court of Justice, the International Law Commission,<sup>16</sup> U.N. human rights supervisory bodies, the Executive Committee of the U.N. High Commissioner for Refugees<sup>17</sup> (UNHCR), and is supported by European Court of Human Rights jurisprudence.

However, if restitution is materially impossible to achieve, victims may be forced to accept compensation rather than restitution. In the specific case of refugee repatriation, the greatest challenge to property restitution comes from secondary occupants of residential property. An UNHCR study of land issues in refugee repatriations and a report commissioned by the U.N. Sub-Commission on the Promotion and Protection of Human Rights both concluded that there is currently a lack of sufficient legal guidance about how to resolve such conflicting rights, and that this is an area in which more legal development is needed.<sup>18</sup>

Palestinians can cite several legal authorities to argue that, at most, Israeli secondary occupants of refugee property should be given alternative housing or compensation, but that restitution for refugees should not be impeded by the claims of private Israeli citizens who currently reside on the property. Yet not all recent conflict resolution agreements in other contexts have clearly followed this rule. As a result, Israeli and Palestinian negotiators may have some flexibility to design an equitable solution in these cases that would comply with international law. Equitable principles are not strict rules of law, but they are part of international law and can be important in influencing particular decisions in particular cases.<sup>19</sup>

The question of secondary occupation arises only in the most difficult cases; where refugee property remains unused or has not been substantially developed there should be little legal reason to block restitution.

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16. The International Law Commission's draft articles are indicative of generally accepted principles of law, similar in authority to the writings of leading publicists. *See generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24 (6th ed. 2003); OPPENHEIM'S *INTERNATIONAL LAW* 30 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L L. 857, 867 (2002).

17. The Executive Committee is currently composed of 72 member states. U.N. High Commissioner for Refugees (UNHCR) Executive Committee, <http://www.unhcr.org/cgi-bin/texis/vtx/excom?idc40111aab4>. Its conclusions are passed by consensus of these states, and are hence evidence of customary norms related to refugee law, although the conclusions are not strictly binding. UNHCR, *Basic Facts*, at <http://www.unhcr.org/basics.html>.

18. U.N. HIGH COMMISSIONER FOR REFUGEES (UNHCR) INSPECTION AND EVALUATION SERVICE, *THE PROBLEM OF ACCESS TO LAND AND OWNERSHIP IN REPATRIATION OPERATIONS* 48, EVAL/03/98 (May 1998) [hereinafter UNHCR INSPECTION AND EVALUATION SERVICE]; Pinheiro, *supra* note 14, ¶ 48; COMM'N ON HUMAN RIGHTS, SUB-COMM'N ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, 56TH SESS. FINAL REPORT OF THE SPECIAL RAPPORTEUR ¶¶ 8-9 E/CN.4/Sub.2/2005/17 (June 28, 2005).

19. *See* OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 16, at 44.

Secondary occupants who use property for commercial purposes would be entitled to less legal protection than those who make their homes on former refugee property. Current research indicates that there is a great deal of refugee property inside Israel that is available for restitution without displacing Israelis. Therefore, even if one accepted the most generous possible approach toward the rights of secondary occupants of refugee property, many if not most Palestinian refugees should still be able to obtain restitution under international law.

## II. NATURE OF THE PROPERTY IN QUESTION

### A. *Scope of Potential Palestinian Property Claims*

Israel was founded in 1948 when the British government ended its mandate over Palestine. The first Arab-Israeli War lasted (in different phases) from November 1947 until armistice agreements were signed between Israel and several Arab states in 1949. In the course of this conflict around 700,000 non-Jewish Palestinians were displaced, representing roughly three-quarters of the non-Jewish population of the country, and beginning the Palestinian refugee problem that remains to this day at the heart of the Israeli-Palestinian conflict.<sup>20</sup> These refugees left behind substantial immovable property, which is the main focus of this Article. Most of their property was seized by Israel, in most cases through the mechanism of the Custodian of Absentee Property.

Palestinian property claims inside Israel are potentially immense in scope, though somewhat difficult to define precisely.

There is no one agreed-upon figure for the land that moved from Arab hands to the state [of Israel] in the wake of 1948. This stems from Israel's expansion of the conception of state land during the 1950s and 1960s, the fact that land registration and settlement of title were not completed during the [British] mandate [over Palestine], and the differing views regarding which land should be included.<sup>21</sup>

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20. For a history of the expulsion and flight of the refugees, see BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED* (2003); NUR MASALHA, *EXPULSION OF THE PALESTINIANS: THE CONCEPT OF TRANSFER IN ZIONIST POLITICAL THOUGHT, 1882-1948* (1992); NUR MASALHA, *THE POLITICS OF DENIAL: ISRAEL AND THE PALESTINIAN REFUGEE PROBLEM* (2003); ILAN PAPPÉ, *A HISTORY OF MODERN PALESTINE* (2004).

21. Alexandre (Sandy) Kedar & Jeremy Forman, *From Arab land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV'T & PLAN.

At the high end, in 1951 the U.N. Conciliation Commission for Palestine (UNCCP) estimated that more than 80% of Israel as defined by the 1949 armistice lines was in fact Arab-owned land, or 16,324,000 out of 20,500,000 dunums.<sup>22</sup> At the other extreme, a 1948 Israeli commission estimated that refugees lost more than 2 million dunums,<sup>23</sup> while other Israeli official and independent estimates are of between 4.2 and 6.5 million dunams.<sup>24</sup> A 1964 U.N. estimate reported 7 million dunums.<sup>25</sup> Despite these disparate estimations, it is clear that much of Israel was Arab land until 1948.

[L]and officially owned by Jewish individuals and organizations only amounted to approximately 8.5% of the total area of the State. With the addition of land that was owned formerly by the British Mandatory government and thereby inherited by Israel, only about 13.5% (2.8 million dunums; 700,000 hectares) of Israeli territory was under State or Jewish ownership. Thus, a large discrepancy existed between the sovereignty and control of land by the Jewish State on one hand and its ownership and possession on the other.<sup>26</sup>

It disputed how much refugee property is actually in use by Israelis today because Jewish Israeli life appears to still be concentrated in those regions that were Jewish-owned before 1948. It is also essential to note that around one in five Israeli citizens are Palestinian Arabs whose families either were not displaced in 1948 or were internally displaced within the borders of the future State of Israel. However, it is safe to assume that of the land that Jewish Israelis use today, some could be subject to Palestinian refugee property claims. For instance, by 1951, "the Custodian [of Absentee Property] owned more than two-thirds of all the citrus groves and olive plantations in Israel."<sup>27</sup> Confiscated urban property included residential property (homes and apartments), as well as more than 8000 businesses. "The Custodian found himself the largest legal urban

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DEV.: SOC'Y & SPACE 809, 812 (2004).

22. See LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEE IN INTERNATIONAL LAW* 339 (1998); Terry Rempel, *The Ottawa Process: Workshop on Compensation and Palestinian Refugees*, 113 J. PALESTINE STUD. 36-49 (Autumn 1999). See MICHAEL R. FISCHBACH, *RECORDS OF DISPOSSESSION* 323-25 (2003).

23. See FISCHBACH, *supra* note 7, at 44.

24. Kedar & Forman, *supra* note 21, at 812.

25. See HUSSEIN ABU HUSSEIN & FIONA MCKAY, *ACCESS DENIED: PALESTINIAN LAND RIGHTS IN ISRAEL* 143 (2003); Kedar & Forman, *supra* note 21, at 812.

26. Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 INT'L L. & POL. 923, 945-46 (2001).

27. FISCHBACH, *supra* note 22, at 35.

landlord in Israel after 1948.<sup>28</sup> Many refugee buildings were taken over or renovated by Israel,<sup>29</sup> although many others were destroyed or left neglected.

In an attempt to provide a more specific understanding of the types of property that might be subject to restitution, the following discussion will attempt to trace, in summary fashion, the nature of the property lost by the refugees, and the means of its expropriation by Israel.

### B. *Private v. Municipal and Community Property in Pre-1948 Palestine*

Several aspects of Arab land ownership patterns are important to note in order to understand the nature of refugee losses. From 1920 to 1946, British Mandate authorities attempted to register and map all land in Palestine, but they succeeded in mapping only 35%, most of which was in the proposed Jewish State recommended by the U.N. General Assembly Resolution 181 in 1947.<sup>30</sup> This meant that traditional use patterns and Ottoman-era property classifications are relevant to understanding the types of property lost by Arab refugees.<sup>31</sup>

Ottoman law embraced forms of private property, but not the same forms conventionally used in western private law. Under the Ottoman Land Code of 1858,<sup>32</sup> some land was considered *Mulk*, which was equivalent to full private ownership. Most of this land was in urban areas.<sup>33</sup> Also similar to private property was the category *Miri*, which was a temporary grant from the Sultan to use, control, and possess land for a particular purpose. *Miri* grants could be quite long term, and someone who used a *Miri* grant continuously for ten years could ask for the land to be registered in his name. *Miri* rights could also be inherited or assigned to others, though if the land ended up with no heir then it would revert to the state.<sup>34</sup> Ottoman law included another category of land belonging to the state, *Mawat* land, which was actually undeveloped and unused, defined as being at least one and a half miles from inhabited areas, or “at such a

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28. *Id.* at 28.

29. TAKKENBERG, *supra* note 22, at 339.

30. HUSSEIN & MCKAY, *supra* note 25, at 108-09.

31. In 2005, the Turkish government agreed to turn over Ottoman era land records for Palestine to the Palestinians in order to assist in the documentation of Palestinian land claims. See Danny Rubinstein, *Turkey Transfers Ottoman Land Records to Palestinian Authority*, HAARETZ ONLINE, Oct. 11, 2005, <http://lists.mcgill.ca/scripts/wa.exe?A2=ind0510b&L=fofognet&P=769>.

32. See generally Kedar, *supra* note 26, at 932-33.

33. HUSSEIN & MCKAY, *supra* note 25, at 106.

34. *Id.*

distance from towns and villages from which a human voice cannot be heard at the nearest inhabited place.”<sup>35</sup>

In rural areas, much land that was in practice used communally by farmers is somewhat difficult to categorize in terms of Western concepts of individual ownership. In nineteenth century Palestine, “the most impressive feature of communal life was the *musha*’ system, a voluntary method of cultivation based on the rotation of collectively owned plots of land among villagers, so that all would in turn have the benefit of the more fertile parcels.”<sup>36</sup> Ottoman land law accommodated such practices through the concept of *Matruka* lands, which were technically owned by the state but were assigned for general public use as farmland, markets or roads.<sup>37</sup> *Matruka* land could not be bought and sold.<sup>38</sup> “In a typical Palestinian village the built-up area would be *Mulk*, the farmland around it would be *Miri*, other land close to the town might be *Matruka*, while land further away from inhabited areas would be *Mewat*.”<sup>39</sup> By 1948, only three local Arab councils had registered their *Matruka* land.<sup>40</sup> *Matruka* land is critical because much of the land confiscated by Israel would likely have been understood by local residents to have belonged collectively to a village, rather than to an individual. But since it was official public land, it could be also easily be classified as state land.

For private property, Israel formally abolished the Ottoman land categories with its 1969 Land Law. The new Israeli law established just one form of ownership, and allowed former holders of *Mulk*, *Miri*, as well as private claims to *Mewat* land, to be registered as full owners.<sup>41</sup> Some *Matruka* (communal) land was registered with local authorities.<sup>42</sup>

### C. Formal Mechanisms for Property Seizures

#### 1. Israeli Laws and Regulations Authorizing Property Seizures

Property seizures closely followed refugee flights and expulsions through the course of the 1948 war. Seizures began *ad hoc*, though as Israel consolidated its military victory it worked to create legal and regulatory structures for confiscating property. Shortly after seizing the

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35. *Id.* at 106-07.

36. PAPPE, *supra* note 20, at 15.

37. HUSSEIN & MCKAY, *supra* note 25, at 107.

38. *Id.*

39. *Id.* at 111.

40. *Id.* at 108.

41. *Id.* at 115.

42. HUSSEIN & MCKAY, *supra* note 25, at 115.

land, the state worked to transfer it to effective Jewish control. Both the seizures and the transfers were legitimized, at least for Israeli domestic law, via legislation passed by the Knesset (Israeli Parliament) in 1950. However, as a factual matter, seizures and transfers occurred before the enactment of regulations or legislation. Israeli authorities were often attempting to legitimize transactions after the fact. The legal regime they enacted enabled the State of Israel to transform previously Arab property into “Israel Lands” that were managed mainly for the benefit of Jews.<sup>43</sup>

During the fighting and even before the official founding of the State of Israel, decisions to seize refugee property were taken by a range of actors, including the Jewish Agency, the Agricultural Center, the Israeli army and its precursor militia—the Hagana, and individual Jews.<sup>44</sup> In March 1948 (before the founding of the state), the Hagana created a Commission for Arab Property in Villages, and in April 1948 (following the conquest by Israeli forces of the northern cities of Haifa, Tiberias and Safad) established the Supervisor of Arab Property in the Northern District, as well as the Committee for Abandoned Arab Property. In July 1948, the Custodian of Abandoned Property in Jaffa was created.<sup>45</sup>

These disparate decisionmaking bodies became more centralized in mid-1948. Israel enacted its first legal instrument regarding refugee property on June 21, 1948 (Abandoned Property Ordinance No. 12 of 5708/1948), which was retroactive to May 16, 1948 (Israel’s Independence Day).<sup>46</sup> In July 1948 Israel established the Ministerial Committee for Abandoned Property.<sup>47</sup> The first Custodian of Abandoned Property (under the Ministry of Finance) was appointed on July 15, 1948, two days after the capture of Ramle and Lydda, two Arab cities in the center of the country.<sup>48</sup> The applicable laws and regulations were repeatedly revised over the coming months and years.<sup>49</sup>

These initial regulations authorized the seizure of any land that was “abandoned.”<sup>50</sup> Abandoned areas were defined to include any area that “(1) had been conquered by or surrendered to Israeli armed forces; or (2) had been partially or completely deserted by its inhabitants.”<sup>51</sup> Hence, Israel’s first law governing seizure of property made military conquest as much a

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43. See generally Kedar & Forman, *supra* note 21.

44. See FISCHBACH, *supra* note 7, at 13-15.

45. *Id.* at 13.

46. It is not clear how, if at all, property seizures that took place before the formal proclamation of Israeli independence were legitimized.

47. FISCHBACH, *supra* note 7, at 13.

48. *Id.* at 13.

49. See generally *id.* at 13-16.

50. Kedar & Forman, *supra* note 21, at 813.

51. *Id.* at 813 n.5.

criterion for confiscation as the flight of the owners. Yet, Israeli policymakers found the Abandoned Areas Ordinance unsatisfactory because it did not legally permit the state to sell or transfer the seized property, and because some officials worried that it would be condemned internationally.<sup>52</sup> On August 20, 1948 the Ministerial Committee for Abandoned Property decided to formally expropriate refugee lands.<sup>53</sup> “[T]he [Abandoned Property] ordinance stipulated that abandoned areas had to be officially designated. As this step was never taken, it appears that the ordinance was never legally applied.”<sup>54</sup>

In December 1948, Israel shifted its definition of land subject to confiscation in order to appear more legally legitimate by mirroring World War II-era British laws.<sup>55</sup> The Minister of Finance issued the Emergency Regulations regarding Absentee Property, which established the basic definition of an absentee that is still in use today.<sup>56</sup> From this point, “absentee property” was defined by the personal status of its owner, rather than by the military conquest of the land.<sup>57</sup> Modeled after the 1939 British Trading with the Enemy Act, these regulations allowed the Custodian to indefinitely seize and administer land, but not to acquire or transfer title.<sup>58</sup>

These limitations on transfer did not completely prevent the State of Israel from selling refugee land. The Custodian began issuing leases to Jewish farmers,<sup>59</sup> and in December 1948 the State illegally sold 1 million dunams of confiscated land to the Jewish National Fund (JNF).<sup>60</sup> The Custodian also did not use rental moneys and profits from Arab business as prescribed.

According to Israeli legislation, the Custodian was to set aside all net profits he received from the refugee property under his sequestration and keep them for the benefit of the absentees. . . . Most of this came from the sale of moveable goods, inasmuch as most of the lease fees collected by the Custodian went toward expenses, repairs, taxes, and the like. . . . The Israeli government did not actually hold onto the money. It quickly spent it.<sup>61</sup>

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52. *Id.* at 814.

53. FISCHBACH, *supra* note 7, at 13.

54. Kedar & Forman, *supra* note 21, at 814.

55. *Id.* at 815.

56. HUSSEIN & MCKAY, *supra* note 25, at 70.

57. *Id.*

58. Kedar & Forman, *supra* note 21, at 815.

59. FISCHBACH, *supra* note 7, at 13-16.

60. *Id.* at 14-15; Kedar & Forman, *supra* note 21, at 815.

61. FISCHBACH, *supra* note 22, at 32.

The State's inability to legally sell confiscated property led to major legislative reform. On March 14, 1950, the Knesset enacted the Emergency Regulations (Absentees' Property) Law of 5710/1950, which solidified Israeli control over refugee property in permanent legislation (rather than emergency regulations). The law prevented "absentees" from selling their properties.<sup>62</sup> The law also permitted the Custodian to sell land to the Development Authority.<sup>63</sup> A separate statute, the Development Authority (Transfer of Property) Law (1950), allowed the Development Authority to sell either to the state for general public use, or to the JNF.<sup>64</sup>

These two statutes established a legal means by which property originally owned by Arab refugees could be first seized by the Custodian, and then transferred to Jewish institutions for permanent use. While the original 1948 Absentee Property Ordinance had been based on a British model, the 1950 legislation was modeled on a Pakistani legislative scheme that allowed property belonging to Hindu and Sikh refugees to be reallocated to Muslim refugees from India.<sup>65</sup> In the Pakistani system, a Custodian of Evacuee Property was authorized to transfer property to a Rehabilitation Authority which could then transfer land to others.<sup>66</sup> Israeli Government officials told the Knesset that the Custodian of Absentee Property would be acting to safeguard refugee property, and would behave as a trustee.<sup>67</sup> But the legislation actually allowed the Custodian to surrender control of the property.

By 1951, the Development Authority, the state, and the JNF held around 92% of all of the land in Israel.<sup>68</sup>

In 1953, the Custodian formally sold to the Development Authority all the lands vested in him at the time. In 1961, after having sold some of its land to the JNF, the Authority held 2,596,000 dunums, or 13 per cent of all Israel Lands. This remained almost unchanged in 2000. . . . The JNF owns . . . a total of 2,542,000 dunums.<sup>69</sup>

The transfer of refugee land out of the hands of a nominal trustee was solidified by Israel's 1960 establishment of the Israel Lands Administration to govern usage of all land held by the state, the JNF, and

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62. *Id.* at 14.

63. *Id.* at 14-15.

64. *Id.*

65. Kedar & Forman, *supra* note 21, at 816.

66. *Id.*

67. *Id.* at 817.

68. *Id.* at 823.

69. HUSSEIN & MCKAY, *supra* note 25, at 149.



the Development Authority.<sup>70</sup> This was essentially a closed reservoir of land. Because the state was prohibited by law from selling agricultural land to anyone except the JNF, the JNF could not sell property at all, and the Development Authority could sell only to the state or the JNF.<sup>71</sup>

## 2. Private Rights to Possession on Israel Lands in Israeli Law

In 1953 Israel enacted the Land Acquisition (Validity of Acts and Compensation) Law, which was intended to legitimize retroactively previously *ad hoc* land seizures.<sup>72</sup> Also, Israeli courts have legitimized unauthorized or *ad hoc* Jewish settlements on refugee land using the concept of an “implied license.” In this doctrine, which is very similar to the common law concept of adverse possession, a Jewish settler can claim the right to remain on a piece of land by virtue of long term occupancy.<sup>73</sup> For instance, in 1962 the Israeli High Court refused to evict Jews from a pre-1948 Arab village because the evictions would dispossess them “from their homes in which they have dwelled by permission and not fraudulently for approximately fourteen years.”<sup>74</sup> In other cases, Israeli courts have held that individuals who came on their own to unauthorized settlements may be evicted, but those who came with licenses from the Jewish Agency have a right to remain.<sup>75</sup>

There are two aspects of these cases that are important for Palestinian restitution claims. First, the Israeli jurisprudence holds that individuals have a right to rely on licenses issued by the state or quasi-state institutions, no matter how these institutions themselves acquired the land.<sup>76</sup> Second, these cases typically pitted individual Jewish settlers

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70. The Israel Lands Administration was established by two laws, Basic Law: Israel Lands (1960) and the Israel Lands Law (1960). Israel Lands Administration Law, 5720-1960, 312 LSI 56 (196) (Isr.).

71. HUSSEIN & MCKAY, *supra* note 25, at 149.

72. See Usama Halabi, *Israel's Land Laws as a Legal-Political Tool*, 5 (Badil Resource Center Working Paper No. 7, 2004).

73. See Kedar, *supra* note 26, at 990-93.

74. CA 160/62 Ovadia Levy v. The Mayor of the City of Tel Aviv-Jaffa [1962] HCJ 16(3) 1773, 1777.

75. CA 290/97 Eizman v. Dev. Auth. [1958] S. Ct. 22(1) 16, 18-19, *quoted in* Kedar, *supra* note 26, 991-92.

76. *Id.* The district court ruled:

the settlers believed . . . that they occupied their land by license of the Jewish Agency . . . and on the basis of this belief invested money and labor in building and developing their farms. The fact that since 1948 . . . and until the initiation of this lawsuit, nearly ten years, they were permitted to stay on the land clearly proves that they received retroactive license to do so.

against Israeli state institutions such as the Development Authority or local municipalities. By ruling in favor of the individual settlers, the Israeli courts inherently recognized two separate parties in the occupation of former Arab land: the state or quasi-state institutions, and the individual Jewish occupants. Israeli jurisprudence protects the individual occupants' expectations even when they either received no license, or when the agency issued the license *ultra vires* without itself properly acquiring ownership. The validity of these distinctions will be essential in determining the scope of Israeli defenses to restitution, a point that I return to in the fifth chapter of this study.

### 3. Discriminatory Nature of Land Regime

Israeli policies toward refugee property seizure were facially neutral with regard to religion and ethnicity. The definition of an "absentee" did not single out Arabs *per se*. In theory, anyone who was a national of, or resided even temporarily in, any Arab country that fought with Israel could be deemed an absentee, as well as anyone who left Palestine before September 1, 1948, or anyone who temporarily fled to a part of Israel that was at the time under Arab military control.<sup>77</sup> This included citizens of Western countries, Bahais, and Jewish citizens of Arab states who owned property in Palestine.<sup>78</sup> Nor was Israeli citizenship a basis for protection; many Arabs who were internally displaced within Israel were also considered absentees.<sup>79</sup> But the law contained means by which Israel could prevent confiscation of property owned by Jews:

In fact, [the absentee definition] was so all encompassing that it included most residents of Israel — Jews and Arabs alike. Israel, however, had no intention of applying this status to Jews, so the regulations contained a clause by which Jews could be systematically exempted, without incorporating explicitly discriminating provisions. The result was that practically no Jewish Israelis, but tens of thousands of Arab Israeli citizens, were classified as absentees, assuming the paradoxical legal identity of "present absentee."<sup>80</sup>

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*Id.*

77. FISCHBACH, *supra* note 7, at 24.

78. *Id.* at 24-25.

79. Benvinisti & Zamir, *supra* note 8, at 304.

80. Kedar & Forman, *supra* note 21, at 815.

These special exceptions allowed the Custodian to exempt absentees who left their homes for fear of Israel's enemies, or who were "capable of managing their property efficiently without aiding Israel's enemies."<sup>81</sup> According to historian Michael Fischbach, Jews of any nationality were always treated more favorably: "Jewish absentees owning property in Israel were treated differently from Arabs. The custodian generally released to them any property they owned in Israel upon their immigration to Israel. On other occasions, such land was released to their representatives."<sup>82</sup> In December 1949, the first Custodian of Absentee Property told a Knesset committee that "all efforts had been made not to apply the regulations to Jews."<sup>83</sup> To a lesser extent, the Custodian discriminated among Arabs as well, favoring Christian religious property over Muslim. Most Christian *waqf* (religious endowment) land was eventually returned to the respective churches. Muslim *waqf* land was managed by the Ministry of Religious Affairs Division of Muslim and Druze Affairs.<sup>84</sup>

The racial nature of Israel's property confiscation policy is also evident if compared to Jordanian pre-1967 practice in the West Bank and Jerusalem. The Jordanian custodian for enemy property confiscated property belonging to Arab Palestinians who had become Israeli citizens, as well as Jewish Israelis.<sup>85</sup> Israel effectively only confiscated non-Jewish (primarily Arab) property.<sup>86</sup>

Discrimination in favor of Jews is also evident in the way property has been administered once confiscated property became Israeli land. Land that came to be owned by the JNF is managed in an openly discriminatory manner because the JNF by its charter acquires land only for the benefit of the Jewish People.<sup>87</sup> It therefore will not lease land to non-Jews. Beyond this, the JNF has disproportionate influence over Israel Lands in general, including the land owned by the state and Development Authority.

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81. *Id.* at 815 n.8.

82. FISCHBACH, *supra* note 22, at 25.

83. Kedar & Forman, *supra* note 21, at 815 n.7 (quoting Knesset Law and Constitution Committee, 1949-50, minutes of Dec. 6 & 22).

84. FISCHBACH, *supra* note 22, at 39-40.

85. Benvinisti & Zamir, *supra* note 8, at 304.

86. *See id.* ("In August 1950, the Jordanian General Administrative Governor of the West Bank issued Proclamation No. 55. This proclamation provided, inter alia, that residents of the State of Israel (including its Arab citizens) would be considered enemies in relation to the laws regarding trading with the enemy.").

87. According to a recent statement by the JNF, "[A]ccording to a 1961 contract between the State of Israel and JNF, JNF-owned land can only be leased to Jews because we have a covenant to hold the land for our donors." JNF Special Report: Land Issue, [http://www.jnf.org/site/PageServer?pagename=special\\_report\\_land](http://www.jnf.org/site/PageServer?pagename=special_report_land).

While the JNF's restriction on leasing to non-Jews applied only to JNF land, the covenant [of the Israel Lands Administration] ensured JNF control of almost 50% of the seats on the Israel Lands Council. This, along with the state's Jewish-oriented agenda and the [Jewish Agency]'s involvement in land allocations, ensured that ILA [Israel Lands Administration] policy regarding state and DA land would be focused exclusively on Jewish interest as well.<sup>88</sup>

Although the JNF holds a minority of the land (around 13%), most of these lands "are located in areas of high demand in the center and north of the country, whereas over 60 percent of state lands are located in the Negev, Golan and Arava, which are in relatively low demand."<sup>89</sup>

The discriminatory nature of the Israel Lands Administration is currently changing, and will likely be subject to further political and legal battles within Israel. On January 27, 2005 Attorney General Menachem Mazuz issued a legal opinion that the Israel lands should be available to all Israeli citizens, including Arabs.<sup>90</sup> However, this change would not completely reverse previous pro-Jewish discrimination; the JNF would be compensated by land swaps for any of its property leased to non-Jews.<sup>91</sup>

#### D. Land Use in Israel Today

Just as very little Israeli land was actually owned by Jews in 1948, relatively little is privately owned today. The Israel Lands Administration anticipates that at least 93.5% of land will be Israel Lands owned by the state, the JNF, or the Development Authority when all titles have been settled.<sup>92</sup> Much of this land was originally confiscated refugee land, but much of it also was either state land before 1948 or was purchased by the JNF or other pre-state institutions before 1948. By transferring "absentee" property to the category of Israel Lands, refugee property has been mixed with other Jewish and state land, rendering it "virtually indistinguishable" in the context of Israeli property law.<sup>93</sup>

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88. Kedar & Forman, *supra* note 21, at 824.

89. Amiram Barkat, *Buying the State of Israel*, HAARETZ ONLINE, available at <http://www.christusrex.org/www1/news/haaretz-2-12-05a.html> (Feb. 23, 2005) (last visited Oct. 1, 2007).

90. Yuval Yoaz & Amiram Barkat, *AG Mazuz Rules JNF Land Can Now Be Sold to Arabs*, HAARETZ (Jan. 27, 2005), available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=532455&contrassID=1&subContrassID=7&sbSubContrassID=0&listSrc=Y>.

91. *Id.*

92. HUSSEIN & MCKAY, *supra* note 25, at 116.

93. Kedar & Forman, *supra* note 21, at 826.

Most Israeli individuals, *kibbutzim* and *moshavim* (collective farms and industrial communities), and private commercial or industrial land users have long term leases or licenses from one of the Israel Lands agencies. These are essentially long-term leases for use and possession of state land, albeit sometimes with restrictions (i.e., land may be designated solely for agricultural use). These licenses were granted in an ethnically exclusive manner; “Arab citizens of Israel remained almost totally excluded from the allocation of public land.”<sup>94</sup>

The fact that so much of the land is held by the Israel Lands Administration is likely to enhance Israeli fears that refugee property restitution would lead to massive displacement of Jews. This is not necessarily the case, however, because Jewish residential areas have not actually spread across the country. Moreover, Jewish population centers are not always in the same locations as previous Arab centers.

The most extensive published studies on current Israeli usage of refugee property have been conducted by Salman H. Abu Sitta.<sup>95</sup> Abu Sitta reports that more than two-thirds of the current Israeli population lives on only 8% of Israeli territory.<sup>96</sup> This narrow slice of territory, mainly along the coast (Tel Aviv, Haifa, and the central district), roughly corresponds to the territory that was settled and owned by Jews before 1948.<sup>97</sup> This is one of the most important empirical factors that should be considered in designing a refugee return and restitution plan because it suggests that Palestinian restitution claims in most of the country would not conflict with the interests of current Israeli occupants.

Abu Sitta reports that the majority of rural refugee property is in fact still vacant or unused today.<sup>98</sup> This may explain why Israeli accountings of land transferred for various uses in the 1950s usually listed between 2 and 5 million dunums, while Palestinian advocates claim losses of several million more dunums.<sup>99</sup> The JNF has planted forests or established parks on the ruins of some villages in order to prevent them from being technically vacant.<sup>100</sup> Refugee property is far more likely to have been left unused in the Israeli northern and southern peripheries (Galilee and Negev) than in the densely developed triangle between Tel Aviv, Haifa

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94. Kedar, *supra* note 26, at 990.

95. See SALMAN ABU-SITTA, THE FEASIBILITY OF THE RIGHT OF RETURN, PALESTINIAN REFUGEE RESEARCH NET (June 1997), <http://www.arts.mcgill.ca/mepp/prn/papers/abusitta.html>; Salman Abu-Sitta, *The Right of Return: Sacred, Legal and Possible*, in PALESTINIAN REFUGEES: THE RIGHT OF RETURN 195 (Nasser Aruri ed., 2001).

96. *Supra* note 95.

97. *Supra* note 95.

98. *Supra* note 95.

99. See FISCHBACH, *supra* note 7, at 44-45, 51-52.

100. See, e.g., Gideon Levy, *Social Studies Lesson*, HAARETZ MAG., Apr. 2, 2004.

and Jerusalem. However, in a few urban areas, Israelis are now living in former Arab homes. In the Jerusalem area, these are often quite wealthy or stylish areas (i.e., Qatamon, Ein Kerem),<sup>101</sup> while in Jaffa and Haifa they were used mainly to settle poor Jewish immigrants.<sup>102</sup> There are also a small number of commercial districts where Israeli businesses are housed in Arab buildings.

In other cases, original Palestinian structures have been demolished and confiscated land substantially redeveloped. In these cases, the land may have originally been agricultural, but has now become part of much more developed urban areas settled by Israelis. These vary between development towns for Jewish immigrants and wealthy districts. Some refugee land that had been farmland or residential property before 1948 has now been subject to substantial investment in Israeli commercial or industrial enterprises.<sup>103</sup> For example, the hotel district along the coast in northern Tel Aviv includes within it a partially hidden Muslim cemetery, but the original surrounding original buildings are now gone. A large cinema complex near the city of Herzliya is built on previously Palestinian farm land, with the ruins of some original buildings still visible. Some Israeli institutions of general public interest are situated on former refugee land. These include not only a leading Israeli university (Tel Aviv University in Ramat Aviv), but also could include police stations, libraries, archeological sites, and municipal buildings. This category could also include roads and other public infrastructure. Israel has used some refugee property as military bases, installations, etc. In 1952, more than 44,000 dunums of refugee land were used for the Israeli military,<sup>104</sup> but it is not known how much is used by the military today.

#### *E. Israeli and Jewish Property in the Occupied Palestinian Territories*

Jewish and Arab citizens of Palestine, who became citizens of Israel, owned significant properties in the West Bank, Gaza and East Jerusalem ("OPT" or "Occupied Palestinian Territories"), though much less than the amount of Arab property left behind inside Israel. This property was dealt with by Jordanian and Egyptian authorities through means somewhat analogous to Israeli policies, although the Jordanian policies were less

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101. See generally Nathan Krystall, *The Fall of the New City 1947-1950*, in JERUSALEM 1948, at 113 (Salim Tamari ed., 1999).

102. MORRIS, *supra* note 20, at 384; FISCHBACH *supra* note 22, at 33-34.

103. See FISCHBACH, *supra* note 22, at 30 ("In addition to 400 apartments allocated to government officials, the Custodian leased 20 dunums of abandoned buildings in Jerusalem to some 200 commercial enterprises established by new immigrants, including a show factory, cigarette factory, and a clothing factory.")

104. See Benvenisti & Zamir, *supra* note 8, at 304-05.

discriminatory than the Israeli versions.<sup>105</sup> The same principles and rights that apply to Palestinian land owners regarding property in Israel should also apply to Jewish property in the OPT. Jewish residents of Palestine who became Israelis also owned property in other Arab countries, but these property issues would not be relevant to peace negotiations with the Palestinians.<sup>106</sup>

Pre-1948 Jewish property in the OPT is centered in the West Bank, where there are 16,684 dunums of land formerly owned by Jews.<sup>107</sup> Forty percent of these dunums were in the four former settlements comprising the Etzion Bloc.<sup>108</sup> Other Jewish properties were in Beit Jala, Jerusalem, Silwan, Beit Iksa, Beit Safafa, Hebron, and the Nablus-Tulkarem-Jenin triangle.<sup>109</sup> Major corporate Jewish property owners included the Mizrahi Land Improvement Co., Palestine Jewish Colonization Association, the JNF, Anglo-Palestine Bank, Hebrew University (Jerusalem), and a number of Jewish religious endowments and cemeteries (especially in Hebron and Nablus).<sup>110</sup> There was also Jewish property in Gaza, which Egyptian authorities seized via a military order.<sup>111</sup> The Jordanian Guardian of Enemy Property was prohibited by law from selling Israeli-owned lands, but the Jordanian authorities did rent much of it out. Significant portions in both the West Bank and Gaza were used by the United Nations for refugee camps and related facilities.<sup>112</sup>

### III. LEGAL BASIS FOR PALESTINIAN REFUGEE PROPERTY CLAIMS

#### A. Analytical Approach

The first question in analyzing Palestinian claims regarding Israeli confiscations of Arab refugee property is whether such confiscations were

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105. *Id.* Jordan established a Guardian of Enemy Property in 1948 which gained legal control, though not title, to any property owned by an Israeli (including Arab Israelis) in the West Bank. *Id.* In Gaza, Egypt issued Order No. 25 (1948) for Administering the Property of Jews in the Areas Subject to Egyptian Forces in Palestine. *Id.*

106. Zionist settlement enterprises included properties in Syria, Lebanon, and Trans-Jordan. During the Taba negotiations in 2001, Israel sought to make reference to Jewish refugee claims in other Arab countries, but the Palestinian delegation insisted that this was not a relevant subject for bilateral negotiations with the PLO. *See generally* EU “Non-Paper,” *supra* note 7.

107. FISCHBACH, *supra* note 22, at 156-57.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 161.

112. FISCHBACH, *supra* note 22, at 160-61.

legitimate. The Israeli government asserted that the fact that the confiscations were legal under Israeli law settles the issue because “property rights within the borders of a sovereign State are exclusively subject to the domestic laws of that State.”<sup>113</sup> There are several alternative arguments that can be made to conclude that this is not the case.

First, customary norms of armed conflict prohibit pillage, plunder, and confiscation of immoveable civilian property except for military necessity. Humanitarian norms protecting property rights had coalesced as binding customary norms before 1948. As noted in the previous section, property confiscations began while fighting still raged in 1948, and continued into the 1950s during a period when a state of war continued to exist between Israel and neighboring states. “Absentee” identity for the purpose of Israeli land confiscations was defined with specific reference to countries that fought (or were fighting) with Israel.

Second, while Israel’s property seizures were modeled on internationally accepted practices toward enemy nationals, this was more form than substance. Actual practice and the over-breadth of Israel’s Absentee Property Law suggest that racial discrimination in favor of Jews was the major motive and effect of Israeli policy. Moreover, even if the enemy nationals argument was to be accepted, restitution should still be available once Israel achieves peace with particular Arab states.

Third, a binding resolution of the U.N. Security Council in early 1948 prohibited property seizures, as well as forced displacement and Israel’s refusal to allow refugees to return to their homes.

Fourth, the property seizures violated international human rights norms. Some relevant human rights instruments did not become binding until 1991, when Israel ratified the International Bill of Rights. Although more recent human rights law can be invoked by defining refugee property dispossession as a continuing violation of human rights, this still requires a means to argue that the property confiscations were illegal when they began. Hence, the focus must be on those human rights principles that were already established customary norms in the late 1940s and early 1950s. In this regard, the most important rule is the general prohibition on discrimination in property seizures. By 1948, nondiscrimination was already established as a preemptory norm of international law.

Fifth, Israel’s seizure of refugee property was part of a composite violation of ethnic displacement, and should be seen in conjunction with forced expulsion of non-Jews from Israeli territory.

Each of these arguments will now be explored in more detail.

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113. *Id.* at 48.



### B. *Property Confiscations as a Violation of Humanitarian Law*

Under the ancient customary doctrine of “booty of war,” belligerents in an armed conflict could take all moveable and immoveable property that they found on conquered territory.<sup>114</sup> Were this rule in force in 1948, Israeli property seizures might have been legally legitimate. In order to make property claims against Israel, Palestinian refugees must argue that Israel was bound by modern limitations on war booty and pillage.

Historically, war booty and pillage were permitted because property was viewed as linked to sovereignty. International law considered “that war declared against a particular sovereign necessarily implied war against all his subjects, collectively or individually, wherever found.”<sup>115</sup> When a new sovereign acquired territory, pre-existing private property claims were considered essentially moot.<sup>116</sup>

During the nineteenth century, this doctrine began to erode as courts and governments began seeing private property as a right that could continue independent from changes in sovereignty.<sup>117</sup> Treaties began to prohibit confiscation of private property in wartime, so that one leading treatise on international law reports that there has not been a case of legal wartime private property confiscation since the 1793 war between Britain and France.<sup>118</sup> In 1833 the U.S. Supreme Court cited customary international law in a case concerning a Spanish private property claim in Florida (which the United States had acquired from Spain). The Court held that even if a sovereign changes, people’s “relations to each other, and their rights of property, remain undisturbed.”<sup>119</sup> In 1923, this principle was affirmed by the Permanent Court of International Justice in the *German Settlers Case*.<sup>120</sup>

The most important instruments limiting the war booty doctrine were the 1899 Hague Conference and the 1907 Hague Convention IV respecting the Laws and Customs of War on Land (Hague Convention) and its annexed Regulations concerning the Laws and Customs of War on Land (Hague Regulations). The Hague Regulations remain the most specific set of rules protecting public and private property during armed conflict.

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114. OPPENHEIM’S INTERNATIONAL LAW 326 (7th ed. 1952); GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 185 (1957).

115. COLEMAN PHILLIPSON, *INTERNATIONAL LAW AND THE GREAT WAR* 93 (1915).

116. *See generally* L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT’L L. REV. 263 (1997).

117. *Id.*; PHILLIPSON, *supra* note 115.

118. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 114, at 326.

119. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87 (1833) (J. Marshal).

120. *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10).

The Hague Convention explicitly applies only to conflicts between parties to the Convention, and hence only to international conflicts.<sup>121</sup> The nascent State of Israel was not (and is not today) a party to the Hague Convention. However, by World War II, the Hague Regulations' provisions (including its protections of property) had become binding customary norms so that violations could be considered prosecutable war crimes.<sup>122</sup> The 1945 London Charter establishing the Military Tribunal at Nuremberg defined "plunder of public or private property" as a war crime.<sup>123</sup> In its final judgment, the Nuremberg Tribunal stated, "[B]y 1939 these rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."<sup>124</sup> The International Court of Justice has held that the Hague Regulations constitute customary norms.<sup>125</sup> Israel's High Court has also accepted the Hague Regulations as binding customary law, enforceable in Israeli courts.<sup>126</sup>

The Hague Regulations provide protection to both private and public property, and limit confiscations by the principle of military necessity.<sup>127</sup>

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121. Laws of War; Laws and Customs of War on Land (Hague IV) Oct. 18, 1907. In addition, the Geneva Conventions' Common Article 3, which applies to non-international conflicts, does not contain any protection of civilian property. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

122. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 10 (2004).

123. Charter of the International Military Tribunal (IMT) 6B, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

124. International Military Tribunal (Nuremberg), Judgment and Sentences, 1946, 41 AM. J. INT'L L. 172, 248-49 (1947). *Accord* International Military Tribunal for the Far East (Tokyo), 1948, [1948] AD 356, 366.

125. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. at 131, ¶ 89 (July 9) [hereinafter Wall in OPT Advisory Opinion].

126. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* 31-40 (2002).

127. The following are the most important provisions:

Article 23

[I]t is especially forbidden . . . (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Article 28

The pillage of a town or place, even when taken by assault, is prohibited.

Article 46

[P]rivate property . . . must be respected.

Article 47

Pillage is formally forbidden.

These provisions protect virtually any immovable property of a civilian character; they explicitly protect not just private property, but also public and municipal state property. The protections afforded public property (article 56) are especially important in the case of Palestine because significant portions of Arab property belonged to local communities, rather than to an individual owner. The only property confiscations that would be legitimate were those justified by military necessity,<sup>128</sup> and those of state-owned financial and moveable property “which may be used for military operations.”<sup>129</sup>

The concept of property “seizure” has been given a broad, functional interpretation. During the *A. Krupp* trial at Nuremberg, the defense argued that the prohibition on seizure in occupied territory would only be violated if there is a definite transfer of title.<sup>130</sup> The Tribunal rejected this argument, noting that customary law required “respect” for private property, and explained that an occupying army depriving a factory owner from using his factory could constitute a war crime.<sup>131</sup>

These provisions have been cited in objections to Israeli policies in the West Bank, East Jerusalem and Gaza as rules governing military or

Article 53

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally movable property of the State which may be used for military operations. [Final paragraph omitted].

Article 56

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings. UK Treaties Series 9 (1910), Cd. 5030 [hereinafter Hague Regulations].

128. Military necessity should be restricted to land that was actually put to military use because there are indications that Israeli authorities may have used military justifications in bad faith in order to acquire more land. Immediately after the 1948 conflict, Israeli military forces facilitated property seizures by declaring villages to be “closed military areas” in accordance with the 1945 Defence (Emergency) Regulations, article 125. See Halabi, *supra* note 72, at 4. This excluded farmers from their lands, which were then vulnerable to being confiscated under the Emergency Regulations (Exploitation of Uncultivated Land) of 1948. *Id.*

129. See Hague Regulations, *supra* note 127, art. 53.

130. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 174-75 (2001).

131. *Id.*

belligerent occupations.<sup>132</sup> If framed only as rules governing occupation, Israel may object that refugee property within Israel (i.e., within Israel's *de facto* borders set by the 1949 armistice lines) is subject to Israeli sovereignty, not occupation.<sup>133</sup> It is important to note that only article 46 (requiring general respect for private property) and article 53 (dealing with moveable property) refers to "occupation."<sup>134</sup> The other provisions appear in a chapter of the Hague Regulations entitled, simply, "Means of injuring the enemy, sieges, and bombardments."<sup>135</sup>

Another doubt related to the Hague Regulations may be that the Israeli-Palestinian conflict is not of an international character. Common article 3 of the 1949 Geneva Conventions, which sets out minimum standards of conduct for non-international conflicts, does not provide protections of property rights.<sup>136</sup> Somewhat vaguely, the Hague Regulations article 1 specifies that "the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps."<sup>137</sup> Establishing the nexus to armed conflict, in this case international armed conflict, requires a case-by-case assessment, although it is not strictly necessary for the action to take place during combat.<sup>138</sup>

A first response is to note that the protections of civilian property embodied by the Hague Regulations are part of international criminal law, not only international humanitarian law, and have been applied in purely civil conflicts. As noted above, the London Charter defined "plunder of public or private property" as a war crime.<sup>139</sup> The Statute of the International Criminal Tribunal for the former Yugoslavia contains an identical provision.<sup>140</sup> The Rome Statute of the International Criminal

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132. See, e.g., Wall in OPT Advisory Opinion, *supra* note 125; Letter dated Dec. 22, 1987 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, A/43/63/S/19376 (Dec. 23, 1987).

133. Cf. Wall in OPT Advisory Opinion, *supra* note 125, ¶ 124 (noting that only section III of the Hague Regulations apply to Israeli actions in the West Bank and East Jerusalem).

134. Hague Regulations, *supra* note 127.

135. *Id.*

136. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950.

137. Even if the 1948 war was an internal civil war, insurgents and armed factions taking part in hostilities are not exempt from international humanitarian law. See INTERNATIONAL COMMITTEE OF THE RED CROSS, *Disintegration of State Structures*, reprinted in HOW DOES LAW PROTECT IN WAR? 482, 484 (1999). It could be argued that the Hague Convention IV is customary law binding in all armed conflicts, no longer just between states.

138. See Michael Bothe, *War Crimes*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 379, 389 (Antonio Cassese et al. eds., 2002).

139. London Charter of the International Military Tribunal art. 6(b) (1945).

140. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3(e), as adopted by S.C. Res. 827, S/Res/827 (1993).

Court contains an analogous definition of illegal property seizures relating to war crimes in non-international conflicts.<sup>141</sup>

A second response is that the property confiscations at issue took place at a time when the Arab-Israeli conflict was characterized by hostilities between Israel and its neighboring states, before the founding of the Palestine Liberation Organization.<sup>142</sup> In the appeal judgment in *Tadic*, the International Criminal Tribunal for the Former Yugoslavia set down standards for determining whether a conflict is international so that victims of a particular action could be considered protected persons under the Geneva Conventions.<sup>143</sup>

It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.<sup>144</sup>

In the *Tadic* case, the conflict in Bosnia and Herzegovina was considered international at least until 1992 because of the involvement of the army of the former Yugoslavia (FRY).<sup>145</sup> In addressing the period after 1992, the court first noted that in the context of humanitarian law, state responsibility could be attributed to irregular militias and paramilitaries if there is “some measure of control”<sup>146</sup> and “a relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict.”<sup>147</sup>

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141. Rome Statute of the International Criminal Court, art. 8(2)(e)(xii), U.N. Doc. A/CONF.183/9th (1998) (“Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.”). This crime is distinguished from pillage in article 8(2)(e)(v) which constitutes “appropriation of property for private, personal use.” Bothe, *supra* note 138, at 413.

142. The Israeli High Court has held that booty in land warfare extends to the entire theater of operations. H.C.J. 574/82, Al Nawar v. Minister of Defense [1985] Isr. SC 39(3) 449, 461 (described in DINSTEIN, *supra* note 122, at 215). A similar broad reading may be applied in defining the nature of the conflict itself.

143. Prosecutor v. Dusko Tadic, IT-94-1-T, Judgment of Appeals Chamber (July 15, 1999).

144. *Id.* ¶ 84.

145. *Id.* ¶¶ 86-87.

146. *Id.* ¶ 96.

147. *Id.* ¶ 94. In reaching this conclusion, the ICTY cited an Israeli military tribunal sitting in Ramallah. *Id.* ¶ 93 (citing Military Prosecutor v. Omar Mahmud Kassem, 42 International Law Reports 1971, 470, 477). In this case, the Israeli tribunal held that Jordan could not be held

Applying the *Tadic* principles to the Arab-Israeli conflict, we can see that Israel was dealing mainly with an international conflict in the late 1940s and 1950s. Although Israel (and its pre-state antecedents) fought indigenous Palestinian militias during the 1947-1948 war, Israel's policies toward refugee property were formed after May 1948 when the war became chiefly a battle between Israel and the armies of various Arab states. After May 1948, the war became most analogous to the war in the former Yugoslavia in the period before 1992. Indeed, it was this international character of the conflict that animated both Israel's definition of an absentee, and Israeli leaders' statements on the subject. Israel defined and justified its policy toward refugee property with reference to its international armed conflicts with Arab states.<sup>148</sup> As early as August 1948, Israel's official statements on the refugee question used the context of inter-state armed conflict with Arab countries to explain its policies toward refugees and their property. David Ben-Gurion stated on August 1, 1948: "When the Arab states are ready to conclude a peace treaty with Israel this question [of refugees] will come up for constructive solution as part of the general settlement, and with due regard to our counterclaims."<sup>149</sup> Hence, the principle of estoppel should bar Israel from arguing that the rules of international armed conflicts do not apply.<sup>150</sup>

### *C. Israeli Property Seizures as a Violation of a Security Council Resolution*

Israeli seizures of refugee property could be seen as a violation of a specific Security Council resolution. On April 17, 1948, Security Council Resolution 46 called on the Jewish Agency and the Arab Higher Committee to "refrain, pending further consideration of the future government of Palestine by the General Assembly, from any political activity which might prejudice the rights, claims, or positions of either community."<sup>151</sup> This resolution was passed just as land confiscations were beginning, and before the declaration of Israeli statehood. Its broad language prohibiting any prejudice against "rights, claims, or positions"

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responsible for actions of the PLO because the PLO was illegal and harassed at the time in Jordan.  
*Id.*

148. See discussion of treatment of enemy property, *infra* Part III.C.

149. Quoted in TAKKENBERG, *supra* note 22, at 16.

150. See *Nuclear Tests (Austl. v. Fr.)* 1974 I.C.J., 253, 267 ("[D]eclarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."); BROWNIE, *supra* note 16, at 616 ("A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency.").

151. S.C. Res. 46 ¶ 1(d), U.N. Doc. S/RES/46 (Apr. 17, 1948).

should have prevented Israel from confiscating properties (as well as prohibited expulsions and the Israeli decision to prevent refugee return).<sup>152</sup> This Palestine-specific resolution strengthens the arguments that the property seizures were de jure illegal.<sup>153</sup>

#### D. *Israeli Property Confiscation as a Policy Toward Enemy Property*

At least two studies by Israeli scholars have argued that Israel's appointment of a "custodian" of absentee followed World War II precedents for dealing with enemy property, and were specifically modeled on the British Trading with the Enemy Law of 1939.<sup>154</sup> A similar ordinance had been enacted by the British government in Palestine.<sup>155</sup> This enemy property argument has some force at least in terms of the form of Israel confiscation laws. The following analysis will also show that, even if accepted, the enemy property argument should not block Palestinian property claims as part of a final peace settlement.

The Hague Regulations allow property confiscations for military purposes as "imperatively demanded by the necessities of war,"<sup>156</sup> and do

152. *Id.*

153. Although in less explicit or binding language, this position is also confirmed by two subsequent Security Council Resolutions in the wake of the 1948 war. S.C. Res. 73, ¶ 1, U.N. Doc. S/RES/73 (Aug. 11, 1949) "expresse[d] the hope" that the governments concerned would apply General Assembly Resolution 194. S.C. Res. 89, ¶ 6, U.N. Doc. S/RES/89 (Nov. 17, 1949) called for "the Governments concerned to take in the future no action involving the transfer of persons across international frontiers or armistice lines without prior consultation through the Mixed Armistice Commissions." *See also* Conclusions from Progress Report of the United Nations Mediator on Palestine VIII ¶ 4(h)(i) (Sept. 16, 1948).

154. Benvinisti & Zamir, *supra* note 8, at 300-05; Kedar & Forman, *supra* note 21. Benvinisti and Zamir suggest that World War II precedents justified Israeli legislation, while Kedar and Forman suggest only that they were historical explanations, but not necessarily justifications. Benvinisti and Zamir define the purposes of appointing a custodian of enemy property:

The provisions of the ordinance that refer to enemy property are based on the concept that the wealth of a nation, which may be used for its war effort, includes not only the property situated in its territory, but also its property and that of its citizens situated abroad. Therefore, the ordinance severs the link between the nationals of the enemy state and their property situated within the borders of the state, and vests the property in the custodian. Other purposes of this vesting of ownership are to safeguard the assets until the termination of the state of war, and, indirectly, to try to ensure that in the peace arrangements there will be mutuality in the determination of the fate of the assets situated in the warring states.

Benvinisti & Zamir, *supra* note 8, at 302.

155. Trading with the Enemy Ordinance (Palestine), No. 36 of 1939 [hereinafter Trading with the Enemy]; *see* Benvinisti & Zamir, *supra* note 8, at 303; *supra* text accompanying note 36.

156. Hague Regulations, *supra* note 127, art. 23(g).

not prevent a warring state from taking “many kinds of measures against enemy persons and enemy property” as part of an overall war effort.<sup>157</sup> The theory behind this is that civilian assets could be used to generate funds for the war effort.<sup>158</sup> In World War I, the 1914 British Enemy (Amendment) Act created the first Custodian of Enemy Property, in order to collect revenues on German property, a practice continued in World War II.<sup>159</sup> In Palestine during World War II, the Custodian was entitled to retain as a fee five percent of the value of the property, as valued on the date that he took control of it.<sup>160</sup>

These World War I and World War II era measures defined a person’s enemy character in terms of his place of residence, not his nationality or permanent domicile (in law, domicile is more permanent, while residence can be temporary).<sup>161</sup> The Palestine ordinance defined “enemy” to mean any “individual resident in enemy territory.”<sup>162</sup> In World War II, this meant that even nationals of neutral states could have enemy character if they were voluntarily present in Germany, or even in German-occupied territory, during the war.<sup>163</sup> Critically, the purpose of appointing a custodian was not to permanently seize the property (which would violate the Hague Regulations), but to hold it in escrow until the end of hostilities.<sup>164</sup> The Palestine ordinance defined the custodian’s mandate in these terms: “With a view to preventing the payment of money to enemies and of *preserving enemy property in contemplation of arrangements to be made at the conclusion of peace*, the High Commissioner may appoint custodians of enemy property for Palestine.”<sup>165</sup> A pamphlet published in 1940 in Tel Aviv by two officials of the Palestine custodian’s office explained:

The principle duty of the Custodian is to hold any money paid to him and any property or the right to transfer any property vested in him until the termination of the present war and thereafter to deal with the same in such manner as the High Commissioner shall direct. The task of the Custodian consists therefore merely in the preservation of money and property in his possession. . . . *It must be borne in mind that the main purpose of his appointment was, in*

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157. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 114, at 268-69.

158. *Id.* at 399, 407; PHILLIPSON, *supra* note 115, at 101.

159. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 114, at 327-28.

160. Trading with the Enemy, *supra* note 155, ¶ 9(1).

161. See LORD MCNAIR & A.D. WATTS, THE LEGAL EFFECTS OF WAR 78 (1966).

162. Trading with the Enemy, *supra* note 155, ¶ 4B.

163. MCNAIR & WATTS, *supra* note 161, at 89, 91.

164. *Id.* at 333-35.

165. Trading with the Enemy, *supra* note 155, ¶ 9(1) (emphasis added).



*addition to preventing the payment of money to enemies, to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace, and for this purpose enemy property should, as far as possible, be preserved in natura.*<sup>166</sup>

In a similar vein, a 1948 Israeli agricultural law that allowed for cultivation of refugee land included the explanatory note: “[T]he interest of the State demands that, *without prejudice to the right of ownership of land or other property*, agricultural production be maintained and expanded as much as possible and the deterioration of plantations and farm installations prevented.”<sup>167</sup>

As noted above, these historical precedents for dealing with enemy private property in wartime were influential in determining the form of Israeli laws, though their substance is better described as discriminatory pillage. Israeli lawmakers considered other approaches to try to justify their policies before settling on this one. During the formative period of Israeli policy toward refugee property (1948-1950), Israeli policymakers initially considered justifying their actions by necessity, specifically the necessity to house incoming Jewish immigrants and to use all available agricultural land to avoid food shortages.<sup>168</sup> Historical records show that Israeli officials at the time considered this to be a “fiction,” and understood that it only justified temporary use of land while they actually intended to spur permanent transfer and development.<sup>169</sup> In any case, a defense of necessity may not be invoked when “the state has contributed to the situation of necessity.”<sup>170</sup>

Recall that Israel did not immediately adopt the enemy property approach. Rather, as its policy evolved, Israel’s land laws came to closely mirror the previous British statutes. From mid-1948 through 1950, Israel’s confiscation policy was repeatedly revised and redefined.<sup>171</sup> Property confiscations began *ad hoc* in spring 1948 during the course of fighting,<sup>172</sup> but became more formalized on June 21, 1948 with the Abandoned

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166. ARNO BLUM & I. ROSKIN-LEVY, *THE LAW RELATING TO TRADING WITH THE ENEMY* 69 (1940) (emphasis added).

167. Emergency Regulations for the Cultivation of Fallow Land and the Use of Unexploited Water Sources of 5709/1948 (Oct. 11, 1948), *translated in* FISCHBACH, *supra* note 22, at 20.

168. Kedar & Forman, *supra* note 21, at 814.

169. *Id.*

170. INT’LL. COMM’N, DRAFT ARTICLE ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, art. 25(2)(b), GAOR A/56/10 (2001); *see* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 184 (2002).

171. *See* FISCHBACH, *supra* note 22, at 14-26.

172. *Id.* at 14-15.

Property Ordinance, which attempted to regularize seizures that were already taking place.<sup>173</sup> Three days later, the Abandoned Areas Ordinance permitted confiscation of any land “conquered by or surrendered to armed forces or deserted by all or part of its inhabitants.”<sup>174</sup>

The June 1948 focus on conquest was clearly rooted in the antiquated doctrine of war booty, in which conquest alone is enough to justify seizing property. This policy violated the Hague Regulations and likely fell under the definition of “plunder” used at Nuremberg.<sup>175</sup> However, in December 1948 Israel revised its policy so as to make the owner’s identity more important than the land’s vacancy or military conquest.<sup>176</sup> This shift in focus from conquest of land to an owner’s personal status remained in the final definition of “absentee property” in the Absentees Property Law of 5710/1950.<sup>177</sup> This law defined absentee property as land belonging to any person who either was a citizen of any of the seven Arab states that went to war with Israel, or who was present in one of these states (i.e., Palestinian refugees).<sup>178</sup> It also included displaced Palestinians who left the country during the war for some other destination, or who fled to a part of Israel that was held “at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment.”<sup>179</sup>

Just as British laws had defined enemy character by a person’s residence, even if temporary, Israel defined “absentee” by a person’s residence in territory controlled by any of the Arab armies with which it fought.<sup>180</sup> By defining the confiscations based on the owners’ purported connection with Arab states and their armed forces, Israel followed in form accepted precedents about the treatment of enemy civilian property.<sup>181</sup> This mechanism allowed Israel’s custodian to claim property belonging to Palestinian refugees, not just citizens of other Arab states.

The historical development of Israeli law indicates that Israel was driven by a desire to confiscate all non-Jewish property that its forces conquered and to transfer the property to Jewish control; the enemy

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173. Abandoned Areas Ordinance, No. 12 of 5708/1948 (1948), *quoted in* FISCHBACH, *supra* note 22, at 18.

174. Abandoned Areas Ordinance, 5708/1948 1 LSI 25, pt. 1(a) (1948-1987) (Isr.).

175. FISCHBACH, *supra* note 22, at 21.

176. *Id.* at 21.

177. *Id.* at 24.

178. *Id.*

179. *Id.*

180. FISCHBACH, *supra* note 22, at 24.

181. *See id.* at 22 (noting that South Asian policies toward land left behind by Muslims in India and Hindus in Pakistan and the British Trading with the Enemy Ordinance were used as models).

property format for the revised law was developed only retroactively, and was too overinclusive to match the purported interest in harming Israel's military enemies. The law included people who traveled outside the Middle East, not just to countries that fought with Israel. And its inclusion of internally displaced Palestinians who were actually Israeli citizens is peculiar since their assets could not be used by any enemy state.<sup>182</sup> Under British policy the "enemy character" of the internally displaced would likely have ended when the enemy army lost control of the territory on which they were residing (i.e., when Israeli forces conquered their new places of residence).<sup>183</sup>

This overbreadth supports the conclusion that Israel followed the enemy property doctrine only in form, and it did so in bad faith. In fact, Israel's custodian failed to hold the refugee property in anticipation of a peace settlement. Instead, Israel transformed the refugees' property into "Israel Lands" for use primarily for the benefit of Israeli Jews, without any provision for the property to be preserved for its original owners' benefit. Evidence of the Custodian's ethnic discrimination includes that fact that property owned by Jews was in practice exempted from confiscation.<sup>184</sup> It also stems from the fact that the Custodian often did not follow his own legislative mandate, for instance illegally selling large tracts of land to the JNF.

Even if accepted, the enemy property argument would only allow Israel to partially justify property confiscations that would otherwise be considered war crimes. This justification is time-limited by its link to armed conflict. At minimum, the state of armed conflict would end with the conclusion of a final agreement between Israel and the Palestinians. Arguably, the armed conflict relevant for many refugees has already ended. Israel defined "absentee" status in reference to the refugees' residence in hostile Arab states. Since Israel has concluded peace treaties with Egypt and Jordan, it is now arguably illegal for Israel to continue holding property owned by refugees in Egypt, Jordan, or the OPT. This is also true for areas inside Israel that were at one point in 1948 held by Jordanian or Egyptian forces, such as Ashqelon (Majdal), Beersheva, and Ramle.

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182. Benvenisti & Zamir, *supra* note 8, at 300. See also FISCHBACH, *supra* note 22, at 23 (quoting a Knesset member objecting that "We are not dealing with enemy property, but with the property of a substantial part of the population of our country.").

183. See MCNAIR & WATTS, *supra* note 161, at 78.

184. FISCHBACH, *supra* note 22, at 25.

### E. Israeli Property Seizures Under Human Rights Law

International human rights law can be used as an alternative argument for Palestinian refugee property claims in Israel. As the following discussion will show, human rights law prohibits the kind of property confiscations undertaken by Israel. However, a human rights-based argument for Palestinian refugee property confronts several challenges. First, modern human rights instruments did not exist, or were at least not formally binding, in the 1940s and 1950s. Second, human rights protection of property is derogable in times of national emergency, and is in any case more limited than property protections in international humanitarian law. Palestinians can overcome these obstacles by focusing on the preemptory norm of nondiscrimination in order to conclude that Israeli property seizures were illegal from their birth, and rely on the doctrine of continuing violations to invoke more recent human rights instruments.

#### 1. Violation of Preemptory Norm of Nondiscrimination

Nondiscrimination constitutes a preemptory (*jus cogens*) norm of international law.<sup>185</sup> There is some ambiguity about precisely when nondiscrimination became a *jus cogens* norm; Ian Brownlie has given 1965 as the *latest* possible date.<sup>186</sup> However, this seems to be an overly cautious conclusion. The British House of Lords has held that the preemptory norm against racially discriminatory property confiscations can invalidate domestic property laws that were in place during World War II. In *Oppenheimer v. Cattermole (Inspector of Taxes)*, the Lords dealt with a Nazi-era property dispute with analogies to Israeli policies toward non-Jewish “absentee” property.<sup>187</sup> After a German Jew fled to England in 1939, the German government confiscated his property under a 1941 decree that provided: “A Jew loses his German citizenship (a) if at the date of entry into force of this regulation he has his usual place of abode abroad” and which took the property of de-nationalized Jews for the benefit of the Nazi efforts toward “a solution of the Jewish problem.”<sup>188</sup> The Lords held that the 1941 German decree was effectively void because

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185. For a general discussion of the norm of nondiscrimination, see BROWNLIE, *supra* note 16, at 546-49; *Amoco Int'l Fin. Corp., 15 Iran-U.S. Cl. Trib. Rep. 189, 231 (1987-II)* (“Discrimination is widely held as prohibited by customary international law in the field of expropriation.”); *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (holding that “protection from slavery and racial discrimination” are preemptory norms of international law).

186. BROWNLIE, *supra* note 16, at 546.

187. *Oppenheimer v. Cattermole (Inspector of Taxes)* [1976] A.C. 249.

188. *Id.* at 281.

it was founded on racial hatred.<sup>189</sup> Israel's laws with regard to absentee property were more facially neutral than the Nazi laws, but it is clear from this holding that the Lords considered nondiscrimination to be a preemptory norm by 1941.

Equality is highlighted in the preamble of the U.N. Charter as one of the organization's purposes of existence.<sup>190</sup> The 1945 London Agreement defining crimes against humanity for the Nuremberg trials included nondiscrimination elements.<sup>191</sup> Common article 3 of the 1949 Geneva Conventions included a nondiscrimination provision.<sup>192</sup> The 1951 Convention relating to the status of Refugees includes a nondiscrimination provision, and prohibits reservations from this provision.<sup>193</sup> These provisions provide ample evidence that nondiscrimination, in particular the prohibition on racial discrimination, was a preemptory norm of international law before 1948 and also when Israel implemented its policy of property seizures. As I have already argued, discrimination for Jews and against Palestinians was the primary substantive feature of Israel's confiscation of refugee property. As such, they violated preemptory norms of international law.

## 2. Property Confiscations as Continuing Violations of Human Rights Law

Because the international human rights covenants date from the 1960s and treaties may not be applied retroactively, the key international human rights covenants cannot be directly invoked regarding the bulk of Palestinian refugee property claims. However, new human rights obligations can be invoked against a state when an action was a breach of its obligations at its birth and continues after the treaty became binding.

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189. *Id.* at 281-82.

190. U.N. Charter pmb. & art. (1)(1). *See also* Universal Declaration of Human Rights arts. 1-2, G.A. Res. 217(A) (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

191. Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280 ("persecutions on political, racial or religious grounds . . .").

192. Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 75 U.N.T.S. 135 ("Persons taking no active part in hostilities . . . shall in all circumstances be treated humanely, without any adverse distinctions found on race, colour religion or faith, sex, birth or wealth, or any other similar criteria.").

193. Geneva Convention Relating to the Status of Refugees, art. 3, July 28, 1951, 189 U.N.T.S. 150 ("The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."); *id.* art. 42(1) (prohibiting reservations to art. 3).

The doctrine of continuous violations holds that states may be liable for rights violations that began even before the ratification of key human rights instruments, so long as the situation still exists at the present time.<sup>194</sup> For instance, in the context of refugee property claims in Cyprus, the European Court of Human Rights has held that Turkey could be liable for property confiscations that occurred 16 years before it accepted the court's jurisdiction.<sup>195</sup> Since Israel violated international law in seizing refugee property and still holds the wrongly confiscated property, this constitutes a continuing breach which "extends over the entire period during which the act continues and remains not in conformity with the international obligation."<sup>196</sup>

The first way land confiscations may violate human rights law is as a violation of the right to property. Article 17 of the non-binding Universal Declaration of Human Rights provides that "Everyone has the right to own property alone as well as in association with others. . . . No one shall be arbitrarily deprived of his property."<sup>197</sup> However, the International Covenant for Civil and Political Rights (hereinafter ICCPR)<sup>198</sup> and the International Covenant for Economic, Social and Cultural Rights (hereinafter ICESCR)<sup>199</sup> do not deal with property rights *per se*.<sup>200</sup> The ICCPR protects residences through article 17: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."<sup>201</sup> Article 11 of the ICESCR protects the right to adequate housing.<sup>202</sup> Also, the International Convention on the Elimination of All Forms of Racial Discrimination (ICEARD), article 5, prohibits racial discrimination "in the enjoyment of . . . the right to own property alone as well as in association with others."<sup>203</sup>

These provisions generally amount to protection from arbitrary or discriminatory evictions from one's home, or discriminatory deprivation

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194. Papamichalopoulos v. Greece, Judgment of June 24, 1903, Ser. A no. 260-B, ¶40, at 69.

195. Loizidou v. Turkey, Judgment of Dec. 18, 1996 (merits), Reports 1996-VI, ¶42, at 2230.

196. INT'L L. COMM'N, *supra* note 170, art. 14(2).

197. Universal Declaration of Human Rights, *supra* note 190, art. 17.

198. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

199. International Covenant for Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

200. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, Protocol No. 1, art. 1 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions.").

201. ICCPR, *supra* note 198, art. 17.

202. ICESCR, *supra* note 199, art. 11.

203. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICEARD].

of property.<sup>204</sup> The protection of one's home extends beyond formal categories of property ownership. The U.N. Committee on Economic, Social and Cultural Rights has emphasized that "[n]otwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."<sup>205</sup>

Nevertheless, these human rights principles are somewhat weakened by a state's prerogative to derogate certain rights "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."<sup>206</sup> Israel can use this exception to argue that it was not bound to respect refugee property so long as the state remained at war. Israel's Provisional Council of State declared a state of emergency on May 19, 1948, and Israel has never declared the emergency to have ended. The ICCPR permits derogation from its protection of arbitrary interference with the home (article 17).

A second and stronger argument is that the discriminatory nature of the Israeli land system violates human rights law. I have already argued that Israel violated preemptory norms of nondiscrimination. These practices also represent continuing violations of CEARD's broad ban on racial discrimination<sup>207</sup> and its specific provision that states must "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . (d)(v) The right to own property alone as well as in association with others; (vi) The right to inherit."<sup>208</sup> In human rights treaties, the principle of nondiscrimination is non-derogable. In treaty law, the ICCPR provides that emergency measures are legitimate "provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin."<sup>209</sup> ICEARD contains no provision for derogation. The reference here to "other obligations under international law" includes international humanitarian law, which prohibits property confiscations.

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204. See U.N. ESCOR, General Comment No. 7, ¶¶ 8, 10, 13, 14 (1997).

205. U.N. ESCOR, General Comment No. 4, ¶ 8(a) (1991).

206. ICCPR, *supra* note 198, art. 4(1).

207. ICEARD, *supra* note 203, art. 1 ("the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

208. *Id.* art. 5.

209. ICCPR, *supra* note 198.

Israel may counterargue that these provisions do not apply to the confiscation of enemy national property. In time of emergency, the ICCPR prohibits only discrimination that is “solely” based on a prohibited grounds.<sup>210</sup> Israel arguably did not confiscate property solely on the basis of non-Jewish ownership; only people displaced to territories held at some point by a hostile military were subjected to confiscations. Similarly, CEARD’s broad protections do not necessarily include measures taken against foreigners.<sup>211</sup> Nevertheless, these arguments are on the whole unconvincing. As noted above, Israel’s “absentee” property policies did not target Jews. CEARD’s exception for foreigners allows a state to discriminate in its immigration and nationality laws. But this does not explain why Israel confiscated internally displaced Palestinian property; these owners became Israeli citizens. Palestinian refugees are not Israeli nationals only because Israel has prevented their return, something that CEARD condemns.<sup>212</sup>

#### *F. Displacement and Dispossession as a Composite Violation*

Because this Article is focused on property rights, the analysis thus far has focused on the discrete subject of confiscations of refugee property. However, Israel’s actions vis-à-vis property were not taken in isolation. The historical debate over how and why Palestinian refugees left their homes is continuing. There is now a wide body of historical accounts indicating that fear, violence, and in many cases deliberate Israeli military actions were the major causes of refugee flight, although Israel officially does not accept this account.<sup>213</sup> Several historical scholars argue that Israel was engaged in a systematic effort to remake the demographic character of its territory during and after the 1948 war.<sup>214</sup>

Forced expulsions would constitute separate violations of international law, the facts and legal basis of which will not be analyzed here. However, it should be noted that international law does not require that Israeli policies toward the Palestinian refugees as people (forced expulsion/refusal of return) be artificially separated from Israel’s policy toward the property that these people owned. The International Law Commission has recognized that a state may breach international law

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210. *Id.* art. 4.

211. *Id.* art. 1(2).

212. ICEARD, *supra* note 203, art. 5(d)(ii). See generally HUSSEIN & MCKAY, *supra* note 25, at 36.

213. See generally MORRIS, *supra* note 20; Quigley, *supra* note 9, at 173-81.

214. *Supra* note 20.



through a series of actions or omissions defined in aggregate as wrongful. . . . In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.<sup>215</sup>

Examples of such composite violations include apartheid and systematic racial discrimination.<sup>216</sup> Defining a violation as a composite act is often complimentary to identifying a continuing violation because “only after a series of actions or omissions takes place will the composite act be revealed.”<sup>217</sup>

Israel’s confiscation of Palestinian refugee property formed part of a composite violation of illegal forced population transfer in which non-Jews were forced from their homes and their land transferred to Jewish control. This composite violation began, at least, with the first forced expulsions of refugees in the 1947-1948 war and included the Israeli decisions in 1948 to prohibit non-Jewish refugee return and to confiscate refugee property. The violation continues today both because refugees remain displaced and dispossessed, because the custodian of absentee property continues to confiscate property, and because the property has been administered by the Israel Lands Administration primarily for the benefit of Jews. The composite violation could also include Israeli policies in the post-1967 occupied territories, where Israel has systematically confiscated land for illegal settlements.

The notion of a composite violation is somewhat analogous to the international criminal law concept of “persecution” as a crime against humanity. In certain circumstances, property violations may constitute a crime against humanity if they are fundamental and take place in the context of other violence.

[O]ffenses against industrial property were held not to constitute crimes against humanity because the compulsory taking of the property could not be said to affect the life and liberty of oppressed peoples, while it might be said that economic measures of a personal type can constitute persecutory acts, especially if committed by terror or linked with other acts of violence, or as part of a comprehensive process, such as the *comprehensive destruction*

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215. INT’L L. COMM’N, *supra* note 170, art. 15.

216. CRAWFORD, *supra* note 170, at 141.

217. *Id.* at 143.

*of homes and property that are the livelihood of a certain population.*<sup>218</sup>

This last sentence bears a substantial resemblance to the situation of Palestinian refugees; Palestinian property was comprehensively seized and much of it destroyed. Loss of home and livelihood are central parts of the U.N. “working definition” of Palestine refugee.<sup>219</sup> Indeed, in the case of *Kupresic et al*, the trial court of the International Criminal Tribunal for the Former Yugoslavia specifically linked comprehensive and discriminatory property destruction to forced transfer or deportation:

[T]he case at hand concerns the comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. . . . The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.<sup>220</sup>

The concept of a composite violation is important as a background in designing a remedy, the subject of the remainder of this Article. Although property claims can easily be thought of as essentially individualized private issues, one of the arguments for restitution in the Israel/Palestine situation is that the remedy must reverse, as much as possible, ethnic displacement. Both refugee return and restitution are critical to remedy the forced displacement and property dispossession that occurred together. Addressing only the property issue or only the displacement would fail to completely remedy the full violation endured by the refugees. Yet, as I noted in the introduction, recent literature about the Bosnia experience calls into question whether restitution of property and return of refugees should actually be linked so closely. I will explore this issue in greater detail in Part V below.

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218. KITTICHAISSAREE, *supra* note 130, at 118 (emphasis added).

219. UNRWA, Consolidated Registration Instructions, Jan. 1, 1993, ¶ 2.13.

220. Prosecutor v. Zoran Kupresic, Case No. IT-95-16-T, ICTY T. Ch. II, Jan. 14, 2000, ¶¶ 630-631, *affirmed on other grounds*, IT-95-16-A, Oct 23, 2001.

#### IV. RESTITUTION AS THE PRIMARY REMEDY FOR PROPERTY VIOLATIONS

##### A. Analytical Approach

Assuming, as the previous section of this Article argues, that confiscations of refugee land were illegal and constitute a continuing violation, this section will outline the availability of restitution as a remedy for this violation. I will focus on the general legal basis for claiming restitution as a remedy for property seizures that violate international law. In sum, long recognized principles of international law hold that reparation (i.e., returning a situation as much as possible to the *status quo ante*) is required to remedy violations of international law. Restitution is important in cases of violations of home and property rights, and is an essential part of international refugee policy, particularly in cases of refugee repatriation and conflict resolution.

##### B. The General Right to Reparation and Restitution

It is a basic principle of law that every right must have an effective remedy.<sup>221</sup> In 1928, in the *Chorzow Factory Case*, the Permanent Court of International Justice ruled:

[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. . . . [R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>222</sup>

Both the *Chorzow Factory* decision and more recent decisions by the European Court of Human Rights stress that restitution is the preferred remedy in cases of property rights violations.<sup>223</sup> As the European Court explained, actual return of wrongfully taken land puts a person “as far as possible in a situation equivalent to the one in which they would have been.”<sup>224</sup>

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221. See ICCPR, *supra* note 198, art. 2(3); Universal Declaration of Human Rights, *supra* note 190, art. 8.

222. Factory of Chorzów, P.C.I.J., Ser. A, no. 17 (1978), at 47, available at [http://www.worldcourts.com/pcij/eng/decisions/1928.09.13\\_chorzow1/](http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1/).

223. *Id.*; Papamichalopoulos v. Greece (art. 50), 18/1992/363/437 (1995), ¶¶ 34, 38-39.

224. *Papamichalopoulos*, 18/1992/363/437 (1995), ¶ 38.

The International Law Commission has codified these principles in draft articles on the Responsibility of States for Internationally Wrongful Acts.<sup>225</sup> The draft's article 35 provides that a state responsible for a wrongful act "is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed . . . ."<sup>226</sup> The only exceptions to this obligation are if restitution would be "materially impossible" or if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."<sup>227</sup> In the specific context of refugee return, the Committee on the Elimination of Racial Discrimination has commented:

All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void[.]<sup>228</sup>

Similarly, the U.N. Human Rights Commission has emphasized that refugees have a right to return and to property restitution.<sup>229</sup>

It has not been my purpose in this Article to reanalyze the Palestinian refugees' right of return. The right of return and the right to property restitution are complimentary, but they rely on separate provisions and principles of international law. Each right can stand alone, but they also support one another and in practice, are highly intertwined, especially as a remedy to the composite violation of population displacement.

The right of return is now understood to encompass not merely returning to one's country, but to one's home as well. . . . Indeed, housing restitution is an indispensable component of any strategy aimed at promoting, protecting and implementing the right to return.<sup>230</sup>

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225. INT'L L. COMM'N, *supra* note 170, art. 35.

226. *Id.*

227. *Id.*

228. Comm. on the Elimination of Racial Discrimination, General Recommendation XXII on art. 5 of the Convention on Refugees and Displaced Persons ¶ 2(c) (1996).

229. U.N. Hum. Rts. Comm'n Res. 2003/34 ("Reaffirming that, pursuant to internationally proclaimed human rights principles, victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation").

230. Pinheiro, *supra* note 14, ¶¶ 22, 61.

Reciprocally, the protection of civilian property in armed conflict adds implicit support for the right to return; it is difficult to understand why governments in 1907 (at the drafting of the Hague Convention) would have been willing to protect civilian property if they did not assume that civilians have a right to return to their homes. In 2004, the UNHCR Executive Committee specifically addressed the importance of restitution in post-conflict refugee repatriation and reconciliation. Its conclusion unanimously agreed to by 66 member states included the following statement:

Recognizes that refugees, in exercising their right to return to their own country, should, in principle, have the possibility to return to their place of origin, or to a place of residence of their choice, subject only to restrictions as permitted by international human rights law; and, in this context, notes the importance of efforts that seek to mitigate the likelihood that returning refugee could become internally displaced. . . .

Recognizes that, in principle, all returning refugees should have the right to have restored to them or be compensated for any housing, land or property of which they were deprived in an illegal, discriminatory or arbitrary manner before or during exile; notes, therefore, the potential need for fair and effective restitution mechanisms, which also take into account the situation of secondary occupants of refugees' property; and also notes that where property cannot be restored, returning refugees should be justly and adequately compensated by the country of origin.<sup>231</sup>

UNHCR's policies on repatriation similarly emphasize the importance of restitution.<sup>232</sup> UNHCR considers "returnee recovery of or access to land, housing and property through the establishment of a fair and equitable restitution and compensation framework" essential to repatriation programs.<sup>233</sup>

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231. UNHCR EXCOM, Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, Conclusion No. 101 (LV) (2004) [hereinafter UNHCR EXCOM Conclusion No. 101].

232. UNHCR policy cannot be considered binding law on its own, but it indicates international refugee policy and can (depending on the circumstances) be evidence either of custom, general practice, or standards of best practice.

233. UNHCR, HANDBOOK FOR REPATRIATION AND REINTEGRATION ACTIVITIES 16 (May 2004) [hereinafter UNHCR, HANDBOOK FOR REPATRIATION]. See also UNHCR, NOTE ON INTERNATIONAL PROTECTION ¶ 8, Executive Committee of the High Commissioner's Programme, A/AC.96/989 (July 7, 2004) ("In relation to durable solutions, ensuring the sustainability of

In terms of Palestine-specific resolutions by the United Nations, General Assembly Resolution 194(III) of 1948 recognized both the refugee right to return and the refugees' right to reclaim property.<sup>234</sup> Paragraph 11 assumes that return means return to specific places of origin ("to their homes"), not just to Israel in general, which makes restitution implicit. Regarding property, the resolution states that "compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible."<sup>235</sup> The drafting history of Resolution 194 shows that the right to restitution is essential because the right to return was conceived as a right to return to one's home, which necessitates restitution.<sup>236</sup> The General Assembly rejected two separate amendments to the resolution that would have replaced "home" with "areas from which they have come."<sup>237</sup>

The refugees' right to return to "their homes" is mentioned at least nine times in the U.N. Mediator's September 1948 report, which proposed the original text for Resolution 194.<sup>238</sup> In 1950 the U.N. Secretariat stated that the General Assembly intended to incorporate the right to restitution within the right of return by use of the phrase "to their homes," and produced a working paper outlining mechanisms of post-conflict restitution from the Treaty of Nimmeguen of 1678 (between Spain and France) through the partition of India in 1947.<sup>239</sup>

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voluntary repatriation has proved a continuing challenge in countries emerging from conflict, especially when conditions have not yet stabilized and basic services still need to be restored. Enabling refugees to regain their own homes and land, through fair and effective property restitution mechanisms, is often a related challenge, in which UNHCR has become increasingly involved over the years.").

234. G.A. Res. 194 (III) ¶ 11 (1948).

235. *Id.*

236. *Id.*

237. See Terry Rempel, U.N. GENERAL ASSEMBLY RESOLUTION 194(III) AND THE FRAMEWORK FOR DURABLE SOLUTIONS FOR 1948 PALESTINIAN REFUGEES 9, paper presented at Badil Resource Center *expert forum at Ghent University, May 2003, available at* [http://www.badil.org/Campaign/Expert\\_Forum/Ghent/paper05.pdf](http://www.badil.org/Campaign/Expert_Forum/Ghent/paper05.pdf) (last visited Aug. 24, 2007).

238. Progress Report of the U.N. Mediator for Palestine, GAOR, 3d sess., Supp. 11, U.N. Doc. A/648. (Sept. 16, 1948). See Rempel, *supra* note 237, at 9.

239. Historical Precedents for Restitution of Property or Payment of Compensation to Refugees, Working Paper prepared by the U.N. Secretariat, Geneva, U.N. Doc. A/AC.25/W.81/Rev.2 (Annex 1) (Mar. 1950) ("The underlying principle . . . is that the Palestine refugees shall be permitted *either* to return to their homes and be reinstated in the possession of the property which they previously held *or* that they shall be paid adequate compensation for their property.").

## V. CONFLICTING RIGHTS IN RESTITUTION

### A. *The Secondary Occupant Problem*

I have argued so far that restitution is the preferred, primary remedy for property violations that take place in contexts similar to the Israeli/Palestinian conflict.<sup>240</sup> Where a claimant can prove that property was taken from him illegitimately, the default remedy is restitution. Because Israeli seizures of Palestinian refugee property violated international law, Palestinian refugees can make a *prima facie* claim for restitution of that property. However, the right to claim restitution is not unlimited. There are situations in which a returning refugee may be forced to accept compensation instead. Even though they preferred restitution as a remedy, both the Permanent Court of International Justice in 1928 and the European Court of Human Rights have accepted compensation as well as a remedy for property violations where restitution would be impossible.<sup>241</sup> The 1928 *Chorzow Factory* decision stated:

Restitution in kind, or, *if this is not possible*, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>242</sup>

Refugee-specific sources, such as the UNHCR Executive Committee Conclusions<sup>243</sup> and UNHCR policy statements,<sup>244</sup> also leave open the possibility of exceptions, and mention the alternative of making compensation instead of restitution in some situations.<sup>245</sup> The U.N. Sub-

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240. See Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/SUB.2/RES/2002/7 ¶ 5 (Aug. 14, 2002) (“Affirms that the remedy of compensation should only be used when the remedy of restitution is not possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution.”).

241. *Chorzów*, P.C.I.J. Ser. A, No. 17; *Papamicholopoulos*, 18/1992/363/437 (1995), ¶ 39.

242. *Chorzów*, P.C.I.J. Ser. A., No. 17, at 47.

243. UNHCR EXCOM Conclusion No. 101, *supra* note 231 (noting the importance of taking into account the “situation of secondary occupants” and providing for compensation where property cannot be restored).

244. UNHCR, HANDBOOK FOR REPATRIATION, *supra* note 233 (referring only to “access to land” and to both compensation and restitution).

245. Similar exceptions can be found in domestic private law. For instance, in Israeli domestic law of unjust enrichment, a defendant must make restitution in general, but “if restitution in kind is impossible or unreasonable, he will pay him the value of the benefit.” Unjust Enrichment Law

Commission on the Promotion and Protection of Human Rights appointed a special rapporteur, who has drafted principles aimed at resolving some of the ambiguities about restitution that have emerged in the specific case of refugee repatriation.<sup>246</sup> We are today in the early stages of codifying an emerging area of international law and policy that has become especially relevant in conflict resolution since the end of the Cold War.<sup>247</sup>

As several U.N. sponsored studies have noted, the most challenging problem in post-conflict restitution concerns the need to protect the rights of secondary occupants.<sup>248</sup> Secondary occupants are civilian individuals or institutions who have taken over former refugee property. Restitution for returning refugees normally requires their eviction. This can potentially abridge secondary occupants' right to a home, which is protected in international human rights law,<sup>249</sup> and infringe on their private property interests.<sup>250</sup> Recent peace agreements in other contexts have given different levels of protection to secondary occupants.

A UNHCR study suggests a loose approach in which "each situation calls for an *ad hoc* response,"<sup>251</sup> which would take into account "justice and equity"<sup>252</sup> but would also account for political and economic factors.<sup>253</sup> If this is correct, then one of the challenges facing Israeli and Palestinian negotiators is to work out an equitable solution to the conflicting rights between refugees and secondary occupants. On the other hand, if rules of

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5739/1979 (No. 22) § 1(a).

246. See Pinheiro, *supra* note 14; COMM'N ON HUMAN RIGHTS, SUB-COMM'N ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, FINAL REPORT OF THE SPECIAL RAPPORTEUR ¶¶ 8-9 E/CN.4/Sub.2/2005/17 (June 28, 2005).

247. See generally SCOTT LECKIE, HOUSING, LAND AND PROPERTY RIGHTS IN POST-CONFLICT SOCIETIES: PROPOSALS FOR A NEW UNITED NATIONS INSTITUTIONAL AND POLICY FRAMEWORK, U.N. High Commissioner for Refugees Legal and Protection Policy Research Series, PPLA/2005/01 (Mar. 2005).

248. Pinheiro, *supra* note 14, ¶¶ 46-48; UNHCR INSPECTION AND EVALUATION SERVICE, *supra* note 18, ¶¶ 47-48.

249. See ICCPR, *supra* note 198, art. 17(1) (prohibiting interference with privacy, family and home); ICESCR, *supra* note 199, art. 11 (recognizing the right to adequate housing).

250. International law's protection of nonresidential private property is less clear than its protection of residences. In general, private ownership is normally considered a matter for domestic law. See BROWNLIE, *supra* note 16, at 414. However, there is a general norm that private property should not be subject to arbitrary or discriminatory interference. As described in this paper, private property enjoys extensive protection in humanitarian law. Property rights survive changes in sovereignty. See Ederington, *supra* note 116. Foreign-owned property may not be expropriated without compensation. See BROWNLIE, *supra* note 16, at 509-11. These principles indicate that private property in general is entitled to some protection under the law, though not as much protection as the right to a home.

251. UNHCR INSPECTION AND EVALUATION SERVICE, *supra* note 18, ¶ 48.

252. *Id.*

253. *Id.* ¶ 10.



law have solidified about how to resolve these problems, then much less flexibility would be available to negotiators in a settlement based on international law. It is therefore essential to determine whether international law is in fact ambiguous about restitution in cases of secondary occupation. Only in this case would there be reason to turn to principles of equity in determining a remedy.

In international law, the concept of equity includes considerations of fairness, reasonableness and policy “necessary for the sensible application of the more settled rules of law.”<sup>254</sup> Judge Weeramantry of the International Court of Justice has called the use of equity to fill in gaps in existing rules of law “equity *praeter legem*.”<sup>255</sup> Equity is especially important in balancing the conflicting interests of two different parties,<sup>256</sup> which is precisely the situation when secondary occupants seek defenses from restitution claims by returning refugees. This recourse to equity to resolve property issues in the Israeli-Palestinian conflict is consistent with General Assembly Resolution 194, which stated that Palestinian refugee property claims should be resolved under “principles of international law or in equity.”<sup>257</sup> However, an equitable balance needs to be struck only if there is ambiguity about the applicable legal principles.

### B. *Is There Ambiguity in the Law about Secondary Occupation?*

At most, there is legal ambiguity about whether restitution should be available only in a limited set of cases in the Israeli-Palestinian context. There are two reasons for this. First, as noted above, available research indicates that there may not be secondary occupants on the majority of Palestinian refugee property inside Israel. Second, not all secondary occupants are equal. International law gives more protection to the right to a home than commercial property. In all cases, a secondary occupant who is stripped of an investment could in theory receive monetary compensation for his loss. Only in the case of a property used for

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254. BROWNLIE, *supra* note 16, at 25.

255. Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. REP. 38, 231-32 (Sep. Op. Weeramantry).

256. *Id.* at 247 (citing BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 48-49 (1987)).

257. G.A. Res. 194 (III) ¶ 11 U.N. Doc. A/810 (Dec. 11, 1948). The resolution explicitly mentions only compensation, not restitution. But on the other hand, the idea of compensation for damaged property implies restitution as a measure of compensation. A refugee would receive compensation for damaged property on the assumption that he or she retakes possession, but needs supplemental compensation in order to receive property that is equal in value to what he or she left. Were there to be no restitution, all property would be essentially “lost” for the refugees; they would not have the opportunity to worry about mere “damage.”

residential purposes by Israelis might the rights of secondary occupants and Palestinian refugees be in genuine conflict. Even here, an evicted secondary occupant could receive alternative housing in order to avoid violating his or her right to a home. The central question would be whether it would be more equitable for the Israeli secondary occupant or the returning Palestinian refugee to be given alternative housing.

Palestinians can cite several authorities to argue that there is actually no equitable balance to be struck because established legal rules allow for refugee restitution even in the case of secondary occupation of residential property. As noted earlier, the basic standard is that restitution is the default remedy unless it is “materially impossible.”<sup>258</sup> The leading international law treatise, *Oppenheim’s International Law*, in an edition published in 1952, made a strong argument for restitution of wrongfully confiscated property and ruled out any defenses to restitution that would otherwise be available:

If the occupant has performed acts which according to International Law he was not competent to perform, *post liminium* makes the invalidity of these illegitimate acts apparent. Therefore, if the occupant has sold immovable state property, such property may afterwards be claimed from the purchaser, whoever he is without compensation. . . . If he has appropriated and sold such private or public property as may not legitimately be appropriated by a military occupant, it may afterwards be claimed from the purchaser without payment of compensation.<sup>259</sup>

In recent years the U.N. Sub-Commission on Human Rights has sought to codify legal principles governing post-conflict property restitution, a process that in 2005 led to the introduction of draft principles proposed by the U.N. Special Rapporteur Paulo Sergio Pinheiro (Pinheiro Principles).<sup>260</sup> The Pinheiro Principles identify three main rights of secondary occupants of residential property. The first and most clear is procedural: Secondary occupants should be protected from “arbitrary or unlawful” eviction through safeguards of due process.<sup>261</sup> The second right is to receive alternative housing when eviction is justified.<sup>262</sup> The third right, and the

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258. INT’L L. COMM’N, *supra* note 170, art. 35.

259. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 114, at 619.

260. Paulo Sergio Pinheiro, Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons (Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, 56th Sess., E/CN.4/SUB.2/2005/17 (June 28, 2005)).

261. *Id.* ¶ 17.1.

262. *Id.* ¶ 17.3

most critical for present purposes, concerns third parties who purchase property in good faith:

In cases where housing, land and property sold by secondary occupants to third parties acting in good faith, States may consider establishing mechanisms to provide compensation to injured third parties. The egregiousness of the underlying displacement, however, may arguably give rise to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases.<sup>263</sup>

Thus, the Pinheiro Principles acknowledge that good faith strengthens the rights of a party claiming an interest in a particular property. But they recommend granting restitution to the returning refugee and providing compensation to the evicted good faith purchaser.

This principle was applied in refugee restitution arrangements in Bosnia and Kosovo. During the 1992 to 1995 war, 2.3 million people fled their homes, while more than half of the housing stock in the country was damaged.<sup>264</sup> As displaced persons fled into enclaves controlled by their own ethnic groups, local authorities issued legislation purporting to legitimize their occupation of other displaced people's homes.<sup>265</sup> In other cases, members of minority ethnicities were forced to "sell" homes at gunpoint.<sup>266</sup> By the end of the war, only a minority of the population remained in their original homes. The properties of people who fled were declared "abandoned" and allocated to others.<sup>267</sup> The war ended with the Dayton Peace Agreement, which established the state of Bosnia and Herzegovina, consisting of the Federation of Bosnia and Herzegovina and the Republic of Srpska.

Before the Dayton Accords, Security Council Resolution 820 had insisted that displaced people be allowed to return to their former homes, and reaffirmed that any land transactions made under duress were null and void.<sup>268</sup> The Dayton Accords' Annex 7 covered the rights of refugees and displaced persons. Its first paragraph provided:

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263. *Id.* ¶ 17.4.

264. Das, *infra* note 312.

265. *Id.*

266. *Id.*

267. *Id.*

268. S.C. Res. 820, ¶ 7, S/RES/820 (Apr. 13, 1993) ("Reaffirms its endorsement of the principles that all statements of commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so.").

All refugees and displaced persons have the right to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.<sup>269</sup>

Article I(1) provided that refugee return “is an important objective of the settlement of the conflict.”<sup>270</sup> Article I(3)(a) required parties to “repeal of domestic legislation and administrative practices with discriminatory intent or effect.”<sup>271</sup>

Bosnian legislation is heavily weighted in favor of refugee claimants over current occupants. If the claimant has a valid property right, eviction may be prevented only if the occupant has no alternative housing, and in that case it may usually only be delayed until temporary housing becomes available.<sup>272</sup> Bosnian property claims have been adjudicated administratively by a commission established by the Dayton Accords. Decisions by the commission address both the rights of returning refugees and current owners; they provide a ruling on the claimant’s ownership rights, a decision on termination of the current occupant’s rights, a time limit for the current occupant to vacate the property, and a decision as to whether the current occupant is entitled to alternative housing. A current occupant may remain on the property until a resolution of the claim.<sup>273</sup> Decisions can be appealed, but appeals do not delay implementation of vacating orders.<sup>274</sup> If the current occupant fails to leave, the claimant may seek an eviction order.<sup>275</sup>

The 1999 Kosovo crisis saw property violations similar to those in Bosnia; masses of housing units were destroyed, while Albanian returnees often took over houses abandoned by fleeing Serbs. This crisis followed a longer period of ethnic discrimination in the early 1990s in which thousands of Kosovo Albanians had lost their rights to state provided housing. In 1991, the Serbian Parliament had banned the sale of Serbian-owned property to Kosovo Albanians without special permission.<sup>276</sup>

U.N. Security Council Resolution 1244 (1999) provides for a right of return, but does not provide specific rules governing property rights.<sup>277</sup> In

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269. Dayton Peace Accords, Annex 7.91, Dep’t State Dispatch Supp.

270. *Id.* art. I(1).

271. *Id.* art. I(3)(a).

272. *Id.* at 13-14.

273. *Id.* at 10.

274. Dayton Peace Accords, *supra* note 269, at 10.

275. *Id.* at 11.

276. *See generally* Das, *infra* note 312.

277. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

November 1999, the U.N. Interim Administration Mission in Kosovo (UNMIK) established the Housing and Property Directorate and the Housing and Property Claims Commission. In 2000, UNMIK set down a regulation governing property restitution. This regulation<sup>278</sup> provided, among other things:

- “Any person whose property was lost between 23 March 1989 and 13 October 1999 as a result of discrimination has a right to restitution. Restitution may take the form of [restitution in kind] or compensation.”<sup>279</sup>
- “Any refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law.”<sup>280</sup>
- “The Directorate may, at its discretion, delay execution of the eviction order for up to 6 months, pending resolution of the housing needs of the current occupant, or under circumstances that the Directorate deems fit.”<sup>281</sup>

Like Bosnia, restitution arrangements in Kosovo grant secondary occupants relatively little recourse. In general, their need for replacement housing can lead to a delay of restitution of only six months.

These authorities and recent precedents support the strongest possible argument for restitution of Palestinian refugee property even if it requires evicting secondary Israeli occupants. If it was illegitimate for Israel to have confiscated the property in the first place, then this violation must be remedied. The most appropriate remedy to restore the *status quo ante* is restitution. This was already established international law by the late 1940s and 1950s, so all Israelis occupying former refugee property had due notice from the beginning that they had no legal right to ownership. Nevertheless, there may be more ambiguity in the law than suggested by Oppenheim’s treatise, ILC draft articles, or the Pinheiro Principles. The fact that these authorities all reach the same conclusion certainly adds to their weight, but they are at base only soft law guides to accepted legal principles.<sup>282</sup> Actual state practice, including in conflict resolution settings, is not quite as clear.

The assertion in Oppenheim’s treatise that secondary occupants of wrongfully seized property have no right to claim even compensation for

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278. UNMIK/REG/2000/60 (Oct. 31, 2000).

279. *Id.* art. 2.1.

280. *Id.* art. 2.5.

281. *Id.* art. 13.2.

282. See OPPENHEIM’S INTERNATIONAL LAW, *supra* note 16, at 328-29.

their post-conflict evictions is particularly open for debate. Oppenheim's treatise does not contain any citation to treaty law or clear evidence of custom, and indeed the same edition contains evidence of contrary state practice.<sup>283</sup> No international treaties, nor other codifications of international law, spell out this requirement for restitution in such absolute terms. As set out in the discussion above, major sources such as the *Chorzow Factory* decision and draft articles by the International Law Commission all contain exceptions (i.e., for impossibility) to the general obligation to make restitution.<sup>284</sup>

Although the restitution arrangements in Bosnia and Kosovo have been especially stingy in providing protection to secondary occupations, several other recent post-conflict restitution systems allow exceptions or defenses to restitution in a broader category of cases, and therefore appear contrary to both the ILC draft articles and the Pinheiro Principles. Perhaps the strongest precedent for secondary occupation preventing full restitution is the Arusha Peace Accords in Rwanda. The 1994 Rwanda crisis is mainly remembered as a genocide, but it grew from a longer system of ethnically based government. The country is currently facing a housing and land crisis, which is "inextricably linked to a longer history of ethnically motivated displacement and deep-seated violence and mistrust. Over the last fifty years, more than two-thirds of the population have been displaced at one time or another for varying periods."<sup>285</sup> Much land in Rwanda is held through customary law, a form of ownership not fully recognized by state legislation. Colonial authorities had attempted to relocate subsistence farmers to promote cash crops, while ethnic violence in 1959, 1963, and 1973 forcibly displaced thousands of (mostly Tutsi) Rwandans. The exiled Tutsis launched a war against the Hutu-dominated Government in 1990, and took over the government after the genocide. As the Tutsi-led Rwandan Patriotic Army (RPA) took over the country, more than 2 million Hutu Rwandans fled.<sup>286</sup>

The RPA government in 1994 proclaimed its intention to apply the 1993 Arusha Accords, which guarantee the right to return for all refugees

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283. *Id.* (noting that completed wartime transactions of enemy property in World War I were confirmed, and compensation was paid to the state as part of the overall state-to-state exchange of reparations); *id.* at 330 (noting that the 1947 Peace Treaties formally ending World War II allowed the allies to liquidate enemy property in order to pay for their war claims and debts).

284. INT'L L. COMM'N, *supra* note 170 (providing for exceptions where restitution is impossible or where it would be disproportionately burdensome).

285. Lisa Jones, *Giving and Taking Away: The Difference Between Theory and Practice Regarding Property in Rwanda* (unpublished manuscript of chapter to be published in *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (Scott Leckie, ed.)).

286. *Id.*

as “an inalienable right” that is essential to “peace, unity, and national reconciliation.”<sup>287</sup> This protocol allows returning refugees to settle “in any place of their choice” so long as they do not encroach on others’ rights.<sup>288</sup> It also holds that “all refugees shall . . . have the right to repossess their property on return.”<sup>289</sup> However, the same protocol states:

The two parties recommend, however, that in order to promote social harmony and national reconciliation, refugees who left the country more than 10 years ago should not reclaim their properties, which might have been occupied by other people.<sup>290</sup>

Those excluded from restitution by this rule were to receive compensation. The Rwandan Government began developing alternative villages and lands for returning refugees.

The “ten-year” rule has been explained by commentators and by UNHCR as a reflection of Rwanda’s housing and land crisis and as a unique application of local customary law, rather than as a general precedent.<sup>291</sup> In this context, it could more easily be presumed that many Rwandans took over refugees’ property in good faith, or perhaps out of desperation. Restitution would have required mass resettlement of these new residents.<sup>292</sup> When Tutsi refugees returned, they often did not seek out their former properties. “Their repatriation unleashed a wave of violent property takeovers as they did not, in fact, seek to reoccupy their former family homes and lands but felt free to choose, with impunity, whatever homes they desired.”<sup>293</sup> Then, at the end of 1996, Hutu refugees began returning—around 1.3 million in just a few weeks. This led to disputes with Tutsi squatters, though on paper the government recognized the Hutu refugees’ property rights and eventually set up local commissions to resolve the disputes. By 2000, the government was able in most cases to relocate (usually voluntarily) the current occupants in order to allow back the original refugee owners.

Though Rwanda may have been exceptional, limits on restitution can also be seen in post-Apartheid South Africa. Black South Africans were dispossessed of property through European force and conquest beginning in the seventeenth century as well as through statutory regimes that formed

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287. *Id.*

288. *Id.*

289. *Id.*

290. Jones, *supra* note 285.

291. *Id.*; UNHCR INSPECTION AND EVALUATION SERVICE, *supra* note 18, ¶ 48.

292. Jones, *supra* note 285.

293. *Id.*

the cornerstone of apartheid. “The denial of property rights of Africans was the foundation on which apartheid and African political and economic subjugation was built.”<sup>294</sup> The 1913 Natives Land Act denied Africans the right to own private property, and forced 75% of the country’s population to live on 7% of the land.<sup>295</sup> The 1936 Native Land and Trust Act increased the African share to 13%.<sup>296</sup> These pre-World War II land laws set the stage for the formal declaration of the apartheid system after 1948. Between 1960 and 1983, 3.5 million Africans were forcibly moved to “homelands.”<sup>297</sup>

South Africa’s post-apartheid constitutional Bill of Rights section 25(7) provides for restitution—with limits—for people dispossessed by the 1913 or 1936 acts: “[A] person or community dispossessed of property after 9 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.”<sup>298</sup> This Constitutional provision was implemented through the Restitution of Land Rights Act, No. 22 of 1994.<sup>299</sup> The Act set a three year period during which land claims could be filed; the Land Claims Commission received more than 65,000 claims.<sup>300</sup> The Act established four key criteria for restitution. First, the claimant (or a deceased relative) had to have been dispossessed after 1913.<sup>301</sup> Second, they had to have had a right in land (which in the legislation included sharecropping and tenant labor, as well as unregistered ownership).<sup>302</sup> Third, the dispossession had to have been the product of racial discrimination.<sup>303</sup> Fourth, the claimant could not have already received just compensation for the loss.<sup>304</sup>

However, in addition to these criteria, the Land Claims Court considered whether it was “practical” to order restitution.<sup>305</sup> The South African system considered restitution to be a conflict of rights between the

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294. Lauren G. Robinson, *Rationales for Rural Land Redistribution in South Africa*, 23 BROOK. J. INT’L L. 465, 472 (1997).

295. *Id.*

296. *Id.* at 475.

297. *Id.* at 477.

298. S. AFR. CONST. 1996, ch. 2 (27-7).

299. Restitution of Land Rights Act, No. 22 of 1994.

300. Heather Boyle, *The Land Problem: What Does the Future Hold for South Africa’s Land Reform Program?*, 11 IND. INT’L & COMP. L. REV. 665, 679 (2001).

301. Restitution of Land Rights Act, *supra* note 299, art. 2.

302. *Id.* art. 1(xi) & art. 2.

303. *Id.* art. 3.

304. Emily Bordeaux Smith, *South Africa’s Land Reform Policy and International Human Rights Law*, 19 WIS. INT’L L.J. 267, 285-86 (2001).

305. *Id.* at 286.



current owner and the dispossessed African.<sup>306</sup> Where land had been developed substantially, direct restitution was usually avoided in favor of financial compensation.<sup>307</sup> Restitution in urban areas has been particularly restricted by these defenses.<sup>308</sup> In addition, the person who lost her property through restitution (i.e., usually a white owner) is entitled to compensation from the state.<sup>309</sup> The government first offered to buy property from secondary occupants before deciding whether to expropriate it or offer an alternative remedy to the dispossessed claimant.<sup>310</sup> Hence, in terms of implementation, the South African system distinguished the culpability of individual secondary occupants from the apartheid system through which they gained ownership.

The Restitution of Land Rights Act, section 42D(2), also included a provision as to the mechanisms for restitution for communal properties:

If the claimant [ ] is a community, the agreement [for restitution or compensation] must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community members of the community.<sup>311</sup>

South Africa's adjudication system has been faulted by some for being inefficient, owing to its judicial rather than administrative orientation.<sup>312</sup>

The resolution of the Guatemalan civil war is also instructive on the subject of the rights of secondary occupants who benefited from discriminatory state policies. Guatemala endured a 35-year civil war until

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306. KRISTINA MANNERBACK & HANNA FRANSSON, RESTITUTION OF LAND RIGHTS AS PART OF LAND REFORM IN SOUTH AFRICA: A CRITICAL ANALYSIS OF THE PROCESS 92, GOTHENBURG DEPARTMENT OF LAW (2003), available at <http://www.handels.gu.se/epc/archive/00003601/>.

307. *Id.* at 33.

308. UNIVERSITY OF THE WESTERN CAPE, PROGRAM FOR LAND AND AGRARIAN STUDIES, NO. 20, LAND AND AGRARIAN REFORM IN SOUTH AFRICA; A STATUS REPORT (2004) [hereinafter LAND AND AGRARIAN REFORM REPORT], available at <http://www.plaas.uwc.ac.za/publications/Research%20report%2020.pdf> (last visited Oct. 1, 2007).

309. MANNERBACK & FRANSSON, *supra* note 306, at 33.

310. LAND AND AGRARIAN REFORM REPORT *supra* note 308, at 7.

311. Restitution of Land Rights Act, *supra* note 299, § 42D(2).

312. Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 INT'L & COMP. L.Q. 437 (2004).

1992 which killed up to 200,000 and displaced 1 million people.<sup>313</sup> The war was triggered in part by 1954 land reforms<sup>314</sup> which confiscated and redistributed certain agricultural lands.<sup>315</sup> These reforms generally expropriated land from wealthy landholders and redistributed it to lower class Guatemalan families. The reforms directly benefited around 10% of the population, but hurt the United Fruit Company and other large corporate landowners, who obtained American support for a successful *coup d'état*.<sup>316</sup> The new U.S. backed government supported large landholders and agribusinesses, and resulted in the continued exploitation of the peasant population. This economic conflict formed the backdrop to the insurgency and civil war.<sup>317</sup> During the civil war itself, the government sought to control the countryside by confiscating and repopulating lands, sometimes by force, often by relocating peasants from other parts of the country. The government issued a decree which provided that property “voluntarily” abandoned for more than one year would revert to the state.<sup>318</sup>

The resolution of the Guatemalan war produced two legal milestones in refugee rights.<sup>319</sup> First, the 1989 International Conference on Central American Refugees (CIREFCA) produced one of the first multilateral agreements to extend assistance to internally displaced persons (IDPs), rather than only to refugees. Second, the 1992 repatriation agreement (CEAR-CCPP) was negotiated directly with refugee representatives through Permanent Commissions of Guatemalan Refugees in Mexico.<sup>320</sup> This agreement included detailed provisions to resolve property disputes, and covered refugees with definitive titles, public deeds, residents of cooperatives, and owners of municipal lands.<sup>321</sup>

Under the CEAR-CCPP agreement, once a refugee lodged a property claim, the government commenced negotiations with the current occupier of the property to persuade him or her to leave in order to avoid

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313. Mark Gibney, *United States Responsibility for Gross Levels of Human Rights Violations in Guatemala from 1954 to 1996*, 7 J. TRANSNAT'L L. & POL'Y 77 (1997).

314. R. Andrew Painter, *Property Rights of Returning Displaced Persons: The Guatemalan Experience*, 9 HARV. HUM. RTS. J. 145, 147 (1996).

315. *Id.* at 148.

316. See generally STEPHEN KINZER, *OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ* 129-47 (2006).

317. *Id.* at 149.

318. *Id.* at 150-51.

319. *Id.* at 153-55.

320. FINN STEPPUTATAT, *SUSTAINABLE RETURNS?: STATE, POLITICS AND MOBILE LIVELIHOODS—THE GUATEMALA CASE*, IN *PALESTINIAN REFUGEE REPATRIATION* 115-21 (Michael Dumper ed., 2006).

321. *Id.*

adjudication. Central to this scheme was the principle that all people who previously owned land should receive land, whether their original property or an alternative.<sup>322</sup> The current occupier could refuse, which would lead to one of two options. If a Verification Agency (VA) determined that the returning refugee was undergoing too much current hardship and could not endure a long adjudication process, the government provided an alternative piece of land to the refugee.<sup>323</sup>

When cases went to adjudication, several disputes emerged.<sup>324</sup> For present purposes, the most important concerns the rights of current occupiers. During the Civil War, the government had expropriated land through the National Institute for Agrarian Transformation (INTA), which is still in existence. The INTA had deemed the population displacements to be voluntary, and hence supported the land rights of the current occupants. The more recently created Commission for Repatriates, Refugees and Displaced (CEAR) decided in 1990 that the displacements were not in fact voluntary. Yet, the INTA refuses to reconsider cases from before 1990.<sup>325</sup> Because of this dispute between the two institutions, it may be an exaggeration to cite Guatemala as a clear precedent in either direction. Yet the dispute itself indicates that merely declaring past land confiscations illegal does not necessarily resolve the conflicting rights of secondary occupants who relied on government at the time.

From the authorities and recent precedents reviewed here, it should be clear that the legal principles governing the rights of secondary occupants in the context of refugee restitution are still coalescing, though the weight of authority and the precedents of Bosnia and Kosovo lean heavily in favor of the refugees seeking restitution. The emerging rule is that secondary occupants' right to a home does not render restitution materially impossible; secondary occupants rights can instead be addressed by proving alternative housing. Yet, not all restitution schemes in recent examples of conflict resolution necessarily comply perfectly with this rule. The Pinheiro Principles and ILC draft articles should be seen as an indication of a legal trend, but it is premature to conclude that clear rules of law always prohibit allowing some secondary occupants to resist eviction and hence block refugee restitution if they acquired the property in good faith. At least as the law stands today, an equitable balance needs to be struck between the rights of refugees and secondary occupants, though with a default presumption favoring restitution for wrongfully dispossessed refugees.

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322. Painter, *supra* note 314, at 154-55.

323. *Id.*

324. *Id.* at 161.

325. *Id.*

### C. *Alternative Means of Assessing Secondary Occupants' Rights*

In order to make an equitable balance between secondary occupants and refugees' competing rights, it is important to have more precise means of determining how much weight to give to secondary occupants' interests. I have already noted that only residential occupants have interests sufficiently protected by international law to potentially conflict with returning refugees' restitution claims. Yet there may be other means of differentiating the weight of various secondary occupants' rights. I will here suggest two additional variables that should be considered. First, widely accepted norms of private law suggest that secondary occupants' rights should be protected only if they can be said to have acquired their property in good faith. Second, secondary occupants' rights should be given more weight if the refugee property has been substantially changed or developed. In the case of Israel and Palestine, both principles point in a similar direction.

The premise that concepts of good faith imported from private law should be relevant in the resolution of an international conflict is a contestable proposition because it invokes private law as a defense against international obligations. The commentary to the ILC's draft articles states:

restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution do not amount to impossibility.<sup>326</sup>

Yet property rights by their very nature invoke private law in ways that other international disputes do not. Any land claims tribunal set up to adjudicate specific restitution claims would be adjudicating individual claims for private property. As noted earlier in this study, property seizures are restricted in wartime in part because international law protects private interests. One of the theoretical reasons for limiting the war booty doctrine was that private property rights and relationships can transcend changes in sovereignty and therefore take on international relevance. It would therefore be highly artificial to look only at public law authorities in

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326. CRAWFORD, *supra* note 170, at 242.

identifying applicable equitable principles in the context of property restitution.

In private law, one of the classic dilemmas of restitution is where an unjustly taken piece of property passes to an innocent third party who claims to be a *bona fide* purchaser. Restitution would generally be unavailable this circumstance.

[A] good faith purchaser's immunity is simply that it amounts to a justification for retaining a benefit that would otherwise be impermissible. . . . [F]reedom of commerce demands that one ought to be able to keep what one has paid for in all innocence, even if the result is a gain at someone else's expense.<sup>327</sup>

This defense exists in civil law systems as well as in the common law.<sup>328</sup> It also exists in Israeli law, both for owners and lessees, so that private purchasers bear no responsibility for wrongful property registrations by the state.<sup>329</sup> The logic of this defense is that the third party defendant had no part in the original wrongful dispossession.

Another common problem in restitution is where a defendant, while possessing the property, has improved the land by investing in new construction or other economic development. Where the defendant improves land by mistake, it is settled law that he or she may claim expenses for the value of the improvements.<sup>330</sup> The same is true where the defendant incurs expenses in reliance that his enrichment was valid.<sup>331</sup> However, this defense appears to hinge on the principle of innocent mistake. In Israeli law, a defendant may deduct only for "what he has reasonably expended or undertaken to expend or invest."<sup>332</sup> Where the defense can be applied, the current occupant essentially must be paid back for his or her investment by the rightful owner, a requirement that may act as incentive for the two sides to simply negotiate a fair purchase price.

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327. ANDREW TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* 25-26 (3d ed. 2002).

328. Reinhard Zimmerman, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403, 412 (1995).

329. Land Law, 1969, S.H. § 10 ("Where a person acquired a right in settled property for consideration and in bona fide reliance on the registration, his right shall be valid even if the registration was not correct."). A lease is defined as a right in settled property. Land Law § 3.

330. BURROWS, *supra* note 15, at 165-66; *Pulbrook v. Lawes* (1876) 1 QBD 284; *Rowley v. Ginnever* [1897] 2 Ch 503.

331. Mitchell McInnes, *Enrichments, Expenses and Restitutionary Defences*, 118 LAWQ. REV. 209, 210 (2002).

332. *Unjust Enrichment Law*, 1979, S.H. § 3.

*Bona fide* purchase arguments and expenses for improvements to land depend on good faith. In order to avoid restitution, the defendant must not have constructive knowledge that the property is subject to the plaintiff's claim. Another way to say this is that the defendant is liable for restitution only if he was in "knowing receipt" of unjustly obtained property. An enrichment is unjust only if the defendant should have known that it was unjust.<sup>333</sup> This means the defendant must not know, or must not have had a duty to inquire, about the contested title to the property.<sup>334</sup> "[T]he recipient is liable for knowing receipt only if he has actual or constructive knowledge, constructive knowledge being determined . . . according to the duty of inquiry."<sup>335</sup>

It is hence essential to precisely define the duty of inquiry. Traditionally, there is a higher duty of inquiry in purchases of land than in other commercial transactions. "A purchaser is taken to have notice of an equitable interest unless he can show that he took all reasonable care and made inquiries."<sup>336</sup> A land purchaser is expected to examine documents of title, inspect the land, or carry out searches of the title register, while in commercial transactions there is less duty so long as nothing appears suspicious.<sup>337</sup>

Extending this logic to the Israel and Palestine setting, one could argue that the State of Israel was a wrongdoer, but individual Israelis who acquired property from the State were not. Despite the discriminatory nature of Israel's land regime, many Israelis who benefited would be entitled to substantial sympathy under common law property rules. In order to say that most Israeli secondary occupants did not acquire their property in good faith, the duty of inquiry here would have to include more than merely the duty to ascertain the title history. A prospective occupant would also have to have the duty to assess whether domestic law was consistent with international law. This is a considerably higher duty of inquiry than what is imagined by the common law in normal private property disputes. Since Israel became recognized as a sovereign state, it could be argued that individual Israelis could reasonably rely on its property laws even if they theoretically could have known that specific piece of property was illegally confiscated.

It should be noted that in the 1950s the international community did not uniformly condemn Israeli confiscation of refugee property. The United

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333. Nicholas J. McBride & Paul McGrath, *The Nature of Restitution*, 15 OXFORD J. LEGAL STUD. 33, 38 (1995).

334. JAFFEY, *supra* note 15, at 234.

335. *Id.* at 331.

336. JILL E. MARTIN, HANBURY AND MARTIN MODERN EQUITY 33 (15th ed. 1997).

337. JAFFEY, *supra* note 15, at 343.

States initially opposed the Absentee Property Law, but by 1961 considered it “improbable in practical terms that the process [of land confiscation and transfer] could be reversed,” and considered it Israel’s sovereign right to dispose of property within its borders.<sup>338</sup> In 1954, in *F. & K. Jabbour v. Custodian of Israeli Absentee Property* a British court accepted the authority of the Israeli custodian in a case concerning insurance revenues.<sup>339</sup> The holding in this case was concerned solely with choice of law in a private commercial transaction, and did not reach the legitimacy of property confiscations under public international law. However, it is difficult to fault individual Israelis for relying on Israeli law when an English court was doing the same.

The fact that Israel became a recognized sovereign state bolsters the good faith defense for individual Israelis.<sup>340</sup> Individuals normally can rely on a sovereign state’s regulation of private property. The sovereignty factor gives secondary occupants inside Israel a considerably better argument for good faith than Jewish settlers in the West Bank, Gaza Strip and East Jerusalem where Israel is a belligerent occupant and is banned by the Fourth Geneva Convention from transferring its civilian population.

Despite the force of these arguments that many Israeli secondary occupants acquired refugee property in good faith, Palestinians can raise substantial objections. It could be argued that most Israelis who occupy refugee property know or should know what they are doing. The history of the absentee property law is a matter of public record, as are at least some British Mandate era property records. Beyond legal records, the human memory of what was once on a particular piece of land cannot be so easily erased. Many Israelis, especially in the 1950s, lived in Palestine before 1948 and hence would have known where many Arab farms and villages were. Although the Israeli army destroyed many or most buildings, the physical reminders can still be seen all over the country today, whether in the form of partial stone buildings, abandoned cemeteries or other markers.

Israeli government policies were not a secret. Israel did not deny that it had confiscated refugee property and sold it to the Development Authority. In many cases, Israel directly settled new immigrants in

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338. FISCHBACH, *supra* note 22, at 242 (quoting an internal U.S. government study and statements by the U.S. Secretary of State).

339. *F. & K. Jabbour v. Custodian of Absentee Property*, [1954] 1 WLR 139 (Queen’s Bench).

340. *Cf. Judith Hippler Bello et al., Loizidou v. Turkey*, 90 AM. J. INT’L L. 98 (holding that the so-called government of the Turkish Republic of Northern Cyprus could not legally confiscate the property of a Greek Cypriot refugee, but relying extensively on the fact that U.N. Security Council Resolution 542 (1983) had declared the establishment of the Republic of Northern Cyprus to be legally invalid, had also been condemned by a number of other regional and international bodies, and was not regarded as a sovereign state under international law).

abandoned refugee housing.<sup>341</sup> Israeli policy and the dominant Zionist narrative have not denied that Israel took over much Arab land in the 1948 war; they have merely sought to justify it. Israelis who lease property from the Israel Lands Administration, and particularly from the JNF, know that they were taking advantage of a land system skewed in favor of Jews. For all of these reasons, it is open to Palestinians to argue that most individual Israelis who are occupying former refugee property have constructive knowledge of what they are doing.

Given these contesting arguments, the merit of good faith defenses for secondary occupants would depend essentially on the kind of duty of inquiry inherent on Israelis vis-à-vis refugee property owners. As a factual matter, it would be hard to argue that secondary occupants actually had no constructive notice that they were taking refugee property. But it is also reasonable to argue that individual Israelis did not have a duty to inquire whether Israel's property laws were legitimate in terms of international norms.

Another important means of interpreting the "materially impossible" exception to restitution claims relates to pieces of property that have been substantially developed since their confiscation. In the Israeli and Palestinian context, this is likely to be a relevant consideration where original Palestinian structures have been destroyed and the land developed for other uses. The commentary to the ILC's draft articles on state responsibility suggests that this might make restitution impossible.

[Q]uite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed in some cases tribunals have inferred from the terms of the *compromise* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in the best interests of the parties, and of the public.<sup>342</sup>

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341. See Terry Rempel, *Dispossession and Restitution in 1948 Jerusalem*, in JERUSALEM 1948: THE ARAB NEIGHBORHOODS AND THEIR FATE IN THE WAR 217-18 (Salim Tamari ed., 2002).

342. CRAWFORD, *supra* note 170, at 214 (citing WALTER FLETCHER SMITH, 2 BRITISH CLAIMS IN THE SPANISH ZONE OF MOROCCO, UNRIAA 913, 918 (1927)).



This would appear to explain the limits on restitution in South Africa that I have described above.

Even where a refugee has a right to claim restitution, it may be in the economic interests of both parties to instead negotiate financial compensation or a payment of rents to the refugee. This is especially likely to be the case if, in the particular case at hand, there is a profitable Israeli commercial enterprise situated on former refugee property. The principle that “satisfaction shall not be out of proportion to the injury”<sup>343</sup> would in some cases prevent returning refugees from obtaining full title to property that has been substantially developed, while the secondary commercial occupant may be entitled to compensation for good faith investments. Because it may be economically inefficient to provide actual restitution in such a case, the Israeli enterprise would have an incentive to pay the Palestinian refugee to not seek restitution. However, such arrangements would be a matter of economic negotiation, and would not conflict with the refugee’s right to seek restitution.

In the case of newly developed residential property, the secondary occupants’ position would be stronger. In this case, the structures belonging to the returning refugee will not be in existence. Restitution would require evicting secondary occupants from their homes and providing alternative housing. Given that the returning refugee would need to redevelop the property in order to return to the *status quo ante*, it may be in the best interest of the parties to provide the refugee an alternative piece of property rather than evict the secondary occupants.

#### D. *Balancing Conflicting Rights in the Context of a Peace Agreement*

This analysis suggests that the most difficult restitution cases will be those where the refugee property has been substantially redeveloped for new residential housing. Where original Palestinian (or, in the case the OPT, Jewish) structures remain, restitution is clearly materially possible, and the most immediate and direct means of remedying dispossession. Moreover, where original structures remain, it is more difficult to presume that secondary occupants could have obtained or invested in the property in good faith without constructive knowledge that it was confiscated from a displaced person. Good faith would also be in doubt where the property is occupied and used by the Government of Israel (including the Development Authority or Custodian of Absentee Property), the JNF, Jewish Agency, or any other institution that materially and directly participated in the *de facto* or *de jure* seizing of refugee property.

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343. INT’L L. COMM’N, *supra* note 170, art. 37(3).

But where the original structure was destroyed before the arrival of the current occupant, and where the property has been redeveloped, there is a genuine problem of conflicting rights between the secondary occupant and the refugee. How these conflicting rights are balanced equitably depends to a great extent on the structure of an eventual peace agreement. Given that the refugee would need to rebuild in order to restore his or her property, at a purely individual level it may be equitable to provide the refugee with alternative property of equal value rather than displace the secondary occupant simply to allow the refugee to rebuild in the same location. Yet there are a number of compelling reasons to nevertheless consider providing full restitution and evict the secondary occupant. As I have explained, one of the main reasons why Israeli confiscation of Palestinian property was illegal is that it was discriminatory, and part of a composite violation of forced ethnic displacement. Coupled with the refugees' right to return, property restitution is critical to remedy these large scale violations. This provides a reason to provide restitution and to evict secondary Israeli occupants even where the individual interests alone do not necessarily point to the same conclusion.

Like most legal claims that are connected to the Palestinian refugee right of return, the idea of property restitution runs counter to the general political thrust of international peacemaking efforts in the Middle East today. In 2003, the Security Council endorsed the concept of a two-state solution to the Israeli-Palestinian conflict.<sup>344</sup> Though this resolution does not negate refugee claims for either return or property, it is based implicitly on the logic of ethnic separation along the "two states for two peoples" model.<sup>345</sup> Such a peace agreement may effectively legitimize some degree of population transfer. By contrast, one of the reasons that secondary occupants had so few defenses in Bosnia and Kosovo is that the Security Council made reversing ethnic cleansing a high priority. The United States has taken strikingly opposite positions on refugee rights in different cases, favoring return and restitution in the Balkans and opposing the same for Palestinians.<sup>346</sup>

To be clear, I have doubts about the legality, much less the durability, of any peace agreement predicated on legitimizing ethnic displacement or

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344. S.C. Res. 1515 U.N. Doc. S/RES/1515 (Nov. 19, 2003) (calling on all parties to implement the "Performance Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" and endorsing the "vision of two states living side by side in peace and security.").

345. *Id.*

346. See FISCHBACH, *supra* note 22, at 111 ("[O]ne cannot help but be struck by the difference in U.S. opinion between insistence that the only 'practical' solution to the Palestinian refugee problem is to resettle the bulk of the exiles and insistence that Bosnian refugees be allowed to return to their homes, regardless of whether this proved practical or ethnopolitically palatable.").

denying the right of return. However, where international law leaves some room for ambiguity, the nature of the overall peace settlement could certainly affect the equitable balance in resolving conflicting rights situations. This is the case with secondary occupation of residential property. As other commentators have noted, there are reasons for doubting the efficacy of the two-state model,<sup>347</sup> and there is certainly no guarantee that it will remain the favored framework for peace indefinitely.<sup>348</sup> If the two-state solution actually becomes the basis of a final peace settlement, it will be essential for the parties to clarify what precise vision a two-state solution they are using. A two-state solution does not necessarily rule out fully embracing refugee rights. It should be recalled that the original 1947 U.N. partition plan for Palestine (Resolution 181) specifically forbade population transfer.<sup>349</sup> Under that plan, every non-Jew who was a resident of the Jewish state (i.e., the Palestinians) would have been entitled to citizenship within the Jewish state. Jews in the Arab state would have had a reciprocal right.<sup>350</sup> The resolution provided that all Palestinian citizens “shall become citizens of the State in which they are residents and enjoy full civil and political rights.”<sup>351</sup> In other words, the original U.N. vision for a two-state solution provided for a Jewish and Arab state but without the massive demographic majorities that are usually assumed to be essential in Israel.

## VI. CONCLUSION

The key question in determining how a rights-based approach to restitution would be implemented in the Israeli-Palestinian context is whether reversing ethnic displacement becomes a high priority in the eventual peace settlement. If reversing displacement is a high priority, then the default rule should be that secondary occupants (mostly Israeli citizens) should be given alternative housing while refugees obtain restitution. In Bosnia, reversing ethnic cleansing was a major goal of the international community, so there would be ample precedent for this approach, even if it would encounter maximum Israeli opposition because of the traditional insistence on maintaining a large Jewish majority. Yet, aggressively reversing population displacement is not necessarily in the

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347. See, e.g., Allison Beth Hodgkins, *Beyond Two States: Alternative Visions of Self-Determination for the People of Palestine*, 28 FLETCHER F. WORLD AFF. 109 (2004).

348. See Cynthia Johnston, *Palestinians Talk of Scrapping Call for a State*, REUTERS, July 5, 2004.

349. G.A. Res. 181 pt. I(C), ch. 3(1), A/RES/181(II) (Nov. 29, 1947).

350. *Id.*

351. *Id.*

interests of Palestinian refugees either. In Bosnia refugees undermined this policy goal by not returning in the large numbers necessary to completely undo ethnic cleansing. This indicates that if peacemakers actually want to reverse the displacement that occurred in 1948 they would need to promote, not just allow, Palestinian refugee return. This might necessitate rigidly linking repatriation and restitution so that refugees would have to go home in order to be reclaim their assets.

My analysis is that rigid linkage of restitution and return for Palestinian would actually violate the rights of refugees. Both Jews and Palestinians displaced in the Israeli-Palestinian conflict have the right to return and the right to claim restitution, but these are autonomous rights that essentially require letting affected individuals decide on their own what is best for themselves and their families. The recent literature regarding Bosnia tends to support weighing the rights of individuals over the collective rights of national communities, and thus deprioritizing full reversal of population displacement. As Charles B. Philpott wrote:

The choice to sell, rent, or return is now largely an individual one, freed from the politics of ethnic cleansing and return. The rights-based approach has created a situation in which the market, not politicians or soldiers, will now shape people's decisions about their property.<sup>352</sup>

This approach does not guarantee a complete reversal of unjust policies, but it does permit individuals to reach what one might consider a private peace. One of the sad differences between Israel-Palestine and Bosnia is that in Israel-Palestine refugees would be asked to make choices remedying violations that occurred originally to their parents or grandparents. The long passage of time makes it essential that individuals have flexibility to make choices allowing them to remedy violations while simultaneously adjusting to new circumstances.

Prioritizing individual rights would lessen the impact of property restitution on individual Israelis by avoiding putting the burden of remedying illegal dispossession on individual Israeli citizens. Some commentators argue that in a reconciliation plan individuals should be treated more leniently than a wrongdoing state in order to "avoid assigning guilt to an entire people."<sup>353</sup> If the parties do not make reversing ethnic displacement a high priority, the balance of interests between refugees and

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352. Philpott, *supra* note 1, at 80.

353. Michael R. Scharf & Paul R. Williams, *The Role of Justice in Building Peace: The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 CASE W. RES. J. INT'L L. 161, 170 (2003).

secondary occupants may shift more in the favor of secondary occupants in many cases, especially where original structures have been destroyed and new residences built over them. This would limit restitution for Palestinians in some areas of the country by not penalizing individual Israelis for illegitimate policies pursued by their government, and it would admittedly render successful in many cases Israeli efforts to preserve an unjust status quo. As such, it would be subject to reasonable Palestinian objections.

In order for this to be a defensible approach, it would be essential that restitution be part of a larger process of reconciliation, for instance including a truth commission and other compensation procedures to remedy the harms inflicted on civilians in the course of the conflict. More fundamentally, it is essential that the discrimination that produced this land problem in the first place come to an end. Legislation on both sides that discriminated against Jews or Arabs must be repealed; laws banning discrimination in housing and property should be enacted (no such law has been passed in Israel as of today); and discriminatory institutions such as the JNF should either be dismantled or substantially reformed.

The individual rights approach certainly does not resolve Israeli fears of refugee return completely. Since each Palestinian would choose freely, there is no way to know in advance how many Palestinians would be reabsorbed into Israel.<sup>354</sup> Yet the approach does offer long-term advantages for Israel. The only way to make the number of returnees completely certain in advance would be to impose a fixed quota; this was essentially the approach taken by the unofficial 2003 “Geneva Accord” and the 2002 “People’s Voice” (Nuseibeh-Ayalon) initiative.<sup>355</sup> Both of these initiatives encountered fierce opposition from Palestinian refugees, which helped prevent them from gathering the popular momentum necessary to jump-start official negotiations. Because they abridged the right to return with a quota, these unofficial peace attempts “foundered on the rocks of deep-set, unresolved Palestinian refugee grievances.”<sup>356</sup> Increasing the choices

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354. For an examination of the importance of ensuring the opportunity for refugees to make free choices, see Michael Kagan, *Politically Preferred Solutions and Refugee Choices: Applying the Lessons of Iraq to Palestine*, in PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES (Michael Dumper ed., 2006).

355. Geneva Accord: A Model Israeli-Palestinian Peace Agreement, art. 7(4)(v) (2003), available at <http://www.geneva-accord.org/accord.aspx?FolderID=33&lang=en>.

356. FISCHBACH, *supra* note 22, at 3.

Negotiators can draw lines on maps. Drafts, proposals, and “nonpapers” can be written. . . . Outsiders can pledge money. Yet if peace is to break out between Israelis and Palestinians, it can only do so, from the Palestinian perspective at

available to Palestinians makes it *possible* for refugees to remedy the injustice they suffered without actually choosing to return, as many refugees from Bosnia chose to do. There is no sure way to predict what individuals would choose, but in exchange for this uncertainty refugees would be less likely to have continuing grievances against Israel. This in turn makes long-term peace more sustainable.

None of this analysis makes the Palestinian refugee question any less sensitive, nor any less central to achieving a just and lasting peace. But it does suggest that some of the assumptions that have guided peacemakers to this point are actually questionable, in particular the assumed linkages between restitution and return on the one hand and compensation and resettlement on the other. These assumptions implicitly privilege collective interests over individual rights. We now have many decades of bitter experience illustrating that Israeli and Palestinian demands are often irreconcilable at the level of national communities. As the peace process begun at Oslo crumbles, it may be useful to shift the focus to the individual rights of the people who have been most affected by seemingly endless conflict. The lessons of other conflicts suggest that private parties may be able to resolve contentious issues faster than politicians.

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least, if it provides the refugees with at least a modicum of satisfaction and closure to their sixty-year-old grievances.

*Id.*

