

# LAND, LAW, AND LEGITIMACY IN ISRAEL AND THE OCCUPIED TERRITORIES

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## INTRODUCTION

This Article challenges the claim that law plays a significant role in legitimating<sup>1</sup> the standing social and political order within the oppressed groups or classes in society.<sup>2</sup> The claim rests on an assumption, occasionally explicit, that a dominant class could not rule, or at least could not rule as efficiently, without the consent of the dominated. In other words, a distribution of power that leaves the dominant group with less than complete control of society compels the resort to legality.<sup>3</sup> By the logic of this view, one should not

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1. As used here, "legitimation" refers to "the attempt by those engaged in some realm of social activity to offer a normative justification for their actions." Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 686 (1981) (concluding that rules do not serve legitimating function if they are impossible to carry out). According to Professor Richard Abel, the party may offer the justification to those whom the policy will affect or to outside observers. *Id.*

2. There is a voluminous body of scholarship positing that law confers legitimacy on the state or political system. See, e.g., EUGENE D. GENOVESE, ROLL, JORDAN, ROLL 25-49 (1974) (arguing that dominant groups in society use law to cement their authority); ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (1971) (theorizing that successful domination rests on legitimacy and consent of governed); Charles W. Gray, *Whatever Happened to Politics? A Critique of Structuralist Marxist Accounts of State and Law*, in MARXISM AND LAW 196, 196-207 (Piers Beirne & Richard Quinney eds., 1982) (concentrating on Marx's theory of law and its effect on society); 6 20TH CENTURY LEGAL PHILOSOPHY SERIES, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 334-37, 338-42 (Max Rheinstein ed., 1954) (studying impact of law and economics on society); ROBERTO M. UNGER, LAW IN MODERN SOCIETY 43-242 (1969) (finding that law is glue that holds society together); cf. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 400-18 (questioning theoretical and empirical validity of Weberian model of legitimation through law).

3. See, e.g., GENOVESE, *supra* note 2, at 25 (suggesting that rulers of Western world maintain dominion over their subjects by representing their governance as embodying interests and objectives of dominated). In another variation, Unger suggests that the legal order in liberal societies is a sort of compromise, a "class stand-off," brought about by the incapacity of any one class to impose its hegemony over all the others. UNGER, *supra* note 2, at 69.

expect to find a legalistic style of governance in societies characterized by extreme imbalances of power, wherein one group or class thoroughly dominates all others, and the support of the dominated is therefore inessential to the regime.

Yet heavy reliance on law is characteristic of many colonial societies that are typified by precisely such extreme imbalances of power.<sup>4</sup> The use of law by colonizers to execute and rationalize oppressive policies, notably the acquisition of native lands for European settlement, is poorly explained as an effort to gain the consent of thoroughly dominated indigenous populations.<sup>5</sup> Rather, it is argued

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4. "Colonialism" refers to European expansion into Asia, Africa, and the Americas that took place from the fifteenth through the twentieth centuries. Cf. MARY E. TOWNSEND, *EUROPEAN COLONIAL EXPANSION SINCE 1871*, at 8-9 (1941) (defining modern colonialism as European expansion from mid-nineteenth century). Conquests of other peoples have by no means been limited to this era or to European powers. Both the size and the sweep of modern European colonialism, however, are unprecedented, doubtless because of the "unique alliance of the state and private enterprise which characterized the late modern period and distinguished it from its predecessors." *Id.* at 3-4. Although colonialism is a tremendously variable phenomenon, classical colonialism, if there is such a thing, involved domination of a non-European country by a European one, with political control often exercised from the European metropole. Beverly Gartrell, "Colonialism" and the Fourth World: *Notes on Variations in Colonial Situations*, 6 *CULTURE* 3, 3-4 (1986); Hans Kohn, *Reflections on Colonialism*, in *THE IDEA OF COLONIALISM* 4, 11 (Robert Strausz-Hupé & Harry W. Hazard eds., 1958).

The term "colonial society," on the other hand, denotes a society in which relatively sharp social distinctions persist between a settler population established via a colonial project and an indigenous population. Moshe Semyonov & Andrea Tyree, *Community Segregation and the Costs of Ethnic Subordination*, 59 *SOC. FORCES* 649, 649-50 (1981). These distinctions give rise to differential access to economic, political, military, cultural, and other tangible and intangible power resources, whether or not the society remains under the political control of a European metropole. The interaction between settler and indigenous populations tends to constitute a prominent social dynamic only when the indigenous population maintains a numerical "critical mass"; thus, to constitute a "colonial society," the indigenous population should represent some minimum of the society's total population. Other scholars, in describing "multi-ethnic societies," have fixed upon the necessarily arbitrary figure of ten percent, and that figure will be adopted here. See Semyonov & Tyree, *supra*, at 656-59 (studying segregation and its effect on Israeli society); Oren Yiftachel, *The Concept of 'Ethnic Democracy' and its Applicability to the Case of Israel*, 15 *ETHNIC & RACIAL STUD.* 125, 128, 130 (1992) (rebutting Professor Smootha's classification of Israel as ethnic democracy).

5. Virtually all settler-colonial ventures of the last five hundred years grappled with the moral and legal challenges of acquiring land for European settlement in areas inhabited by indigenous peoples. Popular memory aside, the history of European settlement is seldom simply "the story of the unbridled, unabashed, and undisguised power of the conqueror over the conquered," Michael J. Kaplan, *Issues in Land Claims*, in *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND CLAIMS* 71-72 (Imre Sutton ed., 1985); see also Albie Sachs, *Liberating the Land - Liberating the Law*, in *ESSAYS ON THIRD WORLD PERSPECTIVES IN JURISPRUDENCE* 355 (M. L. Marasinghe & William E. Conklin eds., 1984) ("This history of conquest and pillage and of violence to serve the ends of exploitation, was the principal element characterizing the phase of the implantation of the Portuguese colonial system in Mozambique."). Studies of Spanish, see, e.g., L.C. GREEN & OLIVE P. DICKASON, *THE LAW OF NATIONS AND THE NEW WORLD* 17-27, 81-124, 143-73 (1989) (evaluating legal, theological, and philosophical justifications of colonizers); LOUIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* 17-36 (1949) (articulating that Spain attempted to make Christian principles prevail in its conquest of America); Rene Kuppe, *The Indigenous Peoples of Venezuela and the National Law*, 2 *LAW & ANTHROPOLOGY* 113, 116-28 (1987) (focusing on current structure of national legislation

concerning Venezuela's indigenous population), English, *see, e.g.*, Russell L. Barsh, *Behind Land Claims: Rationalizing Dispossession in Anglo-American Law*, 1 LAW & ANTHROPOLOGY 15, 20-26, 28-41 (1986) (explaining that British recognized native laws but not native rights); LESTER, ABORIGINAL LAND RIGHTS: SOME NOTES ON THE HISTORIOGRAPHY OF ENGLISH CLAIMS IN NORTH AMERICA (1988); Gordon R. Woodman, *Aboriginal Peoples and the Law of Anglophone West Africa (Excluding Liberia)*, 2 LAW & ANTHROPOLOGY 313, 318-30 (1987) (describing British efforts in West Africa to create law that British purported to be identical to folk laws), French, *see, e.g.*, AMAL R. VINOGRADOV, *THE AIT NDIHIR OF MOROCCO: A STUDY OF THE SOCIAL TRANSFORMATION OF A BERBER TRIBE* 5-13, 79, 93-105 (University of Michigan Anthropological Papers No. 55, 1974) (studying French classification of Moroccan society as tribal anarchy and barbarism); John Ruedy, *Land Policy in Colonial Algeria*, in 10 NEAR EAST STUDIES 87-97 (J.J. Finkelstein et al. eds., 1967) (tracing imposition of French law to public lands controlled by indigenous land tenure rules based on history, economy, and ecology), Dutch, *see, e.g.*, JOHN S. FURNIVALL, *COLONIAL POLICY AND PRACTICE: A COMPARATIVE STUDY OF BURMA AND NETHERLANDS INDIA* 8-10, 131-37, 267-69 (1956) (maintaining that European powers established control in Burma and India by imposing Western system of law in place of native personal authority systems), colonialism in many regions of the world, as well as studies of derivative settler-colonial societies such as the United States, *see, e.g.*, FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 43-48 (1975) (reviewing European attempts to justify seizure of American Indian land); Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossession of the Indians*, in SEVENTEENTH CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 15, 16-25 (James M. Smith ed., 1959) (describing moral and legal problems caused by European expansion); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 98-99 (1990) [hereinafter WILLIAMS, *THE AMERICAN INDIAN*] (justifying dispossession of American Indians on grounds that native Americans lacked mental capacity to manage own lands); Maivan Lam, *The Imposition of Anglo-American Land Tenure Law on Hawaiians*, 23 J. LEGAL PLURALISM 103, 104-15 (1985) (studying court application of land tenure and adverse possession laws to dispossess native tenants); James W. Springer, *American Indians and the Law of Real Property in Colonial New England*, 30 AM. J. LEG. HIST. 25, 25-55 (1986) (analyzing American Indian property rights under New England law), Canada, *see, e.g.*, MENNO BOLDT & J. ANTHONY LONG, *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS* 183-245 (1985) (posing answer for how Canada should redress historic injustices to native peoples); Douglas M. Sanders, *Aboriginal Rights in Canada: An Overview*, 2 LAW & ANTHROPOLOGY 177, 178-79 (1987) (explaining British land gain in Canada through land cession treaties and myth that Canada was "juridically a vacant land"), Australia, *see, e.g.*, MARC GUMBERT, *NEITHER JUSTICE NOR REASON* (1984) (combining legal and anthropological analysis of aboriginal land rights); NANCY M. WILLIAMS, *THE YOLNGU AND THEIR LAND* 139-55 (1986) (accounting for European belief that Aborigines had no proprietary interest in land); Garth Nettheim, *Australian Aborigines and the Law*, 2 LAW & ANTHROPOLOGY 371, 372-400 (1987) (focusing on legal treatment of Australian aboriginal populations), New Zealand, *see, e.g.*, David Williams, *Aboriginal Rights in Aotearoa (New Zealand)*, 2 LAW & ANTHROPOLOGY 423, 424-40 (1987) (discussing New Zealand legal treatment of Maori), and South Africa, *see, e.g.*, Elizabeth Mertz, *The Uses of History: Language, Ideology, and Law in the United States and South Africa*, 22 LAW & SOC'Y REV. 661, 663-72 (1988) (hypothesizing that government rationalized dispossession of South African natives by claiming it was for natives' own protection); M.C.J. Olmesdahl, *Aboriginal Peoples and South African Law*, 2 LAW & ANTHROPOLOGY 277, 280-306 (1987) (reporting on unequal treatment of native population under South African law), suggest that the investment of considerable resources in the construction of moral and legal frameworks legitimating the dispossession of indigenous peoples of their lands has been, if not the norm in Europe's colonial expansion, certainly more common than is frequently recognized. The land rights of indigenous peoples have continued to present challenges to modern colonial and post-colonial states. In some places, recent disputes over land arose due to new waves of expansion into remote territories into which indigenous peoples had been pushed, and to increased demands for raw materials and energy. This was the case in Canada, *see* Sanders, *supra*, at 185-87 (finding renewed interest in Aboriginal rights in 1970s), the United States, *see* William T. Hagan, *Justifying Dispossession of the Indian: the Land Utilization Argument*, in AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY 65, 77-80 (Christopher Vecsey & Robert W. Venables eds., 1980), and Australia, *see* Barsh, *supra*, at 34-41 (redefining Aboriginal rights after Australian economic growth in 1960s), in the 1960s and 1970s.

here, the use of law under such circumstances reflects the needs of dominant colonial groups to maintain internal cohesion and morale, and, to a lesser extent, to gain international approval for their policies.

This argument is substantiated through a detailed examination of the Zionist movements, and later, Israel's acquisition of Arab lands in Palestine,<sup>6</sup> beginning in the period before Israel's establishment as a state, and extending to Israel's current program of settlement in the

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6. The Sinai Peninsula and the Golan Heights, which historically are part of Egypt and Syria, respectively, are excluded from this study. See *infra* note 11 and accompanying text (noting that Palestine formally became distinct political entity only following its conquest by British armed forces in World War I and that, prior to British administration, the area had been part of Ottoman Turkish Empire).

Palestine had been administered under a variety of different schemes, but was always divided into several geographical sub-units. See NEVILLE E. MANDEL, *THE ARABS AND ZIONISM BEFORE WORLD WAR I* xix (1976) (studying Palestine at end of Ottoman period and noting that Ottomans never treated Palestine as single administrative unit). Nonetheless, both the Ottoman Government and the Arab inhabitants of the Levant referred to a geographic area as *Filastin* ("Palestine") that roughly corresponds to the modern state of Israel and the West Bank and Gaza Strip. *Id.* at xx. In 1920, after several years of British military administration, the League of Nations' charter assigned Palestine to Great Britain as a Mandate. The mandate eventually became legally binding on September 29, 1923. QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 607 n.9 (1930) (making reference to Article 22 of Covenant of League of Nations, 28 June 1919). The mandate system was a compromise arrangement between the imperial ambitions of France and Britain, *id.* at 48, and the demands for independence of the residents of the former colonies of the defeated Germany and the Ottoman Empire. *Id.* at 62. The system divided those colonies into Class A, B, and C mandates, in descending order of their perceived readiness for self-government, and placed them under either British or French authority for an indefinite "tutelage," after which they would gain national independence. See NORMAN BENTWICH, *THE MANDATES SYSTEM* 11-14 (1930). Palestine, along with the other former Ottoman provinces (Syria, Lebanon, Iraq, and Transjordan), were categorized as Class A mandates. *Id.*

Britain's task in Palestine was, in retrospect, fatally complicated by the incorporation into the Palestine Mandate of the Balfour Declaration, an informal and unilateral statement offered in 1917 by then British Foreign Secretary Lord Balfour to Zionist leader Chaim Weizmann that the British Government approved the use of Palestine as a Jewish homeland as long as the rights of non-Jewish citizens living in Palestine were not compromised. WRIGHT, *supra*, at 600. Article 4 of the Palestine Mandate also provided for the recognition of a quasi-governmental "Jewish Agency" that would help develop social, economic, and other policy matters that would affect Jewish citizens and the new Jewish State. See *id.* at 600-01 (describing functions of Jewish Agency). The Palestinian Arabs, the region's predominant group, also had aspirations of political independence within some form of Arab state and were steadfastly, and not infrequently, violently opposed to Zionism from the outset. See MANDEL, *supra*, at xviii (noting that as early as 1891, Arab elite in Jerusalem pressed the Ottoman Government to halt Jewish immigration and land purchases in Palestine); see also MUHAMMAD Y. MUSLIH, *THE ORIGINS OF PALESTINIAN NATIONALISM* 69-78 (1988) (studying social forces such as Ottoman ideology, Western threats, Arab nationalism, and Zionist encroachment and how they shaped Palestinian nationalism); YEHOASHUA PORATH, *THE PALESTINIAN ARAB NATIONAL MOVEMENT: FROM RIOTS TO REBELLION* 68-70, 71, 77, 108, 127 (1977) (discussing history of Palestinian Arab National Movement in decade following 1929 riots); Rashid Khalidi, *Palestinian Peasant Resistance to Zionism before World War I*, in *BLAMING THE VICTIMS* 207 (Edward W. Said & Christopher Hitchens eds., 1988) (examining reaction of Palestinian peasant class to Zionism).

territories it occupied in the 1967 war with the Arab states.<sup>7</sup> This Article demonstrates that although Israel, like some other colonial powers,<sup>8</sup> has enjoyed virtually unchecked power vis-à-vis the Arab

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7. See IBRAHIM ABU-LUGHOD, *THE ARAB-ISRAELI CONFRONTATION OF JUNE 1967: AN ARAB PERSPECTIVE* 99 (1970) (compiling works of previously published Americans of Arab descent that conflict with commonly accepted conclusions drawn by Western authors); JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 229 (1990) (examining tension surrounding Israel from its inception to present). Several months of escalating tensions between Israel, on one side, and Syria, Jordan, and Egypt, on the other, capped by Egypt's decision to close the Straits of Tiran (leading from the Gulf of Aqaba into the Red Sea) to Israeli shipping, preceded the war. QUIGLEY, *supra*, at 161. In the early hours of June 5, 1967, Israel launched what it characterized as a "pre-emptive strike" against Egypt. *Id.* at 162. Jordan entered the fray later in the morning of June 5 by shelling and launching air strikes against Israel. *Id.* Syria shelled targets in Israel, but otherwise was only peripherally involved in the fighting until June 9, when Israel attacked Syrian forces in the Golan Heights. *Id.* at 163. When the fighting ended on June 10, Israel had occupied East Jerusalem, the West Bank, the Gaza Strip, the Sinai Peninsula, and the Golan Heights. *Id.*; see also Richard B. Parker, *The June 1967 War: Some Mysteries Explored*, 46 MIDDLE E. J. 177, 177-97 (Spring 1992) (studying origins of war as well as responses of Soviet Union and Egypt). While Israel returned the Sinai Peninsula to Egypt following the 1979 peace treaty between Israel and Egypt, the other areas have remained under Israeli occupation. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 25, 41-42 (Emma Playfair ed., 1992) (analyzing Israel's use of law in light of its long-term military occupation of its territories); HENRY CATTAN, JERUSALEM 115 (1981) (viewing Arab-Israeli conflict from its effect on Jerusalem). Israel exerted its authority over East Jerusalem, the municipal borders of which were considerably extended into the West Bank, shortly after the cessation of the fighting, and then formally annexed the city on July 30, 1980. Israel extended its authority over the Golan Heights and effectively annexed it in December 1981. Roberts, *supra*, at 41.

8. The state of Israel was founded in 1948 through the efforts of a European-based colonial project, the Zionist movement. See Teodor Shanin, *The Price of Suspension: The Policy of Stages and the Historical Defeat of Moderate Zionism*, in ISRAEL AND THE PALESTINIANS (Uri Davis et al. eds., 1975). The term "Zionism," derived from Mount Zion in Jerusalem, emerged in the late nineteenth century to designate a heterogeneous group of movements, mostly within Jewish communities in Central and Eastern Europe, that shared the aim of giving Jews a spiritual, territorial, or state center, preferably in Palestine, as a response to the problem of European anti-Semitism. See Maxine Rodinson, *Zionism: Theoretical Sketch of an Ideology*, in ISRAEL AND THE PALESTINIANS, *supra*, at 57, 59. See generally DAVID VITAL, *THE ORIGINS OF ZIONISM* (1975) [hereinafter VITAL, ORIGINS] (exploring changes in Jewish peoples following Zionist revolution); DAVID VITAL, *ZIONISM: THE CRUCIAL PHASE* (1987) [hereinafter VITAL, CRUCIAL PHASE] (defining political forces that shaped Zionism); DAVID VITAL, *ZIONISM: THE FORMATIVE YEARS* (1982) [hereinafter VITAL, FORMATIVE YEARS] (considering phenomenon of Zionism during its formal organizational stage). Zionism first achieved organizational coherence in the initial convention of the World Zionist Congress in 1897 in Basel, Switzerland. The delegates to the Congress, under the sway of ideologist Theodor Herzl's manifesto *Der Judenstaat* ("The Jewish State"), adopted the aim of establishing a Jewish state in Palestine. VITAL, *ZIONISM: FORMATIVE YEARS*, *supra*, at 1-8. Prior to that, Herzl had considered the viability of colonizing either Argentina or Uganda, but selected Palestine on the basis of its anticipated appeal to Jews. See Theodor Herzl, *The Jewish State*, in THE ZIONIST IDEA 204, 222 (Arthur Hertzberg ed., 1959) (explaining that Herzl selected Palestine over Argentina because Palestine was historic homeland for Jews and would serve as rallying cry); Morris R. Cohen, *Zionism: Tribalism or Liberalism?*, in ZIONISM: THE DREAM AND THE REALITY 48, 49 (Gary V. Smith ed., 1974). The 1897 meeting in Basel signaled the ascendance of "political Zionism," a largely secular nationalist movement, over religious and humanist variants of Zionism, which were led, for example, by Ahad Ha'am. Ha'am advocated establishment of a spiritual center for Jews in Palestine, but eschewed state power. VITAL, *ZIONISM: FORMATIVE YEARS*, *supra*, at 27-28. For purposes of this Article, the terms "Zionism" and "Zionist movement" will refer to political Zionism, unless otherwise specified. Israel's non-Jewish minority—almost entirely Palestinian Arab by ethnicity, Kevin

populations under its authority, it has nonetheless resorted to legality as a strategy for the appropriation of Arab land and for the general social control of the area's Arab population. Neither the purpose nor the effect of this strategy, however, was to legitimate Israel's actions among its Palestinian subjects. Instead, law was employed to rationalize and defend acquisition of Arab lands for two principal audiences: the Israeli public itself, and, secondarily, the international community.

If the oft-claimed connection between law and political legitimacy seems weakest with respect to colonial societies, it may be no stronger in non- or post-colonial societies. This Article concludes by pointing to the absence of empirical verification for law's legitimating role within marginal groups and classes in even non- or post-colonial societies.<sup>9</sup> Thus, this Article suggests that law in its legitimating

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Avruch, *The Society and Its Environment*, in ISRAEL: A COUNTRY STUDY, 83, 120 (Helen Metz ed., 1990)—composed 18.1% of the country's total population of 5,037,000 in 1991. ISRAEL YEARBOOK AND ALMANAC, 1991/1992, at 104. Thus Israel, whether viewed discretely or together with the West Bank (with a Palestinian population of 990,000, including residents of East Jerusalem) and Gaza Strip (with a Palestinian population of 650,000), clearly meets the demographic profile of a colonial society. McDowall, *A Profile of the Population of the West Bank and Gaza Strip*, 2 J. REFUGEE STUD. 20, 21 (1989).

Persistent sharp distinctions between Palestinian Arabs and Israeli Jews give rise to differential access to most power and other resources in society. Thus, Israel clearly meets the definition of a "colonial society" offered above. For other scholars who have applied models of colonialism to Israel, see MAXINE RODINSON, ISRAEL: A COLONIAL-SETTLER STATE? 35-78 (1973) (distinguishing Israel from other colonial empires); GERSHON SHAFIR, LAND, LABOR, AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT 1882-1914, at 8-12 (1989) (arguing that Palestine shares characteristics of other European settlement colonies); ELIA T. ZUREIK, THE PALESTINIANS IN ISRAEL: A STUDY IN INTERNAL COLONIALISM 76-79, 143-44 (1979) (researching cultural and psychological characteristics of Arabs and Jews).

Zionist writers have adamantly rejected the colonial appellation for Israel. Avneri, for example, argues that unlike colonials, whose aim was to exploit the land and send its profits home, the Zionists came to settle the land and make it their home. ARIEH L. AVNERI, THE CLAIM OF DISPOSSESSION: JEWISH LAND-SETTLEMENT AND THE ARABS 1878-1948, at 279-80 (1984). This description of colonialism encompasses only *one* variant, or perhaps phase, of colonialism, which Israel appears not to resemble. Nonetheless, as will become clear, Zionist colonization of Palestine shared many features of colonial ventures in other parts of the world. Moreover, Avneri relies on a view of colonialism reconstructed through hindsight, and underestimates the extent to which a shield of justificatory ideology preceded even the most rapacious colonial ventures. At the times these ventures unfolded, their perpetrators did not view themselves as robbers and racists, but as bearers of civilization and progress to unschooled heathens and primitives. See Wolfgang J. Mommsen, *Introduction to EUROPEAN EXPANSION AND LAW* 8 (W.J. Mommsen & J.A. de Moor eds., 1992) (characterizing conquest as cultural mission).

9. Indeed, the small but growing body of ethnographic studies of popular attitudes toward law in the United States report findings consistent with those presented here. See generally SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990) (contrasting perceptions of plaintiffs and court personnel toward court system); Sally E. Merry, *Everyday Understandings of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253 (1986) (studying legal ideology of American society through observation of city residents using courts for personal and business reasons); Austin Sarat, " . . . The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343 (1990) (examining intrusiveness of law into lives of welfare poor); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989) (focusing on role of lawyers in legitimating legal institutions); Barbara Yngvevesson,

function may be effective chiefly, if not exclusively, among those proximate to the centers of social and political power.<sup>10</sup>

Part I commences with a discussion of the centrality of land acquisition to the Zionist enterprise, and the various ideological constructs that Zionists used to rationalize their goal. Part II lays a backdrop necessary for the understanding of subsequent sections by describing the status of land tenure in Palestine and the program of Zionist land acquisition in the pre-state period. Part III examines the continuation of this program following the Zionist movement's accession to state power, and the exploitation of the opportunity for land acquisition presented by the mass flight of Palestinians from their homes during the 1948 Arab-Israeli War. Part IV reviews the laws used by Israel to acquire Palestinian lands and the role of Israeli courts in this land acquisition program. Part V recounts the continuation of Israel's acquisition of Palestinian lands in the territories occupied in the 1967 war. Part VI explores the effect of Israel's resort to law to acquire Arab lands on Palestinians, on the international community, and on the Israeli public, as well as the limitations on legal justifications for land acquisition. This Article concludes that Israel has employed a complex legal regime to "finesse" the apparent conflict between its need to acquire land and its democratic impulses, and questions whether law is ever effective, in any society, in gaining legitimacy for a government among those it injures and oppresses.

## I. LAND AND THE ZIONIST ENTERPRISE

The alienation of Arab land in Palestine began in the late period of Ottoman rule<sup>11</sup> when Jewish individuals and private institutions

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*Inventing Law in Local Settings: Rethinking Popular Culture*, 98 YALE L.J. 1689 (1989) (analyzing anthropology and literature to determine their role in shaping law).

10. In so doing, the author hopes to validate the assertion by anthropologist Sally Engle Merry that, while studies of colonialism focus on the mechanics of domination at the fringe of the world stage, "the way in which European societies expanded and endeavored to dominate culturally distinct groups indicates much about the nature of European society itself," and that attention to "the role law played in the establishment of colonial control in the past and at the periphery . . . provides insights into processes of domination in the present and in the core." See Sally E. Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 890 (1991) (emphasizing that domination occurred at "periphery of the world stage" because European nations did not have enough power to effectively dominate their neighbors but did have such power over unsophisticated societies that were not considered major actors on world stage).

11. See MOSHE MA'OZ, *STUDIES ON PALESTINE DURING THE OTTOMAN PERIOD* xv, 375 (1975) (explaining that Ottomans ruled Palestine from 1516 until British military forces occupied it during World War I). At its apogee, the Ottoman Empire, which was a Turkish Muslim dynasty, encompassed Hungary, virtually all of Southeastern Europe, Anatolia, and most of the Arab world. 1 STANFORD SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* 1 (1976).



started to purchase land from Arab owners.<sup>12</sup> The purchases accelerated considerably during the thirty-one years of British rule (1917-48),<sup>13</sup> increasingly as part of a coordinated effort directed by the central organizations of the Zionist movement with the conscious intent of establishing a territorial nucleus for the creation of a Jewish state.<sup>14</sup> By far the greatest number of land transfers from Arab to Jewish ownership occurred after the Zionist movement gained control of the apparatuses of state with the creation of Israel in 1948.<sup>15</sup> Since that time, Israeli control has replaced Arab control of large areas of land, usually through the medium of a relatively complex legal regime pieced together in the initial years of Israeli independence.<sup>16</sup> This process continues today in somewhat modified form, especially in those areas under Israeli authority in which significant Arab private ownership in land still exists, such as the West Bank and the Gaza Strip.<sup>17</sup>

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12. See MA'OZ, *supra* note 11, at xv, 375 (commenting that Arabs opposed Jewish purchase of land); SHAW, *supra* note 11, at 1 (noting that sizable Jewish population existed in Palestine by turn of century).

13. See *infra* note 14 (noting that Zionist purchases of land predated period of British Mandate rule).

14. ZIONISM: THE DREAM AND THE REALITY, *supra* note 8, at 16. The intent to establish a Jewish state, and Zionist purchases toward that end, certainly predated the years of British mandatory rule. See *supra* note 4. Yet the focus on the purchase of *contiguous* plots for Jewish settlement, requiring cooperation and planning among Zionist institutions and individuals, came only in response to the civil strife in Palestine in 1929, when dispersed Jewish communities fell victim to attacks by Palestinian Arabs protesting Zionist colonization. KENNETH W. STEIN, *THE LAND QUESTION IN PALESTINE, 1917-1939*, at 65 (1984).

15. Avruch, *supra* note 8, at 93. On November 29, 1947, the United Nations General Assembly passed Resolution 181 (II), which provided for the division of Palestine into two states, one Jewish and one Arab, and for the establishment of an international administration for the city of Jerusalem. G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11, at 322-43, U.N. Doc. A/364 (1947). The Zionist movement accepted the plan for the partition of Palestine, but the Arab residents of Palestine vehemently resisted. As civil unrest in the country grew, Great Britain announced its inability to implement Resolution 181 and its intent to withdraw permanently from Palestine on May 15, 1948. JACOB C. HUREWITZ, *THE STRUGGLE FOR PALESTINE* 311 (1950). The day before the British announcement, Zionist leaders had declared the independence of the State of Israel. *Id.* at 314. Within hours, five Arab countries (Lebanon, Syria, Iraq, Jordan, and Egypt) declared war on the new state. *Id.* at 315. In the ensuing fighting, lands slated to become the Arab state were absorbed either by Israeli forces advancing from the coastal region to the east (and later annexed by Israel), or were occupied by Egypt (the Gaza Strip) or annexed by Jordan (the West Bank). *Id.* at 318. The city of Jerusalem was divided, the western half of the city falling under Israeli jurisdiction, and the eastern half under Jordanian jurisdiction. *Id.* at 319. Jordan subsequently annexed the West Bank, including East Jerusalem, while the Egyptian military government placed the Gaza Strip under martial law. *Id.* at 318-19.

16. ESTER R. COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982*, at 152-56 (1985).

17. Avruch, *supra* note 8, at 93. Officially barred until 1979, purchases in the West Bank and Gaza Strip by private Israeli individuals or land development companies have become a significant aspect of the overall process of the alienation of Palestinian lands. COHEN, *supra* note 16, at 155. As in Israel itself, however, the Israeli Government (military, in the case of the Occupied Territories) has instigated the largest proportion of transfers through methods that will be discussed more fully below. Continuing settlement activity in and around the Old City

### A. Motivations for Zionist Land Acquisition

Zionism's movement to colonize Palestine, like all other colonial ventures,<sup>18</sup> has its own unique characteristics. For example, unlike early English settlers in the United States, whose religious utopianism and flight from sectarian persecution are otherwise reminiscent of Zionism, Jewish settlers conceptualized their arrival in Palestine as a "return" to a land that belonged to them by historical or divine right.<sup>19</sup> That Zionism was impelled in significant measure by high ideals, by the notion of liberating Jews from injustice and persecution, rather than by imperial and economic aims,<sup>20</sup> was also unusual,

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of Jerusalem, while involving comparatively little territory, nonetheless excites great political controversy. Michael Dumper, *Israeli Settlement in the Old City of Jerusalem*, 21 J. PALESTINE STUD. 32, 37-38, 40-52 (1992); Anita Vitullo, *Erasing Arab Jerusalem*, 175 MIDDLE E. REP. 24, 24-27 (1992); ISRAEL YEARBOOK AND ALMANAC, 1991/1992, at 230-31.

18. No two colonial ventures have been identical. On the contrary, each has varied according to the historical period in which the venture unfolded, the colonial power's philosophy and strategy of rule, the venture's fit within a grander colonial scheme, the venture's particular needs for land and labor, the relative size, characteristics, and patterns of resistance of colonized populations, the natural terrain and resources of the colony, and a multitude of other factors. See Gartrell, *supra* note 4, at 4 (explaining colonialism to be variable phenomenon); Merry, *supra* note 10, at 891 (noting that role of law in colonial process varied greatly over time, but was usually central to colonizing process); see also Jorg Fisch, *Law as a Means to an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion*, in EUROPEAN EXPANSION AND LAW, *supra* note 8, at 20-26 (describing three distinct types of colonies, "colonies of settlement," "commercial and tributary colonies," and "feudal colonies").

19. See QUIGLEY, *supra* note 7, at 66 (discussing Zionist justification for espoused claim of right to Palestine). In the words of David Ben-Gurion, a central figure in the pre-state Zionist movement and Israel's first Prime Minister: "We are in Palestine as of right. We are at home here. Ever since the Jewish people has existed, Palestine has been, remains, and will remain their national home—and to one's home one can always return as of right without having to ask anybody else's leave." David Ben-Gurion, *The Only Solution of the Jewish Problem*, in 1 PALESTINE YEARBOOK 11, 19 (1945). Zionism's mytho-historical tracing of the roots of the Jewish nation to antiquity, on the other hand, is typical of nationalism, which despite its objective modernity, nearly always depicts itself as ancient. See, e.g., B. ANDERSON, *IMAGINED COMMUNITIES* 9 (rev. ed. 1991) (identifying nationalism as cultural artifact that commands and arouses deep emotional attachment); NATIONALIST IDEOLOGIES AND THE PRODUCTION OF NATIONAL CULTURES xi (Richard G. Fox ed., 1990) (describing how political activity of ethnic groups contributed to growth of nationalism); THE INVENTION OF TRADITION 1-4 (Eric Hobsbawm & Terence Ranger eds., 1983) (noting that, although tradition surrounding British monarchy appears ancient, traditions that appear old are often quite recent in origin and are sometimes invented). This tendency to project claims of nationhood backward in time reverberates in some academic work on the region. Arieh Avneri, for example, referring, apparently unselfconsciously, to the expulsion of the Jews from Palestine in the first century A.D., states: "After the *nation of Israel* lost its independence, there were many expeditions of conquest, each of which introduced a layer of new settlers into the country's population." AVNERI, *supra* note 8, at 11 (emphasis added). Similarly, the Biblical injunction that man "occupy the earth, increase, and multiply," although not a mandate to settle a specific locale, was one of the primary rationalizations employed by the Puritans for the appropriation of Native American lands. See Chester E. Eisinger, *The Puritans' Justification for Taking the Land*, 84 ESSEX INST. HIST. COLL. 131-43 (1948) (describing ideological, theological, and moral justifications Puritans offered for dispossessing Indians from American lands).

20. QUIGLEY, *supra* note 7, at 5. Still, Zionist leaders actively courted imperialist powers and appealed directly to their strategic and economic interests as a means to achieve Zionist ideals. Theodor Herzl, the founder of political Zionism and the leader of the world Zionist

although not unique. The Puritan colonists of New England, for example, came to America with lofty ideals of creating a "visible Kingdom of God."<sup>21</sup>

Yet, for all its arguably distinctive features, the Zionist movement resembled most other settler-colonial ventures in facing the initial challenge of obtaining land for settlement. While small numbers of religious Jews, mostly from Europe, had been making their way to Palestine for centuries,<sup>22</sup> the organized Jewish Community in Palestine, the Old Yishuv,<sup>23</sup> in the nineteenth century was small, concentrated in a relatively few urban centers (primarily Jerusalem, Hebron, Safad, and Tiberias), and possessed negligible holdings of land.<sup>24</sup> The community subsisted mainly on commerce and on alms, or "halukka," from Jews abroad.<sup>25</sup> Few members of the Old Yishuv were adherents of the nascent ideology of Zionism,<sup>26</sup> which was still

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organization, for example, argued to European leaders that a Zionist presence in Palestine would "constitute part of the wall of defense against Asia; we would serve as an outpost of civilization against barbarism." Herzl, *supra* note 8, at 52; see also QUIGLEY, *supra* note 7, at 7 ("The idea of Zionism, which is a colonial idea, should be easily and quickly understood in England."); ALAN R. TAYLOR, *PRELUDE TO ISRAEL: AN ANALYSIS OF ZIONIST DIPLOMACY, 1897-1947* v-viii (1961) (tracing political and cultural origins of Zionist movement, concentrating on diplomatic activities of its leadership); Walid Khalidi, *The Jewish-Ottoman Land Company: Herzl's Blueprint for the Colonization of Palestine*, 22 J. PALESTINE STUD. 30, 44 (1993) (noting that Herzl drafted charter for prospective "Jewish-Ottoman Land Company" that closely traced models of British and Dutch East India companies); RODINSON, *supra* note 8, at 28-33 (suggesting that although Zionist colonial project was sponsored by political movement that spanned European national boundaries, Britain, through its incorporation of Balfour Agreement into terms of Mandate and creation of Jewish Agency, performed function of colonial sponsor state for Zionist movement).

21. YASUhide KAWASHIMA, *PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS, 1630-1763*, at 8 (1986) (quoting EDMOND S. MORGAN, *THE PURITAN FAMILY* 3-4 (1966)).

22. MANDEL, *supra* note 6, at xxiii.

23. See CHARLES S. KAMEN, *LITTLE COMMON GROUND: ARAB AGRICULTURE AND JEWISH SETTLEMENT IN PALESTINE, 1920-1948*, at 8 (1991) (explaining that "Yishuv," literally "settlement" in Hebrew, is term used by Jewish settlers to refer to organized Jewish community in Palestine); see also JEFF HALPER, *BETWEEN REDEMPTION AND REVIVAL: THE JEWISH YISHUV OF JERUSALEM IN THE NINETEENTH CENTURY* 6-9 (1990) (noting that "Old Yishuv," which is traditional pre-Zionist Jewish community, is distinguished from "New Yishuv," which is composed of Zionist settlers).

24. KAMEN, *supra* note 23, at 8.

25. See Mo'she Ma'oz, *Changes in the Position of the Jewish Communities of Palestine and Syria in Mid-Nineteenth Century*, in *STUDIES ON PALESTINE DURING THE OTTOMAN PERIOD*, *supra* note 11, at 142-63 (stating that in 1850, Jewish population of Palestine was 13,000 and that, in 1880, about time that Zionist colonization began, number had risen to 14,731); see also JUSTIN MCCARTHY, *THE POPULATION OF PALESTINE* 10 (1990) (acknowledging difficulty in determining exact extent of Jewish landholdings in Palestine in same period, but nevertheless concluding that they were minute). In 1900, after nearly a decade of Zionist colonization, Jewish land ownership in Palestine was 220,700 dunums, equivalent to 0.8% of later Mandate Palestine's 25 million dunums. 1 A SURVEY OF PALESTINE 244, 372 (1991). A dunum, the local unit of measure for real property, equals 0.227, or roughly one-quarter, of an acre. ABRAHAM GRANOVSKY, *LAND POLICY IN PALESTINE* ix (1940) (explaining evolution of land values in history of speculations and problems with national land policy in Israel).

26. ZIONISM: THE DREAM AND THE REALITY, *supra* note 8, at 13.

a minority viewpoint even within the European Jewish communities in which it originated.<sup>27</sup> Thus, the Palestinian Jewish community provided neither a tangible nor ideological base for expansion and development. The creation of such a base was the primary task of the Zionist movement during the periods of Ottoman and British rule.

Zionist leaders were fully aware that acquisition of a land base in Palestine would be essential to the realization of the Zionist project.<sup>28</sup> They viewed control of land as an essential component of independence and stability in the prospective society.<sup>29</sup> In 1940, Abraham Granovsky (Granott), head of the Jewish National Fund (JNF),<sup>30</sup> wrote:

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27. ZIONISM: THE DREAM AND THE REALITY, *supra* note 8, at 16. Many Eastern European Jews saw anti-Semitism as an example of racist persecution endemic to class-based societies, and responded by joining either the Communist movement or the Bund. See Uri Davis, *Foreword to ISRAEL AND THE PALESTINIANS*, *supra* note 8, at 3 (noting that Bund was Jewish socialist organization that insisted on positive value of national and cultural pluralism and "embraced the idea of a Jewish people, differentiated by culture, history and tradition within a Socialist commonwealth of nations"). Both communism and the Bund had greater numbers of Jewish adherents than Zionism until World War II, during which the Bund was physically decimated and the Holocaust lent credence to the Zionist claim that survival could only be assured through the medium of a Jewish state. *Id.* There continue to be leftist Jews critical of Zionism, both in and outside of Israel. See, e.g., ARIE BOBER, *THE OTHER ISRAEL: THE RADICAL CASE AGAINST ZIONISM* 2-4 (1972) (compiling statements issued by Israeli Socialist Organization and articles written by its members detailing Jewish-Arab relations, social conditions, and influence of Israel-Arab war); URI DAVIS, *ISRAEL: AN APARTHEID STATE* 13 (1987) (criticizing racial segregation between Jews and non-Jews in Palestine); NATHAN WEINSTOCK, *ZIONISM: FALSE MESSIAH* 22 (1979) (providing socioeconomic explanation for Zionist movement). For an analysis of the strong socialist tendencies within Zionism, see YOSEF GORNY, *ZIONISM AND THE ARABS 1882-1948: A STUDY OF IDEOLOGY* 81 (1987) (asserting that socialist tendencies became salient during pre-state period and continued, after Israel's establishment in 1948, to dominate Israeli politics through Labor Party); Ben Halpern & Jehuda Reinharz, *The Cultural and Social Background of the Second Aliyah*, 27 MIDDLE E. STUD. 487, 495 (1991) (noting strong socialist tendencies within Zionism, particularly associated with Second Aliyah of 1904-1914 and relating that "aliyah" means "rising up" in Hebrew and connotes waves of Zionist immigration into Palestine). For analysis of Jewish religious opposition to Zionism, see Benjamin Beit-Hallahmi, *Israel's Ultra-Orthodox: A Jewish Ghetto Within the Zionist State*, 179 MIDDLE E. REP. 22, 23 (1992) (relating that ultra-orthodox Jews from Germany and Eastern Europe, who opposed Zionist definition of Jews as nation and cleaved to ancient tradition of Jews as religious community waiting for messiah, formed anti-Zionist movement Agudat Israel).

28. See QUIGLEY, *supra* note 7, at 4-5 (noting central role of land to realization of Zionist project); see also DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 49 (1990) (discussing Zionist leaders' belief that Jewish ownership and control of land was needed both as resource for settlement of Jews and in order to transform social and economic structure of Jewish people into successful Jewish state); Raya Adler, *The Tenants of Wadi Hawarith and the Land Question*, 20 INT'L J. MIDDLE E. STUD. 197, 214-17 (1988) (reviewing role of tenants of Wadi Hawarith, and descendants of first Bedouin tribe, in affecting Palestinian Arab national movement in history of Jewish land purchase).

29. QUIGLEY, *supra* note 7, at 4-5.

30. The JNF was originally created as a corporation under English law, and its primary function was to purchase lands in the prescribed region (Palestine, Syria, any parts of Turkey in Asia, and the Sinai peninsula), for purposes of settling Jews in these lands. Uri Davis & Walter Lehr, *And the Fund Still Lives*, 7 J. PALESTINE STUD., Summer 1978, at 3, 4-7.

Following the establishment of Israel, the "World Zionist Organization—Jewish Agency (Status) Law of 1952" and the "Keren Keyemeth LeIsrael Law of 1953" formalized the

The realization that the first step in the struggle for a Jewish Homeland is the struggle for land is one of the basic principles of Zionism. Land is the indispensable foundation of any human activity. Without it, there can be no agriculture, no industry, no urban settlement. The first task of a landless people is to provide this foundation for its existence.<sup>31</sup>

Indeed, the "conquest of the land" was one of the pillars of the Zionist effort.<sup>32</sup>

The Zionist leadership was also aware that the indigenous Arab population would steadfastly oppose acquisition of land in Palestine as a base for the establishment of a Jewish state.<sup>33</sup> Dr. Yitzhak Epstein, in an address to the Seventh Zionist Congress in 1905, queried, "Therefore, as we come to possess the land, does not the question immediately arise: What will become of the Arab fellahin [peasants] whose lands we buy?"<sup>34</sup> Concerns about the impact of Zionist colonization on the indigenous Arab population, and the latter's anticipated hostile reaction, caused humanist Zionists, such as author Ahad Ha'am, to question the propriety of seeking statehood, as opposed to a home for Jews in Palestine that would serve as a spiritual center.<sup>35</sup>

Such views, however, remained in the minority. As Israeli sociologist Gershon Shafir points out, the offer of land may have been a necessary inducement to attract settlers in numbers sufficient to

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relationships between the state and the various institutions of the Zionist movement. *Id.* at 7. In 1960, the Knesset passed the "Israel-Lands Law," which spells out the respective powers and responsibilities of the JNF and the state in implementing land distribution in Israel. *Id.* at 108. As a result, the JNF became one of the principal holders of public lands in Israel, administering over 90% of the area of the country. *Id.* at 69-74. As one commentator has remarked:

The existence of separate, Jewish institutions such as the JNF, that control vast resources and do not include Arabs in the decisionmaking process, enables the government to use the legal system to transfer resources from the public domain to the Jewish sector. It does this without discriminating in the law between Jews and Arabs, but by assigning responsibility for the disposition of these resources (especially lands and funds from abroad) to institutions which are historical creations of the Zionist movement with personnel imbued with the desire to consolidate and strengthen the Jewish community in Eretz Ysrael.

IAN LUSTICK, ARABS IN A JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY 109 (1980).

31. GRANOVSKY, *supra* note 25, at 3; see also ABRAHAM GRANOTT, THE LAND ISSUE IN PALESTINE 12 (1936) (advocating that Jews return to vocation that is source of all production: agriculture).

32. See Davis, *supra* note 27, at 8 (naming Hebrew conquest of land, labor, and means of production as three pillars of Zionist effort).

33. NEIL CAPLAN, PALESTINE JEWRY AND THE ARAB QUESTION 3-5 (1978) (explaining that large segment of Zionists viewed Arab question as serious demographic, political and physical threat to Zionism).

34. Yitzak Epstein, *A Hidden Question*, 28 NEW OUTLOOK 27, 29 (1985).

35. See Ahad Ha'am, *After the Balfour Declaration*, in ZIONISM: THE DREAM AND THE REALITY, *supra* note 8, at 83; Hans Kohn, *Ahad Ha'am: Nationalist with a Difference*, in ZIONISM: THE DREAM AND THE REALITY, *supra* note 8, at 21.

mount a credible claim to Jewish sovereignty in Palestine:

Palestine, however deeply it was embedded in the Jewish psyche, was a less desirable European settlement society than many of the alternatives available to Jewish immigrants. As long as other shores were open only a small percentage of ashkenazi [Eastern European] Jews chose Palestine. . . . To attract voluntary Jewish immigrants and attain the critical demographic mass necessary to establish a claim to parts of Palestine, a popular social program remained essential . . . [and] the continued provision of "free land" by the JNF was indispensable in this respect.<sup>36</sup>

These pragmatic considerations also dovetailed with ambitions, held by influential groups within the Zionist movement, that went beyond mere Jewish settlement in Palestine; these groups aimed at restructuring the Jewish society, which historically had been barred from ownership of land, by giving it an agricultural base.<sup>37</sup>

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36. SHAFIR, *supra* note 8, at 198. Shafir notes, however, that the majority of land purchased by the Zionist colonization organizations continued to be owned by the organizations, which held the land in trust "for the entire Jewish people." Because the colonization organizations controlled much of the land, the inducement to settlers was free access to land rather than individual enrichment through outright land grants. *Id.*

37. John Ruedy, *Dynamics of Land Alienation*, in *THE TRANSFORMATION OF PALESTINE* 119 (Ibrahim Abu-Lughod ed., 1971). According to Ruedy:

The conditioning of Jews in Europe . . . had taught them that dignity and honor flowed from land, land from which European Christian society for a millennium and a half had systematically excluded the Jew. Forced into the urban ghetto and confined exclusively to city occupations, the Zionist Jew came to see himself and his culture as distorted, warped, lacking in balance; nor, of course, had his considerable urban and village accomplishments over the centuries ever permitted him to own any country. Cultural accomplishments were politically ephemeral, but land ownership had an aura of permanence.

*Id.* at 127.

Ber Borochov, a Marxist-influenced Zionist, coined the term "inverted pyramid" as a metaphor for the structure of Jewish society, arguing that reestablishing a more typically shaped society was a necessary antecedent to further revolutionary transformation. See BER BOROCHOV, *NATIONALISM AND CLASS STRUGGLE* 17 (1937) (asserting that formula for success of Jewish national movement required synthesis of nationalism and class struggle); see also Amos Perlmutter, *Dov Ber Borochov: A Marxist Zionist Ideologist*, 5 MIDDLE E. STUD. 32, 40-43 (1969) (explaining Borochov's formula for socialist-Zionist movement and its role in colonization of Palestine).

The notion of the "redemption of Jewish labor" was the rallying cry of the Second Aliyah, a term used to describe the second wave of immigrants to Israel and Palestine in 1904-14. GORNY, *supra* note 27, at 12. The "redemption of Jewish labor" was the unifying theme expressed by the Second Aliyah immigrants who believed Jewish manual labor to be the vital factor in national revival. *Id.* These immigrants are credited with leading Jews to national independence by preparing the course for the new Jewish society. *Id.* at 13. Referring to these immigrants, Yosef Gorny wrote:

The leading force among the newcomers was a group of several thousand young people with revolutionary ideas. These secular, romantic young people came singly, without families; some of them were socialists. They disagreed as to whether the class struggle was the way to build the Jewish society, but agreed that Jewish labour was a vital factor in the national revival process.

*Id.* at 12; see also SHAFIR, *supra* note 8, at 6 (cautioning against weighing ideological factors too

### B. *Zionist Settlement and "Arab Feudalism"*

Justifying the Jewish settlement in Palestine to the indigenous Arabs and to the world was an important, even necessary task in the pre-state period because the Zionist movement was forced to operate under the authority of two foreign state powers: the Ottoman Empire, and later, Great Britain.<sup>38</sup> Again, while recognizing the indisputably distinctive features of the Zionist colonization movement, as discussed below, it is clear that its leaders fixed upon a number of ideas and images, some implicit and others explicit, that have been used to rationalize colonial ventures in many other parts of the world.

This challenge was especially great during the Mandate period<sup>39</sup> due to explicit British commitments, canonized in the Palestine Mandate, to advance the interests of both Jewish and Arab residents of Palestine.<sup>40</sup> Although subsequent events gave rise to further rationales for Zionist settlement and land acquisition in Palestine, it

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heavily when interpreting forms that Zionist colonization assumed in Palestine and arguing convincingly that much of specificity of Israeli society is due precisely to Zionist movement's response to conflict between Jewish immigrant-settlers and Palestinian Arab inhabitants of land and not to ideological commitments in abstract; Davis, *supra* note 27, at 7-8 (mentioning that other ideological trends within Zionism at time were not averse to exploiting, rather than displacing, Arab agricultural labor).

In practice, even Jewish settlers committed to the "redemption of Jewish labor" sometimes resorted to using Arab labor. Rishon-le-Zion, established in 1882 as the first permanent Zionist settlement in Palestine, was run by a Jewish advisory staff and a small number of landowners who employed mostly Arab laborers. STANLEY B. GREENBERG, RACE AND STATE IN CAPITALIST DEVELOPMENT: COMPARATIVE PERSPECTIVES 359 (1980). Since 1967, Israeli employers, particularly in agriculture and construction, have relied heavily on cheap, politically and legally vulnerable Palestinian day laborers from the Occupied Territories. See, e.g., Samir A. Saleh, *The Effects of Israeli Occupation on the Economy of the West Bank and Gaza Strip*, in INTIFADA: PALESTINE AT THE CROSSROADS 4-6 (Jamal R. Nassar & Roger Heacock eds., 1990) (explaining use of day laborers by Israeli employers and defining "Intifada" as right of Palestinians in West Bank and Gaza to determine their destiny, which entails termination of Israeli occupation of West Bank and Gaza); Toby Shelley, *Palestinian Migrant Workers in Israel: From Repression to Rebellion*, in ADEL SAMARA, PALESTINE: PROFILE OF AN OCCUPATION 32, 56 (1989) (noting that in 1980s, interest in welfare of migrant workers increased and unionization efforts developed).

38. MANDEL, *supra* note 6, at 3-11 (exploring limitations and restrictions Ottoman and British rulers placed on Jewish settlement). The Zionist appeal to the Ottoman Sultan was primarily based on promises that Jewish financial resources would be mobilized globally to lend assistance to his financially strapped empire. *Id.* at 14-16. This appeal fell flat. See Khalidi, *supra* note 20, at 30-47 (describing Theodor Herzl's failed pitch to Ottoman administrators in 1903). Ottoman leaders viewed Zionism as likely to foment nationalistic sentiments already stirring in the Levant, and feared that Zionist colonization might serve as a bridgehead in Palestine for its principal European rival, Russia. MANDEL, *supra* note 6, at 16. Indeed at this time, a majority of Zionists were native Russians. These concerns led the Ottoman Sultan to restrict Jewish immigration and land purchases in Palestine in the late nineteenth century. *Id.*; see also Khalidi, *supra* note 20, at 30-47 (noting that Jewish colonization of Palestine did occur during Ottoman period in spite of Ottomans' preferences and reflected increasing impotence of Ottoman administration to enforce its will in outlying provinces during waning years of Empire).

39. "Mandate period" refers to the 26 years of British rule in Palestine from 1922 to 1948. MANDEL, *supra* note 6, at xx.

40. MANDEL, *supra* note 6, at xviii, xix; see *supra* note 6 (discussing incorporation of Balfour Declaration into Palestine Mandate).

was during the Mandate period that Zionist leaders mapped the main strategy of justification for the movement. Zionist functionaries and agents associated with the Jewish Agency<sup>41</sup> churned out position papers, reports, and proposals seeking to justify Jewish settlement in Palestine and to convince Mandate officials of the compatibility of their project with British interests and obligations.<sup>42</sup>

Among the ideological tools employed most ubiquitously by colonial movements in their efforts to justify acquisition of native lands were notions of "progress" and hierarchical schemes of social evolution. These schemes ranked sedentary, agriculturally based, and Christian European societies at the pinnacle of civilization, and designated all other societies as vestiges of an earlier, primitive stage of human development.<sup>43</sup> Colonial ventures imagined that European societies were dynamic, rational, scientific, and progressive, while non-European societies were thought to be static, moribund, and bound to endless self-replication by blind and irrational adherence to custom.<sup>44</sup>

Colonists constructed myths of native peoples engaged in hunting and gathering over wide expanses of land. These myths held that the native peoples' occupation of the land was wasteful and, in a sense, therefore unjust.<sup>45</sup> In this view, land rights were, according to John

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41. See *supra* note 6 (explaining that function of quasi-governmental body, Jewish Agency, was principally to advise and cooperate with administration of Palestine to facilitate interests of Jewish population in Palestine).

42. KAMEN, *supra* note 23, at 5.

43. See WILLIAMS, *THE AMERICAN INDIAN*, *supra* note 5, at 3-8 (describing rationale employed by Americans to justify colonization of land inhabited by American Indians). Williams writes:

In seeking the conquest of the earth, the Western colonizing nations of Europe and the derivative settler-colonized states produced by their colonial expansion have been sustained by a central idea: that the West's religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples. This superiority, in turn, is the redemptive source of the West's presumed mandate to impose its vision of truth on non-Western peoples.

*Id.* Concepts such as "discovery" and "settlement" seem to derive from the colonialists' hierarchical ordering of societies. JENNINGS, *supra* note 5, at 32. As Francis Jennings observes:

The implications of this use of the word *settlement* are worth notice. First, it vaguely implies that preexisting populations did not classify as humanity, for it is not used to apply to Indians; only Europeans "settle." It also dismisses the Indians' ability to wrest a generally satisfactory living from the "wilderness" and to travel over established trails to known destinations.

*Id.*

44. See I RAYMOND ARON, *MAIN CURRENTS IN SOCIOLOGICAL THOUGHT* 77-95 (1968). The quintessential ideologist of the notion of progress was the Frenchman Auguste Comte, the father of positive philosophy. *Id.*

45. See EMMERICH DE VATTTEL, *THE LAW OF NATIONS AND THE PRINCIPLES OF NATURAL LAW* 85-87 (1758) (providing first articulation of this concept as legal principle). De Vattel, the prominent international lawyer of the Enlightenment, wrote:

[T]hose that pursue an erratic life, and live by hunting rather than cultivate their lands, usurp more extensive territories than with a reasonable share of labor they



Locke, established by productive agricultural use of the land:

Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property . . .

As much land as a man tills, plants, improves, and can use of the product of, so much is his property.<sup>46</sup>

In Palestine, European-born Zionists encountered an Arab society that was, for the most part, undeniably sedentary and agricultural,<sup>47</sup> and that possessed medium to large urban centers and developed court systems.<sup>48</sup> Thus, the imagined stark contrasts between Europeans and their colonial subjects that served so conveniently to justify dispossession of native populations in the New World, Africa, and

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would have occasion for, and have, therefore, no reason to complain if other nations, more industrious, and too closely confined, come to take possession of a part of those lands.

*Id.* This idea was echoed in the writings of colonial administrators and in the judgments of colonial courts from Australia to America. See *Report of Reverend Jedediah Morse to the Secretary of War*, in ALPHEUS SNOW, *THE QUESTION OF ABORIGINES* 125 (1921) (articulating concept that ownership of land flows legally to those who cultivate land and work soil). A government emissary wrote from the western American frontier to the Secretary of War in 1821:

When the hunter state, from whatever cause, is relinquished and the agricultural state adopted, the Indians are entitled to no more of their territories, so changed, than is requisite to give them, from cultivating the earth, a support equal to that which they derived from their whole territory in the hunter state. The advantages of the agricultural over the hunter state are presumed to be a just equivalent to the Indians for the lands they are constrained to resign to the civilized state.

*Id.*

European colonizers often simply ignored, or consciously concealed, the reality that the native populations themselves were greatly dependent on agriculture, and were, in the first centuries of settlement at least, superior to Europeans in this endeavor. See, e.g., JENNINGS, *supra* note 5, at 60; Washburn, *supra* note 5, at 15; Thomas R. Wessel, *Agriculture, Indians, and American History*, in *THE AMERICAN INDIAN: PAST AND PRESENT* 1-9 (Roger L. Nichols ed., 3d ed. 1986) (discussing how North America's European invaders viewed indigenous peoples as uncivilized and simple people and overlooked their extensive agricultural skills); Davidson & Wells, *The Land, the Law, and the State: Colonial Australia 1788-1890*, in *2 LAW IN CONTEXT* 89-117 (1984). In Anglo-American jurisprudence, at least, there is a discernible thread of distrust of individuals who are not linked to a specific community and place. See generally William Chambliss, *Vagrancy Law in England and America*, in *THE SOCIAL ORGANIZATION OF LAW* 132, 135 (Donald Black & Maureen Mileski eds., 1973) (positing that Anglo-American jurisprudence assumes that individuals who are not linked to specific place are immoral due to legacy of feudal bonds to land and need to control movement of labor during emergence of early capitalism).

46. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 17, 20 (Liberal Arts Press, 3d ed., 1952).

47. The principal exception is the Bedouin population that inhabited the southern Negev desert in Palestine. See Longina Jakubowska, *Resisting "Ethnicity": The Israeli State and Bedouin Identity*, in *THE PATHS TO DOMINATION, RESISTANCE, AND TERROR* 85, 91 (Carolyn Nordstrom & Jo Ann Martin eds., 1992). But see *THE CHANGING BEDOUIN* x (Emanuel Marx & Avshalom Shemu'eli eds., 1984) (explaining that Bedouin depended to some extent on seasonal agriculture); EMANUEL MARX, *BEDOUIN OF THE NEGEV* 3 (1967) (examining economic changes among pastoral nomads in Negev region).

48. Jakubowska, *supra* note 47, at 91.

Oceania could not be as easily drawn in the colonization of Palestine.<sup>49</sup>

Instead, Zionists depicted pre-Zionist Palestine as a desolate backwater, trammled by governmental corruption and inefficiency and hindered by ancient, outmoded agricultural practices.<sup>50</sup> The cause of the social and economic torpor afflicting Palestine, according to the Zionists, was the structure of local society. The Zionists sometimes referred to the Arab local society as an example of "Arab feudalism," which was epitomized by a class of absentee Arab landowners known as the *effendis*.<sup>51</sup> The Zionists also lamented communal forms of land tenure that Palestinians practiced into the twentieth century<sup>52</sup> as causes of stagnation and waste in the agricultural sector.<sup>53</sup>

49. See KAMEN, *supra* note 23, at 5 (arguing that Zionists nonetheless saw themselves as purveyors of science and enlightened European values in backward region of world).

50. See David Waines, *The Failure of the National Resistance in THE TRANSFORMATION OF PALESTINE* 214-15 (Ibrahim Abu-Lughod ed., 1971) (explaining that Arab population was poorly trained and too slow to achieve desired progress in agriculture and land development).

51. Barsh, *supra* note 5, at 28 (arguing that other colonial powers had employed feudalist imagery as justification for colonization and undertook "sweeping reconstruction of land tenure" in those areas). For a discussion of the British approach to India's land law, see HERBERT MERILLAT, *LAND AND THE CONSTITUTION IN INDIA* 37 (1970).

52. See *infra* notes 89-168 and accompanying text (discussing history of communal land tenure in Palestine region).

53. See Waines, *supra* note 50, at 215 (discussing transformation of Palestinian agricultural base as necessary to goal of Jewish land settlement and progress). Indigenous communal land tenure has been attacked as an obstacle to economic growth by colonial administrators throughout the world. Collective ownership was believed to discourage individual entrepreneurship and capital investment, to inhibit the adoption of modern techniques of production, and to result in waste. In Algeria, for example, officials were "struck by the apparent disproportion between the amount of land legally owned or occupied by the Muslims and the number of individuals this land supported." Ruedy, *supra* note 5, at 87. In the United States, the Indian General Allotment Act (commonly known as the Dawes Act), 25 U.S.C. § 331 (1988), enacted February 8, 1887, registered formerly communal tribal lands to individual Indians in 160 acre "allotments." Its proponents believed that this measure would encourage Indians to adopt "modern" methods of farming, leading to their general assimilation into majority society and culture. Donald J. Berthrong, *Legacies of the Dawes Act: Bureaucrats and Land Thieves at the Cheyenne-Arapaho Agencies of Oklahoma*, in *THE AMERICAN INDIAN: PAST AND PRESENT*, *supra* note 45, at 204-18.

A common result of colonialism's introduction of individual private property into non-capitalist societies was the growth of land speculation. Peasant holders, often in debt and always at the mercy of the elements, frequently sought relief through the sale of their lands, and so were in essence "cashed out" of the agricultural sector, or became agricultural laborers. See, e.g., ALLAN CHRISTELOW, *MUSLIM LAW COURTS AND THE FRENCH COLONIAL STATE IN ALGERIA* 28 (1985) (explaining modern European colonialism in Africa and Asia as both agent of change and impediment to it); ERIC WOLF, *PEASANT WARS OF THE TWENTIETH CENTURY* 214 (1968) (explaining modern European colonization in Africa and Asia as both agent of and impediment to change). Theodore Roosevelt approvingly described the Dawes Act as a "mighty pulverizing engine to break up the tribal mass." Joe Ryan, *Compared to Other Nations*, 3 AM. INDIAN J. 3, 4 (1977). Interestingly, this connection between collective ownership and communal solidarity was not lost on the Zionist movement, which organized its colonization effort in the main through bodies (such as the JNF) that obtained land and held it in trust for the "entire Jewish people" and only leased it to individual Jews. See generally FRANZ OPPENHEIMER & JACOB

Alfred Bonne, Director of the Economic Research Institute of the Jewish Agency, wrote with regard to "Arab feudalism":

These Arab states exhibit, as heretofore, the typical features of an Oriental administration and an Oriental mentality, which are found among the governing and governed alike. The relations between the masses and the State are largely determined by the old feudal pattern with the fate of State placed almost exclusively in the hands of a class of large landowners. The landless population in the village and town has practically no say in any of the representative bodies and is thus without political influence, a state of affairs that breeds indifference among the masses towards the State and its functions.<sup>54</sup>

Bonne also asserted that the "Oriental administration" lacked the capacity to function as a modern state, and "[i]n particular, the execution of policies designed to raise the standard of living, the level of education, of health services, etc., all of which are dependent on the co-operation of the population, is greatly hampered by this lack."<sup>55</sup>

The image of Arab feudalism was rich with justificatory possibilities. Preeminently, the image demonstrated that the allegedly miserable social and material conditions of the country, held to have existed for centuries, could not possibly be changed from within.<sup>56</sup> Only a dynamic external agent, Zionist colonization, could overcome local

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OETTINGER, LAND TENURE IN PALESTINE 12-13 (1917) (noting that only factor that can truly protect national property is introduction and permanent establishment of paramount ownership by community of land).

54. Alfred Bonne, *The Potential Importance of the Jewish State for the Middle East*, 4 PALESTINE Y.B. & ISRAELI ANN. 221, 224 (1948-1949).

55. *Id.* at 225.

56. This conception was false on several counts. Palestine was neither isolated nor static. In fact, Palestinian society and its economy had undergone striking changes between the eighteenth and twentieth centuries. See JOEL S. MIGDAL, PALESTINIAN SOCIETY AND POLITICS 10 (1980). Far from being a backwater, Palestine was suffering the throes of its incorporation into the capitalist world system and the demise of its former agrarian system. Furthermore, at the time of the Mandate, it was experiencing other fundamental socioeconomic transformations. See generally LAND TENURE AND SOCIAL TRANSFORMATION IN THE MIDDLE EAST (Tarif Khalidi ed., 1984) (exploring studies of ancient medieval, early modern, and modern transformations in land tenure, rural topography, and ecology in Middle East); MIGDAL, *supra*, at 10 (exploring changes in Palestinian stratification and population resulting from distinct policies of investment, alliance, and scrutiny); YLANA N. MILLER, GOVERNMENT AND SOCIETY IN RURAL PALESTINE, 1920-1948 (1985) (investigating conditions that determined and limited Palestinian Arab capacity to protect their homeland); OTTOMAN PALESTINE, 1800-1914: STUDIES IN ECONOMIC AND SOCIAL HISTORY (Gad G. Gilbar ed., 1990) (providing collection of studies tracing demographic characteristics and changes in Palestine by examining immigration of Muslims, Arabs, and Jews); ALEXANDER SCHOLCH, PALESTINE IN TRANSFORMATION, 1856-1882: STUDIES IN SOCIAL, ECONOMIC AND POLITICAL DEVELOPMENT (1992) (offering systematic analysis of Palestinian society and politics under four regimes to identify causes of social stratification).

stagnation and be the catalyst for progressive change.<sup>57</sup> The advent of a modern and scientifically minded settler group would abolish feudalism, liberate the local peasants from the oppression and exploitation of the *effendis*,<sup>58</sup> raise living standards, and transmit new technological knowledge throughout the region.<sup>59</sup> The Zionist envisioned that the new settler society would be a beacon of progress for the entire Middle East.

Zionist leaders argued, therefore, that the local population would benefit as much from Jewish colonization as would the new settlers themselves.<sup>60</sup> In 1937, Berl Katznelson, a Jewish Agency leader, wrote, "Never before has the white man undertaken colonization with that sense of justice and social progress which fills the Jew who comes to Palestine."<sup>61</sup> Jewish settlers arrived in Palestine infused with the ideal of "coming to conquer the desert and to redeem the land from its desolate state,"<sup>62</sup> to make "gardens in the desert and the swamp."<sup>63</sup>

Although land reclamation would provide some margin for Jewish

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57. See KAMEN, *supra* note 23, at 70-71 (discussing positive effects Jews believed colonization would have on Arab population, including development of innovative agricultural techniques, improved health conditions, and creation of growing urban market for Arab farmers).

58. The *effendis* were not, strictly speaking, figments of the Zionists' imagination. There were indeed absentee Arab landowners (a number of them Lebanese or Syrian) who owned large tracts of land in Palestine. Barsh, *supra* note 5, at 15. Moreover, there was an identifiable trend toward the consolidation of landholdings in Palestine that had begun at least as early as the mid-nineteenth century. *Id.* But see ZUREIK, *supra* note 8, at 43 (demonstrating that in first half of twentieth century, no more than 10% of populated portion of Palestine was controlled by large landowners).

59. ZUREIK, *supra* note 8, at 194. Leftist Zionists attempted to state this argument in Marxist terms, applying to Palestine the model of the "Asiatic mode of production." See, e.g., Schlomo Avineri, *Modernization and Arab Society: Some Reflections*, in ISRAEL, THE ARABS, AND THE MIDDLE EAST (I. Howe & C. Gresham eds., 1973) (noting impact of Western imperialism on Arab society). For a critique of this attempt, see Bryan S. Turner, *Avineri's View of Marx's Theory of Colonialism: Israel*, in 40 SCIENCE AND SOCIETY 385-409 (1976-1977).

60. See KAMEN, *supra* note 23, at 70-71 (explaining Jews perspective on improvements colonization brought to Arab population in Palestine and Arab view that colonization had negative impact in region). Although this view was the public position taken by the Zionist movement, many Zionists privately recognized that their ambitions were irreconcilable with the interests of the Arab inhabitants of Palestine, and saw the coming clash with them as unfortunate but inevitable. CAPLAN, *supra* note 33, at 4. This expectation was not broadcast, however, because it would have jeopardized the support of British administrators in Palestine and the support of the public in Britain and elsewhere—support on which the Zionist movement was highly dependent at the time. *Id.*

61. GREENBERG, *supra* note 37, at 357 (quoting Katznelson). Katznelson's statement notwithstanding, there is nothing novel in a colonizers' claim that colonization would benefit native subjects by bestowing on them the manifold wonders of civilized society. See Barsh, *supra* note 5, at 26 ("Unceded Indian lands were opened to settlement, for example, on the pretence that the natives would benefit from closer contact with civilized, Christian company.").

62. AVNERI, *supra* note 8, at 61.

63. Lionel Feitelberg, *Jewish Settlement in Israel*, 4 PALESTINE Y.B. & ISRAELI ANN. 365, 379 (1948-1949).

settlement,<sup>64</sup> the indigenous population already worked most of the arable land in Palestine.<sup>65</sup> The prescription lay in increasing productivity through the intensification of Arab agriculture, guided by the example of the Zionist settlers. Jewish colonization, it was argued, could then take place without disturbing the local population.<sup>66</sup>

The Zionists devised numerous schemes for agricultural development that would have concentrated Arab land holdings, thereby freeing lands for Jewish settlement. For example, in 1933, Arthur Ruppin, head of the World Zionist Organization's<sup>67</sup> colonization program, presented a broad plan for the development of the country's coastal plain that would have reduced Arab landholdings by one-third. Under this plan, the Jews would buy Arab landholdings and the Arabs would use the proceeds from this sale to introduce modern agricultural techniques onto the remaining lands.<sup>68</sup> This plan would thus free 700,000 dunums of land for Jewish settlement.<sup>69</sup>

64. See Joseph Weitz, *Creating New Soil*, 3 PALESTINE Y.B. 119, 136 (1947-1948) (arguing that notion of land scarcity is part of anti-Zionist propaganda proclaiming that there is hardly room for existing population, let alone new immigrants).

65. See KAMEN, *supra* note 23, at 117 (discussing Palestinian use of land as demonstrated by commitment to land development, modernization, and productivity).

66. See *The Influence of Jewish Colonization on Arab Development in Palestine*, 3 PALESTINE Y.B. 185, 190 (1947-1948) [hereinafter *Jewish Agency Memorandum*] (reprinting memorandum by Jewish Agency presented in March, 1946, to Anglo-American Committee of Inquiry) ("The whole problem of agricultural settlement in Palestine boils down to one of productivity of the soil. The conception that colonization must be based on a displacement of population is disproved both by experience and by theoretical analysis."). The Anglo-American Committee of Inquiry was a delegation jointly dispatched by the American and British Governments to study the problem of Palestine in 1946. See Horowitz, *Palestine's Absorptive Capacity*, 1 PALESTINE Y.B. 60-76 (1944-1945) (arguing that crucial problem of Palestine is that of its economic capacity to absorb large numbers of immigrants during war period of 1939-44). Colonials in America also rationalized that relocation of Native Americans was in the Native Americans' interests; the additional land that became available to whites was merely a happy incident to the relocation. Hagan, *supra* note 5, at 73. European settlers in New Zealand made similar arguments, as did a variety of other colonial societies. SHAFIR, *supra* note 8, at 210.

67. The World Zionist Organization is the global representative of the Zionist movement and was founded at the First Zionist Congress in Basel, Switzerland in 1897. See *supra* note 8 (discussing contribution of renowned Zionist organization leaders such as Theodor Herzl and Ahad Ha'am and their impact on growth and philosophy of World Zionist Organization).

68. AVNERI, *supra* note 8, at 246 (proposing that Arabs would apply proceeds from sale of lands to Jews to paying debts and living expenses, and investing remainder in irrigation systems, citrus plantation and livestock).

69. AVNERI, *supra* note 8, at 246. Similar plans were drawn up for the Jordan and Beit Shean Valleys. Joshua Hankin, a land purchasing agent, presented another plan to the Palestine Land Development Company, see *infra* note 128, in 1934 for the settlement of the Bedouin populations in the Negev desert. *Id.* Hankin stated:

I believe there are some 4,000,000 dunam [sic] which can be considered suitable for cultivation. Concerning the number of Bedouin candidates for settlement (10,000 families), half the area should suffice for them once the water problem has been solved. This would leave 2,000,000 dunam for Jewish settlement, and at the same time the Bedouins, too, will become established farmers thanks to the development projects which will come into being through the influx of Jewish capital.

*Id.* Following the establishment of Israel, the Negev Bedouins were progressively settled: ninety-

Not surprisingly, the desire to free land for Jewish settlement strongly influenced the Zionists' analysis of the problems of Arab agriculture in Palestine, and the solutions to those problems.<sup>70</sup> The Zionists thus advocated the type of intensification of agriculture that would reduce the Arab land use—increasing the labor input per unit of land by changing the crops grown from cereals to vegetables and citrus—instead of increasing the frequency of cropping, which was arguably more suited to the environmental and infrastructural conditions of the country.<sup>71</sup>

As Zionist settlements were established, the image of Arab feudalism, and the contrasting image of the dynamic force of Zionism, yielded still further justificatory arguments during the Mandate period. Palestinian opposition to Jewish settlement was delegitimated as the reactionary impulse of the retrograde class of Arab effendis, whose economic dominance was threatened by the progressive newcomers to the country.<sup>72</sup> Zionists further sought to undermine the Palestinians' claim to the land by arguing that many were recent immigrants from surrounding Arab countries, attracted to Palestine by the economic opportunities created by new Zionist enterprises and the general stimulus to the local economy resulting from colonization.<sup>73</sup>

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three percent of the desert area they inhabited was eventually expropriated. Jakubowska, *supra* note 47, at 89. Jakubowska states: "Sedentarization of the Bedouin was publicly presented as modernization and expressed in the language of paternalism. My interviews with government officials who were carrying out the settlement project yielded contemptuous phrases: 'The Bedouin have progressed 1,000 years during the 35 years of Israeli rule.'" *Id.* at 91. Expropriation of large tracts of Bedouin land was accomplished via a special law enacted in 1980, following the Egyptian-Israeli peace treaty, when Israeli military bases were moved from the Sinai Peninsula into the Negev region. *Negev Land Acquisition (Peace Treaty with Egypt) Law*, 34 LAWS OF THE STATE OF ISRAEL 190 (1980/81).

70. See KAMEN, *supra* note 23, at 261 (concluding that Arab farmers were forced to make way for Jewish settlement).

71. See KAMEN, *supra* note 23, at 261 (discussing how Jewish agricultural planners sought to reduce amount of land cultivated by Arabs by planting certain crops).

72. See ZUREIK, *supra* note 8, at 45 (stating that Jewish writers attempted to blame Arab opposition to Jewish settlers on upperclass Arabs). While it is true that the politically articulate and visible Palestinian leadership in the opposition to Zionism was largely of upper class origins, see ANN MOSLEY LESCH, *ARAB POLITICS IN PALESTINE 1917-1939*, at 55-75 (1979) (analyzing Palestinian politics between 1917 and 1939); MANDEL, *supra* note 6, at 77-79 (examining opposition to Zionist land purchases), the early and consistent resistance to Jewish settlement of the Palestinian peasantry is now well documented. See Mark Buheiry, *The Peasant Revolt of 1858 in Mount Lebanon: Rising Expectations, Economic Malaise and the Incentive to Arm*, in *LAND TENURE SOCIAL TRANSFORMATION IN THE MIDDLE EAST* 291, 291-301 (Tarif Khalidi ed., 1984); Ted Swedenburg, *The Role of the Palestinian Peasantry in the Great Revolt (1936-1939)*, in *ISLAM, POLITICS, AND SOCIAL MOVEMENTS* 169, 169-203 (Edmund Burke III & Ira M. Lapidus eds., 1988) (arguing that peasants played substantial role in limiting expansion of Ottoman empire, Zionism, and British occupation).

73. See *Jewish Agency Memorandum*, *supra* note 66, at 188 (stating that "Palestine has become [a country] of Arab immigration"). This theme has since been reiterated by many writers

The Zionists marshalled evidence that purported to demonstrate that colonization was a boon to the local population.<sup>74</sup> They pointed to the expansion of production and consumption,<sup>75</sup> and the corresponding increase in income levels,<sup>76</sup> the declining infant mortality rates,<sup>77</sup> the higher standards of hygiene and health,<sup>78</sup> and the spread of modern education.<sup>79</sup> According to the Zionists, Jewish immigration and colonization provided the stimulus for these improvements in the standard of living in Palestine.<sup>80</sup>

Implicit in the discussions by Alfred Bonne and others of Arab feudalism was a conception that combining labor and property establishes ownership in the property, and that an administration establishes legitimacy in governance by creating the conditions necessary to realize the full productive, economic potential of the land.<sup>81</sup> By this measure, indigenous political structures were wholly

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sympathetic to Israel. See, e.g., AVNERI, *supra* note 8, at 24-25 (stating that economic development in Palestine was due to Zionist settlement); JOAN PETERS, *FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE* 225-322 (1984) (analyzing Arab immigration into Palestine); Fred M. Gottheil, *Arab Immigration into Pre-state Israel*, in *PALESTINE AND ISRAEL IN THE 19TH AND 20TH CENTURIES* 143, 147-50 (Elie Kedourie & Sylvia C. Haim eds., 1982) (concluding that Arab immigration into pre-state Israel was partly due to increased economic activity). But see MCCARTHY, *supra* note 25, at 40-41 n.20 (maintaining that immigration into Palestine from adjacent countries was limited and labeling Peters' work "demographically worthless"); Edward W. Said, *Conspiracy of Praise*, in *BLAMING THE VICTIMS* 23, 23-31 (Edward W. Said & Christopher Hitchens eds., 1988) (criticizing Peters' work for denying claims of Arabs to Palestine). Another demographer, Israeli Roberto Bacchi, concluded that from 1931 to the end of the Mandate, approximately only 200 Muslim immigrants per year entered Palestine, yielding a relatively small portion of the population of Palestine. ROBERTO BACCHI, *THE POPULATION OF ISRAEL* 388-89 (1974).

Africander settlers fielded a narrative similar to that of Zionist writers. An official publication of the South African Government states: "Three and a quarter centuries ago the whites entered South Africa from the south at Table Bay. . . . It was a Dutch-speaking stream which for more than a century made no significant contact with Blacks. Only in about 1770 was it stopped . . . by a Black stream moving southwards." Mertz, *supra* note 5, at 664 (quoting official publications of South African Government).

74. See *Jewish Agency Memorandum*, *supra* note 66, at 185-200 (demonstrating that Zionists attempted to adduce evidence to show that health conditions, employment, standard of living, and general welfare of Arab residents of Palestine had improved virtually in direct proportion to their proximity to Jewish settlements).

75. *Jewish Agency Memorandum*, *supra* note 66, at 196.

76. *Jewish Agency Memorandum*, *supra* note 66, at 188.

77. *Jewish Agency Memorandum*, *supra* note 66, at 198-99.

78. *Jewish Agency Memorandum*, *supra* note 66, at 199-200.

79. *Jewish Agency Memorandum*, *supra* note 66, at 196.

80. *Jewish Agency Memorandum*, *supra* note 66, at 200. Kamen, in one of the most judicious treatments of the effects of Jewish colonization on the Arabs of Palestine, concludes that, in fact, the development of Arab agriculture was stunted by Zionist exclusionary practices, see *infra* note 122 (discussing how redemption of Jewish labor meant that Arabs would be excluded from employment in settlements), of the new settlers. KAMEN, *supra* note 23, at 258-59.

81. See Bonne, *supra* note 54, at 221-31 (describing methods, such as education and democracy, that Jewish state foster to create economic drive).

illegitimate.<sup>82</sup> In addition, citizenship itself is a function of engaging the land in productive enterprise.<sup>83</sup> In the words of Zionist author Israel Zangwill: "[T]here is no Arab people living in intimate fusion with the country, utilizing its resources and stamping it with a characteristic impress: there is at best an Arab encampment."<sup>84</sup>

Zionists were well aware that Palestine was not literally uninhabited. But because the Arab population had failed to develop Palestine, their moral claim to possess it was thereby weaker than that of the Jewish settlers who were committed to its refructification.<sup>85</sup> The Arab population of Palestine, still in the process of defining for itself a national identity,<sup>86</sup> was depicted alternately as a collection of individuals, a collage of ethnically diverse minorities,<sup>87</sup> or part of a

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82. Bonne, *supra* note 54, at 224-25 (asserting that Arab style of governance, including landless peasantry and feudal structure, did not maximize use of land).

83. Bonne, *supra* note 54, at 221-31 (enumerating ways in which Jewish utilization of land has improved living conditions for all).

84. ISRAEL ZANGWILL, *THE VOICE OF JERUSALEM* 109 (1921).

85. See KAMEN, *supra* note 23, at 99-100 (discussing Zionist views toward Palestinian land). European settlers' confidence in their ability to put land to "superior" use is one of the most common justifications for their appropriation of native peoples' lands. As the Governor of the Indiana Territory William Henry Harrison expressed it: "Is one of the fairest portions of the globe to remain in a state of nature, the haunt of a few wretched savages, when it seems destined by the Creator to give support to a large population and to be the seat of civilization, of science, and of true religion?" Hagan, *supra* note 5, at 68 (quoting ALBERT K. WEINBERG, *MANIFEST DESTINY* 79 (1935)). And the inimitable Theodore Roosevelt stated: "[T]he settler and pioneer have at bottom justice on their side; this great continent could not have been kept as nothing but a game preserve for squalid savages." Washburn, *supra* note 5, at 23 (quoting I THEODORE ROOSEVELT, *THE WINNING OF THE WEST* 90 (1889)).

86. See MUSLIH, *supra* note 6, at 86-87 (tracing origins of Palestinian nationalism to pre-World War I period, but explicitly noting that it was exclusively elite phenomenon). Ylana Miller maintains:

Palestinian Arab villagers acquired their specific national identifications under the mandate. Between 1920 and 1948 they remained a distinct social group and were never fully identified with the interests or concerns of the urban population, which furnished political leadership to the nationalist movement. Instead, villagers entered the period with a largely passive orientation toward both official and nationalist action. Yet in the course of the mandate, more and more villagers were forced to act in their own interests and to assert their own understanding of what it meant to be Palestinian Arab.

YLANA N. MILLER, *GOVERNMENT AND SOCIETY IN RURAL PALESTINE, 1920-1948*, at 163 (1985). Competing with the growing sense of national identity were deeply held feelings of localism, or identification with one's village community. See George Bisharat, *Displacement and Social Identity: Palestinian Refugees in the West Bank*, in *POPULATION DISPLACEMENT AND RESETTLEMENT IN THE MIDDLE EAST* (S. Shami ed., forthcoming 1994) (describing lasting attachments among Palestinian refugees to original towns and villages that they left in 1948); Elias Shoufani, *The Fall of a Village*, 1 J. PALESTINE STUD., Summer 1972, at 108, 108-21 (relating changes in composition of village life after 1947-48 War).

87. See YEHOShUA BEN-ARIEH, *THE REDISCOVERY OF THE HOLY LAND IN THE NINETEENTH CENTURY* 5 (2d ed. 1983) (describing experiences of Western explorers and conquerors in Palestine and among Palestinian people). The following quote from Zionist author Yehoshua Ben-Arieh's book illustrates the claim of Palestine's ethnic heterogeneity, and recapitulates many of the themes in Zionist writings on Arab feudalism:

At the beginning of the 19th century Palestine was but a derelict province of the



great, indistinct Arab mass, with no particular attachment to the land of Palestine.<sup>88</sup> In short, the Zionists portrayed the Arab residents of Palestine as anything but a national group posing rival claims of sovereignty over the country. Nor was Arab society, in any sense, seen as worthy of preservation—least of all at the expense of frustrating the creation of a new and patently superior Jewish society.

## II. LAND TENURE IN PALESTINE BEFORE 1948

It is difficult to understand the forms and directions that Israel's acquisition of Palestinian lands took without some grasp of the status of land tenure in Palestine in the pre-state period. This section, therefore, will outline the status of land tenure in both the late Ottoman and British Mandate periods.

### A. *The Late Ottoman Period*

Palestinian society at the turn of the century was predominantly rural and peasant.<sup>89</sup> The heart of rural society, the units within which the most important social relations were organized, were the

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decaying Ottoman Empire. The Sublime Porte only showed interest in it because of the holy places and the meager revenue extorted from the wretched inhabitants. The country was badly governed, having no political importance of its own; its economy was primitive; the sparse, ethnically mixed population subsisted on a dismally low standard; the few towns were small and miserable; the roads few and neglected. In short, Palestine was but a sad backwater of a crumbling Empire—a far cry from the fertile, thriving land it had been in ancient times.

*Id.* at 11.

Israeli policies later institutionalized the emphasis on the diversity of the Arab community by classifying non-Jewish citizens by both "religion"—as Muslims and Christians—and "nationality"—as Druze and Bedouins. See KRETZMER, *supra* note 28, at 41-44 (discussing classification of residents in Israel under Population Registry Law of 1965). Virtually all Muslims and Christians in Israel are of Palestinian Arab ethnicity (approximately 2500 Circassian Muslims, and a slightly larger Armenian Christian group excepted), see Avruch, *supra* note 8, at 120 (discussing religious composition of Israel), as are all Druze (followers of a religious offshoot of Islam), see GABRIEL BEN-DOR, *THE DRUZES IN ISRAEL* 97-107 (1979) (analyzing political and historical position of Druzes in Israel), and all Bedouins (who represent a small subset of Arab society), see MARX, *supra* note 47, at 3 (discussing origins of Bedouins); see also Avruch, *supra* note 8, at 120 (discussing ethnic composition of Israel).

South Africa has attempted to deflect Black African nationalist claims with similar policies, emphasizing the ethnic heterogeneity of local tribes, and enacting the "homelands" policy based on this supposed diversity. Mertz, *supra* note 5, at 664; see also LEONARD THOMPSON, *THE POLITICAL MYTHOLOGY OF APARTHEID* 26-30 (1985) (discussing how "Afrikaner National Myth" has attempted to establish legitimacy of European settlers' claims over those of natives).

88. See NUR MASALHA, *EXPULSION OF THE PALESTINIANS: THE CONCEPT OF TRANSFER IN ZIONIST POLITICAL THOUGHT, 1882-1948*, at 19-20 (1992) (discussing how Zionists attempted to downplay notion that Palestinians were distinct national group). The author goes on to point out that if "[a]fter all, Palestinians did not constitute a distinct, separate nation and were not an integral part of the country with profound historical ties to it, but instead belonged to the larger Arab nation, then they could be shifted to other territories of that nation without undue prejudice." *Id.*

89. STEIN, *supra* note 14, at 3.

hundreds of villages that dotted the Palestinian landscape.<sup>90</sup> Occasionally, merely clusters of the homes of several lineages or extended kin groups formed these villages, although many villages had populations ranging up to several thousand inhabitants.<sup>91</sup>

The system of land tenure in Palestine during the late Ottoman period was in a state of flux. In keeping with practices established in the early periods of Muslim conquest and gradually systematized by successive Islamic states, only dwelling and limited appurtenant areas were regarded as vested in absolute private ownership (*mulk*).<sup>92</sup> Rural land in Palestine for the most part belonged to the *miri*<sup>93</sup> category (from *amiriyeh*, or princely),<sup>94</sup> according to which the state, as representative of the *umma muhammadiyah*,<sup>95</sup> or entire Muslim community, retained ultimate ownership (*raqaba*).<sup>96</sup> An individual could gain a right of possession and usufruct (*tassaruf*) on the condition that the grantee cultivate the land.<sup>97</sup> The state treasury then levied a tithe against the grantee.<sup>98</sup>

In practice, the village as a whole, or its constituent patrilineages,<sup>99</sup> and not individuals held rights in agricultural land through a formally unrecognized customary system of land tenure called *musha'*.<sup>100</sup> Particular plots of land within the village or lineage holding were rotated periodically among individual nuclear families.<sup>101</sup> During one rotation, a period generally not exceeding two or three years, each family separately farmed a particular plot.<sup>102</sup> According to some estimates, as much as seventy percent of the land in Palestine

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90. Ruedy, *supra* note 5, at 120-22.

91. Ruedy, *supra* note 5, at 120-22.

92. See FREDERIC M. GOADBY & MOSES J. DOUKHAN, *THE LAND LAW OF PALESTINE* 6 (1935) (detailing development and evolution of Palestinian land law from Middle Ages through end of Ottoman Empires).

93. *Id.*

94. DOREEN WARRINER, *LAND REFORM AND DEVELOPMENT IN THE MIDDLE EAST* 67 (2d ed. 1962).

95. Ruedy, *supra* note 5, at 2.

96. GOADBY & DOUKHAN, *supra* note 92, at 3-4.

97. GOADBY & DOUKHAN, *supra* note 92, at 7.

98. GOADBY & DOUKHAN, *supra* note 92, at 7. In *miri* lands, the fact that the state was vested with absolute ownership did not mean that it could determine the ultimate use of the land; it only meant that the state could receive taxes or labor from people who possessed the land. WARRINER, *supra* note 94, at 67.

99. A patrilineage is an extended kin group that traces descent through the father. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1656 (1981).

100. See STEIN, *supra* note 14, at 14-15 (discussing origins and effects of *musha'* land tenure system).

101. STEIN, *supra* note 14, at 14.

102. STEIN, *supra* note 14, at 14.

was held in *musha'* tenure at the end of the nineteenth century.<sup>103</sup>

The Ottomans, however, struggled to eliminate *musha'* tenure. In 1858, the Ottoman Sultan enacted legislation establishing a Land Code that explicitly prohibited customary collective land rights in an attempt to reorder the tenure system in the Empire.<sup>104</sup> The Code divided all lands in the imperial domain into five categories: (1) *mulk*, or land held by absolute private ownership;<sup>105</sup> (2) *miri*, land held by absolute ownership vested in the state, but usufruct to the

103. Raphael Patai, *Musha'a Tenure and Co-operation in Palestine*, 51 AM. ANTHROPOLOGIST 436, 441 (1949). The origins and function of communal land tenure in Palestine are matters of some discussion. Communal land tenure has been seen as an adaptation to political and economic instability, a vestige of tribal society in recently sedentarized communities, and as a device for the maintenance of group solidarity. See STEIN, *supra* note 14, at 14-15 (maintaining that communal land tenure was adopted to encourage cooperation and preservation of land within tribe); VINOGRADOV, *supra* note 5, at 87 (noting that communal land tenure was established to better defend ownership of land); WARRINER, *supra* note 94, at 58 (claiming that communal land tenure is means of overcoming economic instability of farming); Ya'akov Firestone, *The Land-Equalizing Musha' Village: A Reassessment*, in OTTOMAN PALESTINE, 1800-1914: STUDIES IN ECONOMIC AND SOCIAL HISTORY 91, 127-29 (Gad G. Gilbar ed., 1990) (concluding that *musha'* villages were response to political and economic pressures of Mandate); Ruedy, *supra* note 5, at 2 (claiming that Algerian concept of land ownership flowed from notion of group consensus). Synthesizing these points, one commentator argues that *musha'* tenure, characteristic of the "marginal areas" between permanently settled and nomadic communities, represented a "transitional" form of ownership that permitted tribally organized peasants to retreat from temporary settlement into a nomadic life style to avoid intensive taxation or conscription into the army of the central government. J. Held, *The Effects of Ottoman Land Laws on the Marginal Population and the Musha' Village of Palestine, 1858-1914* (1979) (unpublished M.A. thesis, University of Texas (Austin)). Variants of communal land tenure were extremely widespread in the Middle East in this period, as they were in a number of other non-capitalist societies settled by European settlers worldwide. See, e.g., KAWASHIMA, *supra* note 21, at 13-14 (asserting that European concepts of private land ownership conflicted with American Indian notions of communal ownership and contributed to breakdown in American Indian tribe lifestyle); VINOGRADOV, *supra* note 5, at 79-92 (laying out legal status of land and land tenure among Moroccan tribes before French colonization); Lam, *supra* note 5, at 104-08 (discussing land tenure system in Hawaii and impact of Western notions of land ownership on it); Olmesdahl, *supra* note 5, at 286-88 (describing communal land tenure among natives in South Africa); Ruedy, *supra* note 5, at 98-105 (documenting tensions between Algerian land tenure and French colonists' notion of individual ownership).

104. WARRINER, *supra* note 94, at 69. In the early nineteenth century, the Ottoman state found itself pressed to streamline and centralize its bureaucracy in order to facilitate the collection of revenues. Kemal H. Karpat, *The Transformation of the Ottoman State 1798-1908*, 3 INT'L J. MIDDLE E. STUD. 243, 257 (1972). This change was necessitated by the Empire's loss of a major economic base with the opening of the Black Sea (which had been an exclusive Ottoman trade area) to Russian trade in the late eighteenth century. *Id.* at 246. Furthermore, Europe's Industrial Revolution, bringing urbanization, changes in consumptive habits, and advances in the military and technological spheres, combined to alter the balance of trade between Europe and the Ottoman Empire. The latter's exports shrank to agricultural commodities, and new manufactured items purchased from European markets began to replace local goods. *Id.* Thus, the Ottoman government embarked on a program of sweeping reforms collectively known as the "Tanzimat," which was inaugurated in 1839. BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 107 (1961). The new system of administration, however, never became fully operative. *Id.* at 386. See generally Esin Örüçü, *The Impact of European Law on the Ottoman Empire*, in EUROPEAN EXPANSION AND LAW 49-51 (Wolfgang J. Mommsen & Jaap de Moore eds., 1992) (outlining legal reforms instituted during Tanzimat period).

105. WARRINER, *supra* note 94, at 66.

individual holder;<sup>106</sup> (3) *waqf*, land dedicated to pious purpose, and controlled by the Supreme Muslim Council;<sup>107</sup> (4) *matruka*, land owned by the state but preserved for public use (such as roadbeds, or village threshing floors);<sup>108</sup> and (5) *mawat*, barren or unclaimed lands owned by the state (forests, mountainous areas, etc.).<sup>109</sup> The Code partitioned and registered *musha'* holdings as the properties of individual family members.<sup>110</sup>

The Ottomans enacted a series of other laws to compel registration of individual titles to rights in *miri* land in newly established Land Registry offices.<sup>111</sup> This measure was intended primarily to aid in affixing tax liabilities to specific individuals, thereby minimizing tax evasion, and to facilitate enforcement of military conscription.<sup>112</sup>

The Palestinian peasantry, ever distrustful of state authority, appeared to be well aware of these intentions. Villagers attempted to avoid full taxation by understating the size of their lands, by disavowing claim to the lands, or by simply evading the land registrars of the Ottoman government.<sup>113</sup> To escape conscription, groups of villagers would vest title of village lands in the hands of a few village leaders or register them in the name of a fictitious or long-deceased individual.<sup>114</sup> As a result, discrepancies between official titles and the realities of occupancy widened. Local notables, now with legally

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106. WARRINER, *supra* note 94, at 66-67.

107. WARRINER, *supra* note 94, at 67; see also STEIN, *supra* note 14, at 12, 29-30 (describing how British Mandate government created Supreme Muslim Council as counterweight to Jewish organization in political affairs).

108. WARRINER, *supra* note 94, at 67.

109. WARRINER, *supra* note 94, at 66-67.

110. WARRINER, *supra* note 94, at 68. Coupled with the provisions for direct collection of taxes by state officials, this code provision was designed to strike at the growing local autonomy of village *sheikhs* and other local notables. *Id.* at 69. By outlawing private ownership and vesting all legal title in the state, the government could create a strong central administration to control individual *musha'* shares, thereby eliminating other sources of power and maximizing revenue collection. *Id.* By replacing the intermediation of local notables between the central authority and individual cultivators with a direct relationship, the provision was intended to eliminate the problem of the siphoning off of state revenues, which had become rampant under the prior system of tax farming. *Id.* at 68.

111. ABRAHAM GRANOVSKY, *THE LAND SYSTEM IN PALESTINE* 73-75 (1952).

112. *Id.* at 75. One commentator maintains that the *musha'* holdings were the principal targets of the Land Code: "The majority of productive lands in the Empire were, at the time of the Land Code, already under cultivation and subject to taxation. In order to increase state revenue, marginal areas were the focus of endeavor, because the additional effort to result from stabilization could produce the greatest relative gain." Held, *supra* note 103, at 124. The Ottomans also aimed to prevent further conversion of *miri* lands into *waqf* holdings, a common but illegal practice (only *mulk*, or private property, could legally be dedicated to *waqf*) in Palestine. GRANOVSKY, *supra* note 111, at 128-55. *Waqf* lands were not taxed, so these illegal conversions deprived the state of precious revenue. See *id.* (detailing implications of *waqf* system).

113. GRANOVSKY, *supra* note 111, at 74.

114. GRANOVSKY, *supra* note 111, at 75.

enforceable rights in land, actually gained in power, transforming themselves into landlords and their co-villagers into tenants.<sup>115</sup> The consolidation of large estates in Palestine developed into a long-term trend.<sup>116</sup>

At the beginning of the British Mandate period following World War I, Great Britain established special Land Courts to address the complex land situation.<sup>117</sup> These courts maintained the effort to enforce the Ottoman Land Code, including the drive for individual registration.<sup>118</sup>

### B. Zionist Land Acquisition in the Pre-state Period

By the end of the Mandate period in May 1948, Jewish land holdings in Palestine totalled approximately 1.8 to 2 million dunums.<sup>119</sup> While this amounted to a relatively scant five percent

115. GRANOVSKY, *supra* note 111, at 75. In other colonial societies, such as the United States, settlers systematically "misunderstood" the extent of the powers of indigenous leaders, "recognizing" their authority to alienate collectively held lands. KAWASHIMA, *supra* note 21, at 14. In some cases, this misperception of the relationship between tribal leaders, communally held land, and tribal members was used to rationalize the seizure of such lands. This was true, for example, in both Rhodesia under British conquest and Algeria under the French. See Barsh, *supra* note 5, at 28-29 (documenting relationship between colonial powers and natives in regard to land ownership in Rhodesia and Algeria); M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-CLASSICAL LAWS 206-07 (1975) (describing how misunderstanding of tribal relationships lead to "confiscation" of land by colonial French). Of the sequestration of lands in Algeria, colonial officials asserted:

It was a political measure . . . sanctioned in the eyes of the Muslims by the original right and the constant practice of the sovereign. What we would call *confiscation* is really for them *repossession*, whose effect is to terminate the right of usufruct, the only one that the prince, the image of God on earth, may and did alienate.

HOOKER, *supra*, at 206-07. Traces of this reasoning are identifiable in Israel's techniques of land acquisition in the Occupied Territories, as will be discussed *infra*.

116. See GRANOVSKY, *supra* note 111, at 54-77 (chronicling emergence of large estates in Palestine). The same situation occurred in other parts of the Empire as well. See Nur Yalman, *On Land Disputes in Eastern Turkey*, in 2 RESEARCH IN ECONOMIC ANTHROPOLOGY 269-75 (George Dalton ed., 1979) (discussing consolidation of land into hands of landlord class in eastern Turkey). The development of large private estates in the late Ottoman Empire doubtless had economic and other causes that were not simply a function of the 1858 Land Code. See Peter Sluglett & Marion Farouk-Sluglett, *The Application of the 1858 Land Code in Greater Syria: Some Preliminary Observations*, in LAND TENURE AND SOCIAL TRANSFORMATION IN THE MIDDLE EAST 413-17 (Tarif Khalidi ed., 1984) (attributing increase in large estates to broadening of public security). It does appear, however, that in some instances the Code actually strengthened precisely that segment of the population that it had been calculated to weaken—namely, the local notables in Palestine and other outlying provinces. See also *id.* at 417.

117. ALBERT M. HYAMSON, PALESTINE UNDER THE MANDATE 1920-1948, at 78-79 (1950). Substantive law during the Mandate period was based on: (1) existing Ottoman codes; (2) newly legislated ordinances; and (3) English common law, where neither of the first two were applicable. Norman Bentwich, *The Legal System of Palestine Under the Mandate*, 2 MIDDLE E.J. 33, 39 (1948).

118. *Id.*

119. STEIN, *supra* note 14, at 38-39; see also ABRAHAM GRANOVSKY, LAND FOR THE JEWISH STATE 4 (1948) (providing figure of 1.8 million dunums).

of the total land area of Palestine, it may have constituted as much as one-fifth of the total cultivable land.<sup>120</sup> Thus, Jewish land purchases certainly affected the Palestinian population to a greater extent than mere numbers might suggest.<sup>121</sup> The threat to indigenous rural society was not simply the displacement of Palestinian peasants from the land,<sup>122</sup> but also the greater danger caused by preventing Arabs from cultivating arable land in the future, "thereby hastening the time when population pressure on existing land would require alteration of the cropping system."<sup>123</sup>

Zionist colonization in Palestine began in 1881, when a group of Russian Jewish immigrants founded the Rishon-le-Zion colony in the vicinity of present-day Tel Aviv.<sup>124</sup> Over time, a variety of groups formed, primarily in Europe, to provide funds and institutional

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120. KAMEN, *supra* note 23, at 193; *see also id.* at 28 (estimating that in 1944 Jews held 12% of cultivable land); STEIN, *supra* note 14, at 39 (estimating that in 1948, Jews held 20% of cultivable land).

121. The purchase of Arab lands by Jews greatly affected the consciousness of Zionist functionaries and activists:

Whether it was avarice or need, self-preservation or greed, Palestinian Arab land sales breathed life into Jewish aspirations and advanced Zionist goals. Indeed, Jews purchased only a small percentage of the total area of Palestine under the Mandate. The critical variable for Zionist motivation was Arab readiness to part with a portion of their patrimony. Palestinian Arab land sales meant the absence of true commitment to Palestinian nationalism. At a time of feverish anti-Zionist and anti-British sentiment, Palestinian Arab land sales to Zionists showed that individual priorities were equal to or more important than an emerging national movement.

STEIN, *supra* note 14, at 70. Kenneth Stein relates that "of the eighty-nine members elected to the Arab Executive [the leading representative institution in the Palestinian Arab community at the time] between 1920 and June 1928, at least one quarter can be identified, personally or through immediate family, as having directly participated in land sales to Jews." *Id.* at 67. Arab and Jewish middlemen mediated land transactions between Arabs and Jews, attempting to minimize contact between Jewish purchasers and Arab vendors to protect the prestige of the latter. *Id.* at 71. In one method of transaction, an Arab landowner would "borrow" from the Jewish National Fund, then default on the loan, leading to a court action for a "forced" sale of the property used as collateral. *Id.* at 72. Many Arabs did not feel that they were selling their homeland; rather, many were motivated by economics and not a desire to desert Palestine. KAMEN, *supra* note 23, at 270. Moreover, many of the absentee owners who sold land to Zionists were not, after the delineation of the Mandate, Palestinians. Ruedy, *supra* note 37, at 134.

122. The displacement of Palestinian peasants from the land area was exacerbated by the practices adopted by the new settlers. The commitment to the redemption of Jewish labor meant, for the most part, that Jews would work newly settled land and would exclude Arabs from employment in the settlements. KAMEN, *supra* note 23, at 125, 272 (describing how Zionist ideology of "self-labor" required exclusion of Arabs from employment in Jewish enterprises). As previously mentioned, this commitment was not always honored. *See supra* note 37 (discussing how Zionists often employed Arab workers despite their ideological opposition to Arab labor). In an effort to enforce this principle of Jewish labor, the organized Labor-Zion faction advocated a radical separation between Jewish and Arab economies. KAMEN, *supra* note 23, at 125.

123. KAMEN, *supra* note 23, at 259.

124. *Jewish Colonization in Palestine*, 1 PALESTINE Y.B. 205, 205 (1944-1945). Several aborted attempts to establish Jewish colonies actually preceded the establishment of Rishon-le-Zion by a few years; the date of 1881 thus marks the first permanent Zionist settlement in Palestine. *Id.*

backing for the immigration of Jews to Palestinian agricultural colonies.<sup>125</sup> The most important of these organizations were the Palestine Jewish Colonization Association, established by Baron Hirsch and later funded by Baron Edmond de Rothschild, which became the most active agency devoted to Jewish acquisition of land in Palestine in the pre-World War I phase;<sup>126</sup> the Jewish National Fund, founded in 1905 pursuant to a directive of the First Zionist Congress to form a special institution for buying land as the property of the Jewish people;<sup>127</sup> and the Palestine Land Development Company, organized in 1909 to "satisfy the impulse of the individual Jew to buy a plot of land" in Palestine.<sup>128</sup>

Initially, Zionist colonization proceeded at a slow pace, both in terms of the number of Jewish immigrants who came to Palestine and of the amount of land purchased by Jews.<sup>129</sup> The pace of immigration and land acquisition quickened, however, with the formalization of the British obligation to aid the Zionist movement<sup>130</sup> and with the incorporation of the Jewish Agency into the administrative structure of the Mandate government,<sup>131</sup> which was charged with the function of facilitating the "ingathering" of Jewish immigrants.<sup>132</sup> Article 6 of the Mandate stated:

The Administration of Palestine, while insuring the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency . . . close settlement by Jews on the land, including state lands and waste lands not required for public purposes.<sup>133</sup>

Because the British administration was more vigilant and efficient than its Ottoman predecessor, the growing class of large Arab landowners lost the ability to accumulate property through privilege,

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125. See AVNERI, *supra* note 8, at 74-76 (outlining different methods of funding Jewish land purchases in Palestine).

126. AVNERI, *supra* note 8, at 75.

127. See *supra* note 30 (discussing genesis of JNF and its role in governing Israel).

128. A. GRANOVSKY, *AGRARIAN REFORM AND THE RECORD OF ISRAEL* 27 (1956).

129. See GRANOVSKY, *supra* note 25, at 91 (establishing Jewish land holdings in Palestine in 1914 at only 418,000 dunum). The Jewish population during the 1900s, however, had risen to 38,754, an increase of about 15,000 from the inception of Zionist colonization in 1882. MCCARTHY, *supra* note 25, at 10, 13-14. The total population of Palestine in 1914-15 was 722,143. *Id.* at 10.

130. WRIGHT, *supra* note 6, at 600-01.

131. See *supra* note 6 (discussing role of Jewish Agency in mandatory system).

132. Mandate for Palestine (and Transjordan), art. 6, reprinted in WRIGHT, *supra* note 6, at 601; see HYAMSON, *supra* note 117, at 115-16 (discussing incorporation of Jewish Agency into British Mandate Government).

133. MANDATE FOR PALESTINE (AND TRANSJORDAN), art. 6, reprinted in WRIGHT, *supra* note 6, at 601.

access to information, and mastery of informal political structures as they had done during the Ottoman period.<sup>134</sup> As a result, many of these Arab landowners opted to sell their estates, and found willing purchasers in the various Zionist settlement organizations.<sup>135</sup> A number of these estates, the titles to which were legally vested in the individual landowners, still were being cultivated under the customary *musha'* system.<sup>136</sup> Upon sale of the estate, villagers found themselves subject to eviction, and without legal recourse.<sup>137</sup>

Early in the period of British rule, administrators recognized the potential dangers of a landless Palestinian peasantry.<sup>138</sup> The principal contributing factor to the transformation of the Palestinian free peasantry into tenants and agricultural laborers was rural indebtedness.<sup>139</sup> Beginning in the nineteenth century, Palestinian peasants relied increasingly on moneylenders who were based in the towns and who charged usurious rates for loans needed to pay taxes and purchase seed and other implements necessary to cultivate the land.<sup>140</sup> When the Palestinian peasants could not repay the loans, the creditors took possession of the debtor's property.<sup>141</sup> The economic disruptions to Palestine's rural economy caused by World War I, a series of bad harvests due to poor rainfall, and the benefits large estate holders derived from selling their land to Zionist purchasers all served to hasten the process of "proletarianizing" the Palestinian peasantry during the Mandate period.<sup>142</sup>

To forestall the growing crisis in the agricultural sector, the government enacted a Land Transfer Ordinance in 1921 that provided tenants with formal legal protection from evictions.<sup>143</sup> The

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134. See STEIN, *supra* note 14, at 33-34 (describing how more highly educated Jews had advantage over Arabs in dealing with British bureaucracy); see also *supra* notes 92-116 and accompanying text (discussing state of land law in Palestine under Ottoman rule).

135. See STEIN, *supra* note 14, at 33-34 (noting that under efficiency of British Mandate, Arabs lost control of their lands to Jews).

136. See STEIN, *supra* note 14, at 33-34 (describing how presence of large shareholder in *musha'* village, as well as notable control over peasants, hindered land reform by mandatory government); see also *supra* notes 103-116 (discussing implications of *musha'* system).

137. Khalidi, *supra* note 6, at 211.

138. See Kenneth Stein, *Legal Protection and Circumvention of Rights for Cultivators in Mandatory Palestine*, in PALESTINIAN SOC'Y & POL. 233, 238 (Joel S. Migdal ed., 1980) (noting that British attempted to halt loss of land to Arabs by closing Land Registry office in 1918).

139. STEIN, *supra* note 14, at 19.

140. STEIN, *supra* note 14, at 19.

141. STEIN, *supra* note 14, at 19 (listing tithe and heavy taxes among reasons for poverty and debt of rural Palestinians). Another practice, in which Palestinian peasants informally mortgaged their properties in order to bribe Ottoman conscription officers for exemptions from military service, also caused rural Palestinian indebtedness. *Id.*

142. See KAMEN, *supra* note 23, at 133-35; STEIN, *supra* note 14, at 65-70.

143. Transfer of Land Ordinance, 1920-1921, reprinted in 1 LEGISLATION OF PALESTINE 1918-1925, at 62-65 (Norman Bentwich ed., 1926) [hereinafter Transfer of Land Ordinance]. Britain,



ordinance required the parties to submit a petition for disposition of immovable property to a Land Registry Office, and to show that the transaction would leave tenants with enough land for their subsistence.<sup>144</sup> Vendors and purchasers eventually developed techniques for circumventing the ordinance, often by paying or pressuring tenants to leave the land prior to transactions for sale.<sup>145</sup>

In 1929, a new ordinance providing compensation for "disturbed" tenants virtually legalized the aforementioned evasive practices adopted in response to the 1921 ordinance by requiring payments to displaced tenants instead of requiring that tenants retain sufficient land for sustenance.<sup>146</sup> Although the Mandate Government continued to tinker with policies directed toward the protection of agricultural tenants, it failed to provide the alternative source of capital that would have aided the peasantry in breaking its reliance on the moneylenders, merchants, and landlords.<sup>147</sup> As a result, *fellaheen*<sup>148</sup> frequently sold land to Jewish purchasers in order to maintain financial solvency.<sup>149</sup>

Until the early 1930s, the majority of Zionist land purchases in Palestine were from large estate holders.<sup>150</sup> After that period,

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in extending legal protection to Palestinians for rights and interests in land, was acting well within the traditions of colonial administrations. According to Merry, "[T]he law provided a way for the colonial state to restrain the more brutal aspects of settlers' exploitation of land and labor." Merry, *supra* note 10, at 891; see also Barsh, *supra* note 5, at 45 n.10 (stating that provincial officials often removed unruly settlers) (citing 1 OYSTER BAY TOWN RECORDS 520 (Cox ed., 1916)). In South Africa, for example, the Black Land Act of 1913 recognized the existing state of land ownership by Africans, demarcated reserves, and prohibited (by criminal sanctions) land transfers by sale or lease to Europeans. Olmesdahl, *supra* note 5, at 287. In North America, the colonies, and later the U.S. Federal Government, sought to regulate land transfers between American Indians and Europeans, and generally to monopolize the power to extinguish American Indian title. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142-43 (1810) (holding that state may extinguish title held by American Indian); KAWASHIMA, *supra* note 21, at 70 (observing that Puritan governments oversaw sale of land to Indians in effort to control land and protect rights of American Indians); Springer, *supra* note 5, at 35 (noting that colonial governments forbade direct purchases of land from American Indians). The same practice was adopted in the Native Land Purchase Ordinance of 1846 in New Zealand. Williams, *supra* note 5, at 428.

144. See Transfer of Land Ordinance, §§ 5, 8, *supra* note 143, at 62-63.

145. Ruedy, *supra* note 37, at 131.

146. Draft Protection of Cultivators Ordinance, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE No. 237, June 16, 1929, 710-14 (enacted as Protection of Cultivators Ordinance No. 27 of 1929, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE No. 240, Aug. 1, 1929, 860). The ordinance required one year notice for the termination of any tenancy in land of greater than two years duration, and required compensation for any loss or expense directly attributable to quitting the land. *Id.*; see also KAMEN, *supra* note 23, at 153, 157 (describing effects of 1920 and subsequent land transfer ordinances).

147. STEIN, *supra* note 14, at 64. Another Protection of Cultivators Ordinance (POCO) was issued in 1933, then substantially amended in 1936. See *id.* at 249-55 (detailing extent and effect of 1933 POCO).

148. STEIN, *supra* note 14, at 4 (describing *fellaheen* as Palestinian agricultural laborers).

149. STEIN, *supra* note 14, at 189.

150. STEIN, *supra* note 14, at 178.

however, small owner-occupiers and *musha*' shareholders provided an increasing share of land to Zionist buyers.<sup>151</sup> In fact, funding was the only substantial limitation on Zionist land acquisition during the entire Mandate period; there was never a shortage of willing vendors.<sup>152</sup>

The British Mandate's "dual obligation," as it became known, to the Jewish and Arab populations of Palestine became a primary policy dilemma. British actions oscillated in favor of one community or the other, depending on political expediencies within and outside of Palestine, and on the personal political sympathies of British Mandate officers.<sup>153</sup> The ordinances of 1921 and 1929,<sup>154</sup> for example, were adopted in the aftermath of severe Arab riots against Zionist colonization.<sup>155</sup> In 1939, with the Second World War looming, the British Government issued a White Paper that narrowly restricted Jewish land purchases to specific zones in Palestine, a move that reflected British fears that its support of the Zionist movement would drive the Arab states into the Axis camp.<sup>156</sup>

On the other hand, the failure of the Mandate Government to enforce legislation implemented in 1941 to annex water rights to land to which the water rights would naturally appertain was the consequence of local Jewish opposition.<sup>157</sup> Many Jews had procured water in areas that the 1939 White Paper had prohibited Jews from

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151. STEIN, *supra* note 14, at 178. Nevertheless, it appears that most of the land purchased by Zionist settlers in Palestine was through transactions with large, and often absentee, owners. Rashid Khalidi presents evidence that between 1878 and 1907, 58% (143,577 dunums) of all land sales to Jews were by non-Palestinian absentee landlords; 36% (88,689 dunums) were by Palestinian absentee landlords; and only 6% (15,200 dunums) by local landlords or peasants. Khalidi, *supra* note 6, at 225. Khalidi suggests that this pattern was likely maintained through 1948. *Id.* His suggestion is partially corroborated by estimates of Walter Lehn, based on reports from the Jewish Agency that, of the total land purchased by Jews by 1936, 52% was from large absentee owners, 24.6% from large but local landowners, 13.4% from institutions such as churches, foreign companies, and the like, and only 9.4% from small farmers. Walter Lehn, *The Jewish National Fund*, 3 J. PALESTINE STUD., Summer 1974, at 74, 94-95.

152. KAMEN, *supra* note 23, at 150; STEIN, *supra* note 14, at 37.

153. See HUREWITZ, *supra* note 15, at 24 (describing indecisiveness of British mandatory policy); STEIN, *supra* note 14, at 35-79 (chronicling oscillating policy of Mandate period).

154. See *supra* notes 143-46 and accompanying text (describing 1921 and 1929 ordinances as British effort to assist Palestinian peasants retain land).

155. QUIGLEY, *supra* note 7, at 18. The causes of the 1929 riots, which resulted in the deaths of 133 Jews, were investigated by the Shaw Commission, appointed for that purpose by the Mandate Government. *Id.* The commission identified two principal causes of the riots: alarm that Jewish immigration and land purchases would lead to Arab destitution, and fears of political subjugation to the new colonizers. *Id.* at 19. Both the 1921 and the 1929 ordinances were strongly criticized by the Jewish sector in Palestine as unwarranted restrictions on land acquisitions and as violations of the terms of the Mandate spelled out in Article 6. See HYAMSON, *supra* note 117, at 80-87.

156. See generally HUREWITZ, *supra* note 15, at 94-111 (describing Britain's reasons for adopting 1939 White Paper and its impact on Arab nationalists).

157. DOREEN WARRINER, LAND AND POVERTY IN THE MIDDLE EAST 73-74 (1948).

purchasing; the Jews sought to neutralize this prohibition by maintaining control over the water supply in these areas, which was vital to the cultivation of the land.<sup>158</sup>

The Zionist movement enjoyed considerable advantages over the Palestinian community in pressing its case before the British administration. The Zionists' mastery of English and other European languages, their familiarity with British culture, and their experience in dealing with complex bureaucracy assisted the movement in gaining a substantial voice in administrative affairs.<sup>159</sup> The Jewish Agency, for example, successfully lobbied the Mandate Government to concede or lease approximately 195,000 dunums of state domain to Jewish settlers by 1947.<sup>160</sup>

While the five percent of Palestine acquired via the program of Zionist land acquisition by the end of the Mandate period represented a geographical nucleus for the establishment of a Jewish state,<sup>161</sup> the viability of the future state was contingent upon significant expansion beyond this nucleus.<sup>162</sup> The partition plan for Palestine, adopted by the United Nations in November 1947,<sup>163</sup> had been drawn to encompass as much land under Jewish ownership into the

158. *Id.* at 74.

159. STEIN, *supra* note 14, at 214 (maintaining that "[t]he Arabs' primary experience was of survival against nature, and they had little experience in confronting the bureaucratic and legislative machinery introduced by the Ottomans and the British").

160. Ruedy, *supra* note 37, at 133. This was, of course, an obligation of the British under Article 6 of the Mandate. See *supra* note 6 and accompanying text (discussing incorporation of Jewish Agency into administrative structure of Mandate Government). The Jewish Agency, however, did not hesitate to classify large tracts of lands that were occupied by permanent Arab tenants as vacant in order to allow the Mandate Government to open them for Jewish colonization. Ruedy, *supra* note 37, at 133. This practice is reminiscent of land classification in Hawaii:

Legal documents after 1839 often speak of "waste land" when referring to wild or fallow land which, in a swidden system, must remain that way for many years. This conceptual confusion, which itself reflects a puritanical compulsion to view anything at rest, or in its natural state, as waste, has done much to justify the separation of Hawaiians from their lands for it encouraged the view that the *maka'ainana* [commoners] did not use and therefore could not claim, such lands.

Lam, *supra* note 5, at 123 n.19.

161. See *supra* note 120 and accompanying text (discussing Jewish landholdings in Palestine in 1940s).

162. ABRAHAM GRANOVSKY, *LAND FOR THE JEWISH STATE* 4 (1948). That the state would need to expand beyond its geographical nucleus was true not only because the limited Zionist land purchases were insufficient to support the anticipated large scale Jewish immigration, but also because of the dispersion, and resultant military vulnerability, of the 305 Jewish colonies scattered throughout Palestine. *Id.* This dispersion occurred despite the Zionist movement's best efforts, especially beginning in the late 1920s, to purchase contiguous plots. *Id.* Finally, these settlements were relatively sparsely populated; as late as 1946, seventy percent of the Jewish population lived in urban areas. Janet L. Abu-Lughod, *The Demographic Transformation of Palestine*, in *THE TRANSFORMATION OF PALESTINE* 139, 153 (Ibrahim Abu-Lughod ed., 1971).

163. See *supra* note 15 (discussing 1947 U.N. partition plan for Palestine, withdrawal by Great Britain, and subsequent actions by new Israeli state to acquire land).

Jewish state as possible.<sup>164</sup> Nonetheless, even within that area, which in aggregate amounted to fifty-six percent of the total land area of Palestine,<sup>165</sup> only eleven and one-half percent was controlled by Jews.<sup>166</sup> With the creation of the state of Israel in 1948, "the Jewish national movement had achieved sovereignty over the land, but it did not possess the ownership of land needed to pursue its immediate goals."<sup>167</sup> Jewish acquisition of more land was, therefore, virtually inevitable.<sup>168</sup>

### III. LAND ACQUISITIONS IN ISRAEL AFTER 1948

Israel declared its independence on May 14, 1948, the same day that Great Britain terminated mandatory rule and evacuated its troops from Palestine.<sup>169</sup> The following day, the surrounding Arab states, bent on preventing Israel's establishment, formally declared war against Israel; this 1948 conflict would prove to be the first of a series of Arab-Israeli wars.<sup>170</sup> In fact, fighting had begun in earnest between irregular Zionist and Arab forces as early as January 1948.<sup>171</sup> By the end of the hostilities, forces of the new state of Israel controlled over 20,000 square kilometers of former mandatory Palestine, or about seventy-seven percent of Palestine's land area.<sup>172</sup>

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164. GRANOVSKY, *supra* note 162, at 4. Only 30 of the 305 Jewish settlements in Palestine fell outside of the area controlled by the Jewish state. These settlements constituted only about seven percent of Jewish landholdings in former Palestine (132,000 dunums out of 1,822,000). *Id.*

165. SAMI HADAWI, BITTER HARVEST '78 (1989) (observing that remaining 44% was apportioned between proposed Palestinian state and international regime over Jerusalem and its immediate environs). One of the primary reasons that the Arabs rejected the partition plan was because the plan allocated more than half of the country, including its most fertile areas, to the Jewish state when at the time Jews constituted approximately one-third of the population. *Id.* at 76. Even with the partition plan's gerrymandering, Jews would have constituted a bare majority within the prospective borders of the Jewish state, which would have included a substantial Arab minority of 497,000 persons. *Id.*

166. In absolute terms, Jews owned 1.7 million dunums of 14.5 million dunums allocated to the Jewish state. GRANOVSKY, *supra* note 162, at 12.

167. KRETZMER, *supra* note 28, at 50.

168. These future acquisitions would necessarily come from Arab owners, as the state domain in the prospective Jewish state was a meager 420,000 dunums. GRANOVSKY, *supra* note 162, at 23.

169. QUIGLEY, *supra* note 7, at 64.

170. See ISRAEL: A COUNTRY STUDY, *supra* note 8, at 50-51 (discussing rising tensions between Arabs and Jews beginning with fears of Arabs in regard to overwhelming recognition of and support for new Jewish state).

171. See BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949, at 29 (1987) (stating that in January 1948, Arab Liberation Army and Arab volunteers went into Israel and launched attack); see also SIMHA FLAPAN, ZIONISM AND THE PALESTINIANS 297 (1979) (stating that by May 12, 1948, several days before outbreak of formal war, Zionist forces controlled nearly all territory assigned to Jewish state by the partition plan, and were already moving into other areas).

172. QUIGLEY, *supra* note 7, at 89.

The remaining 8000 square kilometers, distributed in Gaza and the West Bank, fell within Egyptian or Jordanian control, respectively.<sup>173</sup>

*A. Opportunity: The Palestinian Mass Exodus of 1948*

The massive flight of Palestinian refugees in the 1948 war presented Israel with an unprecedented opportunity for land acquisition. The land abandoned by the refugees constituted an estimated eighty percent of the territory falling within Israeli jurisdiction at the conclusion of the 1949 truce agreements.<sup>174</sup> Between December 1947 and November 1948, some 770,000 to 780,000 Palestinians left the areas of Palestine that would fall under the authority of the new state of Israel.<sup>175</sup> Some Palestinians, particularly those of middle- and upper-class background, had made a relatively orderly retreat from Palestine in the few months directly following the passage of the UN partition plan in late 1947.<sup>176</sup> The vast majority of Palestinian villagers and urban poor, however, fled in nearly complete disarray in the few months surrounding the formal outbreak of war between Israel and the Arab states in May 1948.<sup>177</sup> Still others left their

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173. See QUIGLEY, *supra* note 7, at 89 (discussing Israel's armistice agreements and resulting territorial gains). Although most of this territory was either allocated to Israel in the partition plan or was won by military conquest, an Arab populated area not originally allocated to the Jewish state, known as the "Triangle," was ceded to Israel by Jordan in the 1949 Armistice Agreements. *Id.* at 97; see also Baruch Kipnis, *Regional Development and Strategy Considerations in Multi-Community Land of Israel*, in ARAB-JEWISH RELATIONS IN ISRAEL 21, 28-29 (John E. Hoffman et al. eds., 1988) (stating that "Triangle," together with Upper Galilee, another area not slated for Jewish state but conquered in 1948 war, held 83% of Israel's Arab population in 1948).

174. See Ruedy, *supra* note 37, at 135 (discussing United Nations Conciliation Commission for Palestine's estimate regarding land ownership).

175. See Abu-Lughod, *supra* note 162, at 161 (estimating number of persons displaced as result of 1948 war); see also EDWARD H. BUEHRIG, *THE U.N. AND THE PALESTINIAN REFUGEES: A STUDY IN NONTERRITORIAL ADMINISTRATION* 38-39 (1971) (discussing United Nations Relief and Works Agency (UNRWA) established by United Nations to provide emergency services to Palestinian refugees). UNRWA estimated its charges at nearly 900,000, some of which were not "genuine refugees in need," but rather residents of Arab-controlled border regions whose lands, nonetheless, fell under Israeli control, or who had otherwise lost their livelihoods as a result of the war. BUEHRIG, *supra*; see also AVI PLASCOV, *THE PALESTINIAN REFUGEES IN JORDAN 1948-1957*, at 5-8 (1981) (discussing how Israeli wartime occupation of areas falling outside Jewish state created "Jordanian citizens," "Israeli Arabs," or "Stateless Palestinians").

176. See Erskine B. Childers, *The Wordless Wish: From Citizens to Refugees*, in *THE TRANSFORMATION OF PALESTINE*, *supra* note 37, at 181 (explaining exodus of well-to-do Palestinians to surrounding Arab countries). Perhaps 30,000 such persons left Palestine in late 1947 and early 1948. *Id.*; see also Bisharat, *supra* note 86 (recounting that 75,000 middle- and upper-class Palestinians had relocated from areas slated to become Jewish state to West Bank before 1948 War).

177. See MORRIS, *supra* note 171, at 128-31 (discussing collapse of rule of law, administration, and communication in Arab cities and towns). The causes of the Palestinians' mass exodus during this period represent a continuing controversy in the history of the region. For many years, Israeli and other writers uniformly disavowed any Jewish responsibility for the Palestinians' flight. See, e.g., A. GRANOTT, *AGRARIAN REFORM AND THE RECORD OF ISRAEL* 86 (1956) (stating that "Jews were not responsible for . . . Arab flight"); JOSEPH SCHECHTMAN, *THE ARAB REFUGEE*

homes and villages for other locales within Palestine, finding themselves, in the aftermath of the war, under either Israeli, Egyptian, or Jordanian rule.<sup>178</sup>

Initially, Israeli policies toward the refugees were ambivalent. In the months directly following the cessation of the war, the Israeli Government permitted tens of thousands of Palestinians to return to their homes and villages in Israel.<sup>179</sup> The Government's reluctance to permit the repatriation of all refugees, however, soon hardened into firm resolve to bar such repatriation.<sup>180</sup> Israeli sympathizers defended this policy by characterizing the Palestinian exodus, and the massive influx of Jews to Israel from Arab countries in the immediate

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PROBLEM 4-10 (1952) (discussing Palestinian flight as reaction to Arabs' failure to defeat state of Israel). One claim advanced was that the Arab states, via radio broadcast, exhorted refugees to vacate Palestine in order to facilitate the military operations of the Arab armies. Speech of Abba Eban (Nov. 17, 1958), *reprinted in THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT* 151, 152-53 (Walter Laqueur ed., 1971) ("As early as the first months of 1948 The Arab League issued orders exhorting the people to seek a temporary refuge in neighboring countries, later to return to their abodes in the wake of the victorious Arab armies and obtain their share of abandoned Jewish property.") (quoting The Research Group for European Migration Problems). *But see* Erskine B. Childers, *The Wordless Wish: From Citizens to Refugees*, in *THE TRANSFORMATION OF PALESTINE*, *supra* note 37, at 181 n.59 (concluding, based on study of those broadcasts monitored by BBC, that claims were baseless).

Arab writers have consistently maintained that the Palestinian community was deliberately driven out according to a preconceived Zionist campaign of expulsion. *See, e.g.,* Walid Khalidi, *Zionist Military Operations in Palestine, 1 April 1948-15 May 1948, Within the Framework of Plan Dalet*, in *FROM HAVEN TO CONQUEST: READINGS IN ZIONISM AND THE PALESTINIAN PROBLEM UNTIL 1948*, at 856-57 (Walid Khalidi ed., 1971) (listing military operations designed to expel Palestinians). Acts of terrorism against Palestinians by Zionist paramilitary organizations, such as the April 1948 massacre of over 250 Arabs in the village of Deir Yassin, clearly played a role in stimulating Palestinian flight. *See* Jon Kimche, *Deir Yassin and Jaffa*, in *FROM HAVEN TO CONQUEST: READINGS IN ZIONISM AND THE PALESTINIAN PROBLEM UNTIL 1948*, *supra*, at 775-78.

A recent body of literature emerging from Israel, based partly on newly opened archives and whose authors are dubbed "revisionists" for their efforts to augment or counter traditional Israeli historiography, suggests that, while many causes contributed to the Palestinian exodus, Zionist military forces expelled a large percentage of refugees with the tacit, if not explicit, approval of the Zionist political leadership. MORRIS, *supra* note 171, at 128-29 (stating that while Jews were surprised at vast numbers of Arabs that left, it was "phenomenon to be exploited"); *see also* SIMHA FLAPAN, *THE BIRTH OF ISRAEL: MYTHS AND REALITIES* 81-118 (1987) (discussing voluntary and involuntary exodus of Arabs). Certainly one of the reasons for the disorderly mass flight of the villagers and urban poor in 1948 was the very fact that it had been preceded by the departure of significant portions of the Palestinian community's leadership. Benny Morris, *Debate on the 1948 Exodus: Response to Finkelstein and Masalha*, 21 J. PALESTINE STUD., Autumn 1991, at 98, 100.

178. FLAPAN, *supra* note 171, at 344. Approximately 450,000 Palestinian refugees in Jordan were granted citizenship; of these, perhaps 350,000 settled in the portion of Palestine occupied by Jordan that became known as the "West Bank" or the portions of Jordan lying to the west of the Jordan River. PLASCOV, *supra* note 175, at 16, 32-33.

179. Abu-Lughod, *supra* note 162, at 161 (discussing demographic changes in Palestine).

180. DON PERETZ, *ISRAEL AND THE PALESTINE ARABS* 72-79 (1956) (discussing strong Israeli opposition to repatriation); TOM SEGEV, 1949: THE FIRST ISRAELIS 30 (1986) (describing opposition to Palestinian refugees' return).

post-independence years, as an "exchange of populations."<sup>181</sup> The Israeli Government also pointed to other such exchanges, such as between India and Pakistan, as precedent for its stance.<sup>182</sup>

*B. Added Incentives: Challenges of the Formative Years*

The exigencies facing the new state of Israel only intensified the Zionist movement's impetus for land acquisitions in the pre-state period. In the formative years of the state and its economy, Israel faced tremendous infrastructural and financial challenges, in addition to the costs of defense and security.<sup>183</sup> Among the most pressing of these challenges was providing for the massive influx of new Jewish immigrants.<sup>184</sup> During the first three years of Israel's existence, the country's Jewish population doubled with the arrival of 684,000 new immigrants.<sup>185</sup> Abandoned Arab land and other property clearly played an important role in providing for the needs of these newcomers. Indeed, 350 of the 370 new Jewish settlements established between 1948 and 1953 were located on absentee Arab property.<sup>186</sup> In 1954 alone, nearly one-third of the new immigrants were settled in urban absentee areas.<sup>187</sup> Land acquisitions also provided the fledgling Israeli Government with a vital source of revenue, and thus a measure of economic stability, in a period fraught

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181. SEGEV, *supra* note 180, at 90-91 (stating that Israeli newspapers described Jewish immigration and Arab emigration as "exchange of populations"); see SCHECHTMAN, *supra* note 177, at 91 (pointing out that airlift of more than 120,000 Iraqi Jews to Israel in 1950-51 made room for 120,000 refugees who "could now enter Iraq, occupy the abandoned homes, and find opportunities to earn their livelihood"). For a recent expositor of this view, see Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 N.Y.U.J. INT'L L. & POL. 465, 477-80 (1989) (explaining why Arab countries do not solve Palestinian refugee problem).

182. SEGEV, *supra* note 180, at 81 (noting several precedents of expropriations, including Turkey's expropriation of Greek and Armenian properties, Bulgaria's expropriation of Greek properties, and Romania's expropriation of German properties).

183. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 52-53.

184. LUSTICK, *supra* note 30, at 100-01.

185. QUIGLEY, *supra* note 7, at 101-02 (stating that roughly half of these immigrants were from European countries and half were from Middle Eastern countries); see also KRETZMER, *supra* note 28, at 3 (stating that many "arrived destitute, and were totally dependent on the institutions of the new state and of the Jewish people to provide them with housing, employment, and basic services, such as education and health").

Periods of rapid population growth elsewhere have also stimulated demands for land. See, e.g., JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934*, at 4 (1991) (reporting that U.S. population soared from 63 million to 106 million between 1890 and 1920, prompting settlers to push into arid and semi-arid regions of West and placing renewed pressure on Native Americans to yield their lands).

186. PERETZ, *supra* note 180, at 143.

187. PERETZ, *supra* note 180, at 143. Peretz further notes that the Arabs left "338 towns and villages and large parts of 94 other cities and town, containing nearly a quarter of all the buildings in Israel. Ten thousand shops, business and stores were left in Jewish hands." *Id.*

with difficulties, including the Arab states' economic boycott against Israel.<sup>188</sup>

In the aftermath of the 1948 war, infiltration into Israel (armed and otherwise) from adjacent regions occurred regularly; military concerns were, therefore, the driving force behind many land seizures by Israel in the border areas.<sup>189</sup> The Israeli Government designed land seizures both to create buffer zones along the borders that were clear of Arab residents and to facilitate the upbuilding of a Jewish presence along these borders.<sup>190</sup>

As the Palestinian minority within Israel began to regroup politically and to assert nationalist aspirations, especially in the 1960s and 1970s,<sup>191</sup> Israeli land seizures prevented the Palestinians from establishing important metropolitan centers in their areas. Furthermore, Israeli land acquisition prohibited the development of territorially contiguous population centers that might have become seats of agitation for Arab political autonomy.<sup>192</sup> In the northern district of Galilee, home to a large proportion of Israel's total Arab population and to relatively few Jews, the Arabs had a particularly strong fear that such land seizures would occur.<sup>193</sup>

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188. See PERETZ, *supra* note 180, at 143 (describing how abandoned property contributed greatly to making Israel viable). According to Peretz:

In 1951-52, former Arab citrus groves produced 1.25 million boxes of fruit of which .4 millions were exported . . . which provided for 10% of the country's foreign currency earnings from exports in 1951. In 1949, the olives produced from abandoned Arab groves was [sic] Israel's third largest export, ranking after citrus and diamonds.

*Id.*

189. Abner Cohen, *Arab Border Villages*, in ISRAEL: A STUDY OF CONTINUITY AND CHANGE IN SOCIAL ORGANIZATION 17 (1965).

190. See WILLIAM W. HARRIS, TAKING ROOT 67 (1980) (discussing Israeli Government's colonization of these border area settlements (*nahalim*) with young, able-bodied Israelis who were intended to serve as first line of defense against invasion and infiltration); cf. André Dirlik, *The Algerian Response to Settlement*, in SETTLER REGIMES IN AFRICA AND THE ARAB WORLD: THE ILLUSION OF ENDURANCE 76 (Ibrahim Abu-Lughod & Baha Abu-Laban eds., 1974) (discussing failure of conventional warfare against Algerian tribes' irregular forces and how this first induced French civilian settlement of country's interior because larger presence was regarded as necessary to hold hinterland, given manpower limitations of army).

191. See MOSHE SHEMESH, THE PALESTINIAN ENTITY, 1959-1974: ARAB POLITICS AND THE PLO 171 (1988) (discussing rebirth of Palestinian nationalism on West Bank beginning in 1968); see also ALAIN GRESH, THE PLO: THE STRUGGLE WITHIN 244-48 (1983) (summarizing rise in political activity by Palestinian organizations during 1960s and 1970s).

192. Oren Yiftachel, *State Policies, Land Control, and an Ethnic Minority: The Arabs in the Galilee Region, Israel*, 9 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 329, 335-36 (1991). In comparing Israel to other deeply divided societies, Yiftachel argues that Israel's attempt to break up and physically segregate its Arab population into small enclaves may in fact be counterproductive, stimulating rather than mitigating hostility toward the state. Yiftachel, *supra* note 4, at 130-33.

193. Kipnis, *supra* note 173, at 28-29. A confidential memorandum from the Galilee District Commissioner, Israel Koenig, to then Prime Minister Rabin, found its way into the Israeli press in September 1976 and reflected Israeli consternation over the Arab population of Galilee:

There is ground for serious apprehensions that within the next decade an Arab



### C. *New Justifications: The Cant of Conquest*

The Zionist movement added the war of 1948 to the already considerable array of arguments that the movement used to justify its land acquisition in the pre-state period. The Zionists concluded that the Arab residents of Palestine had forfeited any entitlement to the protection of their land by their violent opposition to Israel's founding.<sup>194</sup> This view was, of course, a somewhat careless and self-serving attribution. Irrespective of the subjective feelings of the indigenous Palestinians regarding Zionism and the creation of an Israeli state, the overwhelming majority of the Palestinians had nothing to do with the decision of the Arab states to attack the new Jewish state<sup>195</sup> and played no role in the actual fighting in 1948; indeed, most Palestinians became the war's victims.<sup>196</sup> Because of the strong antipathy many Israelis felt toward the Arabs on account of the war, it is not surprising that such distinctions were never drawn.<sup>197</sup>

The Israeli Government has not employed as an official or legal

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political and demographic takeover of the Acre and Nazareth areas will occur. . . . It must be taken into account that at one of the stages of the hostile political activities a demand of some kind will be raised to hold a referendum in northern Israel where the Arab population is in the majority.

Translated from the Hebrew daily *Al Hamishmar*, September 7, 1976, and reproduced in full as *The Koenig Report*, 6 J. PALESTINE STUD., Autumn 1976, at 190-93. Koenig's suggestions for policy responses to these perceived trends included the expansion of Jewish settlement in areas where "the contiguity of the Arab population is prominent," and the examination of the "possibility of diluting Arab population concentrations." *Id.* Similar concerns have directed Israeli settlement patterns in the Occupied Territories. See Ibrahim Matar, *Israeli Settlements in the West Bank and Gaza Strip*, 6 J. PALESTINE STUD., Autumn 1981, at 93, 93-94 (examining Israeli Government's policies and tactics for acquiring land).

194. SEGEV, *supra* note 180, at 71 (discussing passions and temptations that led some Israelis to loot). Not infrequently, indigenous peoples' violent resistance to the imposition of colonial rule has provided a rationale for colonial land expropriations. This was true in Algeria. See Ruedy, *supra* note 5, at 54 (describing increased French interest in seizing plains after Abd el Kader declared war against French in 1939). Following the massacre of English settlers in Virginia in 1622, a colonial leader expressed this view:

Our hands which before were tied with gentleness and faire usage, are now set at liberty by the treacherous violence of the Sausages [Savages] . . . . So that we, who hitherto have had possession of no more ground then their waste, and our purchase at a valuable consideration to their owne contentment, gained; may now by right of Warre, and law of Nations, invade the Country, and destroy them who sought to destroy us . . . . Now their cleared grounds in all their villages (which are situate in the fruitfulest places of the land) shall be inhabited by us . . . .

Washburn, *supra* note 5, at 21.

195. JOHN KIMCHE & DAVID KIMCHE, *A CLASH OF DESTINIES: THE ARAB-JEWISH WAR AND THE FOUNDING OF THE STATE OF ISRAEL 149-54* (1960) (discussing Arab leaders' blueprints for attacking Israel).

196. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 51-52 (stating that by October 14, 1948, Arab forces included no more than 5000 fighters from Hajj Amin al Husayni's Palestine Liberation Force).

197. LUSTICK, *supra* note 30, at 86.

justification for the takeover of Arab property in Israel the argument that the Palestinians' rights to their lands had been compromised by their hostility to Zionism and Israel. On the other hand, it was a strongly held popular sentiment, and no doubt triggered the widespread looting of Arab property by Jews that occurred during and immediately following the war.<sup>198</sup> "[T]he moral sense of the few who were attacked by the many and managed to survive, justified the looting of the enemy's property," wrote an Israeli official in a secret report on the problem.<sup>199</sup> The sentiment thus contributed to an ideological climate that Israel later found congenial when seizing Palestinian lands.<sup>200</sup>

Israel's establishment occurred three years after the conclusion of World War II. Even without Arab hostility to Zionism, the events of the Holocaust lent a strong sense of urgency, and even moral imperative, to Zionist efforts.<sup>201</sup> The Zionists might have acknowledged and rationalized injustices to individual Arabs as regrettable but inevitable costs of achieving the higher goals of rescuing individual Jews from persecution and reconstituting a Jewish society.<sup>202</sup> Moreover, many European Jews viewed Arab hostility toward Zionism, and later toward the state of Israel, as part of the continuous threat to the existence of the Jews—a virtual extension of the Holocaust.<sup>203</sup> As an Israeli *mizrachi* (Jew of Middle Eastern background), Ella Shohat has stated:

The master narrative of universal Jewish victimization has been crucial for the Israeli "ingathering" of peoples from such diverse geographies, languages, cultures, and histories, as well as for the claim that the Jewish nation faces a common historical enemy in Muslim Arabs. Associating Arabs with Nazis . . . projects a Jewish European nightmare onto the structurally distinct political dynamics of the Middle East. Sephardi ["Spanish" Jews, or descendants of Jews who fled the Spanish Inquisition, generally to

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198. SEGEV, *supra* note 180, at 68-72 (discussing looting of property by Israeli soldiers during war).

199. SEGEV, *supra* note 180, at 70-71 (quoting Custodian of Abandoned Property).

200. Another justificatory argument occasionally employed by the Israeli press was that because many Jews left Middle Eastern countries after 1948 amidst an atmosphere of hostility and distrust, they were forced to abandon property or sell it at abnormally depressed rates. Just as the Palestinian exodus and influx of Jewish immigrants constituted an "exchange of populations," there was also a concomitant "exchange of properties" in 1948. SEGEV, *supra* note 180, at 90-91.

201. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 48-49.

202. See DAVID K. SHIPLER, ARAB AND JEW: WOUNDED SPIRITS IN A PROMISED LAND 352 (1986) (discussing Holocaust as it relates to Arab-Israeli conflict).

203. See Davis, *supra* note 27, at 42-43 (discussing Zionist reactions to Arab hostility and Arab rhetoric).

the Ottoman Empire] Jews experienced an utterly different history within the Arab world than that which haunts the European memories of Ashkenazi [Central and Eastern European Jews] Jews; the conflation of the Muslim-Arab with the archetypal European oppressors of Jews strategically understates Israel's colonial-settler dispossession of Palestinian people.<sup>204</sup>

The wartime events thus provided the new state of Israel with a historic opportunity to expand its land base. As this Article explores in the following subpart, the war also left Israel with authority over a Palestinian Arab minority that was incapable, then and now, of effectively resisting the erosion of its land base in favor of Jewish settlement.

#### D. *Israel's Control of its Arab Minority*

Defeat had fragmented, demoralized, and traumatized<sup>205</sup> the 120,000 or more Palestinians who remained in the areas falling under Israeli jurisdiction after truce arrangements in 1949.<sup>206</sup> These Palestinians were largely adrift without the guidance of their departed traditional political leadership.<sup>207</sup> In such conditions, Israel's new Arab minority was ill-equipped to resist or influence any state policies.

While the social and political position of the Palestinian minority in Israel has changed in the forty-five years since Israel's establishment, its status in the Israeli nation has continued to be marginal.<sup>208</sup> While enjoying nearly full formal equality as citizens,<sup>209</sup> Israeli Arabs continue to face private and institutional forms of discrimination in many spheres of social and political life,<sup>210</sup> including employ-

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204. Ella Shohat, *Rethinking Jews and Muslims: Quincentennial Reflections*, MIDDLE E. REP., Sept.-Oct. 1992, at 25, 27-28.

205. Khalil Nakhleh, *Cultural Determinants of Palestinian Collective Identity: The Case of the Arabs in Israel*, NEW OUTLOOK, Oct.-Nov. 1975, at 31, 34 (describing Palestinian identity as result of 1948 war).

206. Abu-Lughod, *supra* note 162, at 160.

207. Nakhleh, *supra* note 205, at 31, 34.

208. Sandra A. Garcia, *Israeli Arabs: Partners in Pluralism or Ticking Time Bomb?*, 7 ETHNICITY 15, 18-26 (1980) (detailing changes within Israeli-Arab community and suggesting that Arabs are not true partners with Israel in democratic pluralism).

209. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 121 (stating that Declaration of Establishment of state of Israel grants and guarantees to Israel's Arab population equal religious, social, and political rights). The sole Israeli law that explicitly discriminates on the basis of ethnicity or national origin is the Law of Return, which grants Jews automatic citizenship upon immigration to Israel. KRETZMER, *supra* note 28, at 36.

210. See KRETZMER, *supra* note 28, at 116 (focusing on three spheres of discrimination against Arabs by Israeli Government: budgetary discrimination, resource allocation, and implementation of laws). One dimension of the problem relates to the nature of Israeli administrative culture. After completing an extensive study on the Israeli bureaucracy, David Rosenbloom commented that the Israeli bureaucracy "is characterized by the lack of a service ethic, weak formalization, and a high degree of personalization," and that, as a result, the bureaucracy does

ment,<sup>211</sup> education,<sup>212</sup> housing,<sup>213</sup> financial support for local government,<sup>214</sup> government services,<sup>215</sup> military service,<sup>216</sup> access to land and water resources,<sup>217</sup> and the criminal justice system.<sup>218</sup>

The relative acquiescence of the Palestinian minority in Israel to its marginal status in Israeli society has been notable.<sup>219</sup> Taking this acquiescence as his point of inquiry, Professor Ian Lustick explains Israel's success in controlling its Arab citizens by reference to Israeli policies of "segmentation" (the physical and institutional isolation and fragmentation of the Arab population),<sup>220</sup> "co-optation" (the "capture" of traditional Arab elites),<sup>221</sup> and "dependence" (the economic

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not display a commitment to the rule of law sufficient to protect Arabs' property and civil rights or their rights to equal treatment and to procedural justice. David H. Rosenbloom, *Israel's Administrative Culture, Israeli Arabs, and Arab Subjects*, 13 SYRACUSE J. INT'L L. & COM. 435, 447 (1987).

211. RAJA KHALIDI, *THE ARAB ECONOMY IN ISRAEL: THE DYNAMICS OF A REGION'S DEVELOPMENT* 68 (1988) (asserting that Arab agriculture suffered in 1950s because Arabs were excluded from market); Elia Zureik, *Transformation of Class Structure Among the Arabs in Israel: From Peasantry to Proletariat*, 21 J. PALESTINE STUD., Autumn 1976, at 39, 51-54 (citing wage differentials between Arabs and Jews).

212. SAMI K. MAR'I, *ARAB EDUCATION IN ISRAEL* 137 (1978) (citing studies suggesting that Arab students believe that they are discriminated against in education); see also ZUREIK, *supra* note 8, at 155-56 (suggesting that discrimination in funding for Arab educational facilities exists in Israel).

213. See generally R. KHAMAYASI, *PLANNING AND HOUSING POLICY IN THE ARAB SECTOR OF ISRAEL* (1990).

214. See KRETZMER, *supra* note 28, at 119-22 (discussing differences in funding between Arab and Jewish municipalities).

215. KRETZMER, *supra* note 28, at 119-22 (discussing wide discrepancy in resource allocation between Jews and Arabs in areas of reviving neighborhoods, educating children, monitoring children with truant officers, and providing telephone services).

216. KRETZMER, *supra* note 28, at 98-107 (discussing disguised discrimination against Arabs in armed forces). By law, the Israeli Minister of Justice is entitled to conscript any able-bodied Israeli into military service, including Arab citizens. *Id.* at 98. In practice, this discretion has been exercised only as to Druze and Bedouin Arabs in Israel. *Id.* While this may seem natural in light of the existing state of hostilities between Israel and the surrounding Arab states, a number of important government benefits, not to mention subsequent opportunities for employment in the substantial Israeli arms and security industry, hinge on fulfillment of "national service." *Id.* at 100-04. Meanwhile, exemptions from these effects are made for non-serving religious Jews. *Id.* at 107.

217. Ghazi Falah, *Arabs Versus Jews in Galilee: Competition for Regional Resources*, 21.4 GEOJOURNAL 325, 328-34 (1990).

218. Elia Zureik et al., *Perception of Legal Inequality in Deeply Divided Societies: The Case of Israel* 28 (1992) (unpublished manuscript, on file with author) (discussing perceptions of Arabs and Jews regarding legal system and stating that there exists differential treatment in legal system of Arabs and Jews).

219. LUSTICK, *supra* note 30, at 77 (stating that Arabs are susceptible to Israeli control); ZUREIK, *supra* note 8, at 29 (asserting that Israeli Arabs, like other native populations, have internalized negative stereotypical images); Sammy Smooha, *Control of Minorities in Israel and Northern Ireland*, 22 COMP. STUD. SOC'Y & HIST. 256, 269-70 (1980) (discussing vulnerability of Arab minority in Israel and why Israeli Government has maintained social control of Arab population).

220. LUSTICK, *supra* note 30, at 77.

221. LUSTICK, *supra* note 30, at 77.

and political reliance of the Arabs on the Jewish population).<sup>222</sup>

The state, by imposing military government in areas of Arab population concentration and using forces for internal security, has prevented the Palestinian minority from organizing and expressing itself as a national group.<sup>223</sup> Until the mid-1970s, Arab participation in the Israeli political system was through networks of patronage, which linked traditional leadership in the Arab villages to the major Israeli political parties and through which many Arabs exchanged votes for tangible favors.<sup>224</sup>

In sum, the position of the Palestinians in Israel reflects their absorption into the framework of a state committed to upbuilding a Jewish nation. Given this commitment, the Palestinians' status is unlikely to undergo significant change and will remain that of a nonassimilating minority.<sup>225</sup>

In light of the ample justifications for land acquisition discussed above,<sup>226</sup> one would have expected the Israeli Government to have seized Arab lands by summary actions. It is all the more remarkable, therefore, that the Government did not take precipitous measures. On the contrary, the form for the dispossession of Palestinian lands that the Israeli administrations assumed was complex, legalistic, and

222. LUSTICK, *supra* note 30, at 77; see also Sammy Smooha, *Existing and Alternative Policy Towards the Arabs in Israel*, 5 ETHNIC & RACIAL STUD. 71, 95 (1982) (referring to Israeli policies vis-à-vis its Arab citizens as "machinery of control").

223. SABRI JIRYIS, *THE ARABS IN ISRAEL* 185 (1976); Michael Saltman, *The Use of the Mandatory Emergency Laws by the Israeli Government*, 10 INT'L J. SOC. L. 385, 391-92 (1982).

In addition, Ronen Shamir maintains that, with respect to freedom of expression, the Israeli Supreme Court has developed a dual standard: content-based limitations imposed on Jewish Israelis, and speaker-based limitations imposed on Arabs. Ronen Shamir, *Legal Discourse, Media Discourse, and Speech Rights: The Shift from Content to Identity—The Case of Israel*, 19 INT'L J. SOC. L. 45, 56-62 (1991). Jewish Israelis thus are permitted to express beliefs that Arabs may not, based simply on their respective identities. *Id.*

224. See COHEN, *supra* note 189, at 161-64 (stating that many Arabs bartered their votes for material gains); LUSTICK, *supra* note 30, at 60-61 (describing competition for Arab votes by Jewish political parties); see also ISRAEL: A COUNTRY STUDY, *supra* note 8, at 227 (discussing Arab political parties). Since the 1970s, Arabs have supported two predominantly Arab political groups in Israeli national elections: *Rakah* (the New Communist List), and the Progressive List for Peace. ISRAEL: A COUNTRY STUDY, *supra*, at 227. Another contender for Arab votes in local level politics has been *Abna' al-Balad* (Sons of the Village). *Id.*

225. Garcia, *supra* note 208, at 16. It is noteworthy that the *Intifada*, the uprising against Israeli rule that has convulsed the Occupied Territories since late 1987, has not resulted in a similar movement within Israel. Israeli Arabs, while supportive of the *Intifada* and of Palestinian calls for national self-determination in the West Bank and Gaza Strip, have not as yet voiced the same demands for themselves. Elia Zureik & Aziz Haidar, *The Impact of the Intifadah on the Palestinians in Israel*, 19 INT'L J. SOC. L. 475, 475-99 (1991).

226. See *supra* notes 194-224 and accompanying text (discussing opportunity for expansion afforded by Palestinian exodus, pressing needs for land in post-independence years, proliferation of justifications for land acquisition, and absence of effective resistance from Palestinian quarter as justifications for Israeli land acquisition).

executed cautiously over a period of years.<sup>227</sup>

#### IV. THE LEGAL REGIME FOR LAND ACQUISITIONS

Jewish kibbutzim and agricultural settlements<sup>228</sup> near Arab villages carried out a process of de facto land expropriation in the confusion and anarchy of the 1948 war and during the early months of the consolidation of the authority of the Israeli state.<sup>229</sup> These Jewish settlements took over large areas of Arab land and enclosed them with barbed wire.<sup>230</sup> To bring some regularity to this chaos, the Israeli Government set up mechanisms for the administration of abandoned properties shortly after the outbreak of hostilities. In March 1948, the Haganah (the paramilitary arm of the mainstream Zionist movement) created a "Committee for Arab Properties in Villages" to establish control over lands left vacant by Arab owners.<sup>231</sup> After the occupations of the cities of Haifa in April and Jaffa in May, the Haganah formed custodianships for these areas.<sup>232</sup>

##### A. *The Absentee Property Law*

In December 1948, the new Israeli Minister of Finance issued the "Emergency Regulations Relative to Property of Absentees" to standardize measures taken with regard to Arab properties.<sup>233</sup> The Government renewed these regulations periodically until the Israeli Knesset passed the "Law of the Acquisition of Absentees' Property."<sup>234</sup> This law defined the legal status of vacant property and transferred control of it to a Custodian.<sup>235</sup> The law defined an absentee as any person owning land in Israel who:

- (i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq, or the Yemen, or
- (ii) was in one of these countries or in any part of Palestine outside the area of Israel, or

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227. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 55-57 (discussing Israeli laws passed over 20 year period to expropriate lands).

228. The two basic forms of Jewish agricultural colonies are the *kibbutz*, a communal settlement owned and worked as a common enterprise and with collective housing and finances, and the *moshav*, in which property is collectively owned and worked, but residence and domestic life are based on the nuclear family. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 128-29.

229. Sabri Jiryis, *The Legal Structure for the Expropriation and Absorption of Arab Lands in Israel*, 2 J. PALESTINE STUD., Summer 1973, at 82, 83.

230. *Id.* at 82 (describing process of de facto expropriation). The Jews took over land belonging to refugees as well as land belonging to Arabs still remaining in Palestine. *Id.* at 83.

231. *Id.*

232. *Id.*

233. *Id.* at 85-86.

234. Absentees' Property Law, 4 L. ST. ISRAEL 68 (1949-1950).

235. *Id.* § 4(a).

(iii) was a Palestinian citizen and left his ordinary place of residence in Palestine (a) for a place outside Palestine before September 1, 1948; or (b) for a place in Palestine 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>236</sup>

The law also included in the definition any company, partnership, association, or the like that was "decisively controlled" by individual absentees.<sup>237</sup>

By this definition, all Arabs in Palestine who had left their towns or villages for any reason after the operative date of the law, November 29, 1947, the date of the passage of the U.N. Partition Plan for Palestine, could be classified as "absentees."<sup>238</sup> This definition included as many as 75,000 internal refugees, Palestinians who had moved from one part of Israeli territory to another without ever crossing its prospective borders, as well as the residents of areas that Arab states ceded to Israel pursuant to armistice agreements.<sup>239</sup> These latter areas had enjoyed open access to and from adjacent Arab states until the Arab forces withdrew from them on September 1, 1948.<sup>240</sup> Under this law, the Custodian, in his discretion, could declare as "absentees" as many as half of the Palestinian Arabs who were present in Israel in 1949, the vast majority of whom had never left the area of Israel at any time prior to this date.<sup>241</sup> Following this declaration, their property could be made subject to confiscation.<sup>242</sup>

A written declaration by the Custodian classifying a person as an "absentee" or property as "absentee" raised a legal presumption of the accuracy of the classification.<sup>243</sup> Only a court could compel the Custodian to divulge the sources of information on which a classification was based.<sup>244</sup> The statute barred pleas that circumstances beyond the person's control had caused the "absence."<sup>245</sup> As long as the Custodian had made the decision "in good faith," courts could

236. *Id.* § 1(b)(1).

237. *Id.* § 1(b).

238. See Jiryis, *supra* note 229, at 87.

239. KRETZMER, *supra* note 28, at 57. These Palestinians eventually earned the ironic sobriquet "present absentees." *Id.*

240. SAUL B. COHEN, *THE GEOPOLITICS OF ISRAEL'S BORDER QUESTION* 27 (1986) (relating that, from 1949 to 1967, Israel closed its borders with its Arab neighbors).

241. LUSTICK, *supra* note 30, at 173-74.

242. LUSTICK, *supra* note 30, at 174; see also PERETZ, *supra* note 180, at 149-53 (discussing Custodians' broad powers vis-à-vis Arabs whose land had been taken under absentee property law).

243. Absentees' Property Law, 4 L. ST. ISRAEL § 30(a)-(b) (1949-1950).

244. *Id.* § 30(f).

245. *Id.* § 30(i).

not overturn decisions even if the "absentee" classification was later proven to be inapplicable.<sup>246</sup> The law provided the Custodian with discretion to return lands to their owners if so requested by the owner.<sup>247</sup> By 1958, however, the Custodian had issued only 209 certificates releasing Arab property to its original owners.<sup>248</sup> Later, in 1950, the Government moved to include all *waqf* lands and other assets of the Muslim religious endowment, except strictly religious shrines and buildings, within the category of "absentee" property.<sup>249</sup>

Why was this contorted definition of an "absentee" adopted? Originally, a Ministry of Justice draft of the law proposed a literal definition of "absentee" as a person who was no longer present in the territory of the state.<sup>250</sup> When the draft came before the Ministerial Committee, the Committee learned that thousands of Palestinian refugees had left their villages and settled in Nazareth, and that, under such a definition of "absentee," these refugees would be able to return to their homes.<sup>251</sup> The Committee thus defined "absentee" as anyone who had left his home after a certain date.<sup>252</sup> Using this definition, the Custodian, by the spring of 1950, had gained control over approximately one million dunums of land, including 66,724 rooms in abandoned buildings and 7800 shops, offices, and stores.<sup>253</sup>

### B. Emergency and Security Regulations

Israel inherited the legal structures and the substantive laws that were in force under the Mandate, including the Ottoman Land Code

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246. *Id.* § 17.

247. *Id.* § 28. Section 27 authorized the Custodian to confirm the non-absentee status of a person who had left his residence for fear of harm from the "enemies of Israel" or for reasons other than fear of military operations. *Id.* § 27. Section 29 required that any exercise of the Custodian's power under either section 27 or 28 be approved by a special committee established by the government. *Id.* § 29. Upon release of any property, section 32 also required payment to the Custodian of an amount equal to four percent of the property's value, in addition to repayment for any expenses incurred by the Custodian in "safeguarding" the absentee's real estate. *Id.* § 32.

248. PERETZ, *supra* note 180, at 155.

249. LUSTICK, *supra* note 30, at 59 (discussing Government's taking of large quantities of Arab *waqf* land for use by new Jewish immigrants).

250. SEGEV, *supra* note 180, at 80.

251. SEGEV, *supra* note 180, at 80.

252. SEGEV, *supra* note 180, at 80. Moshe Sharett, then Knesset member and later Prime Minister of Israel, also raised the "reasonable likelihood" that Israel might one day seize Nablus on the West Bank. In that case too, "thousands of refugees would come within Israel's jurisdiction and they would demand to return to their homes and take back the properties they had abandoned." *Id.*

253. SCHECHTMAN, *supra* note 177, at 100-01.



of 1858.<sup>254</sup> The new state also adopted a body of laws entitled the "Defense (Emergency) Regulations of 1945."<sup>255</sup> These regulations were an updated version of laws originally invoked in 1936 by the British to suppress the Palestinian revolt of 1936-39.<sup>256</sup> The regulations were amended repeatedly, reaching their final form during the years that Zionist paramilitary organizations actively resisted British rule.<sup>257</sup>

The Defense (Emergency) Regulations empowered the Israeli Defense Minister to appoint, as he deemed necessary, military commanders as governors over any territories.<sup>258</sup> Upon appointment, the Governor became the competent authority to enforce the Defense Regulations in the territory under his jurisdiction.<sup>259</sup> The Governors possessed a considerable array of discretionary powers: they could impose travel restrictions, order administrative detention without charges and for indefinite periods, and requisition property.<sup>260</sup> Violations of the regulations were tried in special Military Courts.<sup>261</sup> The judges in the Military Defense Regulations Courts were, like the Governors, appointed by the Defense Minister from the army officer corps.<sup>262</sup>

Immediately after the 1948 war, the Israeli Government established military governates in the predominantly Arab areas within Israel.<sup>263</sup> Some of these areas were adjacent to borders and were believed to provide a hinterland in which armed infiltrators might find refuge.<sup>264</sup> Although the Defense Regulations were neutral on their

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254. See Norman Bentwich, *The Legal System of Palestine Under the Mandate*, 2 MIDDLE E.J. 33, 40 (1948) (describing use of Ottoman law during British rule).

255. Defense (Emergency) Regulations, 1945.

256. PERETZ, *supra* note 180, at 119 n.22.

257. The Palestine Jewish Bar Association protested these regulations in 1947 as "counter to the principles of law and justice . . . and which deny the fundamental rights of man, thus constituting a grave danger to the life, liberty, and property of the individual. These regulations deliver the citizen to the mercy of the Executive Authority, the Police and the Army, and set up an arbitrary rule of lawlessness, not amenable to effective judicial control." GEORGE E. BISHARAT, *PALESTINIAN LAWYERS AND ISRAELI RULE: LAW AND DISORDER IN THE WEST BANK* 185 n.31 (1989) (quoting Israel State Archives, "Societies: Jewish Bar Association," File AG 2715, 3-736).

258. Defense (Emergency) Regulations, 1945, pt. I, § 6.

259. *Id.*

260. See SEGEV, *supra* note 180, at 50-52 (detailing use of military powers against Arab population and emphasizing arbitrary nature of enforcement).

261. Defense (Emergency) Regulations, 1945, pt. II, §§ 12-15. These courts should be distinguished from Israeli courts martial, which tried soldiers for violations of the military law of Israel.

262. *Id.* § 13.

263. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 55.

264. SEGEV, *supra* note 180, at 52 (stating that initial reason for instituting military rule was to prevent infiltration by refugees). The country was divided into Northern, Central, and Southern military areas, each governed by military governors appointed by the Israeli Defense Forces (IDF) Chief of Staff. Davis, *supra* note 27, at 36. These military governates were

face, applying equally to all persons present in the designated areas, in practice the Governors rarely invoked them against Jews, who typically comprised only a small number of the people in the areas designated for military rule.<sup>265</sup>

Article 125 of the Defense (Emergency) Regulations empowered the Military Governor of a region to declare any portion of land under his jurisdiction "closed," such that entry to it and exit from it could be undertaken only with a written permit from the Governor or his representative.<sup>266</sup> In tandem with several other laws, this provision allowed the Israeli Government to further appropriate Arab lands.<sup>267</sup> The Knesset passed the "Emergency Regulations for the Exploitation of Uncultivated Lands," also known as the Cultivation of Waste Lands Ordinance, in January 1949.<sup>268</sup> The law empowered the Minister of Agriculture to take possession of uncultivated lands or any land with respect to which the Minister "is not satisfied that the owner of the land has begun or is about to begin or will continue to cultivate the land."<sup>269</sup>

Professor Lustick describes the interaction between Article 125 of the Defense (Emergency) Regulations and the Cultivation of Waste Lands Ordinance as follows:

Typically the process works in the following way: An area encompassing Arab-owned agricultural lands is declared a "closed area." The owners of the lands are then denied permission by the security authorities to enter the area for any purpose whatsoever, including cultivation. After three years pass, the Ministry of Agriculture issues certificates which classify the lands as uncultivated. The owners are notified that unless cultivation is renewed immediately the lands will be subject to expropriation. The owners, still barred by the security authorities from entering the "closed area" within which their lands are located, cannot resume cultivation. The lands are then expropriated and become part of the general land reserve for Jewish settlement.<sup>270</sup>

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maintained until 1966, when they were abolished. *Id.* The Defense (Emergency) Regulations, however, remain in force.

265. *Cf.* LUSTICK, *supra* note 30, at 177-78 (describing way in which Emergency Regulations were used by Government against Arabs).

266. Defense (Emergency) Regulations, § 125.

267. LUSTICK, *supra* note 30, at 178 ("By making use of Article 125, on which the Military Government is to a great extent based, we can directly continue the struggle for Jewish settlement and Jewish immigration.") (quoting Shimon Peres, Director General of the Ministry of Defense in 1962).

268. Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 2 L. ST. ISRAEL 36 (1949). The 1949 law continued, in amended form, regulations initially issued in 1948. *Id.*

269. *Id.* § 4.

270. LUSTICK, *supra* note 30, at 178.

The "Emergency Regulations (Security Zones) of 1949"<sup>271</sup> achieved a similar effect. These regulations empowered the Minister of Defense to declare a "security zone" within ten kilometers of Israel's border in the northern half of the country, and within twenty-five kilometers of the borders in the southern half.<sup>272</sup> Entry into or exit from the area was thereafter barred without permit.<sup>273</sup> The regulations further permitted competent authorities appointed by the Minister of Defense to require a resident of a security zone to leave that area.<sup>274</sup> Pursuant to the Cultivation of Waste Lands Ordinance, the government seized lands left fallow.<sup>275</sup>

Still another law, the "Emergency Land Requisition Law of 1949,"<sup>276</sup> gave the government the right to acquire land whenever a "competent authority" appointed by the government regarded that land as "necessary for the defense of the State, public security, the maintenance of essential supplies or essential public services, or the absorption of immigrants or the rehabilitation of ex-soldiers or war invalids."<sup>277</sup> Initially, the government legally defined the seizure as a temporary requisition, limited in duration to a period of months.<sup>278</sup> Subsequent amendments to the law eliminated the time limitations, effectively transforming the initial requisition into permanent expropriation.<sup>279</sup>

### C. *The Transfer of Ownership*

All of the above-mentioned laws for expropriation shared two characteristics. First, their validity and enforcement were contingent upon the existence of a legally declared state of emergency.<sup>280</sup> Second, although de facto expropriation had occurred on a wide scale, none of these laws transferred legal ownership of the affected

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271. Emergency Regulations (Security Zones) (Extension of Validity) (No.2) Law, 3 L. ST. ISRAEL 56 (1949).

272. *Id.* § 1(a).

273. *Id.* § 6(a).

274. *Id.* § 8(a).

275. See LUSTICK, *supra* note 30, at 178 (stating that Israeli Government used this law to expropriate large amount of Arab lands).

276. Emergency Land Requisition Law (No. 1), 4 L. ST. ISRAEL 3 (1949-1950).

277. *Id.* § 3(b).

278. See KRETZMER, *supra* note 28, at 55 (stating that Emergency Land Requisition Law of 1949 applied only for limited time).

279. Emergency Land Requisition Law (No. 61), 6 L. ST. ISRAEL 103 (1952).

280. See Jiryis, *supra* note 229, at 82-104; PERETZ, *supra* note 180, at 142 (stating that land expropriation laws codified emergency legislation). Such an emergency was declared on May 19, 1948 by the Provisional State Council—the precursor to the Israeli Knesset—and has never since been rescinded. Ruth Gavison, *The Controversy over Israel's Bill of Rights*, 15 ISRAELI Y.B. HUM. RTS. 113, 138 (1985).

lands. Instead, they only enabled the government to have control of the lands, or to take possession of them, or to assign control to the Custodian.<sup>281</sup>

In the earliest measures for expropriation, the Knesset began to lay the groundwork for the resolution of the legal ambiguity inherent in nominal Arab ownership of land that had for some years been under exclusive control of the Israeli Government. Thus, the Absentee Property Law contained a provision allowing the Custodian to "sell" properties to a "Development Authority,"<sup>282</sup> which the Knesset would subsequently form by enacting, five months later, the "Development Authority (Transfer of Property) Law, 1950."<sup>283</sup> The law empowered the Development Authority to receive properties from the Custodian or others.<sup>284</sup> The law, however, forbade the Development Authority from transferring properties to any parties other than the state, the Jewish National Fund, an institution authorized by the government to settle "landless Arabs," or a local authority.<sup>285</sup> Moreover, the Jewish National Fund enjoyed first option for purchase of any lands the Development Authority offered for sale.<sup>286</sup>

The Knesset's passage of the "Land Acquisition (validation of Acts and Compensation) Law of 1953"<sup>287</sup> was the final step completing the process of formal transfer of ownership of expropriated lands from their Arab owners to various Israeli state institutions. This law permitted the Minister of Finance to vest ownership in the Development Authority of lands expropriated pursuant to the various laws mentioned above.<sup>288</sup> The Development Authority could, in turn, sell these lands under the limitations specified in its charter, provided that three conditions were met: (1) that on April 1, 1952, the property was not in the possession of its owners; (2) that within the period from May 14, 1948 to April 1, 1952, the property was used or assigned for purposes of essential development, settlement, or security; and (3) that the property was still required for any of those purposes.<sup>289</sup> The law effectively permitted the retroactive validation

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281. LUSTICK, *supra* note 30, at 174.

282. Absentees' Property Law, § 19(a), 4 L. ST. ISRAEL (1949-1950).

283. Development Authority (Transfer of Property) Law (No. 62), 4 L. ST. ISRAEL 151-53 (1950).

284. See KRETZMER, *supra* note 28, at 58 (stating that Transfer of Property Law made transfers of property from Custodian to Development Authority possible).

285. Development Authority Law, *supra* note 283, §§ 3, 4(c).

286. *Id.* §§ 3, 4(a).

287. Land Acquisition (Validation of Acts and Compensation) Law (No. 25), 7 L. ST. ISRAEL 43-45 (1953).

288. *Id.*

289. *Id.* § 2(a).

of any prior illegal expropriations because written certification by the Minister of Finance that these conditions had been fulfilled was sufficient to permit transfer of ownership to the Development Authority.<sup>290</sup>

The law also stipulated that compensation had to be paid to any expropriated owner in such manner and amount as the Minister of Finance determined.<sup>291</sup> The law provided for two methods of compensation: cash payments, and the granting of alternative lands.<sup>292</sup> Most Palestinians whose lands had been expropriated, however, remained in exile and were consequently unaffected by the compensation scheme.<sup>293</sup>

Of those few Palestinians who had remained in Israel, very few opted for cash compensation.<sup>294</sup> This refusal to accept cash compensation was based primarily on the perception in the Palestinian community that accepting compensation would legitimate the expropriation and extinguish claims that the Palestinians still desired to press.<sup>295</sup> Moreover, the terms for the cash compensation were not favorable. The government offered payment on the basis of the assessed value of the expropriated property in Israeli pounds as of January 1, 1950, plus three percent of that value per year thereafter.<sup>296</sup> In 1950, the value of the Israeli pound was equal to that of the British pound sterling.<sup>297</sup> At the time of the enactment of the law, inflation had decreased its value relative to the British pound by eighty percent.<sup>298</sup> Retroactive valuation thus permitted government acquisition of lands at far less than their current market value.<sup>299</sup>

Provisions for compensation by exchange of alternate lands also limited the efficacy of the compensation scheme. Under the terms of the Land Acquisition Law, a claimant could receive land as compensation only "where the acquired property was used for agriculture and was the main source of livelihood of its owner," and then only by

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290. *Id.*

291. *Id.* § 3.

292. *Id.*

293. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 55.

294. JIRYIS, *supra* note 223, at 126.

295. Jiryis, *supra* note 229, at 45 n.1.

296. Land Acquisition (Validation of Acts and Compensation) Law (No. 25), § 5(a)-(b), 7 L. ST. ISRAEL 44-45 (1953).

297. JIRYIS, *supra* note 223, at 76.

298. JIRYIS, *supra* note 223, at 76.

299. JIRYIS, *supra* note 223, at 99. In the early 1970s, rates of compensation for absentees' property were linked to a cost of living index used in Israel to determine wage and other increases. KRETZMER, *supra* note 28, at 73 n.54.

agreement with the Development Authority.<sup>300</sup> Through administrative interpretation of this provision, Israel offered compensation in land only when the land owner had supported himself primarily from agriculture.<sup>301</sup> Thus, a farmer whose sons had worked as wage laborers—a common occurrence within the land-short Palestinian community—would not qualify for compensation through alternate lands. Finally, government policy limited the amount of land that could be given to a family in compensation to three hectares.<sup>302</sup> Although under the Land Acquisition Law claimants were entitled to judicial review of the compensation terms offered by the Development Authority, courts were authorized by the law only to grant compensation in cash.<sup>303</sup>

#### D. *The Law of Prescription*

Although the bulk of the expropriation of Arab lands in Israel occurred in the period between 1948 and 1953 through the above-described legal regime,<sup>304</sup> the "Prescription Law of 1958"<sup>305</sup> was another measure that adversely affected Arab land rights. This seemingly innocuous statute lengthened from ten to fifteen years the period of time for which occupiers of unregistered lands were required to demonstrate unchallenged possession of land in order to establish prescriptive rights to land.<sup>306</sup> In the case of registered lands, the law increased the term from fifteen to twenty-five years.<sup>307</sup> Under the British Mandate, the program for settlement of titles had concentrated first in those areas in which Arab and Jewish claims conflicted.<sup>308</sup> Thus, the Law of Prescription primarily affected the purely Arab areas of Israel where large areas of land were still in the

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300. Land Acquisition (Validation of Acts and Compensation) Law (No. 25), § 3(b), 7 L. ST. ISRAEL 46 (1953).

301. Yitzhak Oded, *Land Losses Among Israel's Arab Villagers*, 7 NEW OUTLOOK, Sept. 1964, at 10, 18 (stressing that provisions of Land Acquisition Law are subject to multiple interpretations).

302. *Id.* at 18-19. Yitzhak Oded also points out that the government's operational definition of "family" as one nuclear family has caused frequent problems because, by Palestinian custom, married and unmarried sons continue to reside in the household of their father until his death. *Id.* Therefore, confiscated land that had supported an extended family could be replaced only by the amount deemed to be sufficient for one nuclear family. *Id.*

303. LUSTICK, *supra* note 30, at 180.

304. PERETZ, *supra* note 180, at 181 (describing process through which, by 1953, 2,373,677 dunums had passed from Custodian to Development Authority and then to Jewish National Fund).

305. Prescription Law (No. 38), 12 L. ST. ISRAEL 129-33 (1958).

306. *Id.* art. 5.

307. *Id.* art. 5.

308. See Oded, *supra* note 301, at 13.

process of being registered.<sup>309</sup> In the words of one author:

[S]ubject to overriding needs such as afforestation, the lands surrounding a village were considered the patrimony of the local population and constituted a reserve for future development. . . . Since 1948 the opposite attitude has prevailed: all land is national patrimony except what the villagers can prove is theirs under the narrowest interpretation of the law.<sup>310</sup>

The government apparently adopted a variety of legal strategies in opposing villagers' claims of prescriptive rights to cultivation. In many cases, the state claimed that the land in dispute belonged to the Ottoman *mawat* or waste category, with respect to which entry and cultivation cannot confer prescriptive rights without specific authorization from the state.<sup>311</sup> Elsewhere, the government required cultivators to submit either a deed or proof of continuous cultivation since the operative date under the Law of Prescription.<sup>312</sup> The state claimed that other lands were in the possession of absentees, a presumption that the state maintained until convincing evidence of sale or transfer could be produced.<sup>313</sup>

### E. *The Role of Israeli Courts*

Israeli courts have provided only intermittent protection to Palestinian landowners capable of marshaling the resources for a legal defense against expropriation.<sup>314</sup> The reasons for such sporadic protection derive in part from the general character of the Israeli legal system, and in part from the specific character of the laws for land acquisition.<sup>315</sup> Of course, as a practical matter, the great majority of Palestinians who lost land never had the opportunity to test Israeli judicial waters because they remained exiles outside the

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309. The British had completed registration of about one-quarter of the land area that fell within Israeli control in 1948. See Sabri Jiryis, *Settler's Law: Seizure of Palestinian Lands*, 2 PALESTINE Y.B. INT'L L. 17, 28 (1985).

310. Oded, *supra* note 301, at 14.

311. KRETZMER, *supra* note 28, at 52.

312. LUSTICK, *supra* note 30, at 176 (discussing how new law required Arabs to produce records of ownership from period of British mandate).

313. See KRETZMER, *supra* note 28, at 53 (citing uncorroborated claims that up to 205,000 dunums of Arab land were acquired through enforcement of prescription law).

314. See KRETZMER, *supra* note 28, at 71 n.26 (citing case of village of Rabesia). In the case of Rabesia, the government first closed the lands under Article 125 of the Defense (Emergency) Regulations. *Id.* Subsequently, the Israeli Supreme Court overturned the military order for closure on procedural grounds. *Id.* Ultimately, the military governor cured the procedural defect and the Court eventually upheld the order but recommended that something be done to address the plight of the displaced villagers. *Id.*

315. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 183-84 (stating that Israeli courts are responsible for ensuring human rights, but have been faulted in some occasions).

territory of the state.<sup>316</sup>

Israel has never adopted a written constitution, notwithstanding the commitment enunciated in the state's declaration of independence to do so within a few months.<sup>317</sup> The legislative acts of the Israeli Knesset are therefore not subject to judicial review.<sup>318</sup> Courts have consequently been restricted to hearing challenges against the applicability of land acquisition laws to specific factual circumstances, or charges of abuse of discretion by responsible government agents.<sup>319</sup> The latter claim could be appealed directly to the Israeli Supreme Court, in its capacity as a high court of justice, entitled to hear original applications for complaints against government officials alleging unjust treatment.<sup>320</sup>

In regard to appeals against actions of civilian administrators acting under any of the various land expropriation laws, however, the legislation itself largely protected discretionary decisions.<sup>321</sup> As mentioned above, Article 17 of the Absentees' Property Law stipulates that any transaction made "in good faith" by the Custodian in designating property as "absentee" property cannot be invalidated even following a showing of error.<sup>322</sup> Provisions erecting conclusive presumptions of fact existed in other laws, effectively barring legal

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316. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 55 (discussing number of Palestinians outside Israel's boundaries).

317. *Declaration of the Establishment of the State of Israel*, in CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 210 (Daniel J. Elazar ed., 1990); see also Nathan Yanai, *Politics and Constitution-Making in Israel: Ben-Gurion's Position in the Constitutional Debate Following the Foundation of the State*, in CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES, *supra*, at 108 (discussing how David Ben-Gurion opposed adoption of constitution in part because he saw maintenance of military government over Arabs in Israel as both necessary and irreconcilable with bill of rights).

The declaration stated that a constitution should be adopted by October 1, 1948. *Declaration of the Establishment of the State of Israel*, *supra*, at 211. Later discussions over a bill of rights have focused on how to address the issue of legal equality between Jews and Arabs. Minister of Justice Nissim, in the late 1970s, proposed a provision that no law would be deemed discriminatory as the result of Israel being either a Jewish state or the state of the Jewish people. Amnon Rubinstein, *The Struggle over a Bill of Rights for Israel*, in CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES, *supra*, at 141. Ongoing controversy over the status of the Arabs in Israel may be the principal reason why Israel has failed to enact a bill of rights to this day. Gavison, *supra* note 280, at 150.

318. HENRY E. BAKER, *THE LEGAL SYSTEM OF ISRAEL* 11 (1968) (stating that Knesset has no restrictions on its powers).

319. See generally KRETZMER, *supra* note 28, at 49-69 (citing and analyzing Israeli Supreme Court decisions in broad discussion of Jewish land-control policy in Palestine since early 20th century).

320. Jeffrey M. Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245, 1250 (1969).

321. See *supra* part V.A-B (discussing specific details of Israeli land expropriation legislation).

322. See *supra* note 246 and accompanying text (discussing Article 17 of Absentees' Property Law).



recourse for owners suffering land losses.<sup>323</sup>

The courts were still less inclined to overturn actions taken by Military Governors pursuant to their extensive powers under the Defense Emergency Regulations. Particularly in the early years of the state, when security fears were greatest, the Israeli Supreme Court tended to defer to the judgments of military authorities about when security interests were implicated and how they were to be defended.<sup>324</sup> As years passed without major disturbances in the Arab areas of Israel, security concerns became less compelling and the Supreme Court began to demonstrate a greater willingness to overturn decisions of Military Governors.<sup>325</sup> In addition, the Court began to require a more narrowly circumscribed definition of "security," a move that curtailed somewhat the extensive powers of the Military Governors.<sup>326</sup>

Expropriation of Arab lands in Israel continues to be a significant facet, materially and symbolically, of the relationship between the Israeli Government and the Israeli Arab minority.<sup>327</sup> But with the establishment of Israeli control over the West Bank, the Gaza Strip,

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323. For example, Article 30(c) of the Emergency Land Requisition Law provided that a certificate signed by a competent authority that certain land was lawfully requisitioned "shall be conclusive and sole evidence of such fact." Emergency Land Requisition Law, art. 30(c), 4 L. ST. ISRAEL No. 1, at 12 (1949-1950).

324. SEGEV, *supra* note 180, at 51 (stating that, more often than not, Israeli Supreme Court believed arguments made by army representatives regarding security).

325. Cf. Joseph L. Ryan, *Refugees Within Israel: The Case of the Villagers of Kafr Bir'im and Iqrit*, 2 J. PALESTINE STUD., Summer 1973, at 55 (discussing cases where Israeli Supreme Court overturned decisions of military government).

326. JIRYIS, *supra* note 223. In several instances in which the Supreme Court overturned land acquisition orders of the military governors, the Court's judgments met with resistance and sometimes outright defiance. The celebrated cases of Iqrit and Kafr Bir'im, two Palestinian Christian villages near Israel's border with Lebanon, are two examples of cases that elicited such reactions. Ryan, *supra* note 325, at 59-63. Inhabitants of the villages were evacuated under Article 125 of the Defense (Emergency) Regulations in 1948-49. *Id.* The Supreme Court upheld the villagers' right to return to the villages based on a technical defect in the military order, a defect that was subsequently cured. *Id.* While another appeal was pending, the military dynamited all of the homes in Iqrit. *Id.* In a series of decisions, the Supreme Court eventually upheld the legality of the villagers' expulsion, but also affirmed that the military should return the lands of the villages to their owners. *Id.* Despite this holding, the lands were transferred to the ownership of the Development Authority under the terms of the Land Acquisition Law in 1963. *Id.*

327. One of the last major expropriation orders took place in March, 1976 when the Israeli Government took over 20,000 dunums in the Galilee district as part of its program of the "Judaization" of Galilee. KRETZMER, *supra* note 28, at 52. Jiryis suggests that another factor leading to the order was the Government's desire to retaliate against the series of 1974 resolutions in the United Nations recognizing Palestinian rights and the Palestine Liberation Organization (PLO), culminating in the address given by Chairman Yasser Arafat to the General Assembly on November 13, 1974. Sabri Jiryis, *The Arabs in Israel, 1973-79*, 8 J. PALESTINE STUD., Summer 1979, at 31, 45-46.

and the Golan Heights in 1967,<sup>328</sup> the focus of Israeli settlement activity has for the most part shifted to those areas.

## V. ISRAELI LAND ACQUISITION IN THE OCCUPIED TERRITORIES

### A. *The Aftermath of the 1967 War*

Israel's resounding defeat of the Arab states in the 1967 war gave it control over the West Bank, the Gaza Strip, the Golan Heights, and the Sinai Peninsula.<sup>329</sup> For important practical, legal, and political reasons, the course of Israeli land acquisition in the Occupied Territories, while bearing substantial similarities to the land acquisition that occurred in Israel,<sup>330</sup> has taken a somewhat different direction. While some Palestinians fled the areas eventually occupied in the 1967 fighting, most did not. The continued presence of large numbers of Palestinians in the Occupied Territories in large part compelled Israel to take this different approach.

Israel took control of areas inhabited by an estimated one million Arabs after the 1967 war.<sup>331</sup> Hence, Israel was not presented with the same windfall of wide expanses of vacant lands that it had received from the mass exodus of Palestinians in 1948.<sup>332</sup> While the occupation authorities were able to take immediate possession of substantial lands registered to the Jordanian Government and lands "abandoned" by refugees from the 1967 war,<sup>333</sup> ultimately these

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328. See *supra* note 7 and accompanying text (discussing Israel's acquisition of land as result of 1967 war).

329. The victory was striking evidence of Israel's development from a fledgling nation to a regional power.

330. See *supra* notes 11-17 and accompanying text (discussing Zionist acquisition of land in Palestine from indigenous Arabs).

331. See Abu-Lughod, *supra* note 162, at 163 (quoting Israeli estimates of 600,000 Arabs remaining in West Bank and 350,000 Arabs in Gaza Strip for period of August through September 1967). Approximately 525,000 Palestinians, mostly from the West Bank, left the Occupied Territories in 1967 and moved to Jordan's East Bank. BUEHRIG, *supra* note 175, at 40-41. Included in this group were 175,000 Palestinians who had already fled their homes once in 1948. *Id.*

332. JACOB C. HUREWITZ, *THE STRUGGLE FOR PALESTINE* 321 (1950). In addition, the 1948 war was preceded by the gradual relocation of the Palestinian intelligentsia and social leadership, a move that did not occur prior to the outbreak of fighting in 1967. Mark Heller, *Politics and Social Change in the West Bank Since 1967*, in *PALESTINIAN SOCIETY AND POLITICS* 185, 185-87 (Joel S. Migdal, ed., 1980). On the contrary, the population of the Occupied Territories had the advantage of the presence of its established leadership. *Id.* at 185. The presence of a Palestinian leadership accounts in part for the relative rapidity with which the Palestinian community in the West Bank and Gaza Strip rebounded from the shock of the war, and engaged in organized protest against Israeli rule. *Id.* at 201-02. Lawyers, for example, were in the vanguard of nationalist opposition to the occupation in the months following the 1967 war. BISHARAT, *supra* note 257, at 145.

333. See Ben Cashdan, *Colonial Law and Ideology—Israel and the Occupied Territories*, in *PALESTINE: PROFILE OF AN OCCUPATION* 57, 60-61 (Khamsin ed., 1989).

lands were insufficient, both in quantity and location, to satisfy Israeli aims.<sup>334</sup> Because the greatest proportion of land in the Occupied Territories was privately owned,<sup>335</sup> further dispossessions of Palestinian private landholders were inevitable.

The presence of a large Palestinian population did not thwart Israel's efforts to acquire land in the Occupied Territories. Israel's occupation administration certainly faced unremitting local opposition to its rule for twenty years.<sup>336</sup> Its authority, however, was not seriously challenged from within the territories during the initial two decades of occupation.<sup>337</sup> Even after the commencement of the *Intifada* in late 1987, it was Israeli and international politics that constrained Israel's response to the uprising, not the distribution of power between the occupiers and the occupied.<sup>338</sup> On the other hand, Israeli administrators have encountered different problems in contending with present Palestinian landowners, instead of exiled ones.<sup>339</sup> These conditions have generated somewhat different

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334. See, e.g., ESTER COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES, 1967-1982*, at 152-53 (1985) (reporting that Israel immediately possessed 730,214 dunums, out of total of six million dunums, in West Bank and 119,244 dunums, out of a total of 362,923 dunums, in Gaza); ANTHONY COON, *TOWN PLANNING UNDER MILITARY OCCUPATION* 161 (1992) (showing that lands immediately possessed by Israel consisted of approximately 52,700 hectares (580,000 dunums) and were located mostly in Jordan Valley); RAJA SHEHADEH, *OCCUPIER'S LAW 26-27* (2d ed., 1988) (explaining that land was placed under custodianship by Military Order No. 59, issued shortly after 1967 war); cf. COON, *supra*, at 158 (noting that small amount of land, approximately 33,000 dunums, had been purchased by Jews in West Bank and Gaza Strip prior to 1948).

335. See U.N. GAOR Ad Hoc Comm. on the Palestine Question, 2d Sess., app. V, U.N. Presentation B (1950) (detailing U.N. survey of West Bank in 1950 that found that nearly 88% of West Bank was "privately owned by Arabs"). The term "privately owned" is somewhat misleading, as it comprehends two distinct categories of interests in land in the applicable Ottoman law: *mulk* (roughly equivalent to fee simple in Anglo-American jurisprudence), and *miri* (state-owned land in which the occupant enjoys a heritable right of usufruct). See *supra* notes 104-18 and accompanying text (reviewing Ottoman land code).

336. See Heller, *supra* note 332, at 201-09 (detailing continuous opposition by various Palestinian social and economic classes to Israeli rule).

337. See generally OCCUPATION: ISRAEL OVER PALESTINE 3, 3-27 (Nasser H. Aruri ed., 1983) (relating historical overview of Palestinian resistance); THIS LAND IS OUR LAND: THE WEST BANK UNDER ISRAELI OCCUPATION (Jan Metzger et al. eds., 1983) (discussing history of Palestinian resistance to Israeli occupation).

338. See Mark Tessler, *The Impact of the Intifada on Israeli Political Thinking*, in ECHOES OF THE INTIFADA: REGIONAL REPERCUSSIONS OF THE PALESTINIAN-ISRAEL CONFLICT 43, 43-56 (Rex Buynan ed., 1991) (explaining internal and international concerns that guided Israeli policy in *Intifada* response). For a discussion of the roots of the *Intifada*, see generally DAVID GROSSMAN, *YELLOW WIND* (1988) (noting Arab and Jewish causes of *Intifada*); INTIFADA: PALESTINE AT THE CROSSROADS (Jamal Nassar & Roger Heacock eds., 1990) (examining internal and external sources of uprisings in Occupied Territories); Helena Cobban, *The PLO and the Intifada*, 44 MIDDLE E.J. 207 (1990) (detailing political relationships involved in launching, sustaining, and defending uprising).

339. Israel cannot as readily justify taking land as "abandoned" when landowners are present, although such an action is, in limited circumstances, possible. SHEHADEH, *supra* note 334, at 34-36. Israel has always taken great pains to claim that its land acquisitions are legal. *Id.* at 41-43. In addition, present landowners can physically and legally attempt to block land acquisitions. *Id.* at 47-49.

techniques of land acquisition.

Notwithstanding some differences in particulars, the occupation administration's strategy in acquiring Arab land in the Occupied Territories has been, in its reliance on law, consistent with the approach taken to land acquisition in Israel proper.<sup>340</sup> Israel has successfully used a relatively complex array of legal principles and practices to effectuate land acquisitions since 1967.<sup>341</sup> It is difficult to calculate precise figures as to the extent of Israeli land acquisition in the Occupied Territories. Several sources have estimated, however, that as of the early 1990s, Israel had appropriated approximately two-thirds of the West Bank.<sup>342</sup> Concurrently, occupation authorities held over thirty percent of the land area of the Gaza Strip.<sup>343</sup>

### B. *The Legal Framework for the Occupation*

The Israeli Government rejects the use of the term "Occupied Territories" in reference to the West Bank and the Gaza Strip. Instead, it prefers the appellation "administered areas" and no longer considers these areas to be "enemy territories."<sup>344</sup> In fact, Israel's formal legal treatment of the territories—with the exception of

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340. See *supra* notes 119-68 and accompanying text (discussing Zionist approach to land acquisition in pre-state Israel). A strong legal orientation typifies the Israeli occupation of the West Bank and Gaza Strip. Indeed, as author Emma Playfair points out: "The military government invariably seeks to defend its actions in the Occupied Territories with reference to legal provisions or principles, whether of international or local law." Emma Playfair, *Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 205-38 (Emma Playfair ed., 1992). Elsewhere, this author has characterized Israel's administration of the West Bank as "Orientalist Despotism" to highlight the paradoxical duality of the military government's reliance on legality and the subject Palestinian population's experience of that government as arbitrary and unconstrained, and to focus attention on the role of Israeli "experts" on Arab society, or "Orientalists." BISHARAT, *supra* note 257, at 47-69.

341. See SHEHADEH, *supra* note 334, at 22-41 (listing and explaining methods such as declaration of state land, declaration of abandonment, military requisition, security closure, taking for public purposes, and purchase).

342. See COON, *supra* note 334, at 160-67 (estimating that 60% of land area of West Bank was under Israeli dominion by 1992 and presenting breakdown of amounts of land acquired under each variety of legal means). A report commissioned by the civil administration in the West Bank in 1991 stated that 3470 of 5300 square kilometers, or two-thirds, of the region were under Israeli control. *Land Expropriation*, HUM. RTS. UPDATE (Palestine Hum. Rts. Info. Ctr., Washington, D.C.), Apr. 1991, at 55.

343. *Jewish Settlement in the West Bank and Gaza Strip*, in SURVEY OF JEWISH AFFAIRS 1990, at 42-59 (William Frankel ed., 1990). The regional council representing the Jewish settlements in the Occupied Territories reported that at the end of 1991, the Jewish population of the West Bank and Gaza Strip exceeded 114,000. ISRAEL YEARBOOK AND ALMANAC, 1991/1992, at 242. This figure excludes Jewish residents of annexed portions of Jerusalem, or about 124,000 persons in 1987. Emma Playfair, *Introduction to INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES*, *supra* note 340, at 1, 7.

344. EVERETT MENDELSON, A COMPASSIONATE PEACE: A FUTURE FOR ISRAEL, PALESTINE AND THE MIDDLE EAST 45 (1989) (noting Israeli change in terminology was based on illegality of Jordanian occupation).

annexed Jerusalem and the Golan Heights<sup>345</sup>—is as occupied territory under the international law of belligerent occupation.<sup>346</sup> Since the beginning of the occupation in 1967, Israel has administered the West Bank and Gaza through the military government established during the hostilities.<sup>347</sup>

Knesset legislation does not apply to the West Bank or Gaza Strip. By military order, the military government has arrogated to itself full legislative and executive powers in the Occupied Territories.<sup>348</sup> By proclamation in June 1967, the Commander of the Israel Defense Forces in "Judea and Samaria"<sup>349</sup> declared that "any power of government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me

345. See Playfair, *supra* note 343, at 14 (explaining that Golan Heights were effectively annexed in 1981, when Israeli law was extended to region); see also HENRY CATTAN, JERUSALEM 71-72 (1981) (detailing Israeli annexation of Jerusalem in several stages).

346. See Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS* 3, 27-43 (Meir Shamgar ed., 1982) [hereinafter MILITARY GOVERNMENT IN THE TERRITORIES] (explaining how Israel's laws for Occupied Territories have followed laws of belligerent occupation). But see Yehuda Blum, *The Missing Reversioner: Reflections on Status of Judea and Samaria*, 3 ISRAEL L.R. 279, 301 (1968) (articulating view echoed by government that law of belligerent occupation, created to protect reversionary rights of displaced sovereign, is inapplicable to "Judea and Samaria" (the West Bank) as sovereignty had never vested properly in Jordan, itself an illegal occupier of region). Several commentators have refuted Blum's theory. See, e.g., SALLY MALLISON & WILLIAM T. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 253-61 (1986) (rejecting Blum's theory as unfounded in law and misreading of text); Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISRAEL Y.B. HUM. RTS. 104, 106-07 (1978) (dismissing theory and claiming that protections of 1949 Geneva Convention apply to occupied territories); *infra* notes 408-31 and accompanying text (noting that Blum's position has not been accepted by Israeli courts).

347. SHEHADEH, *supra* note 334, at 68-69. The military government underwent several reorganizations, including one in 1981 that Israel presented as a shift to a "civil administration" in the Occupied Territories. Military authority, however, was then, and continues to be, paramount. See JONATHAN KUTTAB & RAJA SHEHADEH, *CIVILIAN ADMINISTRATION IN THE OCCUPIED WEST BANK: ANALYSIS OF ISRAELI MILITARY GOVERNMENT ORDER NO. 947*, at 14-18 (1982) (detailing creation of civil administration and describing it as organ of military government); Joel Singer, *The Establishment of a Civilian Administration in the Areas Administered by Israel*, 12 ISRAEL Y.B. HUM. RTS. 259, 271-73 (1982) (showing that military officers pervade civil administration).

348. English translations of Israeli military orders applicable to the Occupied Territories are not, to the knowledge of this author, systematically compiled. In fact, until 1982, the orders were not compiled in any language. See RAJA SHEHADEH & JONATHAN KUTTAB, *THE WEST BANK AND THE RULE OF LAW* 43-44 (1980) (explaining that inconsistent and haphazard distribution of military orders within Occupied Territories was sharply criticized by local lawyers); see also Shamgar, *supra* note 346, at 450-506 (reproducing selected military orders and translating them into English); Raja Shehadeh, *The Legislative Stages of the Israeli Military Occupation, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES*, *supra* note 340, at 151-52 (noting that, even after 1982, when compilation was issued, many orders were not distributed to local lawyers); cf. *Majmou'at al-Awamir al-'askariya al-Muta'alliqa b'il-Mahakim al-'askariya w'as-Sujun* (1982) (publishing, in Arabic, selection of military orders concerned with military courts and prisons).

349. Israel uses the names "Judea and Samaria" to refer to the West Bank because that term is claimed to grant legitimacy to the area's annexation in 1950 by Jordan (the "East Bank").

alone."<sup>350</sup> The same proclamation announced the continued validity of prior existing law in the area, insofar as it comported with that proclamation and any future proclamation issued by the military government.<sup>351</sup>

This last clause purportedly intended to bring the military government into conformity with the requirements of international law. International law requires an occupying power to apply all laws formerly in force in occupied territories, although it permits amendments of prior existing law on the basis of military necessity, or changed circumstances that require the amendments to preserve public interests.<sup>352</sup> This requirement has rarely inhibited the military government. Since 1967, the military government has issued over 1200 military orders introducing extensive changes in the administrative structures and substantive laws of the Occupied Territories.<sup>353</sup>

Though the Israeli military government does not deem itself politically accountable to the Palestinian residents of the Occupied Territories,<sup>354</sup> it does not possess unfettered power. For instance, after the 1967 war, an international consensus quickly coalesced around the concept of Israel returning the Occupied Territories in exchange for peace with its Arab neighbors.<sup>355</sup> This principle was

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350. Proclamation No. 2 (Proclamation on Law and Administration) of June 7, 1967, *reprinted in* Shamgar, *supra* note 346, at 450-51 [hereinafter Proclamation No. 2]. Identical proclamations were issued in Gaza, Golan, and the Sinai peninsula. Shamgar, *supra* note 346, at 450. The title "proclamation" was later dropped in favor of "military order."

351. Proclamation No. 2, *reprinted in* MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 346, at 450.

352. Article 43 of the Fourth Convention Respecting the Laws and Customs of War on Land reads:

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

1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 629 (James B. Scott ed., 1920). As to the applicability of the Hague Convention and other bodies of international law to the Occupied Territories, see Mazen Qutbi, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 340, at 87-124.

353. SHEHADEH, *supra* note 334, at viii.

354. Unlike the Palestinian minority in Israel, the Palestinian residents of the Occupied Territories are not Israeli citizens and cannot participate in Israeli national elections (although Arab residents of annexed Jerusalem have been offered Israeli citizenship and do participate in municipal elections there). There is no institutionalized forum for Palestinians in the Occupied Territories to articulate their views to the military government, although some informal consultation occurs between Israeli authorities and such bodies as local chambers of commerce. See BISHARAT, *supra* note 257, at 136-38.

355. See William Quandt, *American Proposals for Arab-Israeli Peace*, in MIDDLE EAST PEACE PLANS 69, 70-71 (Willard Beling ed., 1986) (noting quick international response to occupation and development of land-for-peace concept).

codified in U.N. Security Council Resolution 242 in November 1967.<sup>356</sup> Thereafter, Israel functioned under the watchful eye of an international community that did not accord it sovereignty over the Occupied Territories.

International attention has focused on Israel's program of land acquisition in the Occupied Territories because of the close nexus between this program and the use of these lands for seemingly permanent civilian Jewish settlements.<sup>357</sup> The international community, including the United States, has repeatedly criticized these settlements as violations of international law and impediments to a comprehensive and lasting peace in the region.<sup>358</sup>

The Israeli Supreme Court, in its capacity as the high court of justice, has supervised Israel's compliance with international law in the Occupied Territories. The Court's authority to review petitions arising in the Occupied Territories is based on the tenuous theory that it exercises personal jurisdiction over all military government personnel operating in their official capacities, even when outside the State of Israel.<sup>359</sup> Admittedly, the efficacy of the Supreme Court's supervision of the military government is questionable. During the first eighteen years of occupation, only five of the sixty-five petitions

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356. The resolution affirmed in pertinent part:

[T]hat the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- i. Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- ii. Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg., at 8-9, U.N. Doc. S/INF/Rev.2 (1967).

357. Not all lands acquired by Israel in the Occupied Territories have been used for purposes of Jewish settlement. For example, substantial expanses of land have been taken for military training and maneuvers. COON, *supra* note 334, at 164.

358. See COHEN, *supra* note 334, at 160-63 (noting that many critics of Israel's settlement policy charged that settlements violated international law, including Fourth Geneva Convention and Hague Regulations).

359. See Eli Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in Shamgar, *supra* note 346, at 109-20 (setting forth domestic and international legal sources of policy); see also Moshe Negbi, *The Israeli Supreme Court and the Occupied Territories*, 27 JERUSALEM Q. 33, 33-47 (1983) (discussing mix of pragmatic, political, and moral reasons underlying policy of jurisdiction over military personnel). The decision to permit petitions from the Occupied Territories has often been hailed as unprecedented, and palpable evidence of Israel's enlightenment and commitment to the rule of law. See, e.g., ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL* 41-42 (1981) (claiming that allowing such petitions demonstrates that military government must abide by rule of international law); Raphael Israeli & Rachel Ehrenfeld, *Between the Peak and the Pit: Human Rights in Israel*, 13 SYRACUSE J. INT'L L. & COM. 403, 426 (1987) (noting that petition system in Occupied Territories is unprecedented in history of occupations); Justus Weiner, *Terrorism: Israel's Legal Responses*, 14 SYRACUSE J. INT'L L. & COM. 183, 199 (1988) (asserting that Israel's legal system in Occupied Territories helps to preserve human rights in these territories).

from the territories that reached adjudication were resolved in favor of the petitioners.<sup>360</sup> Nonetheless, the military government has had to consider the possibility of Supreme Court intervention in formulating its policies.<sup>361</sup> Moreover, two Supreme Court decisions, which will be discussed in detail below, significantly altered the form and direction of land acquisitions in the Occupied Territories.<sup>362</sup>

### C. *Israel's Settlement Policies in the Occupied Territories*

As discussed above, Israeli's policies of land acquisition in the Occupied Territories are, for the most part, a function of its promotion of Jewish settlement in these areas.<sup>363</sup> The ostensible purposes, intensity, and geographical distribution of Jewish settlement activity in the territories have varied over time according to the agenda of the ruling party in Israel.<sup>364</sup> Yet, land acquisition has remained the official policy of every Israeli Government during the last twenty-six years.<sup>365</sup>

During the first decade of occupation, Labor Party governments focused on land acquisition and Jewish settlement efforts in annexed Jerusalem and in border areas away from Palestinian population centers.<sup>366</sup> The Israeli Government, for example, set up border-area settlements, called *nahalim*,<sup>367</sup> that were populated with young

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360. See Ronen Shamir, *Litigation as a Consummatory Action: The Instrumental Paradigm Reconsidered*, 11 STUD. L., POL., & SOC'Y 41, 48-49 (1991) (showing that from 1968 to 1986, total of 557 petitions from Occupied Territories were filed with court and noting that, of 65 adjudicated, five judgments were rendered in favor of petitioners); see also Qudus, *supra* note 352, at 124 (surveying Supreme Court's decisions vis-à-vis Occupied Territories and concluding that in great majority of cases Supreme Court did not apply laws of war to Occupied Territories, and that when it did so, it "interpret[ed] international law to condone the actions of the military government").

361. Nathan, *supra* note 359, at 163. The efficacy of the Supreme Court's oversight is not adequately measured by the success rate of Palestinian litigants, as the Court may exercise a deterrent influence over the military government. Even the dismissal of petitions have, on occasion, been followed by changes in military government practices. Such a change occurred when the Supreme Court rejected a petition in the late 1980s that challenged the absence of a formal avenue of appeal from judgments of Israeli military courts in the Occupied Territories. Moshe Negbi, *On Occupation, Intifada, and Constitutional Crisis in Israel*, 52 JERUSALEM Q. 18-31 (1989). Within a year of the petition, the military government established a military court of appeals. *Id.*

362. See *infra* notes 408-31 and accompanying text (discussing *Beit El-Toubas* and *Elon Moreh* cases).

363. COON, *supra* note 334, at 157.

364. See DON HOROWITZ & MOSHE LISSAK, *TROUBLE IN UTOPIA: THE OVERBURDENED POLITY OF ISRAEL* 48-50 (1989) (detailing how varying governments changed Israel's settlement policies).

365. COON, *supra* note 334, at 157.

366. Ibrahim Matar, *Exploitation of Land and Water Resources for Jewish Colonies in the Occupied Territories*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 340, at 443, 444-45.

367. See *supra* note 190 (discussing types of Israeli settlements).



Israelis and were intended to help stem infiltration of Palestinian guerrillas and provide a first line of defense against conventional attack by Arab armies.<sup>368</sup> Israel also established settlements on the highland ridges of the West Bank overlooking the Jordan Valley.<sup>369</sup> The placement of these settlements reflected the publicly maintained policy of the Labor Party, which favored territorial compromise with the Arab states, to withdraw eventually from areas of heavier Arab population concentrations and to retain other areas sufficient to ensure militarily defensible borders.<sup>370</sup> This policy began to erode in the later years of Labor Party rule because of the "spontaneous" settlement drive launched by the Gush Emunim ("Bloc of the Faithful"), a group of Jewish settlers ideologically committed to "redeeming" the Land of Eretz Israel by annexing the Occupied Territories.<sup>371</sup> In 1975 and 1976, the settlement-building wing of the movement (the Amana) established a number of civilian Jewish settlements in the Occupied Territories without government sponsorship and often in defiance of Labor Party policies.<sup>372</sup>

The settlement efforts of the Gush Emunim gained the full weight of government support with the accession to power of the Likud Bloc<sup>373</sup> led by Prime Minister Menachem Begin in 1977.<sup>374</sup> The Likud government mounted a concerted effort to settle Jews in massive numbers in and around Palestinian population centers in the Occupied Territories, with the ultimate aim of irreversibly bonding the territories to Israel.<sup>375</sup> The government made extensive land

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368. MICHAEL BAR-ZOHAR, *FACING A CRUEL MIRROR: ISRAEL'S MOMENT OF TRUTH* 26-28 (1990). Until the PLO uprising of 1970 ("Black September"), Jordan was one of the principal staging grounds for guerrilla attacks against Israeli forces. ISRAEL: A COUNTRY STUDY, *supra* note 8, at 276. Consequently, many of the *nahalim* were set up in the Jordan Rift.

369. See HARRIS, *supra* note 190, at 105-09 (providing detailed discussion of Israeli settlement activities in Jordan Rift).

370. This plan was known as the "Allon Plan," after its originator, Yigal Allon, a Labor Party government minister. See BAR-ZOHAR, *supra* note 368, at 26-27 (explaining that Allon designed plan so as to keep Israel out of areas that would be returned to Jordan).

371. Shafir, *Institutional and Spontaneous Settlement Drives: Did Gush Emunim Make a Difference?* in *THE IMPACT OF GUSH EMUNIM: POLITICS AND SETTLEMENT IN THE WEST BANK* 153-54 (D. Newman ed., 1985). For a comprehensive study of the Gush Emunim, see IAN LUSTICK, *FOR THE LAND AND THE LORD: JEWISH FUNDAMENTALISM IN ISRAEL* (1988).

372. LUSTICK, *supra* note 371, at 45-46.

373. The Likud Bloc was a political coalition created in 1970 that combined a number of previously independent political parties. Likud has been dominated by right-wing Herut. Ian Peleg, *The Legacy of Begin and Beginism for the Israeli Political System*, in *ISRAEL AFTER BEGIN* 19, 26 (Gregory S. Mahler ed., 1990).

374. LUSTICK, *supra* note 371, at 46-47.

375. See Matar, *supra* note 366, at 446 (discussing Likud's ideological platform and programs concerning Occupied Territories). Likud policies were designed not only to fuel ideological settlement, but also to lure middle-class Israelis to the Occupied Territories with a variety of financial incentives and with the appeal of "suburban" living in settlements within commuting distance of major Israeli cities. IAN PELEG, *BEGIN'S FOREIGN POLICY, 1977-1983: ISRAEL'S MOVE*

acquisitions during its tenure.<sup>376</sup>

The Likud Bloc lost exclusive control of the reins of power in 1984, when inconclusive elections led to the formation of a "National Unity" government in which Likud and the Labor Party shared authority.<sup>377</sup> From 1984 to 1990, Israel's settlement campaign consisted of establishing a limited number of new colonies in the Occupied Territories and the territorial expansion and "thickening"—meaning increasing the population—of existing ones.<sup>378</sup>

Settlement activity again intensified following the demise of the National Unity government in 1990 and the return to power of the Likud Bloc.<sup>379</sup> For the first time, however, Israel faced sanctions harsher than international reproval of its settlement program. In 1991, President Bush withheld loan guarantees of \$10 billion from the Israeli Government until Israel promised that its settlement activities would cease.<sup>380</sup> The Likud Bloc's refusal to provide such a commitment was one of the main factors leading to its electoral defeat and the return to power of a Labor Party government in June 1992.<sup>381</sup>

The new government, under Prime Minister Yitzhak Rabin, agreed not to undertake new settlements in the Occupied Territories, promptly securing the suspended loan guarantees from the United States.<sup>382</sup> Israeli land acquisitions in the Occupied Territories have since slowed, but have not totally abated,<sup>383</sup> even with the signing of

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TO THE RIGHT 114-15 (1987); see also Vitullo, *supra* note 17, at 24-26 (revealing some methods used by Israelis to effect demographic changes).

376. See COHEN, *supra* note 334, at 147.

377. MICHAEL WOLFFSOHN, ISRAEL: POLICY, SOCIETY, ECONOMY 1882-1986, at 17 (1987).

378. Matar, *supra* note 193, at 447.

379. Jackson Diehl, *Settlers Assert Role of Israel in Nablus Rite*, WASH. POST, May 4, 1990, at A29, A29-30.

380. Leon T. Hadar, *The 1992 Electoral Earthquake and the Fall of the "Second Israeli Republic"*, 46 MIDDLE E.J. 594, 604 (1992).

381. See *id.* at 604-05 (discussing U.S. actions and their implications in internal Israeli politics).

382. *You Take \$10 Billion, I'll Take California*, TIME, Aug. 24, 1992, at 12.

383. From July 13, 1992 to January 31, 1993, Israel confiscated 5303 dunums in the territories. Interview with Peter Lems, Director, Palestine Human Rights Information Center International, in Washington, D.C. (Apr. 2, 1993). Israel has reportedly used most of this land for road building, although a recent practice has been to expropriate 100-meter swaths of land around Jewish settlements against which there has been a Palestinian attack of some kind. *Id.* Whether such measures are for purposes of security or are merely punitive is difficult to assess. In October 1993, Palestinian landowners in an area adjacent to the West Bank city of Hebron learned of an Israeli project to establish a quarry, requiring confiscation of 4526 dunums of their land. *Land Confiscation*, HUM. RTS. UPDATE (Palestine Hum. Rts. Info. Ctr., Washington, D.C.), Oct. 1993, at 17.

Israel and the Palestine Liberation Organization have, however, agreed to move toward Palestinian self-rule. See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O. (on file with *The American University Law Review*). The Declaration provides for Palestinian authority over the West Bank and Gaza Strip during a five-year transitional period, during which time negotiations over the permanent status of those regions

the Declaration of Principles on Interim Self-Government Arrangements on September 13, 1993, by the Government of Israel and the Palestine Liberation Organization.

#### *D. Methods of Land Acquisition*

Although international law, in some senses, has constrained Israel's efforts to gain land in the West Bank and Gaza Strip, occupation authorities have found ways to overcome this obstacle. International law requires the occupying power to maintain the laws that were in force on the eve of occupation.<sup>384</sup> Israel used this principle as an invitation to exploit the laws of Jordan, Mandate Palestine, and the Ottoman Empire to advance its program of land acquisition.<sup>385</sup> Where such laws have not sufficed to meet this end, Israel has issued new laws and military orders to serve its purposes.<sup>386</sup>

In the 1970s, for example, Israeli authorities used the Jordanian law of eminent domain<sup>387</sup> to expropriate land for Jewish residence. Since 1980, Israel has invoked that law to gain land for access roads to settlements.<sup>388</sup> Israel amended the law through the promulgation of military orders that eliminated the requirement of publication of the intention to expropriate<sup>389</sup> and transferred jurisdiction over appeals against expropriation matters from the West Bank civil courts<sup>390</sup> to Israeli military "objections committees."<sup>391</sup> Staffed by

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will take place. *Id.* arts. V-VI, at 3-5. The precise structure and powers of the Palestinian authority are themselves yet to be negotiated. *Id.* art. VII, at 5-6. Specifically exempted from Palestinian jurisdiction, however, and left subject to further negotiation, are "Jerusalem, settlements, military locations, and Israelis." *Id.* art. IV minutes, at 21. Article VII refers to "independent Palestinian judicial organs" that will be created for the interim period, without specifying their form or jurisdiction. *Id.* art. VII, at 5. It seems evident, therefore, that Israeli authorities, including the Israeli Supreme Court, will continue to exercise considerable authority in the Occupied Territories during the five-year interim period, if not permanently. This, of course, assumes that an interim agreement on self-government is even implemented. As of the time of publication, the initial phase of Israeli withdrawal from Gaza and Jericho, due to begin on December 13, 1993, had not yet started. Chris Hedges, *Arafat Must Ask Who's a Friend, Who's an Enemy*, N.Y. TIMES, Feb. 17, 1993, at A3.

384. See *supra* note 352 and accompanying text (discussing occupying powers' obligations under Hague Peace Conference).

385. COON, *supra* note 334, at 40-42.

386. For instance, in annexed Jerusalem, the only legal means of expropriation of Arab lands has been the Israeli law of compulsory acquisition for public purposes. COON, *supra* note 334, at 162.

387. See COON, *supra* note 334, at 60-61 (showing that Israeli land acquisitions under Jordanian eminent domain law have exceeded takings occurring under post-1967 Israeli law).

388. COON, *supra* note 334, at 160.

389. COON, *supra* note 334, at 162.

390. See BISHARAT, *supra* note 257, at 125-44 (explaining that West Bank's Jordan-created civil courts resumed operations in West Bank after 1967 war, and have continued to function to present day, although in altered form and with greatly truncated jurisdictions).

Israeli army officers, objections committees initially defined ad hoc rules of procedure and evidence.<sup>392</sup> In 1984, in response to repeated allegations by Palestinian litigants of the injustices of the objections committees' modes of operation, the committees promulgated their formal codes of evidence and procedure.<sup>393</sup>

The military government has also claimed that the Defense (Emergency) Regulations,<sup>394</sup> in force in all of Palestine on the eve of the 1948 war, were never subsequently abrogated by Jordan in its rule of the West Bank.<sup>395</sup> Israel thus claimed the right to enforce the Regulations as part of its obligation to enforce the law in place at the time of the occupation.<sup>396</sup> The Israeli Government wielded Article 125 of the Defense (Emergency) Regulations as a tool for land acquisition in the Occupied Territories, just as it had done within Israel itself.<sup>397</sup> By 1984, Israel had converted an estimated 1.11 million dunums of land in the West Bank into restricted military areas.<sup>398</sup> The Israelis "requisitioned" another 35,000 dunums for military purposes by declaring, through unnumbered military orders, that the land was required for essential military needs.<sup>399</sup>

In 1967, the occupation administration also promulgated local

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391. See BISHARAT, *supra* note 257, at 126-27 (explaining that Military Order 1060 transferred jurisdiction over certain land appeals); SHEHADEH, *supra* note 334, at 87-91 (discussing how these committees came to be tribunals to which Palestinian complainants were routed for wide range of matters, including tax assessments, customs duties, registration of companies, appointments, and pensions for civil servants).

392. See BISHARAT, *supra* note 257, at 140-41 (arguing that flexible procedural rules of objections committees, while presented by Israel as more just than formal court rules, actually produced unfair and arbitrary results).

393. See EYAL BENVENISTI, LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL 73 n.254 (1990) (noting that 1986 version of objection committees' rules were different from earlier ones, which were never published).

394. See *supra* notes 255-62 and accompanying text (discussing Defense (Emergency) Regulations of 1945). These laws function as the "major portion of the local law dealing with security offenses." COHEN, *supra* note 334, at 94.

395. COHEN, *supra* note 334, at 94. But see SHEHADEH, *supra* note 334, at xiv-xv (contending that regulations were revoked by British, superseded by Jordanian law, and invalidated by international law).

396. See Zvi Hadar, *The Military Courts, in* MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 346, at 171-216 (reviewing military court and Supreme Court judgments upholding Israel's claim that it is entitled to enforce Regulations).

397. See *supra* notes 254-79 and accompanying text (discussing Defense (Emergency) Regulations).

398. MERON BENVENISTI, THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES 23 (1984). Such areas are used by the Israel Defense Forces (IDF) as firing ranges, training grounds, and defensive positions facing Jordan. *Id.* Land initially closed for military purposes under Article 125 has been subsequently transferred to other agencies, particularly for settlement purposes. See COON, *supra* note 334, at 164 (explaining that many of these lands taken for "military training" are later given to preexisting settlements or used to create new ones).

399. BENVENISTI, *supra* note 398, at 31.

versions of the Absentee Property Law<sup>400</sup> in both the West Bank and Gaza Strip.<sup>401</sup> A subtle difference between the 1967 orders and their legal progenitor in Israel enables the occupation administration to continue using the Absentee Property Orders in the Occupied Territories today.<sup>402</sup> While the Absentee Property Law in Israel defined an absentee as one who had left certain regions before September 1, 1948,<sup>403</sup> the newer military orders defined an absentee as one who left the region "on or before the appointed date [June 7, 1967] or subsequently thereto."<sup>404</sup> Furthermore, the 1967 orders, unlike the Absentee Property Law, allowed the seizure of land belonging to Palestinians who were in a country not at war with Israel.<sup>405</sup> Thus, by 1984, 430,000 dunums had passed under the control of the Custodian for Abandoned Property in the West Bank.<sup>406</sup>

Unlike in Israel, no laws have been enacted in the Occupied Territories that affect the formal transfer of title to lands acquired in the above-mentioned methods. In practice, of course, much of the land has been put to uses that appear to be permanent, such as the settlement of Israeli civilians. The formal legal status of these lands, however, remains that of temporary military requisition, closure, or vestment in the hands of the Custodian of Absentee Property.<sup>407</sup> In a pair of 1979 decisions, the Israeli Supreme Court confirmed that legally, Israeli control of land in the Occupied Territories is temporary.

### 1. *The Beit El-Toubas case*

The *Beit El-Toubas* case was actually the consolidation of two

400. See *supra* notes 233-53 and accompanying text (discussing Israel's promulgation of regulations to standardize action taken by administration with regard to Arab property).

401. Military Order No. 58: Abandoned Property of Private Individuals Order, in Shamgar, *supra* note 346, at 465-69. The Gaza version is identical but numbered differently.

402. See COON, *supra* note 334, at 163 (discussing ways in which "abandoned lands" continue to be identified and appropriated).

403. Absentees' Property Law, § 1(b), 4 L. ST. ISRAEL 5710 (1949-1950); see *supra* notes 234-42 and accompanying text (discussing Absentees' Property Law and setting forth law's language).

404. Military Order No. 58, *supra* note 401, at 465.

405. SHEHADEH, *supra* note 334, at 35. Israel, however, has not yet used this broad definition in defining West Bank absentees. *Id.*

406. BENVENISTI, *supra* note 398, at 30. The occupation administration has been able to identify more abandoned property due to legal and administrative regulations that require a license from the Custodian of Absentee Property for all transactions in land. Upon registration of title in the name of heirs to a deceased owner, for example, the Custodian will place any share which devolves upon an "absentee" under his or her control. SHEHADEH, *supra* note 334, at 36.

407. The exception is land, believed to be of small quantity, that has been legitimately purchased by Israeli individuals or organizations in the Occupied Territories. The topic of Israeli land purchases is treated *infra* notes 464-77 and accompanying text.

separate cases that presented the Court with common legal issues.<sup>408</sup> In the first case, the petitioners, Palestinians who owned private lands near the West Bank village of Beit El, initiated a suit when the military government seized their land for purposes of Israeli civilian settlement.<sup>409</sup> The lands in question, which were adjacent to an Israeli (formerly Jordanian) army post, had been requisitioned in 1970 for expansion of the military installation.<sup>410</sup> In the summer of 1978, however, the Government of Israel authorized Israeli civilian settlers to enter and begin the construction of housing on the petitioners' lands.<sup>411</sup>

The second of the two consolidated cases involved agricultural land in a sparsely populated area of the Jordan River Valley north of Jericho, close to the village of Toubas.<sup>412</sup> In 1975, the area commander issued a seizure order, based on security needs, for the petitioners' lands.<sup>413</sup> The owners did not learn of the order until 1978, when they attempted to enter the land to cultivate it and discovered that it had been plowed by settlers of a nearby civilian *moshav*.<sup>414</sup> The petitioners in both cases challenged the legality of the military's conversion of land, seized on the pretext of military needs, to civilian use, claiming that the seizure was motivated by political, rather than military, concerns.<sup>415</sup>

Although the Court rejected both petitions,<sup>416</sup> it clarified several previously disputed questions. The Court's decision, written by Justice Alfred Witkon, noted that a state of belligerency existed between Israel and the Arab countries, and that the status of the military government vis-à-vis the occupied territory was that of an occupying power.<sup>417</sup> As such, the Court concluded that the military govern-

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408. The official titles of the cases were *Ayoub v. Minister of Defense* (Beit El), and *Mattau'a v. Minister of Defense* (Toubas). *Unofficial English Translation of the Judgment in HCJ 606/78 and HCJ 610/78* [hereinafter HCJ].

409. *Id.* at 1.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at 8, 14.

417. *Id.* at 4. The court stated:

Hitherto, we have discussed the question of the legality of the respondents' actions in terms of the 'municipal' law, i.e., the military law operative in the occupied territory. However, as we pointed out, the petitioners have based their petitions also (or even mainly) on international law relating to the rights and duties of an occupying power in occupied territory, on one hand and to the rights and duties of the populace, on the other . . . . No one disputes that the petitioners are such protected persons, according to the meaning of this term in international law.

*Id.*

ment was bound to follow customary international law pertaining to belligerent occupation, including the Hague Convention of 1907.<sup>418</sup> According to Article 52 of the Hague Convention Respecting the Laws and Customs of War on Land, the occupying power is entitled to temporarily "requisition" private lands only where justified by military necessity.<sup>419</sup> In return, the occupying power must make rental payments to owners, whose formal title is thereby undisturbed.<sup>420</sup> In dismissing the petitioners' claims, the Court maintained its traditional deference toward military authority in judgments relating to security concerns<sup>421</sup> and found that the terms of the Hague Convention had not been violated.<sup>422</sup>

## 2. *The Elon Moreh case*

The *Elon Moreh* case<sup>423</sup> represents another instance where Israel seized private land for "military purposes," and then turned the land over to Israeli civilian settlers of the Gush Emunim.<sup>424</sup> The petitioners, who sought the return of approximately thirty-one acres of land, challenged the legality of the settlement on the grounds that international law prohibited confiscation of private land for settlement purposes.<sup>425</sup> This case was different from prior similar cases because it divided Israel's military establishment.<sup>426</sup> IDF Chief of Staff Raphael Eitan supported the rationale that the settlement served

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418. *Id.* at 6; see also Brigadier-General Benzion Farhy, *Current Legal Trends in the Area Administered by Israel*, 113 MIL. L.R. 47, 59 (1986) (noting that Israeli Supreme Court has generally adhered to principle that occupation authorities are also subject to rule of Israeli administrative law).

419. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE, *supra* note 352, at 630.

420. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE, *supra* note 352, at 630.

421. See HCJ, *supra* note 408, at 10 (detailing past and present Court policy of limiting judicial intervention in military matters to very narrow circumstances).

422. HCJ, *supra* note 408, at 8. The decision also differentiated between customary international law, which was held to be part of Israeli municipal law, and international treaty law, which is not part of municipal law unless introduced to it by national legislation. *Id.* at 4-5. On this basis, the Court held that the 1949 Geneva Conventions (of which Israel is a signatory), while binding on the military government in the Occupied Territories, are not justiciable in Israeli municipal courts. Rather, they are enforceable only as between the signatory states. *Id.* at 5-7. The Israeli Government has claimed that it voluntarily observes the "humanitarian provisions" of the Geneva Conventions. SHEHADEH, *supra* note 334, at 43. Ironically, a military order issued in the earliest days of the occupation stipulated that military authorities would be bound to conform to the Geneva Conventions. *Id.* Within five months, the provision was repealed by another military order. *Id.*

423. Formally, the case is entitled *Dweikat et al. v. The Government of Israel*, reprinted in Ian Lustick, *Israel and the West Bank After Elon Moreh: The Mechanics of De Facto Annexation*, 35 MIDDLE E.J. 557, 559 n. 5 (1981).

424. *Id.* at 600.

425. See LUSTICK, *supra* note 371, at 48.

426. See Lustick, *supra* note 423, at 560-61 (arguing that Israeli High Court of Justice used disputes as impetus to deeply probe motivations in appropriating land in question).

military interests, while Defense Minister Ezer Weizman disagreed.<sup>427</sup>

With mixed signals emanating from the military, the Court was forced to determine on its own whether the Elon Moreh settlement had military value. It found that the military government's impetus in establishing the settlement had come from the Gush Emunim, whose paramount aim was not to assist the occupation army, but to colonize the land in question.<sup>428</sup> The Court based its conclusion, in part, on the fact that the Gush Emunim justified the settlement explicitly on ideological, as opposed to military, grounds.<sup>429</sup> Accordingly, the Court ordered the evacuation of the settlers and the dismantling of all structures erected by them on the petitioners' land.<sup>430</sup> In so doing, the Court also held that the Hague Convention barred the location of permanent settlements on land that had been only temporarily requisitioned by the military.<sup>431</sup>

#### *E. The "Redemption of State Land"*

As a legal matter, these court decisions significantly undermined the basis of Israel's settlement policy in the Occupied Territories. Interestingly, the Court rendered these decisions at a time when the Israeli Government, under the Likud administration of Menachem Begin, most actively supported a program of settlement in the Occupied Territories.<sup>432</sup> Consequently, the Likud administration expended considerable effort to elaborate a new legal basis for Israeli settlement. In December 1979, the Israeli Cabinet decided to increase funding for a comprehensive survey of the ownership and registration status of all land in the West Bank.<sup>433</sup> By the spring of 1980, the Cabinet and the Attorney General's office had investigated a variety of legal alternatives that would have protected existing Jewish settlement in the Occupied Territories from court challenges and permitted unencumbered future settlement.<sup>434</sup>

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427. Lustick, *supra* note 423, at 560-61.

428. See Lustick, *supra* note 423, at 561 (stating that Israeli Cabinet and Defense Ministry, as well as Gush Emunim, sought to use settlement in furtherance of goal to achieve dominion over Greater Israel).

429. See Lustick, *supra* note 423, at 561 (explaining that Court also based its decision on vagueness of 'security' concerns and fact that military's justification came from International Settlement Committee, not Defense Committee).

430. LUSTICK, *supra* note 371, at 48.

431. Lustick, *supra* note 423, at 561-62.

432. See *supra* notes 374-75 and accompanying text (explaining goals of Likud government in Occupied Territories).

433. Lustick, *supra* note 423, at 568.

434. See Lustick, *supra* note 423, at 564-65 (detailing various legal methods considered and rejected by Attorney General in Israel).



The administration found a legal basis for Israeli settlement in the indeterminacy of title to large portions of the West Bank.<sup>435</sup> Prior to Israeli occupation, the Jordanian administration had worked steadily but unhurriedly at a program of surveying and registering land in the West Bank.<sup>436</sup> Thus, by the time of the Six-Day War in June 1967, the Jordanian authorities had settled title for approximately 37.5% of the West Bank.<sup>437</sup> In 1979, the Israeli team began a new survey, which revealed that private claims existed for a majority of the populated hill country in the West Bank.<sup>438</sup> The Israelis concluded, therefore, that their only option was to assert claims of state ownership and to designate the land as "state land."<sup>439</sup>

A category of "state land," in which the state held ultimate ownership and possession did not exist under Ottoman law,<sup>440</sup> and was only introduced during the British Mandate period.<sup>441</sup> The Order-in-Council enacted by the British defined the category referred to as "public lands" as "all lands in Palestine subject to the control of the government" and those "which are or shall be acquired for the public service or otherwise."<sup>442</sup> It is clear that the British did not intend for this definition to subsume the Ottoman category of *miri* lands,<sup>443</sup> under which possessory rights (*tasarruf*) were granted to individuals subject to a condition of cultivation.<sup>444</sup> It is unclear whether the British also intended to exclude categories of *matruka* and *mawat* lands by the Order-in-Council definition.<sup>445</sup>

Jordanian law, presumably the law that Israel was obligated to enforce in the realm of land law, had also treated *miri* land as the approximate equivalent of private property.<sup>446</sup> Undaunted, the

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435. See Lustick, *supra* note 423, at 568-69 (listing disorganized document collections and inefficiency of registry service as two reasons for indeterminate nature of West Bank titles).

436. Lustick, *supra* note 423, at 569.

437. Lustick, *supra* note 423, at 569.

438. See Lustick, *supra* note 423, at 569 (reporting estimates that approximately 88% of land was privately owned by Arabs).

439. See Lustick, *supra* note 423, at 69-70 (explaining that Israel adopted policy of using disorganization in land registry system to deny legal validity of many private claims).

440. SHEHADEH, *supra* note 334, at 24.

441. SHEHADEH, *supra* note 334, at 24.

442. SHEHADEH, *supra* note 334, at 24 (quoting *Order-in-Council*, 3 LAWS OF PALESTINE 2569 (1933)).

443. SHEHADEH, *supra* note 334, at 25 (noting British Mandate courts' interpretation of *miri* category of land ownership as not falling within "state land" category).

444. See *supra* notes 105-10 and accompanying text (explaining Ottoman Code's categories of land ownership).

445. Cf. SHEHADEH, *supra* note 334, at 25 (claiming that Mandate state land law did not encompass *matruka* and *mawat* categories).

446. This view was stated by Aziz Shehadeh, a lawyer whose practice spanned the British Mandate, Jordanian rule, and Israeli occupation, in an affidavit in the "Tarquimiyeh case" in 1981:

military government in mid-1980 began to issue an increasing number of "declarations of state land" to Palestinian cultivators.<sup>447</sup> Initially, the government made these declarations only with respect to land that the land survey team had carefully scrutinized.<sup>448</sup> Eventually, the government became less discriminating and, according to one observer, issued more declarations of state land between mid-1979 and early 1980 than it had in the preceding twelve years of occupation.<sup>449</sup> It became apparent, moreover, that the military government intended to lay claim to all lands that fell within the Ottoman categories of *miri*, *matruka*, and *mawat*.<sup>450</sup>

The new tactic of "redeeming state land" required no legislative innovation. Rather, Israel issued the declarations pursuant to a 1969 military order making the written declaration of the Custodian of Government Properties that a particular parcel was "state land" *presumptively* valid.<sup>451</sup> Palestinian cultivators who wished to appeal a declaration of state ownership for lands within their possession could do so before one of the "objections committees."<sup>452</sup>

Under the procedures followed by the objections committees, petitioners had to file their appeal within twenty-one days of the initial declaration, and had to submit within another twenty-four days survey maps prepared by licensed surveyors for all claimed lands, as well as documents that established proof of ownership.<sup>453</sup> The

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[W]e arrive at the clear conclusion that *miri* land is not considered State land under the laws prevailing in the West Bank which were applied during the Jordanian period, and that the ownership of the *raqaba* of *miri* land is a different matter, entirely separate from and independent of the ownership of the right of possession and permanent occupancy of such lands. The latter right is in reality an ownership right enabling the owner to possess the land, build thereon, sell, mortgage, grant, or inherit the land or exercise all forms of possession thereof. The ownership of the *raqaba*, on the other hand, is an entirely theoretical ownership which does not give the government any real or practical right in the land.

Affidavit of Aziz Shehadeh, al-Nazir v. The Military Commander of the Judea and Samaria Region (the "Tarqumiyeh case"), HCJ 285/81 (1981), reprinted in *The Concept of State Land in the Occupied Territories* (Affidavit of Aziz Shehadeh), in II PALESTINE YEARBOOK OF INTERNATIONAL LAW 170-71 (1985). The affiant also pointed out that the Jordanian Government paid compensation for expropriation of *miri* land. *Id.* at 171.

447. See SHEHADEH, *supra* note 334, at 28 (discussing how Israel expropriated lands previously considered *miri*, *matruka*, and *mawat*).

448. Lustick, *supra* note 423, at 571.

449. Lustick, *supra* note 423, at 571 (quoting Letter ("The Problem of West Bank Lands") from Elias Khoury to the Office of the Legal Adviser to the Government, Ministry of Justice, Jerusalem, Feb. 11, 1981, at 5).

450. SHEHADEH, *supra* note 334, at 28.

451. See SHEHADEH, *supra* note 334, at 22 (explaining how Israeli Government used Military Order No. 364 to facilitate land acquisition).

452. See *supra* note 391 and accompanying text (explaining mechanics of appeals before objections committees).

453. SHEHADEH, *supra* note 334, at 30.

committee has refused to accept tax receipts as sufficient proof of ownership, although prescriptive rights have been recognized upon demonstration of continuous cultivation for a period of ten years.<sup>454</sup>

The effect of the legal presumption in favor of state ownership and of the procedures adopted by the objections committees has been to shift the burdens of litigation to Palestinian claimants.<sup>455</sup> These burdens can prove substantial, in both a legal and a practical sense. Many Palestinians have not cultivated their lands continuously; instead, they have joined the force of daily migrant laborers who work in Israel.<sup>456</sup> In addition, the costs of a professional survey, particularly for a large plot, and for lawyers, can be exorbitant relative to the average West Bank resident's income.<sup>457</sup>

Finally, the objections committee is authorized to make only non-binding "recommendations" to the military government.<sup>458</sup> As was the case earlier in Israel with the Custodian of Absentee Property,<sup>459</sup> transactions conducted "in good faith" by the Custodian of Government Properties in the Occupied Territories will remain in force when subsequently adjudged to have been incorrect.<sup>460</sup>

The program of "realizing state land" has permitted the continuation of the military government's acquisition of lands for settlement in the West Bank and Gaza without running afoul of the restrictions imposed on it by the Israeli Supreme Court in the *Elon Moreh* case, which pertained only to the seizure of private lands.<sup>461</sup> Although the military government presumably holds state lands in the Occupied Territories in temporary trust for a future sovereign,<sup>462</sup> no public body exists in the Occupied Territories with the standing to challenge actions of the military government that may be inconsistent with the

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454. SHEHADEH, *supra* note 334, at 31.

455. This burden is particularly onerous because land acquisition decrees are frequently conveyed informally with either poor accompanying documentation of their purported reach, or orally, to village *mukhtars* (petty village officials). SHEHADEH, *supra* note 334, at 214. These procedures rely on regulations passed in 1987. *Id.* The *mukhtars*, appointed by the Israeli military government, are frequently on bad terms with fellow villagers. As a result, the decrees are often delayed in reaching affected owners, and in some instances, never reach the owners at all. *Id.*

456. SHEHADEH, *supra* note 334, at 31.

457. SHEHADEH, *supra* note 334, at 31.

458. SHEHADEH, *supra* note 334, at 28.

459. SHEHADEH, *supra* note 334, at 35.

460. See SHEHADEH, *supra* note 334, at 31 (describing author's experience as practicing lawyer in West Bank town of Ramallah, where he handled case of client whose land was proven to have been wrongly designated as "absentee" property, but was nonetheless not returned).

461. Lustick, *supra* note 423, at 571-72.

462. See SHEHADEH, *supra* note 334, at 27 (noting that Military Order No. 59, which gives Israel control of state lands, intends return of lands at end of occupation).

temporary nature of that trust.<sup>463</sup> Moreover, the presumption in favor of state ownership and the sufficiency of the procedures of the objections committees have received the endorsement of the Israeli Supreme Court.<sup>464</sup> Thus, avenues to contest "redemptions of state land" have become effectively sealed.

*F. Private Israeli Land Purchases in the Occupied Territories*

The purchase of land by private Israeli land development companies and individuals has received less attention than direct state acquisition of land in the West Bank and the Gaza Strip. In 1967, the Israeli Government authorized the JNF and the Israel Lands Administration to purchase land in the Occupied Territories.<sup>465</sup> Initially, it barred purchases by Israeli individuals in order to avoid land speculation and attendant price increases.<sup>466</sup>

The JNF followed the practice of buying land through its subsidiary land development company, Hamnuta, which in turn would deal either directly with Arab vendors or with Jewish middlemen.<sup>467</sup> In a manner reminiscent of the Mandate period,<sup>468</sup> a counterpart group of Arab land brokers developed as well. Despite the prohibition on individual purchases and the requirement of government licensure for all transactions in land, hundreds of unlawful purchases apparently were made, some by Jewish and Palestinian brokers acting as intermediaries for Hamnuta.<sup>469</sup>

In 1979, the Military Commander of the West Bank lifted the prohibition on individual purchases in the Occupied Territories.<sup>470</sup> Since that time, lawyers defending Palestinian landowners have made myriad allegations that Jewish land brokers and Palestinian middlemen used forged documents purporting to convey the landowners' interests in land.<sup>471</sup> The lawyers also allege the use of trickery or

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463. See *supra* note 458 and accompanying text (explaining that objections committees can only make recommendation to military, not issue legal orders).

464. See *al-Nazir v. Military Commander of the Judea & Samaria Region* (1981) (unofficial English translation of HCJ 285/81) (rejecting claim that insufficient due process in taking of land constituted violation of owners' rights to contest taking of land).

465. COHEN, *supra* note 334, at 154.

466. COHEN, *supra* note 334, at 155 (detailing fines and imprisonment for Israeli nationals and companies purchasing land in Occupied Territories).

467. COHEN, *supra* note 334, at 154.

468. See *supra* note 121 (describing role of Arab middlemen in Mandate period).

469. See COHEN, *supra* note 334, at 156 (describing Jordanian laws passed after 1967 that imposed death penalty on Jordanian citizens, which included Palestinian residents of West Bank, who sold land to Israelis).

470. See SHEHADEH, *supra* note 334, at 39.

471. See BISHARAT, *supra* note 257, at 127; see also COHEN, *supra* note 334, at 155-56 (reporting that, in 1977, 10 Jewish land brokers were revealed to have coerced Arab landowners at gunpoint

physical intimidation; these tactics are designed to induce Palestinian landowners to sign documents in Hebrew that grant irrevocable powers of attorney and authorize conveyance of their land.<sup>472</sup>

Whether intentional or not, certain procedural and administrative changes introduced by the occupation administration may have facilitated these transactions. The West Bank civil courts' jurisdiction in disputes involving registration of previously unregistered lands, for example, was removed, and placed under the purview of a military objections committee.<sup>473</sup> The West Bank judiciary's lack of independence<sup>474</sup> and the weakness of the civilian police force are also contributing factors in this situation.<sup>475</sup>

Israeli political scientist Ehud Sprinzak suggests that the occupation administration may have introduced its policy of permitting private land purchases as a means of boosting the fortunes of the Herut Party (the major partner in the Likud Bloc):

Since many poor Arab landlords could not resist the magic appeal of money, the situation created vast opportunities for astute businessmen who could maneuver among anonymous sellers, shadowy documents, and encouraging authorities. The issues at stake were attractive suburban lands bordering on the Green Line [the former border between Israel and the Occupied Territories], thirty minutes from Tel Aviv or Jerusalem. And the developers who were ready to help Herut, were promised quick governmental approval of the only official license needed, a positive resolution by the settlement committee of the government. By the time the

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to sign sales documents and that land gained was then sold to Hamnuta at great profit); COON, *supra* note 334, at 163 (describing case of blind Palestinian woman who rented 150 hectares (approximately 1650 dunums) to neighbor, who, in turn, unwittingly conveyed power of attorney to collaborator). In the case described by Coon, the collaborator sold the land to an Israeli company, which used a document purporting to bear the woman owner's fingerprint to register a sale of roughly four times the amount of land involved in the rental. *Id.* The woman's lawyer succeeded in convincing an objections committee that the document was a forgery, but the committee decided that because the woman admitted signing some document, this document must have authorized the sale of her property, and thus denied her appeal. *Id.*

472. See COON, *supra* note 334, at 163 (describing case of blind Palestinian woman discussed *supra* note 338).

473. See SHEHADEH, *supra* note 334, at 87-91 (discussing objections committee's wide-ranging jurisdictional power). Amendments to the procedures in 1987 also permitted *in camera* hearings for disputes over land registration "for reasons relating to the security of the Israeli Defence Forces or the security of the public." *Id.* at 214. Shehadeh states that these amendments make the objections committee's decisions "even more problematic" from the standpoint of fairness. *Id.* Other military orders prolonged the validity of irrevocable powers of attorney for land conveying five years under Jordanian law, to ten years, and then later to fifteen years. *Id.* at 40. In addition, the orders authorized Israeli notaries to authenticate signatures on these instruments. *Id.*

474. See BISHARAT, *supra* note 257, at 128 (explaining that since 1967, West Bank judges have been appointed by committees of Israeli military officers).

475. See BISHARAT, *supra* note 257, at 128, 133 (citing interviews with Palestinian lawyers).

whole land issue was exposed, it was learned that under Herut's ideological umbrella of settling Eretz Israel, a big industry had emerged. The promise of large sums of money drove many "idealists" to forge documents, cheat poor Arab peasants out of their land, improperly sell unavailable lots to prospective settlers and advertise the operation as a great Zionist project.<sup>476</sup>

The total amount of land in the Occupied Territories acquired by private land purchase is not known, but it is believed to be relatively limited.<sup>477</sup> It is certain, therefore, that the greatest share of transferred lands were those placed under state control by the operation of the various laws described above.<sup>478</sup> It is possible that expropriation and military requisitions will again become the dominant modes of Israeli land acquisition in the West Bank and Gaza Strip as the quantity of lands capable of being declared "state" lands diminishes.

## VI. LAW AND LEGITIMACY IN A COLONIAL SOCIETY

Israel has devoted considerable energy and resources to constructing a legal regime for its acquisition of Palestinian lands. This Article contends that the legitimization of the acquisition of Palestinian lands in the eyes of the Palestinians was not the goal of the Israeli land laws. While the land laws have had the greatest impact on the Palestinians, they were not the subjects to whom the laws were addressed. Rather, Israel addressed these laws to the international community, and perhaps more fundamentally, to the Jewish Israeli public itself.

### A. *Land Expropriations and the Palestinians*

Land expropriations, both in Israel and the Occupied Territories, have caused great hostility toward the government and significant unrest among the Palestinians living under Israeli rule.<sup>479</sup> The first "Day of the Land" was declared on March 30, 1976, in protest of an

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476. Ehud Sprinzak, *Illegalism in Israeli Political Culture: Theoretical and Historical Footnotes to the Pollard Affair and the Shin Bet Cover Up*, 47 JERUSALEM Q. 77, 93 (1988).

477. See SHEHADEH, *supra* note 334, at 39 (citing difficulties in establishing precise amount of private land purchase because of military restrictions, but estimating that it is "small percentage" of settled land).

478. See MERON BENVENISTI, THE WEST BANK DATA BANK PROJECT, 1986 REPORT: DEMOGRAPHIC, ECONOMIC, LEGAL, SOCIAL AND POLITICAL DEVELOPMENTS IN THE WEST BANK 26-32 (1986) (describing total amount of land seized by three basic methods of Israeli land control—expropriation of ownership, seizure of possession, and restriction on use).

479. See generally LILY WEISSBROD, ARAB RELATIONS WITH JEWISH IMMIGRANTS AND ISRAEL 1891-1991: THE HUNDRED YEAR'S CONFLICT (1992) (detailing Palestinian resistance to Jewish settlement from before establishment of Israel up to present day *Intifada*).

expropriation decree affecting land in the district of Galilee.<sup>480</sup> Thousands of Palestinian Arab residents of Israel participated in demonstrations throughout the region; attempts by the military to repress the protests resulted in the shooting deaths of six Arabs.<sup>481</sup>

Since 1976, the "Day of the Land" has become an annual event and has developed into perhaps the most important rallying occasion for the Arab community in Israel.<sup>482</sup> As Professor David Kretzmer maintains: "The issue of land expropriation is possibly the most painful in the relationship between the Arabs in Israel and the Jewish state. It is an issue that has caused tremendous resentment and bitterness among Israeli Arabs and has galvanized them into political action."<sup>483</sup> This observation is no less true in the Occupied Territories, where Palestinians believe that Israeli land acquisitions are part of an explicit design to permanently disable their plans for national self-determination.<sup>484</sup>

In spite of this kind of Palestinian protest, one should not conclude that a less-mediated application of force would have reached the same end. While the Palestinians greatly resent the Israeli legal regime, which is the cause of cynicism rather than legitimacy among Palestinians, it may have engendered less resistance—or less violent resistance—than any other potential mode of land acquisition. The success rate of legal challenges to the government's land-control policies may have been low,<sup>485</sup> but even a narrow ray of hope has been sufficient to draw a number of Palestinian landowners into litigation to defend their claims.<sup>486</sup>

480. See *Israeli Troops Kill Palestinian Protester*, Reuters, Mar. 30, 1989, available in LEXIS, Nexis Library, Reuters File (describing "Land Day" as marking 1976 killings of six Arabs during protests against land expropriation within Israel).

481. *Id.*

482. See Stephen Franklin, *Israel Fears Arab Unity on Day of the Land*, CHI. TRIB., Mar. 27, 1988, at C6 (describing Arab support for annual "Day of the Land" protest).

483. KRETZMER, *supra* note 28, at 50-51.

484. See BISHARAT, *supra* note 257, at 143 (citing views of lawyers and public in West Bank).

485. See *supra* note 360 and accompanying text (discussing outcome of petitions filed with Israeli Supreme Court).

486. See Shamir, *supra* note 360, at 65 (observing that cases filed in Israeli Supreme Court from Occupied Territories have increased in face of rather abysmal rate of success, and suggesting that Palestinians' decisions to litigate cannot be fully grasped from instrumental perspective). Shamir says a "consummatory" perspective is needed: "The [High Court of Justice] became a central arena for dispute processing despite its inability to provide petitioners with concrete remedies. . . . The mere ability to be heard sufficed to inspire a growing number of people to choose legal action." *Id.* While this point should be appreciated, it seems Shamir underestimates the lengths, even to the point of probable futility, to which Palestinian owners will go to protect their lands. After all, owners realize that they confront probable permanent loss of the land to any Palestinian use. Shamir also may overlook the role that others may play in convincing landowners to mount legal resistance to an expropriation order. A vignette demonstrating this process is offered in BISHARAT, *supra* note 257, at 3-5 (recounting agency worker's role in persuading Palestinian peasant farmer to seek legal redress for physical assault

As a result of this litigation by Palestinian landowners, a minor industry of sorts has emerged that employs lawyers, surveyors, and other professionals who work to defend Palestinian landowners from expropriations, principally in the Occupied Territories.<sup>487</sup> This group is almost uniformly nationalist in outlook, and, seeing its work as an aspect of the Palestinian national struggle, is also strongly and vocally critical of the Israeli legal system as it pertains to Palestinian interests.<sup>488</sup> At the same time, the lawyers and their auxiliaries are committed to critiquing and contesting Israeli power in legal terms.<sup>489</sup> One should not doubt this group's fervent commitment to nationalist ideals, despite the fact that its material interests are bound up with the pursuit of a non-violent form of struggle.<sup>490</sup>

One may only speculate as to what form this group's resistance efforts might take, or the effect that its absolute denunciation of the legal system under Israeli rule might have, were the legal avenues not open before it, no matter how discouraging they might be. The social

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and seizure of land by Jewish settlers).

487. See generally BISHARAT, *supra* note 257 (detailing role of Palestinian lawyers in West Bank).

488. See BISHARAT, *supra* note 257, at 145 (describing West Bank lawyers as "vanguard of nationalist opposition to foreign rule"). Perhaps the most prominent of these individuals is Raja Shehadeh, who has written prolifically in English on matters related to law and the Occupied Territories. Shehadeh was a co-founder of *al-Haq* (formerly Law in the Service of Man), a human rights organization founded in Ramallah (a town in the West Bank) in 1979. That organization has produced a bevy of books and pamphlets on the legal status of the territories in both English and Arabic. Many are listed in Diana Vincent-Davis, *The Occupied Territories and International Law: A Research Guide*, 21 N.Y.U. J. INT'L. L. & POL. 575, 605 (1989).

489. See BISHARAT, *supra* note 257, at 169 (describing role of lawyers in resistance effort). It should be mentioned that some lawyers in this group have been accused by Israeli authorities of being members of "hostile organizations" that are committed to the use of violence against Israel. Gaza lawyer Raja Sourani, for example, has repeatedly been placed under house arrest, or in prison, on the accusation that he is a member of the Popular Front for the Liberation of Palestine. MICHAEL POSNER, LAWYERS COMMITTEE FOR HUMAN RIGHTS, AN EXAMINATION OF THE DETENTION OF HUMAN RIGHTS WORKERS AND LAWYERS FROM THE WEST BANK AND GAZA AND CONDITIONS OF DETENTION AT KETZIO 59 (1988).

490. See BISHARAT, *supra* note 257, at 13 (describing Arab states as source of legal funds used to bolster Occupied Territory residents against Israeli pressure). In the late 1970s and early 1980s, the Arab states provided material support with the *amwaal as-sumud* ("Steadfastness Funds") in an effort to promote the *sumud*, or "steadfastness," of the residents of the Occupied Territories against perceived pressures from Israel to drive them out of the West Bank and Gaza Strip. *Id.* A Joint Jordanian-PLO Committee (*al-lajna al-mushtaraka*) administered disbursements from the funds. *Id.* It was common knowledge among Palestinians that individuals faced with land expropriation decrees (and relatives of those facing political or security charges in the Israeli military courts) were able to obtain full reimbursement for legal fees from the Joint Committee by traveling to Amman and presenting receipts. *Id.* For a number of years, the lawyers were able to charge clients far higher fees than they otherwise would have been able to afford, and some prospered by this method. *Id.* The *amwaal as-sumud* dried up in the mid-1980s as the world oil glut depleted the treasuries of the oil-producing Arab states, the prime contributors to the fund. *Id.* at 181 n.23.



authority of the legal profession,<sup>491</sup> and others surrounding it, exceeds its proportions in numbers.<sup>492</sup> The leadership it provides may carry even more weight when the alternatives to the legal struggle constitute a step along the road to the potentially greater sacrifices of violent resistance.<sup>493</sup>

Meanwhile, litigation serves as a kind of "shock absorber" for the occupation authorities. The moral outrage of expropriated owners and their families, greatest in the initial stage, may be diffused in the course of lengthy lawsuits. Tangible and intangible community resources—money, time, ingenuity, expertise, emotional energy—are thus expended in a less threatening form of resistance that is more easily contained by Israeli authorities.

Of course, the toll exacted by litigation also draws resources away from other productive activities, not simply other potential modes of resistance. The countless hours spent in travel from rural sites of land expropriations to lawyers' offices in the towns and cities are hours not spent tending crops and livestock. The money invested in surveys and lawyers fees is money not invested in modernized irrigation systems or college tuition.<sup>494</sup>

It is conceivable, but unlikely, that the effects described above express a conscious aim of Israeli policy. It is more likely that the effects are incidental to policies consciously motivated and directed by other concerns. Hence, there must be alternative explanations for Israel's legally oriented approach to land acquisition.

### *B. Israel's Image and the International Community*

Many indicators show that Israel is highly sensitive to its image in the international community and is eager to maintain a reputation as a democratic nation that venerates and adheres to the ideals of the rule of law. Israel, for example, waged a protracted and ultimately successful campaign to reverse the "Zionism is racism" resolution

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491. See BISHARAT, *supra* note 257, at 168-69 (describing West Bank lawyers' disproportionately large role in leading nonviolent resistance movement).

492. See BISHARAT, *supra* note 257, at 88 (noting that there were only 165 working lawyers and 250 striking lawyers in 1984-85).

493. See BISHARAT, *supra* note 257, at 169 (noting irony that lawyers who act as nonviolent resistors may help Israeli Government).

494. This discussion of the adverse effects of Palestinian litigation in the Occupied Territories does not constitute a judgment that Palestinians in Israel or the Occupied Territories should *refrain* from engaging in legal struggle to defend individuals or groups. In order to make such a determination, a somewhat more complex balancing of considerations is necessary. This author has endeavored to do so in George E. Bisharat, *Courting Justice? Legitimation in Lawyering against Israeli Occupation* (unpublished manuscript, on file with author).

passed by the UN General Assembly in 1975.<sup>495</sup> The resolution bore no practical implications, but was, in a sense, all about image.<sup>496</sup> In the late 1970s, the Israeli Government established the Human Rights Division of the Ministry of Justice, primarily to respond to inquiries from abroad concerning allegations of Israeli human rights violations.<sup>497</sup>

There is a substantial body of justificatory literature in English-language legal periodicals and monographs by Israeli professors and administrators.<sup>498</sup> In 1980, Law in the Service of Man, a Palestinian human rights organization affiliated with the International Commission of Jurists, published a study, with a preface by Commission Secretary-General Niall McDermott, that sharply criticized the Israeli legal administration in the West Bank.<sup>499</sup> Within a year, a study nearly identical in binding and outward appearance (but not authorized by the mother organization) appeared with a foreword from Haim Cohen, Justice of the Israeli Supreme Court and Chairman of the Israel National Section of the International Commission of Jurists, who stated, in a clear reference to the Palestinian work:

The Israel National Section of the International Commission of Jurists submits this study to the international legal community, trusting that the discerning eye and the analytical mind of the lawyer, trained in the ascertainment and evaluation of facts, will easily differentiate between a tractatus politicus and a sober statement of law and fact. Not that a political pamphlet has no justification, especially if it is overtly presented as such and does not purport to pose as what it is not; but lawyers, as distinguished from politicians, are hardly in the habit of contenting themselves too

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495. G.A. Res. 3379, U.N. GAOR, 30th Sess., 2400th plen. mtg., at 1-2, U.N. Doc. A/RES/3379 (1975) (voting 75 to 35, with 32 abstentions, that Zionism is form of racism).

496. See John M. Goshko, *U.N. Repeals Resolution Linking Zionism to Racism*, WASH. POST, Dec. 17, 1991, at A1 (describing U.N. General Assembly's 111 to 25 vote with 13 abstentions to repeal 1975 resolution equating Zionism with racism); see also AVI BECKER, *THE UNITED NATIONS AND ISRAEL: FROM RECOGNITION TO REPREHENSION* 55-64 (1988) (describing 1975 U.N. debate and vote on Zionism is racism resolution).

497. See Weiner, *supra* note 359, at 201 (explaining that Human Rights Division was established to respond to inquiries by Amnesty International, news media, lawyers' groups, academics, and private individuals). The office, along with a parallel agency in the Foreign Ministry, coordinates its work with legal advisors of the IDF, the General Security Service, the Prisons Service, and various police agencies. *Id.* at 202.

498. See, e.g., ISRAEL: THE "INTIFADA" AND THE RULE OF LAW (Colonel David Yahav et al. eds., 1993); Blum, *supra* note 346 (defending Israel's role in Occupied Territories); Farhy, *supra* note 418 (detailing Israeli military's perspective on its role in administering West Bank and Gaza Strip); Shamgar, *supra* note 346 (presenting collections of works on legal aspects of Israeli military government in Occupied Territories); Vincent-Davis, *supra* note 488, at 575-663 (presenting bibliography of works addressing civil rights in Occupied Territories).

499. SHEHADEH & KUTTAB, *supra* note 348 (describing and criticizing West Bank legal system).

easily with what at best amounts to political argument, unsupported by evidence and by authority.<sup>500</sup>

Zionist awareness of international opinion concerning the specific issue of land acquisition was evident in a statement, made prior to the establishment of Israel, by Abraham Granovsky, later to become the first director of the Land Development Authority:

It is hardly necessary to stress the point, that expropriation of land without adequate compensation, which would clearly be nothing but dispossession pure and simple, must be ruled out for many political and economic reasons. Such expropriation would be the equivalent of forcible transfer of land from the possession of one people in the Jewish State to another. Not only would such a measure be unjust in itself; it would be apt to give rise to serious complications within the state itself and in its relations with neighboring countries, and eventually endanger the existence of our state. Expropriation is, therefore, out of the question as being in every respect a revolutionary change.<sup>501</sup>

One may take a cynical view of Israel's concern for its international image as a democratic nation—that its solicitude for human rights and attention to legality are motivated by no more than a preoccupation with public relations.<sup>502</sup> This argument is supported by Israel's heavy reliance on foreign aid, particularly from Western democratic nations, and more particularly from the United States.<sup>503</sup> Indeed, from 1948 to 1990, direct foreign aid expenditures from the United States to Israel have totaled approximately \$47.5 billion.<sup>504</sup>

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500. ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, *supra* note 359, at xii.

501. GRANOVSKY, *supra* note 162, at 27.

502. See Negbi, *supra* note 361, at 27 (stating that most members of Israeli press and political establishment only address human rights when foreign bodies such as United States, United Nations, and Amnesty International force it on them as "public relations" problem).

503. See Yash Ghai, *The Rule of Law, Legitimacy, and Governance*, 14 INT'L J. SOC. L. 179, 194-96 (1986) (pointing out, in reference to several East African states, that attention to legality may owe more to concerns about continuity of financial and other aid from foreign benefactor than to desire to win consent of governed).

504. See Joel Bainerman, *Can Foreign Aid Help Israel?*, J. COM., June 21, 1991, at 4A (describing history of U.S. aid to Israel and potentially damaging effects on Israeli economy). During the Bush administration, the United States gave Israel \$3 billion annually. *U.S. House Cuts Foreign Aid By \$1.3 Billion; Israel Aid Maintained*, UPI, June 25, 1992, available in WESTLAW, Krfinews File. Israel has also benefited from substantial transfers of private aid, generally in the form of voluntary donations from Jews across the world. See, e.g., Sue Fishkott, *New Sales Tactic: Pitching Peace to U.S. Donors*, JERUSALEM POST, Oct. 8, 1993, at 7 (describing fundraising efforts of one U.S. Jewish group for resettlement of Russian Jews in Israel at more than \$800 million over three years); Galit Lipkis, *Brazilian Magnate's Visit Stirs Businessmen's Hopes*, JERUSALEM POST, June 14, 1991, at 5 (profiling Brazilian Jewish millionaire Edmundo Safdie, who donates estimated 10% of his accumulated profits to Jewish communities worldwide). This hints that a more nuanced examination of the "international community" as it pertains to Israel (distinguishing between states, international organizations, private bodies, and the like) is possible. Such an examination does not seem necessary for this Article, however, as most of Israel's audiences abroad are

Ultimately, however, the cynical view is unconvincing. First, and perhaps most critically, Israel frequently has ignored international opinion, not to mention law, in circumstances in which it believes its actions are necessary to preserve important national interests. The December 1992 deportations of more than 400 Palestinians from the Occupied Territories to Lebanon,<sup>505</sup> a move that provoked a storm of international opprobrium and censure by the United Nations,<sup>506</sup> is only a more recent example of this tendency. The seemingly inexorable march of Israeli settlement activity in the Occupied Territories since 1967, against constant international condemnation, is another.<sup>507</sup>

The last example, moreover, serves as a reminder that until former President Bush momentarily suspended loan guarantees to Israel in 1991,<sup>508</sup> Israel had enjoyed a virtually uninterrupted flow of foreign assistance from the United States.<sup>509</sup> United States aid flowed despite practices that, from the perspective of the international community, are patently illegal.<sup>510</sup> Israeli fear of the suspension of

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Western and democratic in orientation, and would be similarly, if not equally, disturbed were Israel to dispense with attentions to legality.

505. See Clyde Haberman, *Israel Expels 400 From Occupied Lands: Lebanese Deploy to Bar Entry of Palestinians*, N.Y. TIMES, Dec. 18, 1992, at A1 (describing government expulsion order backed by Israeli's Supreme Court).

506. S.C. Res. 799, U.N. SCOR, 47 Sess., 3151st mtg., at 1, U.N. Doc. S/RES/799 (1992) (strongly condemning deportation and demanding that Israel ensure safe and immediate return of deportees to Occupied Territories).

507. See John M. Goshko & Helen Dewar, *Israeli Loan Guarantees Appear Doomed; Bush Refuses to Drop Linkage to Freeze on Jewish Settlements*, WASH. POST, Mar. 18, 1992, at A1 (describing President Bush's indication to Senators that he would veto loan guarantees); Ann Devroy, *Bush Agrees to Support Israeli Loan Guarantees; He and Rabin Press for Resolution of Details*, WASH. POST, Aug. 11, 1992, at A1 (describing meeting between Bush and Rabin, and agreement on \$10 billion loan guarantees).

508. See *supra* note 507 (describing suspension of loan guarantees to Israel).

509. See *supra* note 504 (describing U.S. foreign aid to Israel).

510. See Robert J. Caldwell, *Israel's Choice: Loan Guarantees or More Settlements*, SAN DIEGO UNION-TRIB., Mar. 1, 1992, at C5 (stating that settlements have been regarded as illegal under international law); see also COHEN, *supra* note 334, at 159-60 (citing U.S. State Department view that settlements are illegal). But see COHEN, *supra* note 334, at 159-60 (citing opposing view that occupation and settlements are not contrary to international law). The conventional wisdom among U.S. policymakers for a number of years was that pressuring Israel in any way to comply with U.S. demands (particularly demands to cease settlement activity in the Occupied Territories) would create a "circling the wagons" effect, and a more obdurate Israeli political leadership. It is also probable that Israel's power to defy U.S. and international opinion has varied over time, according, in part, to Israel's perceived value as a "strategic asset" to the United States. Indeed, during the Cold War years (and under the presidency of Ronald Reagan), Israel's strategic value was at its peak. See BERNARD REICH, *THE UNITED STATES AND ISRAEL: INFLUENCE IN THE SPECIAL RELATIONSHIP* 89 (1984) (quoting President Reagan's Secretary of State Alexander Haig, who described Israel as strategic asset whose "very existence serves to deter Soviet aggression"). With the end of the Cold War, that value has declined, and so, one might expect, has Israel's freedom to flout U.S. opinion. See *supra* text accompanying note 380 (describing President Bush's opposition to loan guarantees without Israeli guarantee of freeze on settlements in Occupied Territories).

aid for most of the period since 1948 cannot, therefore, completely explain its legalistic approach to land acquisitions.

A discussion of Israel's concern for its international image should include non-instrumental considerations. Indeed, it is more convincing to argue that Israeli politicians, administrators, legal academics, and others view themselves as members of the community of democratic nations, and that this self-perception has independent force and value apart from any instrumental aims it may serve.<sup>511</sup> This sense of belonging to the international democratic community emanated from the same ideological perspective that motivated domestic policy. As Granovsky demonstrated, Israel's concern to legitimate its program of land acquisition internationally was inseparable from its concerns to do the same domestically.<sup>512</sup>

### C. *Land Expropriations and the Constraints of Democracy*

Despite some deterioration in recent years, public opinion surveys indicate that the majority of Israelis support the generalized principles of law-abiding democracy.<sup>513</sup> The commitment to democratic legality is a legacy of the Zionist movement's roots as a struggle for the liberation of an oppressed group.<sup>514</sup> The persistence of this commitment is evident, for example, in Israel's willingness in 1967 to extend the jurisdiction of the Israeli Supreme Court to the Occupied Territories,<sup>515</sup> and in the activities of organizations such as the Israeli Civil Rights Association and *B'Tselem* in defense of Palestinian human and civil rights.<sup>516</sup> The momentous demonstration of

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511. The production of English-language periodicals in Israel, such as the *Israel Law Review*, the *Tel Aviv University Studies in Law*, and the *Israel Yearbook for Human Rights*, provides evidence that Israeli legal academics, at least, view themselves as participants in a broader Western discourse about law and democracy.

512. See *supra* note 501 and accompanying text (predicting problems within Jewish State and in relations with neighbors if Palestinian land was to be expropriated).

513. See YOHANAN PERES & EPHRAIM YUCHTMAN-YAAR, *TRENDS IN ISRAELI DEMOCRACY: THE PUBLIC'S VIEW* 41-43 (1991) (presenting results of three-year survey on Israeli public's views on democracy).

514. Professor David Kretzmer writes:

In spite of their particularistic perspective, the political elite were committed to turning Israel into a modern democracy. Conscious as they were of the fate of Diaspora Jews as persecuted minorities in many countries of the dispersion, they realized that the state of the Jews could do no less than promise full equality to all its citizens, Jew and non-Jew alike.

KRETZMER, *supra* note 28, at 3-4.

515. See Negbi, *supra* note 359, at 37 (describing role of Supreme Court Justice Meir Shamgar in extending Court's jurisdiction to Occupied Territories). Political considerations, however, also suggested such a course. *Id.*

516. The Israeli Civil Rights Association (ICRA) might be likened to the American Civil Liberties Union, concerned with such issues as freedom of speech and privacy rights. See Judy Siegel-Itzkovich, *Top U.S. Expert: Beware Israeli Epidemic of AIDS and Hepatitis B Spread by Medics*

400,000 Israelis—nearly a tenth of the Israeli population at the time—in Tel Aviv in the fall of 1982 evidenced the popular roots of this commitment.<sup>517</sup> The citizens were protesting the Israeli Cabinet's initial decision not to establish a commission of inquiry into the Israeli role in the massacres of Palestinian and Lebanese civilians in the Sabra and Shatila refugee camps in Lebanon.<sup>518</sup>

Government sensitivity to public perception influenced the form by which Israel established control over appropriated lands. These forms were, it seems, consciously designed to obfuscate their true purpose: "The Development Authority Law was based on a kind of legal fiction. It was not desired to transfer the abandoned land to Government ownership, as this would be interpreted as confiscation of the abandoned property. . . . It was necessary to find a means of disposing of the property legally."<sup>519</sup>

The Israelis disguised dispossession of the Palestinians from public view through a variety of other techniques as well. For example, in a fashion reminiscent of the French in Algeria, Israel has exploited conditions of legal pluralism<sup>520</sup> in its rule over the Occupied Territories.<sup>521</sup> The Israelis gleaned all legal methods of land appropriation from all possible sources of substantive law<sup>522</sup> and facilitated their enforcement by displacing local court jurisdiction with military

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*Killer-disease Time-bomb*, JERUSALEM POST, Aug. 25, 1991, available in LEXIS, Nexis Library, JPost File (citing ICRA's support for abortion rights). The more recently founded *B'Tselem* is devoted exclusively to the defense of human rights in the Occupied Territories. See David Forman, *We Can't Afford to Take a Moral Vacation*, JERUSALEM POST, Apr. 1, 1992, available in LEXIS, Nexis Library, JPost File (describing *B'Tselem* as "human rights watch group").

517. See Herb Keinon, *Settlers Vow to Continue Protests Over Rabin's Security Policies*, JERUSALEM POST, Oct. 30, 1992, available in LEXIS, Nexis Library, JPost file (citing 1982 protest as example of demonstration changing government policy).

518. *Id.*; see also ISRAEL: A COUNTRY STUDY, *supra* note 8, at 265 (describing attacks on Sabra and Shatila, and subsequent resignation of Minister of Defense Ariel Sharon).

519. ABRAHAM GRANOTT, *THE LAND SYSTEM IN PALESTINE* 102 (1952); see *supra* notes 233-53 and accompanying text (discussing decision concerning definition of "absentee" in Israel's Absentee Property Law).

520. In this context, "legal pluralism" describes the co-existence of a plurality of systems of substantive law and occasionally of legal institutions.

521. In colonial societies, some of the laws and legal institutions are of indigenous origin and others are colonial accretions. See HOOKER, *supra* note 115, at 209 (describing relation of French civil law and Islamic law in colonial Algeria). The manipulation of resulting alternatives has at times formed an important part of the strategy of colonial rule. *Id.*; see also Ruedy, *supra* note 5, at 103 (stating that, in Algeria, it appeared "that when Muslim law could be used to further the aims of the state, it was upheld, but that when the contrary effect was implied, it was ignored or suppressed").

522. From 1948 to 1967, an Egyptian military administration ruled the Gaza strip according to Palestinian mandatory law and Egyptian military regulations. See Carol Farhi, *On the Legal Status of the Gaza Strip*, in *MILITARY GOVERNMENT IN THE TERRITORIES*, *supra* note 346, at 74-83 (stating that Israel has applied multiplicity of substantive laws in Occupied Territories, including Ottoman, British mandatory, Israeli, Jordanian, and Egyptian law).

administrative tribunals.<sup>523</sup>

The military government's pattern of choices between potential sources of substantive law suggests a preference for reliance on those pre-dating Israeli rule. Prior to 1979, the principal vehicles for Israeli land acquisition in the West Bank had been the Jordanian law of eminent domain and military requisitioning under articles of the Defense (Emergency) Regulations.<sup>524</sup> The military government has claimed that these laws remained in effect from their initiation during the Mandate through the period of Jordanian administration.<sup>525</sup>

After the *Beit El-Toubas*<sup>526</sup> and *Elon Moreh*<sup>527</sup> cases, the military government resorted to Ottoman land categories and the "realization of state lands" to continue land acquisition.<sup>528</sup> The decision to do so came after the military government considered and rejected other alternatives, such as legislation explicitly authorizing Israeli civilian settlement in all of the "Land of Israel" (including the Occupied Territories), or legislation withdrawing the jurisdiction of the Israeli High Court over land-seizure complaints arising from the Occupied Territories.<sup>529</sup>

The Israeli authorities may have gained several advantages in their efforts to gain land in a politically and legally legitimate fashion by their use of preexisting sources of law. First, it obviated the need for new legislation, and thus avoided the appearance of an affirmative movement on the part of the authorities to achieve its goals. Second, conducting itself "in native terms" permitted the authorities to represent their actions as no different from, and no less just than, the practices of prior rulers, to which the Palestinian population was presumably accustomed and so reconciled.<sup>530</sup>

523. See *supra* note 473 and accompanying text (discussing procedures for disputes over land registration).

524. See *supra* note 387 and accompanying text (discussing Jordanian law of eminent domain); *supra* notes 394-97 and accompanying text (discussing military government's use of Defense (Emergency) Regulations).

525. See *supra* notes 394-96 (discussing military governments treatment of Defense (Emergency) Regulations).

526. *Ayyub v. Minister of Defense*, HCJ 606/78, 610/78 (1979) (holding West Bank inhabitants to be "protected persons" under Hague Convention); see also *supra* note 408 and accompanying text (discussing *Ayyub* case in detail).

527. *Dweikat v. Government of Israel*, HCJ 390/79 (1979) (holding government did not have valid security reasons for seizing 31 acres of Palestinian land and passing it to Jewish settlers); see also *supra* note 423 and accompanying text (discussing *Dweikat* case in detail).

528. LUSTICK, *supra* note 371, at 569-73 (describing new government process for securing land for settlers in wake of *Elon Moreh* decision).

529. LUSTICK, *supra* note 371, at 564 (listing various legal formulas considered by government in effort to secure land for settlers after *Elon Moreh* decision).

530. Cf. Saltman, *supra* note 223, at 393-94 (explaining that Israel used Defense (Emergency) Regulations in effort to use practices of prior rulers); see *supra* note 115 (discussing parallels to French Algeria). It is interesting to consider Israel's treatment of *miri* lands as state domain in

Finally, it is important to note that the goal of extinguishing "absentee" Palestinians' ownership of lands in Israel was accomplished incrementally. First, Israel established government "custodianship" over these lands;<sup>531</sup> it then gradually transformed "custodianship" into full ownership.<sup>532</sup> The transformation occurred through the awkward mechanisms of paper transactions between state and quasi-governmental national institutions, such as the Jewish National Fund, over a five-year period from 1948 to 1953.<sup>533</sup>

This process clearly reflects the evolution of Israeli policy from initial uncertainty about the future disposition of the Palestinian refugees' properties to hardening conviction not to permit the refugees to return.<sup>534</sup> To have done otherwise would have resulted in the loss of an historic opportunity to substantially advance the goal of gaining land for Jewish settlement. But the gradual Israeli termination of Palestinian ownership rights and the simple time lapse between seizure and perfection of state title also functioned to lull public attention from the implications of the laws in question. The offer of compensation for expropriated lands gave further legal color to government actions.<sup>535</sup> That the compensation may have been inadequate, or unwanted, was probably little known to most Israelis, and, in any case, may not have evoked their sympathy.<sup>536</sup>

Most of the laws and policy measures reviewed in this Article had

the Occupied Territories in light of a statement by the putative owner of that land during the late Ottoman period, namely the Ottoman Sultan Abdul Hamid II himself:

I cannot sell even a foot of land, for it does not belong to me but to my people. They have won this empire and have fertilized it with their blood . . . . The Turkish people own the Turkish Empire not I. I dispose of no part of it. The Jews may spare their millions. When my Empire is divided, perhaps they will get Palestine for nothing. But only our corpse can be divided. I will not consent to vivisection.

THE DIARIES OF THEODOR HERZL 152 (Marvin Lowenthal ed. & trans., 1956). The statement was made to Theodor Herzl's aide in 1896 to discourage further Zionist colonization efforts. *Id.*

531. See *supra* notes 233-53 and accompanying text (describing use of Absentee Property Law to give government custody over Palestinian lands).

532. See *supra* notes 280-303 and accompanying text (describing use of various laws to transfer to Israelis ownership of Palestinian lands in government custody).

533. See *supra* note 282-86 and accompanying text (discussing establishment of authority to receive and transfer land and noting that Jewish National Fund enjoyed right of first offer of land up for sale).

534. See PERETZ, *supra* note 180, at 141-42 (describing evolution of Israel's absentee property policy).

535. See *supra* notes 300-03 and accompanying text (describing compensation system and its weaknesses).

536. Israel's willingness to compensate expropriated owners and strong resistance to returning the land to Palestinian owners is reminiscent of the policy of the U.S. Government toward Native American land claims. See Wilcomb Washburn, *Land Claims in the Mainstream of Indian/White Land History*, in IRREDEEMABLE AMERICA, *supra* note 5, at 22. The Israeli position is not surprising considering the relative ease of monetary compensation and the potential political explosiveness of returning land to indigenous owners, a step that would require the dislodging of settlers and their descendants.



genuine administrative rationales other than the simple seizure of Palestinian lands.<sup>537</sup> To satisfy themselves and the public at large, administrators could refer to these other rationales and reframe the dispossession of Palestinians as an incidental effect, rather than an intended aim, of official actions.

#### D. *Limitations of Legal Justifications*

It is important not to overestimate the role that laws played in legitimating the seizure of Palestinian lands. As in other colonial contexts, an objective interest verging on necessity was the underpinning of the laws effecting transfers of lands to Israeli control.<sup>538</sup> What originated as a general objective interest of the Zionist movement and a condition of its viability was transformed into the concrete interests of the particular individual settlers who occupied formerly Palestinian-owned lands. One Israeli, who as a young soldier expelled members of a Negev Bedouin encampment in 1948, described the widespread seizures of land and movable property by stating: "Whether public or private, the looting constituted an additional, covert motive for the [expulsion] process . . . since it forged groups which had a material interest, either beforehand or post factum, in the expulsion of the Arab population."<sup>539</sup>

General ideological and political ideas also played a major role in rationalizing land acquisition. As previously discussed, the war of 1948, and probably the war of 1967, provided justification for the seizure of much Palestinian land.<sup>540</sup> Although the results may suggest otherwise, Israeli society indisputably viewed these wars as

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537. See COHEN, *supra* note 334, at 155 (describing function of decree obliging government licensure for land transactions in Occupied Territories as permitting military government to ascertain that all such transactions are undertaken at free will of parties involved). The Absentee Property Law addressed the genuine administrative problem of how to standardize practice in regard to actual abandoned properties. See *supra* note 233 and accompanying text. Even in strict legal terms, its sweep was somewhat broader, however, permitting the assertion of state control over the lands of many who were in fact present within the areas under Israeli rule. See *supra* note 242 and accompanying text. The broad sweep of the law was most evident in the clauses permitting appropriation of lands belonging to citizens of the Arab states that declared war on Israel in 1948, irrespective of the person's presence or absence from Israeli-held areas, and without regard to the shares of lands and businesses that were held by joint owners, some of whom were not "absentees." See *supra* notes 236-37 and accompanying text.

538. See *supra* note 5 and accompanying text (describing European colonialists' use of law to take land from indigenous populations and to meet settlement necessities of their own peoples).

539. Ephraim Kleiman, *Khirbet Khis'ah and Other Unpleasant Memories*, 40 JERSUSALEM Q. 102, 110 (1986).

540. See *supra* notes 194, 331-34 and accompanying text (describing Israeli land acquisition in aftermath of 1948 and 1967 wars).

defensive struggles for its very survival.<sup>541</sup> The sense of embattlement has abated only very slowly, as Israel's regional military superiority has grown, but will no doubt persist at some level as long as Israel's relations with the neighboring Arab states remain fraught with hostility and mutual suspicion.<sup>542</sup> The sense of embattlement has resulted in an unusual degree of social authority for the military—as well as an inviolability of so-called “security” interests—in a society that in other important respects is democratically oriented. Hence the land-transfer laws implemented in Israel and in the Occupied Territories complement the ideas and images of a more general ideological and political character that Israel employs to rationalize its actions in this realm. It is doubtful that a legalistic style by itself could have legitimated ends that were not broadly felt to be just and crucial to the success of the Zionist enterprise.

A second, though related qualification is that Israel's commitments to democracy and the rule of law are not its only ideological values. There are other, at times conflicting, commitments and tendencies within Israeli political culture that are of equal, if not superior, strength. The fundamental commitment of Zionism to the creation and maintenance of a Jewish state is the most important of these other commitments:

On the one hand, the new state was politically and legally committed to the standard legal and moral norms of secular western democracy, and accountable in these terms to enlightened world public opinion as institutionalized in the Charter of the United Nations Organization. On the other hand, the original driving force underlying the effort of political Zionism since its establishment was to attempt to establish in Palestine a state that would be as “Jewish” as England is “English.”<sup>543</sup>

It is clear that the commitment of Zionism to the creation of a Jewish state and its universalist, democratic, and legal commitments have conflicted, and that in the confrontation, the former commitment has often prevailed.<sup>544</sup>

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541. See Yitzhak Rabin, *Foreword* to YONA COHEN, *JERUSALEM UNDER SIEGE* 9 (1982) (recalling war of 1948 as part of Israel's continual fight for its existence); Stephen J. Roth, *Introduction to THE IMPACT OF THE SIX-DAY WAR* xvi-xvii (Stephen J. Roth ed., 1988) (noting Israelis' fear of extinction, particularly during 1967 war).

542. Other processes are at work, as well. For example, a recent phenomenon has been the receding image of the Holocaust. See Amy D. Marcus, *Turning A Page: As Holocaust Memory Fades, Israel Faces Difficult Transition*, WALL ST. J., Mar. 31, 1993, at A1 (describing lesser role of Holocaust in younger Israel's national identity).

543. DAVIS, *supra* note 27, at 21.

544. See Shamir, *supra* note 223, at 59 (“The differential treatment of Arabs and Jews [on the freedom of speech issue in Israel] corresponds to Israel's dominant political ideology that asserts that Israel is, first and foremost, a Jewish state. The ideological commitment to Jewish rule is

Some observers of Israeli society and political culture detect, coexistent with commitments to legality, a strong behavioral tendency toward illegal behavior among Israeli political leaders that "far exceeds the normal and expected sphere of disrespect for the legal norms in a democracy."<sup>545</sup> This tendency reflects a prevalent attitude in Israeli political culture that is characterized by "an instrumental orientation toward the legal order and a conviction that democracy can work without strict adherence to the law."<sup>546</sup> The attitude has roots in the Jewish ghetto experience in Europe, where survival included an elaborate system of using and eluding the law, and grew in the *bakshish* (bribery) culture of the Ottoman Empire.<sup>547</sup> It further developed during the British Mandate, when it was, for the Zionists, "prestigious to cheat on the British and to engage in 'illegal' settlement, 'illegal' defense, and 'illegal' immigra-

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superior to other social commitments, including democratic standards."). Zionism's paramount commitment to the creation of a Jewish state is most apparent in the religious and political right, where law and Zionist interests can be conflated. The strength of this commitment is illustrated in responses by Shlomo Goren ("G"), former chief rabbi of the Israeli army, to questions from a representative of the Israeli daily newspaper *Ha'aretz* ("H"):

H: But isn't torture of prisoners against the law?

G: How so? [A]ny law that serves the interests of the people of Israel is a good law. A law that's contrary to the interests of the people doesn't exist as far as I'm concerned.

*B'Tselem, The Wrong Arm of the Law: Torture Disclosed and Deflected in Israeli Politics*, TIKKUN, Sept./Oct. 1991, at 13, 14, 86. Similar comments came from Limor Linyat ("L"), a member of the Likud Central Committee:

H: Do you agree that the Right has an image problem if it appears that it doesn't put human rights at the top of its concerns?

L: The Right concentrates on the rights of the Jews. We established this state in order to safeguard *our* rights. The right to live in security, for instance. I don't suggest that we should trample on others' rights, but one must call a spade a spade: Zionism and rights don't always go hand-in-hand. The very establishment of this state is an affront to the Arabs' rights. Arabs lived in Jaffa. They didn't leave; they were expelled. We went into the villages and said "Get out." And they got out. Yes, it's important for me and others that this state be a democratic one, but you still have to consider the difference between ourselves and the other countries and remember that democracy is not a value in itself but an instrument. Zionism takes precedence over everything. If a group like *B'Tselem* had been around when Israel was established, a Jewish state would not have come into being.

*Id.* These priorities were similar to those of colonial America.

[T]he Puritan authorities sincerely thought they were doing their best to achieve various and often contradictory objectives simultaneously: the welfare of the Indians, the interest of the white settlers, and the well-being and integrity of the colony. When the objectives came actually to conflict and contradict, however, the priority was clear: the security of the colony first, the welfare of the settlers second, and the benefit of the Indians last.

KAWASHIMA, *supra* note 21, at 237.

545. Sprinzak, *supra* note 476, at 79.

546. Sprinzak, *supra* note 476, at 79.

547. Sprinzak, *supra* note 476, at 81.

tion."<sup>548</sup>

Again, the legalistic approach could not have succeeded in justifying measures that were not in confluence with surrounding sentiments, commitments, and interests. Law, however, may only effectively legitimate political authority for those who enjoy its fruits.

### CONCLUSION

Within its own borders and in the Occupied Territories, Israel faced a contradiction between its democratic image and the need for undemocratic actions imposed by a structural dilemma. This "dilemma" was the need, more or less pressing according to circumstances, to obtain land for Jewish settlement in a country that was overwhelmingly owned by others as late as 1948, the year of Israel's creation.<sup>549</sup> Ultimately, Israel "finessed" this dilemma by interposing a complex legal regime.

Israel's dilemma was "structural" in that it was a challenge intrinsic to the project of settling an inhabited land, and as such has been confronted by most colonial powers.<sup>550</sup> Of course, the practical problem of gaining land for settlement was a "dilemma" only insofar as the colonizing power's ideology placed constraints on its freedom in dealing with the native population:

Israel, as a Jewish state, could not have become viable economically and politically, without the expropriation of Arab lands. Any totalitarian state would have had no problems in this respect and would have ruthlessly legislated on this issue. But by means of emergency powers, Israel could maintain a self-image of democracy both for its Jewish citizens and for the outside world, while at the same time it could selectively infringe upon the elementary civil rights of its Arab citizens.<sup>551</sup>

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548. Sprinzak, *supra* note 476, at 94 (describing formation of Israeli leaders' political psychology in 1940s Palestine). Moshe Negbi, legal correspondent for the Tel Aviv-based Hebrew daily newspaper *Hadashot*, opines that a majority of Israeli leaders harbor formalistic and simplistic concepts of democracy and the rule of law. Negbi, *supra* note 361, at 19. According to Negbi, current Prime Minister Yitzhak Rabin, who was defense minister during much of the *Intifada*, has a standard reply to questions regarding human rights in the occupied territories: "It is all legal, everything is done according to law." *Id.* Negbi asks why Rabin does not address the "obligatory additional questions: What kind of law is it? Is it a law which is fit or permissible for a democratic country to enact and enforce?" *Id.*

549. See *supra* notes 22-32 and accompanying text (describing relatively small concentrations of Jews in pre-1948 Palestine and Zionist leaders' realization that acquisition of land base would be essential to creation of state of Israel).

550. See *supra* note 5 (describing history of European nations acquiring and settling on land belonging to indigenous populations).

551. Saltman, *supra* note 223, at 393.

While Israel's response to this dilemma has unique aspects,<sup>552</sup> the numerous parallels with other colonial societies reinforce the conclusion that the dilemma is recurrent, and the modes of its resolution somewhat regular.<sup>553</sup>

In the case of Israel and the Occupied Territories, the Israeli Government has averted potential collisions between the objective interest in gaining land and the limits on state actions imposed by democratic ideology because it has always found a legal mode to continue land acquisition. The complexities of substantive and procedural laws and the layers of legal institutions that accomplished the transfer of Palestinian lands had the effect of screening this process from the Israeli public's scrutiny. Although, strictly speaking, this screen was not impenetrable, it was sufficient to obstruct the vision of all but the most diligent observer. With their general ideological and political ideas supporting land acquisition and their objective personal interests to defend, the Jewish Israeli public was disinclined to recognize the dispossession of Palestinian landowners for what it was. And having moved the Palestinians to the social and political margin, Israel prevented the Palestinians from forcing the issue of the alienation of their lands upon the consciousness of the politically relevant segments of the Israeli public.

This Article began with a description of some widely held assumptions about the role of law in engendering the legitimacy of states and standing social orders.<sup>554</sup> One of these assumptions holds that law and legal institutions in Western, class-based societies serve to protect the interests of dominant elites by legitimating the dominant elites' role in society by causing that dominance to appear natural, and even just, to disenfranchised classes and groups. This assumption is premised on another, sometimes unstated assumption: that the dominant group would be hard pressed to rule without the consent of the dominated.

In the description of Israel's actions to gain control over Palestinian lands, this Article has shown one circumstance in which a fundamental imbalance of internal power vastly favoring the dominant group has almost mooted the need for consent among those upon whom the laws have their primary negative impact. The legalistic orientation

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552. Several factors make Israel's response unique: the special ideological characteristics of Zionism, the particular history of the country, the possibilities for maneuver afforded by local law, and the forms of indigenous land tenure.

553. See *supra* note 5 (describing similar use of law in previous colonial societies).

554. See *supra* notes 1-3 and accompanying text (noting extensive scholarship on role of law and legal institutions in conferring legitimacy on system in which they operate).

of a dominant group in this situation is explicable primarily by reference to its needs for internal cohesion and morale.

On reflection, it appears that most studies attempting to link law to legitimacy simply infer from the "quiescence" of dominated classes and groups that law "must be working" to legitimate the social and political order.<sup>555</sup> This Article has attempted to show at an admittedly rudimentary level another way in which law may work to effect quiescence: by defusing resistance, channeling it into a manageable path, and vesting "counter elites" with interests in following those paths rather than others. This version does not posit the existence either of a conniving dominant group or of a dominated group so duped and mystified as to be incapable of recognizing its own oppression.

What little is currently known about the quality of the observed quiescence in Western societies seems entirely consistent with the case of the Palestinians living under Israeli domination.<sup>556</sup> Among some marginal groups at least, it seems appropriate to ask whether underlying this quiescence is an enthusiastic, willing compliance with a state and social order seen as "legitimate," or a begrudging and resentful submission to forces that are effectively impossible to resist.<sup>557</sup> Further empirical study of this question may well reveal that law in its legitimating function may be effective only among those proximate to the centers of social and political power.<sup>558</sup> The

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555. See Hyde, *supra* note 2, at 383 (citing THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); CHARLES BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 34 (1960) as examples of authors making unsubstantiated functionalist assumptions about law and legitimacy); JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957).

556. See Sarat, *supra* note 9, at 377. Sarat writes:

My research indicates that the welfare poor frequently contest what are often thought of as the key legitimating symbols of law, in particular the association of law with neutrality, disinterestedness, rule determinacy and rights. They are not "taken in" by those symbols, and, like others with continuous, regular contact with law, they have a realistic, if not cynical view. They have complex and sophisticated views of the bureaucratic and social relations that obtain between welfare workers and legal services lawyers.

*Id.*

557. Cf. JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 28-37 (1985) (arguing that peasant compliance with standing social order is reflection of sense of its inevitability rather than its legitimacy and that subtle forms of peasant resistance signify incompleteness of ruling groups ideological hegemony).

558. Professor Sidney Harring makes a similar point with respect to the exportation of British criminal procedures to British colonies: "Still, the motions, and warrants, and preliminary hearings must have given comfort to the British and created a belief in the legitimacy of their process. It cannot have mattered at all to the native people." Sidney L. Harring, "Please Send Six Copies of the Penal Code": *British Colonial Law in Selangor, 1874-1880*, 19 INT'L J. SOC. L. 193, 193-94, 204 (1991); see also NICHOLAS ABERCROMBIE ET AL., *THE DOMINANT IDEOLOGY* THESIS 7-29 (1980) (making similar argument respecting role of ideology generally in British society).

effectiveness may diminish, however, as the law radiates "outward" in the direction of socially and culturally marginal groups in the society, or "downward" in the direction of less powerful social classes.<sup>559</sup> If this re-ordering of perspective deprives legal academics and others of the cloak of the "Great De-mystifiers, the bringers of true consciousness to the befuddled masses," this, after all, would be salutary. Perhaps it is only us who have been so blind, and have needed awakening, to the nakedness of imperial power.

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559. This trend may be particularly true of postmodern societies transformed by mass movements of peoples due to wars, natural disasters, development projects, labor migration, and other factors, and thus characterized by unprecedented cultural diversity. See Akhil Gupta & James Ferguson, *Beyond "Culture": Space, Identity, and the Politics of Difference*, *CULTURAL ANTHROPOLOGY* 6, 9-13 (1992) (theorizing that changing concepts of space require reevaluation of meaning of culture). While some of the studies on law and legitimacy select particular venues and historical periods (typically the United States or England in the nineteenth and twentieth centuries) within which to situate their discussions, see, e.g., Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 375-85 (David Kairys ed., 1982) (focusing on contract law in eighteenth, nineteenth, and twentieth centuries and concluding that contract law legitimated oppressive social conditions); Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW*, *supra*, at 38-58 (concentrating on law school environment as indoctrination into current social hierarchy), others speak more broadly about the topic in the context of an abstract "modern society." See generally UNGER, *supra* note 2, at 47-103 (creating model of relationship between law and society by surveying western societies rather than focusing on specific country); Sol Piciotto, *The Theory of the State, Class Struggle and the Rule of Law*, in *MARXISM AND LAW*, *supra* note 2, at 169-79 (analyzing legal relations as part of social relations with legal development intertwined with social change); Colin Sumner, *The Ideological Nature of Law*, in *MARXISM AND LAW*, *supra* note 2, at 255-61 (defining law as product of collective consensus of population). Few studies explicitly consider any form of social division beyond class. In particular, they almost never discuss ethnic or national diversity within a single polity. Genovese, in his discussion of the pre-Emancipation American South, sees a partial exception to the rule. See GENOVESE, *supra* note 2, at 25-49 (concentrating on law and hegemony as it applied to black slave class).

