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## Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory

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ARTICLE

LIVING IN LEGAL LIMBO: ISRAEL'S  
SETTLERS IN OCCUPIED  
PALESTINIAN TERRITORY

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## I. INTRODUCTION

The question of rights in land normally focuses on private law. A person's tenure in land depends on the validity of title and possible claims by other persons. Additionally, a person's title depends on the sovereign from whom title derives. In this respect, a person's right in land bears a public law character. If the sovereign lacks a right to the territory, the ownership rights of individuals may be in doubt.

When sovereignty changes, private rights in land are normally respected. Thus, when the United States acquired Florida from Spain, it agreed to respect land grants previously made by the King of Spain, and the courts of the United States honored that commitment.<sup>1</sup> A different situation arises, however, when a state assumes not sovereignty but control. This occurs when a state occupies territory during hostilities.

This distinction between sovereignty and control assumes importance if an occupying power settles its own citizens in the occupied territory. As an occupying power in Palestinian territory since 1967, Israel has settled large numbers of its citizens. Israel and the Palestine Liberation Organization (AP.L.O.) have agreed to negotiate an end to their long-running territorial conflict, and one of the thorniest issues that confronts them is the future of Israel's settlements. The P.L.O. wants the settlements dismantled. Israel seeks to continue the settlements and

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<sup>1</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *U.S. v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

keep them and the areas in which they are located under its control in some measure.

That aspiration raises a number of questions. Does Israel have a right to continue these settlements in existence? Do the settlers, as individuals, have a right to remain? Do the settlers have a collective right to remain? Looking at the matter from the other side, will the Palestine state<sup>2</sup> be obliged to allow the settlers to remain? Do the Palestinian inhabitants have a collective right to see the settlements removed? Do individual Palestinians have a right to recover their land where settlements have been built against their will?

These matters will be topics of negotiation between the two parties, and their resolution may be affected by political factors. Yet the background rules of international law play a role. This Article explores the rights of not only Israel and Palestine but also the Israeli settlers and the Palestinian inhabitants. This Article seeks an outcome consistent with the internationally guaranteed rights of all parties. In seeking this outcome, no party will be in a position, after the fact, to object on grounds of violation of its rights. Such an outcome respects the rights of the parties and is conducive to long-term mutual accommodation and peace in the region.

## II. ISRAEL'S SETTLEMENTS

The territories in which Israel has built the settlements in question are the Gaza Strip and the West Bank of the Jordan River. These are two sectors of historic Palestine that Israel captured during the Six-Day War of 1967. At the time of their capture, Egypt held the Gaza Strip while Jordan held the West Bank.

### A. *Acquisition of the Territory by Israel*

The circumstances of Israel's acquisition of the Gaza Strip and West Bank can be briefly stated. The 1967 military action started on June 5 between Egypt and Israel. By way of a mutual defense treaty with Egypt, Jordan became involved within

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<sup>2</sup> The term "state" is used here on the basis that Palestine is the sovereign in the Gaza Strip and West Bank. See ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982 (1985).

hours. Tension between Israel and Syria engendered friction between Israel and Egypt. This led to threats by Israel to invade Syria.<sup>3</sup> Egypt asked the United Nations to remove a peacekeeping force it maintained on the Egyptian side of the Israel-Egypt frontier, explaining that Egypt may need to move against Israel "the moment [Israel] might carry out any aggressive action against any Arab country."<sup>4</sup> This was an apparent reference to the possibility that Israel might invade Syria. The United Nations asked Israel if it wanted the peacekeeping force moved to its side of the border as protection against a possible invasion. Israel declined the offer, and the United Nations removed its troops.<sup>5</sup> Egypt then moved troops up to the frontier but made no obvious preparations for an imminent invasion of Israel.

On June 4, 1967, Israel's cabinet authorized the Israel Defense Force to invade Egypt.<sup>6</sup> After invading Egypt the next day,<sup>7</sup> Jordan reacted by shelling Israeli territory. Israeli troops then pushed eastward through the old city of Jerusalem (East Jerusalem) to the Jordan River occupying East Jerusalem and the rest of the West Bank. Israeli troops also occupied the Gaza Strip and the Sinai Peninsula.

Both Egypt and Israel claimed that the other struck first.<sup>8</sup> Egypt said that the first move was Israel's aerial bombing of Egyptian military aircraft on the ground at Egypt's home bases. Israel said that the first move was Egypt's shelling of three

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<sup>3</sup> See Charles Yost, *How the Arab-Israeli War Began*, 46 FOREIGN AFFAIRS 304, 307 (1967) (threatening by Israeli Prime Minister Levi Eshkol to invade Syria); Amos Shapira, *The Six-Day War and the Right of Self-Defense*, 6 ISRAEL L. REV. 65, 66 (1971) (quoting the official Israeli *Weekly News Bulletin* (Government of Israel), May 9-15, 1967, at 20); U.N. SCOR, 22d Sess., Supp., April-June 1967 at 90, U.N. Doc. S/7885 (1967) (complaining by Syria of Israel's threats in a May 15, 1967 letter to the President of the Security Council).

<sup>4</sup> INDAR JIT RIKHYE, *THE SINAI BLUNDER: WITHDRAWAL OF THE UNITED NATIONS EMERGENCY FORCE LEADING TO THE SIX-DAY WAR OF JUNE 1967* 16 (1980).

<sup>5</sup> U.N. GAOR, 5th Emergency Special Sess., Annex, at 8-9, U.N. Doc. A/6730/Add. 2 (1967) (indicating that the Secretary-General offered to Israel to move the peacekeepers from the Egyptian to the Israeli side of the frontier, but Israel declined).

<sup>6</sup> See Asher Wallfish, *Meir Reveals Text of War Decision*, JERUSALEM POST, June 5, 1972, at 1.

<sup>7</sup> See RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB-ISRAELI WARS* 180 (Harry Harder, ed., 1984).

<sup>8</sup> See U.N. SCOR, 22d Sess., 1347th mtg. at 1-4, U.N. Doc. S/PV.1347 (1967).

southern Israeli villages and approach of Egyptian jet aircraft towards Israel.<sup>9</sup> Egypt in fact had not shelled into Israel, and its planes had not left their bases but were destroyed there by Israel's air force.<sup>10</sup>

A month later, Israel's Prime Minister admitted that Israel struck first but claimed it acted in "legitimate defense," expecting an Egyptian attack.<sup>11</sup> However, other members of the Israeli cabinet said that the cabinet was well informed on the state of Egypt's preparedness but did not expect Egypt to invade Israel when it decided to invade Egypt.<sup>12</sup> Therefore, Israel was not justified in its attack on Egypt, and Jordan acted in lawful defense of Egypt when it initiated hostilities with Israel.<sup>13</sup> The United Nations bodies that have dealt with this situation have stated no conclusion on legal responsibility for the 1967 hostilities.

### B. *Construction of Settlements*

Starting in 1967, Israel encouraged Israelis to settle first in the West Bank and later in Gaza. Using land confiscation laws,<sup>14</sup> Israel acquired substantial tracts of land, particularly in the West Bank.<sup>15</sup> Israel also provided financial incentives to po-

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<sup>9</sup> See U.N. SCOR, 22d Sess., 1348th mtg. at 15, U.N. Doc. S/PV.1348 (1967) (Mr. Eban stated, "Egyptian forces engaged us by air and land, bombarding the [Israeli] villages of Kissufim, Nahal-Oz and Ein Hasheloshah. . . ." and "approaching Egyptian aircraft appeared on our radar screens. . . .").

<sup>10</sup> See OVENDALE, *supra* note 7, at 180.

<sup>11</sup> *Admission on Attack*, TIMES (London), July 8, 1967, at 3 (statement of Prime Minister Levi Eshkol).

<sup>12</sup> *Le général Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 29, 1968, at 1 (quoting Itzhak Rabin, Chief of Staff, that the troops Egypt brought up to the frontier "would not have been enough to unleash an offensive against Israel. He knew it and we knew it."); *Excerpts from Begin Speech at National Defense College*, N.Y. TIMES, Aug. 21, 1982, at A6 (Menachem Begin, a cabinet minister in 1967, stating that Egypt's troop movements "[did] not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him.").

<sup>13</sup> See U.N. CHARTER, art. 2, para. 4; U.N. CHARTER, art. 51.

<sup>14</sup> See NATIONAL LAWYERS GUILD, TREATMENT OF PALESTINIANS IN ISRAELI-OCCUPIED WEST BANK AND GAZA 4-8 (1978); RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 15-49 (1985); RAJA SHEHADEH & JONATHAN KUTTAB, THE WEST BANK AND THE RULE OF LAW 107-12 (1980).

<sup>15</sup> See MERON BENVENISTI, THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES 30-36 (1984); ANTOINE MANSOUR, PALESTINE: UNE ECONOMIE DE RESISTANCE EN CISJORDANIE ET A GAZA 34-37 (1983).

tential settlers in the form of grants or below-market mortgage rates. Under the Labor Party government of the time, settlement construction was predicated on a stated principle of settling certain sectors to promote Israel's security.

The stated purpose of settlement construction was expanded by the Likud Party government that took office in 1977. Likud Prime Minister Menachem Begin said, "Judea and Samaria . . . are part of the land of Israel, where the nation was born."<sup>16</sup> Since Judea and Samaria are ancient names for sections of the West Bank, Begin's usage bespoke a territorial claim.<sup>17</sup> The Likud Party considered the West Bank to belong to Israel on the ground that it formed part of the ancient Hebrew kingdom in Palestine. Unlike the Labor Party, the Likud Party asserted a right for Israel to establish settlements anywhere in the occupied territories.

In a court action by Palestinian landowners challenging the construction of one settlement in the West Bank, the Supreme Court of Israel said that the Israeli cabinet's approval of the settlement was "decisively influenced by reasons stemming from the Zionist world-view of the settlement of the whole land of Israel."<sup>18</sup> Judge Moshe Landau cited an affidavit of the Attorney General that quoted Begin as affirming "the Jewish people's right to settle in Judea and Samaria . . . ."<sup>19</sup>

Upon taking office in 1983, Likud Prime Minister Yitzhak Shamir vowed to pursue what he called the "holy work" of settlement.<sup>20</sup> Officials acknowledged that settlement construction was aimed at creating a presence to prevent the Palestine Arabs from forming a state.<sup>21</sup> In 1983, the Ministry of Agriculture and the World Zionist Organization, a quasi-governmental body, jointly prepared a Master Plan and Development Plan for Settlement in Samaria and Judea.<sup>22</sup> The plan's stated goal was

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<sup>16</sup> William Claiborne, *Israel Turns to West Bank*, WASH. POST, Apr. 26, 1982, at A1.

<sup>17</sup> *Id.* See also Emergency Regulations Law, 1977, 32 L.S.I. 58, (1977-78).

<sup>18</sup> H.C. 390/79, 17 Residents of the Village of Rujeib v. Government of Israel, 34(1) P.D. 1, reprinted in 1 PALESTINE Y.B. INT'L L., 134, 145 (1984).

<sup>19</sup> 1 PALESTINE Y.B. INT'L L., *supra* note 18, at 146.

<sup>20</sup> DAVID HIRST, *THE GUN AND THE OLIVE BRANCH: THE ROOTS OF VIOLENCE IN THE MIDDLE EAST* 453 (1984).

<sup>21</sup> See SARA ROY, *THE GAZA STRIP: A DEMOGRAPHIC, ECONOMIC, SOCIAL AND LEGAL SURVEY* 137 (1986); BENVENISTI, *supra* note 15, at 49-63.

<sup>22</sup> See BENVENISTI, *supra* note 15, at 19-28.

"to disperse maximally large Jewish population in areas of high settlement priority, using small national inputs and in a relatively short period by using the settlement potential of the West Bank and to achieve the incorporation [of the West Bank] into the [Israeli] national system."<sup>23</sup>

Beginning in 1989, the mass influx of immigrants from the Soviet Union to Israel lent a new impetus to settlement activity. The government settled many of the new arrivals in East Jerusalem. Mayor of Jerusalem, Teddy Kollek, said that Israel should "bring as many immigrants to the city as possible and make it an overwhelmingly Jewish city, so that [the Palestinians] will get it out of their heads that Jerusalem will not be Israel's capital."<sup>24</sup> The Jerusalem Development Authority, a government corporation, built new blocks of apartment buildings in East Jerusalem to settle immigrating Jews.<sup>25</sup>

The Labor Party government that entered office in 1992 indicated that it planned to build less expansively by reducing the financial incentives given to settlers.<sup>26</sup> At the same time, however, it continued construction at significant levels.<sup>27</sup> A group of Israelis who opposed the maintenance of settlements challenged them in the Supreme Court of Israel, but the court declined to rule on what it considered a political issue.<sup>28</sup>

### C. *Settlement Construction Since the Israel-P.L.O. Agreements*

Settlement construction did not end with the onset of Israeli-Palestinian political collaboration in 1993. Since that time, settlement-housing construction has focused on sectors of the West Bank adjacent to East Jerusalem and in East Jerusalem itself. The apparent aim, according to an Israeli human

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<sup>23</sup> Id. at 27.

<sup>24</sup> Editorial, *The Battle for Jerusalem*, JERUSALEM POST, Oct. 22, 1990, at 4.

<sup>25</sup> See Joost R. Hiltermann, *Settling for War: Soviet Immigration and Israel's Settlement Policy in East Jerusalem*, 20 JOURNAL OF PALESTINE STUDIES 71, 77-78 (1991).

<sup>26</sup> See Jose Rosenfeld & Herb Keinon, *Ministry Changes List of Areas Receiving Housing Incentives*, JERUSALEM POST, July 6, 1993 (news section).

<sup>27</sup> See AWAD MANSOUR, *CLEVER CONCEALMENT: JEWISH SETTLEMENT IN THE OCCUPIED TERRITORIES UNDER THE RABIN GOVERNMENT: AUGUST 1992-SEPTEMBER 1993* 1-2 (1994).

<sup>28</sup> See Evelyn Gordon, *Peace Now Petition Against Settlement-Building Rejected*, JERUSALEM POST, Aug. 26, 1993 (news section).



rights organization, is "to create a demographic and geographic reality that will preempt any future effort to challenge Israeli sovereignty in East Jerusalem."<sup>29</sup>

When Israel announced in 1995 that it would expropriate new tracts of land in East Jerusalem to build housing for Jews, the U.N. Security Council met regarding this matter. During the Security Council debate, the U.K. delegate said that Israel should "refrain from taking actions which seek to change the status quo on this most sensitive of all issues before the conclusion of the final-status negotiations."<sup>30</sup> Other delegates also expressed a concern that the land seizures were intended to preempt the Palestinian claim to East Jerusalem.<sup>31</sup> Fourteen of the Council's fifteen members voted in favor of a draft resolution condemning the plan, but the draft failed due to a United States veto.<sup>32</sup> Israeli Prime Minister Yitzhak Rabin later announced that Israel would suspend the expropriations, but he avoided making a commitment not to resume them.<sup>33</sup>

In 1996, the Jerusalem District Planning Committee, an arm of the Jerusalem municipality, announced a plan to build housing for 132 Jewish families in Ras al-Amud, an Arab neighborhood in East Jerusalem. The plan drew international protests, including one from the President of the U.N. Security Council. The Jerusalem municipal council nonetheless approved the plan. However, the government, apparently out of concern over the international repercussions, indicated it would not act on the plan.<sup>34</sup>

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<sup>29</sup> B'TSELEM, A POLICY OF DISCRIMINATION: LAND EXPROPRIATION, PLANNING AND BUILDING IN EAST JERUSALEM 9 (1997).

<sup>30</sup> U.N. SCOR, 50th Sess., 3538th mtg. at 7, U.N. Doc. S/PV.3538 (1995) (quoting Sir David Hannay of the United Kingdom).

<sup>31</sup> See U.N. SCOR, 50th Sess., *supra* note 30, at 3 (Mr. Lavrov, Russian Federation); *id.* at 4 (Mr. Wisnumurti, Indonesia); *id.* at 5 (Mr. Fulci, Italy); *id.* at 8 (Mr. M rim e, France).

<sup>32</sup> See U.N. SCOR, 50th Sess., 3538th mtg., at 6, U.N. Doc. S/PV/3538 (1995). See *U.S. Vetoes a Condemnation in U.N. of Israeli Land Seizure*, N.Y. TIMES, May 18, 1995, at A10.

<sup>33</sup> See VOICE OF ISRAEL RADIO, *Rabin Holds News Conference on Land Expropriation Decision*, (May 22, 1995), (in BBC SUMMARY OF WORLD BROADCASTS, May 24, 1995), available in LEXIS, World Library, ALLNWS File.

<sup>34</sup> See Batsheva Tsur, A-G: *It's Possible to Block Building in Ras al-Amud*, JERUSALEM POST, July 30, 1997, at 2, available in NEXIS, World Library, ALLNWS File; See Ross Dunn, *Israeli Block on Building Opens Way to Talks*, TIMES (London), July 29, 1997, available in LEXIS, News Library, TTimes File.

In 1997, the number of Israeli settlers in the Gaza Strip and West Bank, including East Jerusalem, reached 300,000. That year, Israel's government announced plans to construct 6500 units of housing for Jews in the Jebel Abu Ghneim section of East Jerusalem. This projected settlement, which Israel planned to name Har Homa, was designed to complete a string of settlements between East Jerusalem and the rest of the West Bank, and thus to cut off East Jerusalem.<sup>35</sup> Israel's Minister of Internal Security, Avigdor Kahalani, said that an aim of the new construction was to "make unequivocally clear that Jerusalem is the Jewish capital, and we can build within its municipal boundaries."<sup>36</sup> Prime Minister Benjamin Netanyahu, seeking to justify the construction, said that Jews held title to much of the land involved.<sup>37</sup>

Again, the U.N. Security Council met. A European-sponsored resolution was proposed to condemn Israel's settlement plan as illegal and a "major obstacle to peace." Again, fourteen of the Council's fifteen members voted in favor of the draft resolution, but again the United States vetoed.<sup>38</sup> The General Assembly then took up the matter and adopted as its own resolution the draft that had failed in the Security Council. This resolution asked Israel "to refrain from all actions or measures, including settlement activities, which alter the facts on the ground, pre-empting the final status negotiations, and have negative implications for the Middle East peace process."<sup>39</sup>

When Israel actually began the construction of the Har Homa settlement, the Security Council took up a draft resolution to demand that Israel "immediately cease construction of

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<sup>35</sup> See *Open Statement Concerning the Current Political Situation*, Al-Haq (Ramallah), March 20, 1997 (copy on file with author).

<sup>36</sup> Patrick Cockburn, *Jews Given Swathe of Arab East Jerusalem for Homes*, THE INDEPENDENT (London), Feb. 27, 1997, at 13, available in LEXIS, News Library, Indpnt File.

<sup>37</sup> VOICE OF ISRAEL RADIO, *Netanyahu Phones Egyptian President Mubarak on Har Homa Construction*, (Feb. 26, 1997), (in BBC Summary of World Broadcasts, Feb. 28, 1997), available in LEXIS, World Library, TXTMDE File.

<sup>38</sup> See U.N. SCOR, 52nd Sess., 3747th mtg., at 5, U.N. Doc. S/PV.3747 (1997). See also Paul Lewis, *U.S. Vetoes U.N. Criticism of Israel's Construction Plan*, N.Y. TIMES, March 8, 1997, at A3.

<sup>39</sup> G.A. Res. 51/223, U.N. GAOR, 51st Sess., 93rd plen. mtg., U.N. Doc. A/51/L.68/Add.1 (1997); See Paul Lewis, *Israel's Plan for Jerusalem is Condemned by Assembly*, N.Y. TIMES, March 14, 1997, at A12.

the Jebel Abu Ghneim settlement in East Jerusalem, as well as all other Israeli settlement activities in the occupied territories." The draft received thirteen affirmative votes but was vetoed by the United States.<sup>40</sup>

In casting vetoes, the United States expressly stated that its opposition to the veto was not based on support for the construction and settlement activity. Rather, U.S. opposition proceeded from the premise that in light of the ongoing bilateral process between Israel and the P.L.O., the U.N. was not the "proper forum" for addressing the matter. As stated by the U.S. delegate, "the parties themselves are those that should deal with these very, very important issues."<sup>41</sup>

Concerned over the Security Council's inability to act, however, the U.N. General Assembly convoked a special session to address Israel's settlement construction. The Assembly adopted a resolution reiterating its condemnation of the construction of Har Homa and, significantly, asking states to refrain from giving aid to Israel that might be used for the construction.<sup>42</sup> This resolution was implicitly aimed at the United States as the only state giving aid to Israel. The call was in line with resolutions in earlier years in which the Security Council and General Assembly asked Israel to end settlement construction.<sup>43</sup>

By mid-1997 no action had been taken by Israel to stop construction of the Har Homa settlement. Subsequently, the General Assembly held yet another special session on the issue. By

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<sup>40</sup> See U.N. SCOR, 52nd Sess., 3756th mtg., at 6, U.N. Doc. S/PV.3756 (1997) (Costa Rica abstaining). See also *Security Counsel Again Fails to Adopt Resolution on Israeli Settlement*, U.N. Security Council, Press Release SC/6345, March 21, 1997; Paul Lewis, *U.S. Again Vetoes a Move by U.N. Condemning Israel*, N.Y. TIMES, March 22, 1997, at A4.

<sup>41</sup> Rena Slama, *Washington to Veto Resolution Again on Settlement*, AGENCE FRANCE PRESSE, March 22, 1997 available in LEXIS, World Library, ALLNWS File.

<sup>42</sup> See G.A. Res. ES-10/2, U.N. GAOR, 10th Emergency Special Sess., 3rd plen. mtg., U.N. Doc. A/RES/ES-10/L.1/Add. 1. See also *Israel Warned to Halt New Housing for Jews*, N.Y. TIMES, Apr. 26, 1997, at A4.

<sup>43</sup> See S.C. Res. 465, U.N. SCOR, 35th Sess., S/RES/465 (1980) (asking states "not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories"). See also G.A. Res. 35/122C, U.N. GAOR, 35th Sess., 92nd plen. mtg., (1980), U.N. Doc. A/AC.183/1.2/Add. 2 (1982) (asking states "to avoid actions, including those in the field of aid, which might be used by Israel in its pursuit of the policies of annexation and colonization").

a new resolution, the General Assembly called on states to discourage activities that directly contribute to Israel's settlement construction in the occupied territories, including Jerusalem, even if those activities are those of private economic actors. The Assembly also called on Israel to provide information on goods produced in its settlements, so that other states may determine if their nationals are involved.<sup>44</sup>

### III. LEGALITY OF ISRAEL'S SETTLEMENTS

The Gaza Strip and the West Bank fall under a legal regime called belligerent occupation. Belligerent occupation arises whenever a foreign army occupies territory, whether that army acted aggressively or defensively.

#### A. *Belligerent Occupation and Settlements*

Importantly, occupation of foreign territory does not yield rights of sovereignty. The issue of sovereignty over the territory is separate from the issue of control exercised by the occupant. For example, when France, Great Britain, the Soviet Union and the United States jointly occupied Germany after World War II, these four states acquired no sovereign rights. Similarly, when Iraq occupied Kuwait in 1990, it gained control, but not sovereignty. When it withdrew in 1991 it ceded control. Kuwait held sovereignty at all relevant times. Even if an occupant purports to annex the territory, as Iraq did with Kuwait, it does not gain sovereignty.<sup>45</sup>

Belligerent occupation is subject to a body of international law regulating the rights and obligations of all parties involved. The law of belligerent occupation protects an occupied population, while ceding to the occupying power a certain flexibility of action to preserve its temporary tenure. The law of belligerent occupation operates on the premise that the occupying power is in a position of predominance with respect to the occupied population. Therefore, the occupied population needs international protection.

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<sup>44</sup> See G.A. Res. ES-10/3, U.N. GAOR, 10th Emergency Special Sess., U.N. Doc. A/ES-10/L.2/Rev.1 (1997).

<sup>45</sup> See S.C. Res. 662, U.N. SCOR, 44th Sess., 2934th mtg., U.N. Doc. S/RES/662 (1990) (stating "that annexation of Kuwait by Iraq . . . has no legal validity, and is considered null and void").

The law of belligerent occupation is found in customary international law, the 1907 Hague Regulations,<sup>46</sup> and the 1949 Geneva Civilians Convention.<sup>47</sup> The Hague Regulations are widely viewed as having entered the corpus of customary law, and Israel shares that view.<sup>48</sup> The law of belligerent occupation requires an occupying power to preserve the existing order to the extent feasible, in the expectation that it will ultimately withdraw. It must preserve the "civil life" of the territory<sup>49</sup> and apply existing legislation as the law in force.<sup>50</sup>

An occupying power normally does not settle its own citizens in the occupied territory. For example, the four powers occupying Germany after World War II did not settle their civilians in Germany. If, however, an occupying power has designs on the territory, it may try to settle its nationals there. Iraq did so in Kuwait in 1990. Germany did so in Eastern Europe during World War II. In sectors of Poland, Germany gave Germans willing to settle incentives in the form of exemptions from income, real estate, sales, and inheritance taxes.<sup>51</sup>

Such settlement activities are illegal. An occupying power must leave the territory to the population it finds there and may not bring in its own people as settlers. Article 49 of the Geneva Civilians Convention states, "[t]he Occupying Power, shall not . . . transfer parts of its own civilian population into the territory it occupies."<sup>52</sup> The Hague Regulations do not address transfer of civilians but contain provisions that prohibit use of

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<sup>46</sup> Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex: Regulations Respecting the Laws and Customs of War on Land, art. 43, 36 Stat. 2277 (1910); reprinted in Charles I. Bevans, 1 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 631 (1968) [hereinafter Hague Regulations].

<sup>47</sup> Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Civilians Convention].

<sup>48</sup> See COHEN, *supra* note 2, at 43.

<sup>49</sup> See Hague Regulations, *supra* note 45, art. 43 (the term "vie publique" in the French, and only official, text of the Regulations).

<sup>50</sup> See Geneva Civilians Convention, *supra* note 47, at arts. 43 & 64.

<sup>51</sup> See Order concerning Tax Abatement for the Benefit of the Incorporated Eastern territories (Eastern Tax Abatement Order), Dec. 9, 1940, *Reichsgesetzblatt*, 1940, I, at 1565, excerpted in Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 225, 516-17 (Howard Fertig ed. 1973).

<sup>52</sup> Geneva Civilians Convention, *supra* note 47, at art. 49.

land in the occupied territory as a site for settlement construction. The Hague Regulations require the occupying power to administer public lands to benefit the local population<sup>53</sup> and instruct it not to confiscate private property.<sup>54</sup> Thus, use of either public or private land for settlement construction is forbidden.

Since annexation violates the law of belligerent occupation, such an occupant annexing the occupied territory does not legalize a transfer of population. Thus, Iraq's purported annexation of Kuwait did not legalize the status of Iraqi civilians it brought into Kuwait. In 1967, Israel extended the applicability of Israeli law to East Jerusalem, though not to the rest of the West Bank.<sup>55</sup> This action, which was viewed as a virtual annexation of East Jerusalem, did not legalize the status of Israeli civilians whom Israel brought into East Jerusalem. The International Community condemned Iraq's purported annexation and refused to recognize it.<sup>56</sup>

#### B. *View of International Community*

The international community considers Israel to be in violation of international standards for its settlement construction activity. The 1997 U.N. resolutions cited above were not the first to condemn Israel on the issue. The U.N. Security Council earlier stated:

Israel's policy and practices of settling parts of its population and new immigrants in those territories [the territories occupied in 1967] constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War [Geneva Civilians Convention] and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.<sup>57</sup>

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<sup>53</sup> See Hague Regulations, *supra* note 46, at art. 55.

<sup>54</sup> See Hague Regulations, *supra* note 46, at art. 46.

<sup>55</sup> See Law and Administration Ordinance (Amendment No. 11) Law, 21 L.S.I. 75 (1967); Municipalities Ordinance (Amendment No. 6) Law, 21 L.S.I. 75 (1967). Municipalities Ordinance (Declaration on the Enlargement of Jerusalem's City Limits) 1967, K.T. 2065, 2694, *reprinted in Order Unites Holy City*, JERUSALEM POST, June 29, 1967, at 1.

<sup>56</sup> See S.C. Res. 252, U.N. SCOR, 23d Sess., 1440th mtg., U.N. Doc. A/AC/183/L.2 (1976) (condemning Israeli measures affecting Jerusalem as tantamount to annexation, which the resolution found unlawful).

<sup>57</sup> S.C. Res. 465, *supra* note 43.

The General Assembly, also referring to the Geneva Civilian Convention, "strongly condemn[ed] . . . [the] [e]stablishment of new Israeli settlements and expansion of the existing settlements on private and public Arab lands, and transfer of an alien population thereto."<sup>58</sup> The U.N. Commission on Human Rights criticized Israel for the "settlement of alien populations brought from other parts of the world in the place of the original Palestinian owners of land," as a violation of the rights of the Palestinian population.<sup>59</sup>

### C. *Arguments in Favor of the Legality of Israel's Settlements*

Several contentions have been advanced on behalf of Israel to suggest that the settlement construction did not violate the law of belligerent occupation, and specifically Article 49 of the Geneva Civilian's Convention.

#### 1. *Transfer*

One contention was that the settlers themselves established the settlements, and therefore that Israel had not "transferred" population.<sup>60</sup> An Israeli scholar writes:

one should differentiate between the transfer of people — which is forbidden by Article 49 — and the voluntary settlement of nationals of the occupant, on an individual basis, in the occupied territory. Such settlement, if not carried out on behalf of the occupant's Government and in an institutional fashion, is not necessarily illegitimate.<sup>61</sup>

Whatever the legal merit of this view, there has been little or no settlement of this kind in the Gaza Strip or West Bank. The settlement activity there has been government-backed to a degree that renders this distinction unimportant.<sup>62</sup> The U.S. Legal Adviser, in concluding that the settlements are unlawful,

<sup>58</sup> G.A. Res. 37/88C, U.N. GAOR, 37th Special Political Committee, 37th Sess., Supp. No. 51., 100th plen. mtg., at 93, U.N. Doc. A/37/51 (1983).

<sup>59</sup> U.N. Commission on Human Rights, Res. 1987/2, art. 8(e), U.N. ESCOR, 43d Sess., Supp. No. 5, at 13, U.N. Doc. E/1987/18, E/CN.4/1987/60 (1987).

<sup>60</sup> See Julius STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* 177-81 (1981).

<sup>61</sup> Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISRAEL Y.B. ON H.R. 104, 124 (1978).

<sup>62</sup> See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 140 (1993); *Jewish Settlers Get Big Part of Israeli Housing Budget*, AGENCE FRANCE PRESSE,

has said that Article 49 “seems clearly to reach such involvement of the occupying power as determining the location of settlements, making land available and financing of settlements.”<sup>63</sup> He found the settlements to be “[i]n contravention of the generally accepted interpretation of the [Geneva Civilians] Convention’s Article 49.”<sup>64</sup> The U.S. Legal Adviser said that the settlements violated Article 49 as an unlawful “transfer of parts of its own civilian population.”<sup>65</sup>

## 2. *Displacement*

It was also argued in Israel’s defense that the Geneva Civilians Convention prohibited settlement only to the extent that settlement displaced local residents.<sup>66</sup> However, the text of Article 49 has no such limitation, and its drafting history contains no hint of an intent that there be one.<sup>67</sup> The U.S. Legal Adviser stated the view that local population be displaced before Article 49 is violated is incorrect, and that the Convention applies “whether or not harm is done by a particular transfer.” He further states Article 49 provides “transfers of a belligerent occupant’s civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration.”<sup>68</sup>

## 3. *Security*

The third contention argued is that Israel was permitted under the law of belligerent occupation to protect the security of its temporary tenure, and the Israeli settlements served this purpose.<sup>69</sup> Such a purpose was stated by the Labor Party to be

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Aug. 4, 1997 AVAILABLE IN LEXIS, News Library (stating that settlers received 20% of expenditures of Israeli housing ministry).

<sup>63</sup> Opinion of the Legal Adviser of the U.S. Department of State, 1980 *Digest* 1575, 1577.

<sup>64</sup> U.S. Dept. of State, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 761 (1980).

<sup>65</sup> Opinion of the Legal Adviser, *supra* note 63, at 1577.

<sup>66</sup> See *The Rule of Law in the Areas Administered by Israel* 54-55 (Israel National Section, International Commission of Jurists, 1981).

<sup>67</sup> See W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 264-65 (1986).

<sup>68</sup> Opinion of the Legal Adviser, *supra* note 63, at 1577.

<sup>69</sup> See COHEN, *supra* note 2, at 143-163.



its objective. These settlements would create an Israeli presence in sectors of the occupied territories.

However, this justification was questionable on the following two grounds. First, although an occupying power may protect its security, Article 49 appears to state no exceptions. Thus, while an occupying power may, in general, take measures to protect its security, it may not use civilian settlements as one of those measures. Second, even if, in theory, settlement might be justified on security grounds, the Israeli settlements did not seem to serve that end. The negative reaction of the local Palestinian population, engendered by the establishment of settlements, seemed to exacerbate tensions and thus, arguably, to worsen rather than improve Israel's security.

The U.S. Legal Adviser, referring to limits on an occupying power under the customary law of belligerent occupation, said that

"the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories, and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation."<sup>70</sup>

#### 4. *Ownership of the Land*

Another assertion made on Israel's behalf related to the ownership of the land on which settlements were built. Some land, like a portion of that projected in 1997 for construction of the Har Homa settlement in East Jerusalem, was owned by Jews from a time prior to Israel's establishment.<sup>71</sup> Some settlements were built on land confiscated from private Palestinian landowners, while others were built on land that had been state-owned prior to the occupation.<sup>72</sup> Much of the land in the West Bank was held in an unclear type of tenure that theoretically involved the state as owner but, according to local custom involved private ownership. After 1980, the Likud-led govern-

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<sup>70</sup> *Id.*

<sup>71</sup> See *Netanyahu Phones Egyptian President Mubarek on Har Homa Construction*, *supra* note 37.

<sup>72</sup> See SHEHADEH, *supra* note 14, at 22.

ment of the time began to consider these lands to be state-owned and thus subject to being used for settlements without regard to the rights of the person who, according to local custom, was the owner.<sup>73</sup>

The ownership status of a particular parcel of land is, however, irrelevant. The prohibition is against the insertion of civilians into the occupied territory. It matters not that the land is state-owned. Regardless of whether the land involved was public or private, the erection of settlements was illegal.

##### 5. *League of Nations Mandate*

A further argument made in favor of the legality of the settlements was that they are lawful under the mandate that Great Britain held from the League of Nations to administer Palestine after World War I. The argument was based on language in the mandate instrument whereby Great Britain committed itself to promote a Jewish national home in Palestine. It was said that this language gave Israel a right to settle Israelis in any part of Palestine.<sup>74</sup>

This argument has found little approbation. The mandate instrument spoke of a Jewish national home in Palestine, but failed to specify what that meant, and whether that was to include the entire territory. Given that Palestinian Arabs formed 90% of the population at the time, and that the mandate instrument also required Great Britain to do nothing to prejudice their rights, it is unrealistic to argue that the instrument contemplated Israel as having the entire territory.

##### 6. *Applicability of Geneva Civilians Convention*

Apart from debate about the meaning of Article 49, Israel argued that the Geneva Civilians Convention did not, in any event, apply to its control of the Gaza Strip and West Bank. The convention by its terms applies only in "the territory of a High Contracting Party."<sup>75</sup> Israel contends that only a sover-

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<sup>73</sup> See COHEN, *supra* note 2, at 153.

<sup>74</sup> See Eugene Rostow, "Palestinian Self-Determination:" Possible Futures for the Unallocated Territories of the Palestine Mandate, 5 YALE STUDIES IN WORLD PUBLIC ORDER 147, 159 (1979); Eugene Rostow, *Don't Strongarm Israel*, N.Y. TIMES, Mar. 19, 1991, at A23.

<sup>75</sup> See Geneva Civilians Convention, *supra* note 47, at art. 2.

eign may be a contracting party lawfully holding territory and bound by Article 49. Israel further contended that Jordan was not sovereign in the West Bank, and Egypt was not sovereign in Gaza.<sup>76</sup>

Egypt never claimed sovereignty in Gaza but considered it to be part of Palestine as previously constituted, even though Palestine had ceased to function.<sup>77</sup> Jordan did claim sovereignty in the West Bank subject to possible later developments in the direction of self-determination for the Palestinians.<sup>78</sup> However, its claim was not generally recognized. Despite the facts that Gaza was not under Egypt's sovereignty and Jordan's claim to sovereignty was unclear, Israel's view on the applicability of the Geneva Civilians Convention was rejected by the international community,<sup>79</sup> including the United States.<sup>80</sup> The Geneva Civilians Convention states that it applies "in all cir-

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<sup>76</sup> See Amb. Netanel Lorch, *Statement at Symposium on Human Rights, Faculty of Law, Tel Aviv University*, 1 ISRAEL Y.B. ON H.R. 366 (1971); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REVIEW 279 (1968); Military Prosecutor v. Halil Muhammad Mahmud Halil Bakhis et al., v. Israel, Military Court Sitting in Ramallah, (June 10, 1968), 47 INT'L L. RPTS. 484 (1974) (the government and Supreme Court said that the "humanitarian" provisions of the Convention — a category not found in the Convention — would be applied but did not find 49 to be "humanitarian").

<sup>77</sup> See *Republican Decree Announcing Constitutional System of Gaza Sector*, March 9, 1962, art. 1, 17 MIDDLE EAST J. 156 (1963) (1962 constitution adopted for Gaza by Egypt in 1962 stated: "The Gaza Strip is an indivisible part of the land of Palestine."); *Id.* at art. 73 ("This constitution shall continue to be observed in the Gaza Strip until a permanent constitution for the state of Palestine is issued."). See also Carol Farhi, *On the Legal Status of the Gaza Strip*, 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980 61, 75 (1982).

<sup>78</sup> See Albion Ross, *Amman Parliament Vote Unites Arab Palestine and Transjordan*, N.Y. TIMES, April 25, 1950, at A1 (Jordan's parliament specifying that in incorporating the West Bank into Jordan, it acted "without prejudicing the final settlement of Palestine's just case within the sphere of national aspirations, inter-Arab co-operation and international justice").

<sup>79</sup> See S.C. Res. 237, U.N. SCOR, 22d Sess., Res. & Decs. 5, U.N. Doc. S/INF/22/Rev.2 (1968); G.A. Res. 2443, U.N. GAOR, 23d Sess. at 50, U.N. Doc. A/7218 (1969); Wendy Olson, *UN Security Council Resolutions Regarding Deportations from Israeli Administered Territories: The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 24 STANFORD J. INT'L L. 611, 620 (1988).

<sup>80</sup> See U.S. Dept. of State, *United States Reaffirms Position on Jerusalem*, 61 DEP'T ST. BULL. 76 (1969); Opinion of the Legal Adviser, *supra* note 64, at 1576; U.S. Dept. of State, *Country Reports on Human Rights Practices for 1983* 1292 (1984).

cumstances,”<sup>81</sup> and to “all cases of declared war or of any other armed conflict.”<sup>82</sup>

#### D. *Settlements Under the Israel-P.L.O. Agreements*

None of the arguments made on Israel’s behalf to justify the settlements has been found persuasive by other states. The settlements are viewed as unlawful under the law of belligerent occupation. This law applies, so long as the occupant exercises any authority.<sup>83</sup> Thus, the rules of belligerent occupation have continued in force during the period of the P.L.O.’s assumption of partial authority in the occupied territories. In particular, the prohibition against transfer of civilians remained in force.

In addition, the agreements concluded between Israel and the P.L.O., beginning in 1993, may be relevant to the legality of the settlements. Although the character of these agreements has been the subject of controversy, the better view is that they are international treaties.<sup>84</sup> Israel took the view that its agreements with the P.L.O. did not forbid it to expand settlements, since these agreements do not expressly forbid such construction. The agreements contain no explicit prohibition related to settlement construction.

However, the P.L.O. took the position that settlement construction violated Article 5 of the 1993 Declaration of Principles between Israel and itself.<sup>85</sup> In that article, Israel and the P.L.O. agreed to negotiate the status of the settlements by the end of a transition period. The P.L.O. calling for compliance by Israel demanded: “[c]essation of all actions that may preempt negotiations on the final settlement, including the termination of all colonial settlement activities, whether old or new.”<sup>86</sup>

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<sup>81</sup> Geneva Civilians Convention, *supra* note 47, at art. 1.

<sup>82</sup> Geneva Civilians Convention, *supra* note 47, at art 2.

<sup>83</sup> See John Quigley, *The Israel-PLO Agreements versus the Geneva Civilians Convention*, 7 PALESTINE Y. B. INT’L L. 45 (1992-94).

<sup>84</sup> See John Quigley, *The Israel-P.L.O. Interim Agreements: Are They Treaties?*, 30 CORNELL INT’L L.J. (forthcoming 1997).

<sup>85</sup> See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, art. 5, 32 I.L.M. 1525 (1993).

<sup>86</sup> *Palestine & the UN* (Monthly Bulletin issued by the Permanent Observer Mission of Palestine to the United Nations), vol. 1, issue 1, at 4 (mid-October 1996).

Under international law, parties must fulfill treaty obligations in good faith. Agreeing to resolve a contentious issue in future negotiations, then undertaking measures that make the issue less resolvable, arguably violates the requirement of fulfilling an obligation in good faith.<sup>87</sup>

In another vein, it has been suggested that the Israel-P.L.O. agreements legalize the settlements, since they stipulate that, pending final negotiations, they shall be under Israeli control. Thus, the agreements appear to constitute an acknowledgment by the P.L.O. of the legality of Israel's maintenance of the settlements. However, these agreements also recognized that each party held certain positions of principle regarding the territories and said that nothing in the agreements affected those claims. The 1994 and 1995 interim agreements each included a statement of non-waiver of claims. The provision, identical in the two agreements, read "[n]either Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions."<sup>88</sup> This provision would seem to apply to the P.L.O.'s position that the settlements are unlawful. By agreeing to Israel's temporary control, the P.L.O. did not renounce its view that the settlements are unlawful.

#### IV. STATUS OF ISRAEL'S SETTLEMENTS AT THE END OF ITS OCCUPATION

A state that engages in an ongoing violation of an international obligation is required to cease the violation. The rule as stated by the International Law Commission is "[a] State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred."<sup>89</sup> Since Israel's settlements were unlawful under the law of belligerent occupation, it is under a continuing obligation to dismantle them. Nothing changes in this regard upon termi-

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<sup>87</sup> See Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331.

<sup>88</sup> Agreement on the Gaza Strip and the Jericho Area, *supra* note 14, art. 23(5); Interim Agreement on the West Bank and Gaza Strip art. 31(6).

<sup>89</sup> Draft Articles on State Responsibility, art. 43, *Report of the International Law Commission on the work of its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10 at 142, U.N. Doc. A/51/10 (1996).

nation of the occupation. At that point in time, if the settlements remain, Israel must dismantle them.

If, as some argue, the settlements can be justified on the basis of protecting the security interests of Israel in the occupied territory, then their existence would be lawful only so long as such security interests exist. Those who make this argument limit the security interest to security within the occupied territory, not security for the territory of Israel itself. They indicate that in a peace agreement, the settlements would either be dismantled or turned over.<sup>90</sup>

The law of belligerent occupation aims at protecting the people who live in occupied territory. Thus, under the Geneva Civilians Convention, the settlements violate the rights of the occupied population, taking that population as a whole. Settlements also violate the rights of the sovereign of the occupied territory, as they are an unconsented insertion of a foreign population.

As matters stand with the Gaza Strip and West Bank, and as they will stand upon termination of the occupation, the rights violated are those of Palestine, as the sovereign. A Palestine state was declared, comprising the territory of the Gaza Strip and West Bank, in 1988. This state has been widely recognized, as exemplified by Jordan's renouncement of its claim in the West Bank in favor of Palestine.<sup>91</sup>

The Israeli settlements, were they to continue after an end of the occupation, would be inconsistent with the rights of the Palestine state. They are extraterritorial in the sense that they are not subject to local administration, that only Israelis may inhabit them, and that the settlers remain subject to the law of Israel, rather than to local law.<sup>92</sup> It would be a violation of the rights of the Palestinian state for such an extraterritorial entity to exist, unless one reverts to the notion of extraterritoriality as practiced by Western powers in China, Turkey, and elsewhere a century ago.

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<sup>90</sup> See COHEN, *supra* note 2, at 163.

<sup>91</sup> See John Kifner, *Hussein Surrenders Claims on West Bank to the P.L.O.*, N.Y. TIMES, August 1, 1988, at A1; *Excerpts from Hussein's address on abandoning claims to the West Bank*, N.Y. TIMES, Aug. 1, 1988, at A4 ("The independent Palestinian state will be established on the occupied Palestinian land after its liberation.").

<sup>92</sup> See SHEHADEH, *supra* note 14, at 91-95.

## V. STATUS OF ISRAEL'S SETTLERS AT END OF OCCUPATION

Given that maintenance of the settlements is unlawful for Israel as a state, the question of the status of the settlers upon termination of belligerent occupation remains. International law typically protects the right of persons to remain in their areas of habitation. Under the law of nationality and human rights law, nationals of a state have a right to reside there. If sovereignty changes, individuals are not to be traded by states at the discretion of the governing authorities. Individuals have rights that continue even if sovereignty changes.<sup>93</sup>

The entrance and continued stay of settlers during an occupation violates the rights of the lawful sovereign. That sovereign has the right to determine who may immigrate; not the state in control by virtue of belligerent occupation.

Civilians who settled in occupied territory, in violation of the law of belligerent occupation, may be withdrawn unilaterally by the occupying army when it vacates the territory. Iraq, for example, unlawfully moved Iraqi civilians into Kuwait during its occupation in 1990-91.<sup>94</sup> When Iraqi troops withdrew, these civilians apparently left with them.

If the matter is left to negotiation, evacuation would be provided for as part of the arrangement terminating the occupation. Such arrangement is similar to Israel's withdrawal from the Sinai Peninsula in 1967. Israel took the Sinai Peninsula from Egypt at the same time that it took the adjacent Gaza Strip. In its Camp David treaty with Egypt, Israel agreed to end its occupation of the Sinai and to evacuate its settlers.<sup>95</sup>

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<sup>93</sup> See U.N. GAOR, 50th Sess., Supp. No. 10 at 271, 272-275 (Annex: Report of the Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons), U.N. Doc. A/50/10 (1995).

<sup>94</sup> See Victor Mallet, *Kuwait: Diary of an Occupation*, FINANCIAL TIMES, Aug. 15, 1990, at 15 (quoting Amre Moussa, Egypt's U.N. delegate, as saying that Iraq must remove civilians it has brought into Kuwait); *Kuwaiti Says World Must Stand by Jan. 15 Deadline*, REUTERS, Dec. 18, 1990 (quoting Mohammed al-Sabah, member of Kuwaiti government in exile, stating that Iraq was moving thousands of Iraqis into Kuwait).

<sup>95</sup> See Treaty of Peace between the State of Israel and the Arab Republic of Egypt, March 26, 1979, Annex I: Protocol concerning Israeli Withdrawal and Security Arrangements, art. 1, *reprinted in* 15 ISRAEL L. REV. 306 (1980) ("Israel will complete withdrawal of all its armed forces and civilians from the Sinai not later than three years from the date of exchange of instruments of ratification of this Treaty.").

Albeit over the objection of some of the settlers, Israel fulfilled this commitment by evacuating them.<sup>96</sup>

Israel's evacuation of settlers from the Sinai was consistent with international practice. Nationals of an occupying power, settling in the occupied territory have not been regarded as entitled to remain when the occupation ends. After Italy's withdrawal at the end of World War I, Italians who settled in territory occupied by Italy during the war were not entitled to the nationality of the states in question. The post-war peace treaty required states from whose territory Italy withdrew to extend nationality to resident Italians. However, nationality was only extended to those who were domiciled there as of June 10, 1940, the date on which Italy declared war on France and Great Britain.<sup>97</sup> This limitation excluded Italians who entered under Italian occupation.<sup>98</sup>

Under the Potsdam protocol, Germans who settled in nearby states whose territory Germany occupied during World War II were forced out after the war. In addition, even the Germans of long time residency inhabiting these states were forced out.<sup>99</sup> Thus, there was no special disposition for Germans who settled during the war. While the removal of the settlers was lawful, the removal of the others probably was not.<sup>100</sup>

After World War II, Austria excluded Germans who settled in Austria during the war from Austrian citizenship. The theory behind this action was that they were brought in by Germany after it took Austria by force. In 1938 Germany annexed Austria, abolishing Austrian nationality and thus made Austrian nationals into German nationals. When Austria in 1945 again began to function as a state, it adopted a nationality law that rolled the clock back, extending nationality to those who

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<sup>96</sup> See David K. Shipler, *In Israel, Peace Seems Hollow After Sinai*, N.Y. TIMES, Apr. 25, 1982, at A1.

<sup>97</sup> See Treaty of Peace between the Allied and Associated Powers and Italy, Feb. 10, 1947, art. 19(1), 49 U.N.T.S. 3.

<sup>98</sup> See Yasuaki Onuma, *Nationality and Territorial Change: In Search of the State of the Law*, 8 YALE J. WORLD PUB. ORD. 1, 20 (1981).

<sup>99</sup> See Potsdam Conference Protocol, Aug. 2, 1945, sec. XII, 3 Bevans 1207 (calling for transfer to Germany of German populations in Poland, Czechoslovakia, Hungary). See also Alfred de Zayas, *Nemesis at Potsdam* (1979).

<sup>100</sup> See Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 227-42 (1975).



held it in 1938, plus their descendants. This method of defining Austrian nationality excluded Germans who settled in Austria during the war.<sup>101</sup>

Latvia and Estonia attempted to follow Austria's example when they re-emerged as states in the 1990s. They considered the 1940 incorporation of their territories into the Soviet Union an unlawful occupation. On that basis, they did not consider persons who settled there after 1940 from other parts of the Soviet Union to be entitled to nationality in the re-emerged Latvia or Estonia. Lithuania, which was in a similar factual circumstance, could have made the same argument but did not. A Latvian parliamentary official cited Austria's 1945 action as precedent to argue that Latvia had been occupied and illegally annexed by the U.S.S.R. Therefore the Soviet settlers were not entitled to Latvian nationality.<sup>102</sup> Latvia extended nationality only to persons who held it under pre-1940 Latvian law, or their descendants.<sup>103</sup> Estonia similarly extended nationality only to persons who held it under a pre-1940 Estonian statute.<sup>104</sup>

Latvia and Estonia met considerable pressure from western European institutions to extend nationality to persons who settled after 1940, and as a result modified their approach. While Europeans did not make their rationale clear, most did not consider Latvia or Estonia to be under belligerent occupation after 1940, or to have been unlawfully annexed.

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<sup>101</sup> See Gesetz vom 10. Juli 1945 über die Überleitung in die österreichische Staatsbürgerschaft (Staatsbürgerschafts-Überleitungsgesetz - St-Ü G) ?1, 1945 Staatsgesetzblatt für die Republik Österreich 81 (no. 59).

<sup>102</sup> See Letter of Andrejs Pantelejevs, Chairman, Human Rights and Nationality Issues Committee, Republic of Latvia Supreme Council, to Jeri Laber, Executive Director, Helsinki Watch, Dec. 23, 1991, published in *New Citizenship Laws in the Republics of the former USSR*, at 12.

<sup>103</sup> See Republic of Latvia, Supreme Council, *Resolution on the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization*, Oct. 15, 1991, 1-2, reprinted in *Central & Eastern European Legal Materials* (V. Pechota ed. 1997). See also *Human Rights in the Republic of Latvia: Report by Jan De Meyer and Christos Rozakis* (Parliamentary Assembly of the Council of Europe), 13 HUM. RTS. L.J. 244, 246 (1992).

<sup>104</sup> See Republic of Estonia, Supreme Council, *Resolution on the Application of the Law on Citizenship*, sec. 1, RT 1992, no. 7, item 109 (Feb. 26, 1992), *unofficial English translation* available via Internet at <http://www.vm.ee/laws/92citiz.html>; discussed in *Human Rights in the Republic of Estonia: Report by Raimo Pekkanen and Hans Danelius* (Parliamentary Assembly of the Council of Europe) 13 HUMAN RIGHTS L. J. 236, 239 (1992).

This body of practice is consistent with the norms found in the law of belligerent occupation that nationals of an occupying power who settle in the occupied territory acquire no rights of residency opposable against the sovereign. Israelis transferred into the occupied territory during the occupation acquired no rights there.

## VI. RIGHTS OF ISRAEL'S SETTLERS UPON EVACUATION

Most of Israel's settlers are likely to evacuate if asked to do so by the government of Israel. However, some may object, even to the point of refusing to leave. Even though these settlers have no right to reside in the occupied territory, they are not without rights. They must be treated civilly by the authorities having power over them. Thus, while the occupying power is required to bring about their departure, it must do so in a humane manner. Settlers enjoy a right, as do all persons, to be free of inhuman or degrading treatment at the hands of governmental authorities.<sup>105</sup> As a result of this obligation, an occupying power must facilitate evacuation under humane circumstances. When Israel evacuated its settlers from the Sinai, it was able to do so without violence, despite the objections of many of the settlers.<sup>106</sup>

The issue arises as to the real property of the settlers, and other loss connected with being displaced. When Israel evacuated its settlers from the Sinai, it compensated in amounts ranging from \$132,000 to \$437,500 per family.<sup>107</sup> The issue of compensating Gaza Strip and West Bank settlers for leaving has been widely discussed in Israel. Since the commencement of Israel-P.L.O. negotiations, many settlers have contemplated a possibility of evacuating and some want government compensation.<sup>108</sup> Several members of Knesset parliament have called on the government to allocate funds for this purpose. They have made this call on the basis of their presumption that settlers

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<sup>105</sup> See International Covenant on Civil and Political Rights, art. 7, 999 U.N.T.S. 171.

<sup>106</sup> See Shipler, *supra* note 96, at A1.

<sup>107</sup> See William Claiborne, *Israel, Settlers Fail to Agree on Sinai Payments*, WASH. POST, Jan. 12, 1982, at A1.

<sup>108</sup> See Herb Keinon, *Unsettled Settlers: Many Will Go if the Price is Right*, JERUSALEM POST, Dec. 10, 1993, at 2B.

will depart, either in anticipation of or following a treaty with the Palestinians.<sup>109</sup>

It is not clear under these circumstances, whether compensation is required as a matter of international law. There is a right to one's property under international law.<sup>110</sup> This probably includes a right to compensation if the state takes the property or, as here, forces a person to abandon it.<sup>111</sup> The matter here is complicated by the fact that the establishment of the settlements was unlawful and the settlers were likely aware of that fact. Thus, the settlers understood that any rights they might acquire in land or houses were of doubtful validity. On the other hand, it was the government that encouraged these civilians to settle, despite the illegality. Thus one might conclude that the government bears responsibility to them if it deprives them of rights granted under its authority. In any event, Israel is likely to offer compensation, both out of considerations of hardship for departing settlers and as an inducement to leave.

## VII. A NEGOTIATED SOLUTION

The P.L.O.-Israel Declaration of Principles calls for negotiation of the following major outstanding issues between the two parties: the status of Jerusalem, the fate of the displaced Palestinians, a border between Israel and Palestine, and the settlements.<sup>112</sup> According to the 1993 timetable, negotiations were to commence during 1996, but difficulties between the parties have led to a postponement. In the Declaration of Principles, the parties agreed to take Security Council Resolution 242 as a basis for negotiations. Such resolution asked Israel to withdraw, in light of the prohibition against acquiring territory by military force.<sup>113</sup>

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<sup>109</sup> See Susan Hattis Rolef, *Back to Green Line Israel*, JERUSALEM POST, Jan. 15, 1996, at 6.

<sup>110</sup> See Universal Declaration of Human Rights, art. 17, G.A. Res. 217A, U.N. GAOR, 3d Sess., Res. 71, U.N. Doc. A/810 (1948).

<sup>111</sup> See Catarina Krause, *The Right to Property*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 143, 151-152 (A. Eide, C. Krause & A. Rosas eds., 1995).

<sup>112</sup> See Declaration of Principles, *supra* note 85, at art. 5.

<sup>113</sup> See S.C. Res. 242, U.N. SCOR, 22d Sess., at 8, U.N. Doc. S/INF/22/Rev.2 (1968).

Resolution 242 calls for peace arrangements between Israel and its Arab neighbors. This leaves room for an argument that the peace and withdrawal were conditional on each other. Israel has now concluded peace agreements with Egypt and Jordan. Resolution 242 was adopted before Israel began any substantial settlement activity. The resolution does not mention the settlements.

It is against the background of the legal principles analyzed in this article that Israel and the Palestine Liberation Organization will negotiate regarding the settlements. A lawful outcome would see the settlements either dismantled or turned over to Palestine. Palestinian landowners would be compensated. Settlers would be evacuated and, like anyone else, they may apply for immigration to Palestine.

Only an outcome that is consistent with international legal principles is likely to hold in the long term. This outcome will not be easy to achieve, because Israel appears committed to maintaining the settlements. Israel's defense minister, Yitzhak Mordechai, said that his government's policy of settling the Gaza Strip and West Bank satisfies "natural needs" and provides for "necessary growth."<sup>114</sup> Prime Minister Netanyahu also expressed his commitment to expanding settlements and has followed through on that commitment.<sup>115</sup>

Israel, moreover, enjoys an economic and military preponderance that may allow it to dictate terms. Short of dictating terms, Israel might make a concession on some other issue, perhaps the status of Jerusalem. A return commitment might allow some settlements to remain, perhaps with Israeli rule over the territory in which the settlements are located.

The matter is not entirely up to the two parties, however. The United Nations takes international peace as its primary task. The Israeli settlements are viewed by virtually all governments, with the exception of Israel's, as an obstacle to peace. Criticism of them on that basis has appeared repeatedly in international instruments.

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<sup>114</sup> Hillel Kutler, *State Dept. Decries PM Aide's Comment*, JERUSALEM POST, Dec. 18, 1996 at 1.

<sup>115</sup> See David Makovsky, *US Worried Over Future Settlement Drive*, JERUSALEM POST, Dec. 5, 1996, at 1.

These are not idle words. Under Article 39 of the U.N. Charter, member states that are on the Security Council bear a collective legal obligation to deal with any threat to peace. Thus, the U.N. has played a significant role in this issue since the beginning of Israel's occupation of the Gaza Strip and West Bank.

Shortly after the occupation began, the U.N. General Assembly established a permanent committee to monitor Israel's treatment of the Palestinians of the Gaza Strip and West Bank, called the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories.<sup>116</sup> One of the prime topics followed by the Special Committee has been that of Israel's settlements.

The General Assembly has reviewed the situation regarding the settlements on an annual basis and has adopted, year after year, resolutions criticizing Israel regarding the settlements. The most far-reaching of these called on states that give aid to Israel to avoid giving aid that allows Israel to violate the Geneva Civilians Convention. The Security Council asked states "not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories."<sup>117</sup> The General Assembly asked states "to avoid actions, including those in the field of aid, which might be used by Israel in its pursuit of the policies of annexation and colonization."<sup>118</sup>

Since the Israel-P.L.O. inter-action began, the United States has pressured Israel to stop expanding settlements.<sup>119</sup> However, the United States has refused to take the step urged by the United Nations of withholding aid, which helps Israel expand settlements. In connection with the Israeli 1997 plan to construct the Har Homa settlement in East Jerusalem, the General Assembly and Security Council have met repeatedly.

The international community prefers to avoid being put in the situation of having to respond to an unlawful provision about settlements in a treaty concluded between the parties. Anticipating their obligations under the U.N. Charter, other

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<sup>116</sup> See G.A. Res. 2443, U.N. GAOR, 23d Sess., at 50, U.N. Doc. A/7218 (1969).

<sup>117</sup> S.C. Res. 465, U.N. SCOR, 35th Sess., at 5, U.N. Doc. S/INF/36 (1981).

<sup>118</sup> G.A. Res. 35/122C, Art. 8, U.N. GAOR, 35th Sess., at 90, U.N. Doc. A/35/48 (1980).

<sup>119</sup> See Makovsky, *supra* note 115, at 1.

states are taking an interest in the Israel-P.L.O. negotiations before the fact, to ensure a lawful outcome. This interest is reflected in the Security Council and General Assembly action recounted above.

#### VIII. CONCLUSION

The tie of individuals to the territory of their long-time habitation is normally protected under international law. An exception arises, however, when territory is taken by force of arms and the state newly in control brings in its civilians to settle. Such settlements are not lawful under international law. The state that founded them is in violation of its obligations.

The tenure of the nationals who inhabit settlements is tied to that of the occupant. As a result, they acquire no rights that can be asserted against the occupied population, or against the state that holds sovereignty.

If the international norms here elaborated inform the negotiations between Israel and the P.L.O. regarding the settlements, there will be greater likelihood that the negotiated solution will last. The international community bears a responsibility to ensure an outcome consistent with the legal rights of the parties. If the matter is left exclusively to the parties, there is a serious risk of an inappropriate outcome. That would be unfortunate for the inhabitants of the region. It would also increase the likelihood that the international community, which has dealt with the Palestinian-Israeli conflict for half a century, will face many more years of turmoil in the region.