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Reconciling the Right of Return with *Shari'a* in Gaza

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**RECONCILING THE RIGHT OF RETURN
WITH SHARI'A IN GAZA**

CORINNE SOUAD AFTIMOS*

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INTRODUCTION

“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.”

- Abraham Granovsky, Head of the Jewish National Fund, 1940

Israel’s August 2005 disengagement from the Gaza Strip was an unusual departure from the reparations scheme the Israeli and German governments are credited with promulgating internationally.¹ This rare instance of restitution calls upon the Palestinian National Authority (“PNA”) to implement the Palestinian’s globally recognized right of return.² In order to reconcile this right born of customary international law³ with the principles

¹ Elazar Barkan, Professor of History and Cultural Studies at Claremont Graduate University, cites the compensation paid by Germans to Jews since 1952 as the starting point of recent developments in national politics and international diplomacy regarding historical injustices. Her assertion can be summarized with the following excerpt from her book:

The German-Jewish agreement . . . became the foundation for further reconciliation between Germans and Jews, led to the rehabilitation of Germany, and contributed to the economic survival of Israel. This was the moment at which the modern notion of restitution for historical injustices was born. . . . The German reparations that followed the war became the gauge for future restitution claims.

ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* xxiv (Johns Hopkins Paperbacks ed., The Johns Hopkins University Press 2001) (2000).

² During the 12th United Nations Seminar on the Question of Palestine, the General Assembly’s resolution 38/58 C of December 13th, 1983, issued in accordance with the recommendations of the International Conference on the Question of Palestine, provided the following guideline (amongst others) for future international peace conferences related to the Middle East: “(a) The attainment by the Palestinian people of its legitimate inalienable rights, including the right of return, the right to self-determination and the right to establish its own independent State in Palestine.” U.N. Info. Sys. on the Question of Palestine [UNISPAL], Div. for Palestinian Rights [DPR], *Question of Palestine: Legal Aspects*, 112-13, U.N. Doc. 4 (Mar. 31, 1992), available at <http://domino.un.org/unispal.nsf/9a798adbfc322aff38525617b006d88d7/ec6dd0bfff00344e18525611e006d808d!OpenDocument>.

³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention” of 1949), and the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its annexed Regulations, together comprise what “is widely regarded as a codification of customary international law” related to occupation of enemy territory in the course of war. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 66 (2003). In addition, the United Nations cited the First Geneva Protocol of 1977 as supplementary support for the rules of customary international law regulating belligerent occupation during the 8th United Nations Seminar on the Question of Palestine. UN Question of Palestine, *supra* note 2, at 42 (Mohammad Aziz Shukri, *Israel’s Policies and Practices in the Arab Occupied Territories in the Light of Prevailing International Law*). Article 49 of the Fourth Geneva Convention, which prohibits individual or mass forcible transfers, and provisions of the Hague Regulations limiting occupation to the extent military

of Islamic law adopted by the PNA, the individual property rights demanded by many Palestinians may be compromised.

As with the Aborigines in Australia, the Native Americans and Hawaiians in the United States, and the indigenous peoples of South America, collective rights are an integral part of Islamic society in the Middle East.⁴ Such communal social norms are reflected by limitations on individual property rights, if any individual property rights exist at all.⁵ Like Native Hawaiians, many Islamic societies divided land into public and private property (referred to as “crown” land in Hawaii, and “miri” in the Islamic Land Code of the Ottoman Empire), the public practically eclipsing the private since ultimate ownership of most of the land was vested in the state.⁶ Similar notions of property rights amongst Aborigines, and amongst the native populations of North and South America, also amount to “possession” of land, but fall short of exclusive “title” to it.⁷

In Australia, Aboriginal divergence from the Western concepts of private property adopted by the mostly sedentary Australian farmers and businessmen stems from the Aborigines’ distinct nomadic lifestyle, and their shared use of Australian land for spiritual purposes.⁸ The High Court of

exigencies persist in the absence of a final political settlement, are most pertinent with respect to the humanitarian crisis in the Gaza Strip. Geneva Convention Relative to the Protection of Civilian persons in the time of War, Aug. 12, 1949.

⁴ See generally Barkan, *supra* note 1 (discussing the communal use and limited private ownership of land by indigenous peoples in Australia and North and South America); Andrew Grossman, “Islamic Land”: Group Rights, National Identity and Law, 3 UCLA J. ISLAMIC & NEAR E. L. 53 (2003-2004) (discussing the rejection of Western jurisprudence by Islamic countries in the aftermath of WWII in favor of a return to classical norms of Islamic law which historically limited the marketability of Middle Eastern lands). While other groups, most notably tribes and clans throughout the African continent, place a similar premium on group rights and the communal nature of title to land, a complete discussion of parallel social norms across the globe is beyond the scope of this article. Jon D. Unruh, *Land and Property Rights in the Peace Process*, BEYOND INTRACTABILITY, Jan. 2004, http://www.beyondintractability.org/essay/Land_tenure/?nid=1231 (describing armed conflict, land tenure, and property rights issues in Africa, the Middle East, and South and Central America).

⁵ Global decolonization since WWII in countries that now constitute the Third World, and the growing recognition of indigenous peoples’ rights in the First World since the 1960’s, gave rise to demands for restitution by indigenous peoples that rarely translate into Western norms such as private property rights. The United Nations Working Group on Indigenous Populations develops declarations and resolutions to safeguard the rights of indigenous peoples with an “emphasis on the extra-monetary values embedded in the relationship between the indigenous peoples and the land and the communal character of these groups, including religious and cultural manifestations.” Barkan, *supra* note 1, at 166.

⁶ Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and The Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT’L L. & POL. 923, 933 (2001); Barkan, *supra* note 1, at 225-228.

⁷ See generally Barkan, *supra* note 1.

⁸ *Id.* at 232-245.

Australia recognized the potential for duplicity in native title to land amongst various Aboriginal communities. As a result, the Court abstained from the strict use of English common law to settle an Aboriginal land claim in *Eddie Mabo and Others v. The State of Queensland*.⁹ In the same vein, Palestinians are currently filing manifold land claims in Gaza chiefly based on native title vested by Islamic law (*Shari'a*) codified during Ottoman rule.¹⁰ As opposed to the Western notion of separation of church and state, religion plays a pivotal role in the social contract between many indigenous populations and Islamic societies. For the Palestinians as well as the Aborigines, appeals to classic Western norms, such as individual private property rights, seem somewhat misguided. The Palestinians believe in the inalienability of Islamic land outside the Muslim community, traditionally keeping the land "in whole, as a trust to the Muslims."¹¹

Since the Palestinian Lands Authority validates only those land claims based on land registry records and private deeds,¹² this article primarily addresses property laws related to land registration in the Gaza Strip, including (1) Islamic law in effect during the Ottoman Empire, (2) Western jurisprudential concepts bolstered during the British Mandate period, (3) Israeli military law enforced after the 1967 occupation, and (4) the return of Islamic jurisprudence on the heels of Israeli disengagement in 2005.¹³ Palestinians have historically had little opportunity to register title to their land. This situation is frustrated by the Palestinian people themselves who, fearing exorbitant taxation by foreign authorities, often hid land transactions. Beginning with the disorderly land registration process in effect during the Ottoman Empire, the occupation most favorable to the Arab landholder in Gaza yielded few viable records. The Ottomans eventually gave way to increasingly hostile authorities who enacted onerous obstacles to Palestinian

⁹ *Id.*

¹⁰ Kedar, *supra* note 6, at 932-936.

¹¹ Excerpt from the recorded opinion of the Second Caliph, Umar Ibn al-Khattab, regarding the conquest of Syria and Iraq, and the tradition. Grossman, *supra* note 4, at 58.

¹² *E.g.*, Sara el Deeb, *With Israel Gone, Who Gets the Land (in Gaza)?*, SEATTLE TIMES, Oct. 1, 2005, available at http://www.standwithus.com/news_post.asp?NPI=475; Cynthia Johnston, *In Gaza, Palestinians Pitch Tents to Claim Land*, HERALD NEWS DAILY, Oct. 18, 2005, available at <http://www.astandforjustice.org/2005/10/10-18-12.html>.

¹³ Drawing on information from legal scholars and the International Commission of Jurists, the United Nations prepared a chronology of the development of the Palestinian legal system from 1517 to 1999. U.N. Dep't of Political Affairs [DPA], Office of the Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestinian Liberation Organization and the Palestinian Authority [UNSCO], *Rule of Law Development in the West Bank and Gaza Strip: Survey and State of the Development Effort*, ANNEX 9: PALESTINIAN LEGAL SYS. DEV.—A CHRONOLOGY (May 1999), available at <http://www.arts.mcgill.ca/programs/polisci/faculty/rexb/unscoruleoflaw/a-nine.html> [UN Rule of Law Development].

land ownership and possession. By chronicling the erosion of Palestinian property rights, it becomes apparent there is little ground on which Palestinians petitioning for the return of their homes can stake a claim.

This conclusion is supported by the actions of the PNA immediately after the 2005 withdrawal of Israeli troops. For instance, the PNA forged ahead with the construction of public housing in the coastal strip despite challenges from Palestinians with claims to land allocated for development.¹⁴ The universal right of return safeguarded by international law, as implemented by the PNA, is a qualified right. Although Palestinians as a whole are entitled to return to Palestine, their individual property claims are subject to the whim of PNA officials. Consequently, the Palestinians' well-founded appeal to a right of return in the context of a group right seems ill-founded in the context of individual rights. Therefore, landholders must appeal to their respective governments for the safe keeping of individual rights.

In the Gaza Strip, strict interpretation of *Shari'a* underscores *Allah's* supreme ownership of all property, negating the potential for individual ownership rights. Reconciling the right of return with Palestinian laws will not occur until the Palestinian people cease to equate the right of return with individual rights to restitution of private property. Unfortunate as this may be, the influence of Western norms of secular governance are not at fault. In fact, it is the normative result of fundamentalist Islam dominating the forces of moderation and modernization in the cradle of humanity.

I. 1517-1917: THE OTTOMAN EMPIRE

When the Ottoman Empire conquered Palestine in 1517, the Palestinian population was predominantly comprised of illiterate peasants (*fellaheen*) settled on land they had traditionally cultivated.¹⁵ Although title to the land was vested in the state as trustee of the Muslim people, the *fellaheen* could obtain use and possession rights in the land.¹⁶ To avoid tithes levied by the state treasury against farmers with individual land rights, the *fellaheen* practiced a customary system of land tenure (*musha'*) whereby entire villages

¹⁴ Johnston, *supra* note 12.

¹⁵ Hala Fattah, *The Forgotten History of the Palestinian Peasant: Examples from Jerusalem and other Districts of Palestine*, JERUSALEMITES, Apr. 19, 1999, <http://www.jerusalemmites.org/jerusalem/ottoman/3.htm>. Dr. Fattah is a historian of the Arab provinces of the Ottoman Empire.

¹⁶ George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 492 (1994).

or communities held rights in the land.¹⁷ In order to curb *musha'* tenure, which accounted for as much as seventy percent of Palestinian land by the end of the 19th century, the Ottoman Sultan initiated a legal reform movement drawing on European Civil Law concepts.¹⁸

A. *The Influence of Islam Prior to Ottoman Legal Reform*

The revelations of God (*Allah* in Islam) are the foundation of most religious law. Accordingly, Islamic law (*Shari'a*) derives primarily from the holy book (*Qur'an*) and the traditions of the Prophet Muhammad (*Sunnah*).¹⁹ *Hadiths* recount the acts and sayings of the Prophet, and are, therefore, an integral part of the *Sunnah*.²⁰ Consensus (*ijma*) and analogy (*qiyas*) are secondary sources of Islamic law since they are not directly derived from the Prophet.²¹

While most scholars agree Islamic property law is based on some variation of the concept that *Allah* is the supreme owner of all lands and man merely his trustee, they differ with respect to what rights men have as trustee of *Allah's* land. How does man acquire divine property? Once acquired, to what extent is the property his?

Dr. Jamal Badawi, a religious studies professor at Saint Mary's University in Halifax, describes property rights in Islam in terms of three levels subordinate to *Allah's* ultimate ownership.²² Inaccessible property, such as a galaxy, belongs to God, and property common to all societies, such as an ocean, belongs to the entire human race. Within countries, however, property belongs to the community at large. Whether individual ownership

¹⁷ *Id.* at 492-493.

¹⁸ *Id.*

¹⁹ The term *Shari'a* itself derives from the verb *shara'a*, which relates to the idea of "spiritual law" (*Qur'an* 5:48) and the "system of divine law; way of belief and practice" (*Qur'an* 45:18). Although inferences drawn by scholars (*fiqh*) from the *Qur'an* and the Prophet Muhammad's life are sources of Islamic law, mainstream Islam distinguishes between *Shari'a* and *fiqh*. E.g. Sharia, WIKIPEDIA, <http://en.wikipedia.org/wiki/Sharia> (last visited Sept. 23, 2006). In practice, "*Shari'a* controls the family and property interests of Muslims in countries where personal law is determined by religion." Andrew Grossman, *Finding the Law: Islamic Law (Sharia)*, LLRX.COM, (Aug. 1, 2002), <http://www.llrx.com/features/islamiclaw.htm>.

²⁰ P. Nicholas Kourides, *The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts*, 9:2 COLUM. J. TRANSNAT'L L. 384, 397 (1970).

²¹ For a discussion of the sources of Islamic law, see, e.g., Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27 (1996); Christopher Melchert, *Islamic Law*, 23 OKLA. CITY U. L. REV. 901, 905 (1998); Kourides, *supra* note 20, at 387-391; Peter J. Riga, *Islamic Law and Modernity: Conflict and Evolution*, 36 AM J. JURIS. 103, 104-06 (1991).

²² Jamal Badawi, *Property Rights in Islam*, ISLAMONLINE.NET, July 31, 2005, <http://www.islamonline.net/english/introducingislam/Economics/article05.shtml>.

of property exists within the communal property category, sometimes called “common land,”²³ is the source of much debate.

Strict construction of the *Qur'an* leaves little room for the legitimate ownership of property by persons other than *Allah*. *Allah* is referred to as “the owner of the entire universe,” and “the domain of heavens and earth and anything in-between” belong to him.²⁴ Islamists further limit the possibility of broad construction of divine laws by foreclosing man-made laws and interpretations from consideration. *Shari'a* is considered a complete body of laws, without any allowance for supplementation.²⁵

In spite of the tradition of strict construction, many Islamic law scholars argue authority for looser constructions of *Shari'a* exists in the *hadith* quoting the Prophet Muhammad as follows: “My nation cannot agree on an error.”²⁶ Liberal legal scholars also suggest Muslim societies currently believe individual ownership of property exists in addition to divine ownership. As noted by a lecturer in Islamic Law at the University of London, “[a] distinction is indeed drawn between the rights of God (*huquq Allah*) and the rights of men (*huquq ibad*), but most authorities would regard only property rights as belonging essentially to the latter class....”²⁷

In *Introducing Islamic Political Economy*, Dr. Masudul Alam Choudhury claims the *Qur'an* and *Sunnah* “emphasize the central need for guarantee and protection of property rights or entitlement.”²⁸ During the Prophet Muhammad’s farewell pilgrimage, for instance, he declared: “Your lives and your property shall be inviolate until you meet your Lord. The safety of your lives and of your property shall be as inviolate as this holy day and holy month.”²⁹ Rather than identifying *Shari'a*’s unitary principles with limits on individual rights, Dr. Choudhury justifies his beliefs with the *Qur'an*’s concept of justice (*adl*) in terms of balance. He explains that “because of the *unifying concept* of social justice in Islamic political economy, the concept of property rights must also invoke guarantee and protection of *all* forms of property rights concerning human possession and welfare.”³⁰ Human

²³ *Id.*

²⁴ *Id.* (quoting *Aal-‘Imran* 3:26, and *Al-Ma‘idah* 5:120).

²⁵ Grossman, *supra* note 19; Sharia, *supra* note 19.

²⁶ Consensus (*ijma*) is an additional source of *Shari'a* law. E.g. Sharia, *supra* note 19 (quoting the *Qur'an*).

²⁷ N. J. Coulson, *The State and the Individual in Islamic Law*, 6 INT’L & COMP. L.Q. 49, 50 (1957).

²⁸ Masadul Alam Choudhury, *Introducing Islamic Political Economy*, IBF NET; <http://islamic-finance.net/islamic%2Deconomy/chap1/chap1-4.html> (last visited Sept. 23, 2006).

²⁹ Imad-ad-Dean Ahmad, *Islamic Views on Property Rights, Economic Freedom, and Entrepreneurship: Application to Iraq*, MINARET OF FREEDOM INST., May 8, 2003, <http://www.minaret.org/Islamic%20Views%20on%20Property%20Rights.htm>.

³⁰ Choudhury, *supra* note 28 (emphasis added).

possession and welfare relates to wealth (*al-mal*), which is considered a necessity (*al-dharuriyat*) protected by *Shari'a*.³¹

Shari'a does not explicitly forbid the individual acquisition of property and wealth; it merely prohibits the monopolization of necessities.³² According to the following contention of Dr. Badawi, the *Qur'an* itself gives credence to the notion that *Allah's* property rights are not exclusive:

God tells the Prophet Muhammad what means: [Take from their property charity]. In this verse, God uses the term "their property," showing that there is no contradiction between God's ultimate ownership to the universe and our right as humans to own within the restrictions that God has provided (citation omitted).³³

Whether a person's property rights in Islam are communal or individual, they exist by virtue of Islamic law or personal efforts.³⁴ Islamic law, such as the law of inheritance, explicitly provides many legal bases for acquiring property in lands under Muslim governance (*dar al-Islam*). Dishonesty, however, precludes the legal acquisition of property. The Prophet Muhammad addressed this issue in his farewell pilgrimage when he warned, "nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly."³⁵ Illegitimate practices include fraudulent means of obtaining property, such as theft, or of obtaining a person's consent to the taking of their property, such as bribery.³⁶

³¹ Punishments (*hudud*) are enforced to protect and secure a person's necessities (*al-dharuriyat*) which include: belief (*deen*), life (*an-nafis*), intellect (*al-'aql*), wealth (*al-mal*), and family and lineage (*an-nasil*). Salem Al-Hasi, ISLAMONLINE.NET, Sept. 9, 2002, http://www.islamonline.net/servlet/Satellite?cid=1123996015694&pagename=IslamOnline-English-AAAbout_Islam/AskAboutIslamE/AskAboutIslamE (last visited Dec. 20, 2005).

³² IOL Team, *Freedom of Economic Activity*, ISLAMONLINE.NET, Aug. 14, 2003, <http://www.islamonline.net/english/introducingislam/Economics/article01.shtml>; see also Badawi, *supra* note 22 ("There is a rule in Islamic law that says: 'Private harm could be tolerated if it were necessary to prevent greater harm than would affect a larger number of people or the public at large'"); see also Imad-ad-Dean Ahmad, *Islam and Markets*, MINARET OF FREEDOM INSTITUTE, <http://www.minaret.org/acton.htm> (last visited Sept. 23, 2006) ("Rather than modify the concept of property, the *Qur'an* specifies the terms for its wholesome and just enjoyment and employment").

³³ Badawi, *supra* note 22.

³⁴ If a person is to fulfill their duties (such as paying religious tithe) as *Allah's* agent on earth (*khalifah*), he/she must have some rights in *Allah's* property. See generally *id.* (discussing methods of acquiring property in Islamic law).

³⁵ Muslim Student Association, New Mexico State University, *The Last Sermon of the Prophet Muhammad*, <http://web.nmsu.edu/~msa/article13.html> (last visited Jan. 6, 2007).

³⁶ For an in depth analysis of the sources of Islamic law that provide the rules binding Muslims, see Kourides, *supra* note 20, at 394-97.

Personal efforts, including working for a salary, hunting, fishing, or commercial operations, provide additional legal means of obtaining property in *dar al-Islam*. The *Qur'an* stipulates, in pertinent part, that "to men is allotted what they earn and to women what they earn."³⁷ Prostitution, practicing magic, and other acts prohibited by the Islamic faith are illegitimate means of acquiring property through personal efforts.

For land in territories conquered by Muslims, the following recorded opinion of the Second Caliph, Umar Ibn al-Khattab, provides some insight:

If the Imam distributes the lands amongst those who captured them, they become 'ushr lands, and their previous owners become slaves. If he does not distribute the lands but leaves them in whole, as a trust to the Muslims, then the poll-tax lies on the necks of their owners, who are free, while their lands are charged with *kharaj* tax.³⁸

At first blush, it seems as though the Ottomans behaved in accordance with the mandates of Islamic law, while the Palestinians violated its provisions. The Empire conquered Palestine and retained ultimate ownership of all Palestinian land in trust for the entire Muslim community (*umma muhammadiyah*). Since the Sultan forwent the opportunity to dole out the spoils of war, he was entitled to taxes levied upon the land kept whole for the free *fellaheen*'s. His chosen method of taxation, however, essentially divided the property by forcing the creation of individual landholders. Taking a percentage of the village's total output is a plausible alternative that would have kept the land intact.³⁹ Collective taxation seems to be a better fit, because plots of land in *musha'* tenure were rotated amongst families in the community,⁴⁰ making it difficult to affix tax liability to any individual for particular parcels of land within the village. When the Sultan's efforts to enforce individual registration of land rights inevitably failed, he enacted the least favorable laws to Islamic jurisprudence—European-style legal codes.

B. Ottoman Legal Codes

In less than a century, the Ottoman Sultan reversed the course of land, tax, and administrative laws (*Tanzimat*), and the Civil Code (*Majalla*), in all

³⁷ Ahmad, *supra* note 29 (quoting *Qur'an* 4:32).

³⁸ Grossman, *supra* note 4, at 58.

³⁹ In densely populated villages, the Sultan could have taxed the output of individual families within the community. At that time, however, some villages consisted of "merely clusters of the homes of several lineages or extended kin groups." Bisharat, *supra* note 16.

⁴⁰ *Id.*

of Palestine. The *Tanzimat* legal reform movement, initiated by the Sultan in 1839, resulted in the development of the French Model Commercial Procedure Code, and the wholesale adoption of the French Model Penal Code, the French Model Commercial Code, the French Model Land Code,⁴¹ and the French Model Maritime Code by the time the *Majalla* was adopted in Napoleonic form in 1877.⁴² Above all other laws enacted in the 19th century, the Ottoman Land Code of 1858 was the most influential piece of legislation governing property law in Palestine.

The Land Code enacted by the Sultan abolished the *musha'* tenure system by specifically prohibiting formally unrecognized collective land rights.⁴³ The Sultan enforced the Code by partitioning *musha'* holdings between individual *fellaheen* in each community, and compelling the registration of the properties accordingly. All property in the Ottoman Empire was classified in terms of the following five categories defined by the Code:

(1) *Mulk*, privately owned property: This form of land tenure was rare (usually limited to the center of major villages), and restricted to dwelling and limited appurtenant areas only.⁴⁴

(2) *Miri*, state owned property usufruct to landholders: Formal and ultimate ownership (*raqaba*) of this property was held by the state, but individual landholders could obtain rights of possession and usufruct (*tassaruf*) if they cultivated the land and paid taxes. *Miri* property included fields and agricultural lands, pastures, woodlands, and other land surrounding villages, and was the most common form of land tenure.⁴⁵

(3) *Mawat*, state owned uncultivated and/or uninhabited property: Forests, mountainous areas, and other unclaimed lands were considered

⁴¹ The French Model Land Code was subsequently amended to reflect the German land inheritance system. U.N. Rule of Law Development, *supra* note 13.

⁴² The French Model Criminal Procedure Code was the last European legal code adopted by the Sultan before British Occupation. Islamic law was not, however, fully eclipsed. *Shari'a* courts maintained jurisdiction over personal status and land dedicated to religious purposes (*waqf*), and the *Majalla* was primarily a codification of *Shari'a* law. *Id.* See also Kourides, *supra* note 20, at 398-412 (describing the *Majalla* in detail).

⁴³ See generally Bisharat, *supra* note 16, at 493 (describing the rise and fall of the *musha'* tenure system).

⁴⁴ See, e.g., SOUAD R. DAJANI, RULING PALESTINE: A HISTORY OF THE LEGALLY SANCTIONED JEWISH-ISRAELI SEIZURE OF LAND AND HOUSING IN PALESTINE 13 (Rob Stuart ed., The Centre on Housing Rights and Evictions (COHRE) 2005), available at <http://www.miftah.org/PrinterF.cfm?DocId=7413> (follow "To View the Full report As PDF File (1.76 MB)" hyperlink); Kedar, *supra* note 6, at 932-936; Bisharat, *supra* note 16, at 492-495.

⁴⁵ Anyone who held and cultivated the Empire's land for a period of 10 years had the right to register the property in his/her name as *miri* land according to Article 78 of the Ottoman Legal Code. *Id.* at 541.

mawat, “dead.” Farmers could establish claims to dead land with State permission, or by cultivating it.⁴⁶

(4) *Matruka*, state owned land preserved for public use: The state allocated this property for communal and public purposes. Roadbeds and village threshing floors, for instance, were considered communal lands.⁴⁷

(5) *Waqf*, property holdings of the Islamic charitable endowment: The Supreme Muslim Council controlled these lands which were dedicated to pious purposes.⁴⁸

C. Land Registration Prior to British Occupation

Since the Ottoman Land Code was enacted to curb tax evasion and the shirking of military conscription, Palestinians frequently avoided the Land Registry offices (*Tabu*).⁴⁹ The *fellaheen* evaded the Empire’s land registrars and otherwise thwarted their efforts by understating the size of their property, or by disavowing claims to the land entirely. In addition, villagers vested title to village lands in the name of a few village leaders, or in the name of fictitious or deceased individuals. Further complicating matters were absentee Arab landowners. Absentee landlords, who were usually members of wealthy Syrian and Lebanese merchant families, leased Palestinian property to the *fellaheen*.⁵⁰

Although the villagers successfully circumvented tax liability and the draft, they ultimately paid a heftier price. Zionist colonization in Palestine began in earnest around 1882,⁵¹ spurring the sale of substantial tracts of Palestinian land by absentee landlords for handsome purchase prices.

⁴⁶ *Id.* at 492-495. *Mawat* is sometimes spelled *mewat*.

⁴⁷ *Id.*

⁴⁸ *Id.* *Waqf* is considered immutable and inalienable because it is divine. Hamas, and other Islamist movements, have interpreted the recorded opinion of the Second Caliph as conferring *waqf* status to all land conquered in holy war (*jihad*). Grossman, *supra* note 4, at 57-58. Since Palestine was conquered by a Muslim Empire, British and Israeli occupation of Palestine runs afoul to Hamas’ assertion that *waqf* is inalienable outside the Muslim community. *Id.*

⁴⁹ See, e.g., Kedar, *supra* note 6, at 932-934 (describing the “[dis-]order” of land registration during the late Ottoman period); Bisharat, *supra* note 16, at 494-95 (identifying the methods employed by *fellaheen* to avoid registering their property rights).

⁵⁰ E.g., Danny Rubinstein, *Turkey Transfers Ottoman Land Records to Palestinian Authority*, HAARETZ, Nov. 10, 2005, available at <http://www.jerusalemmites.org/articles/english/oct2005/13.htm>; Fattah, *supra* note 15. See also Bisharat, *supra* note 16, at 484 (“The Zionists sometimes referred to the Arab local society as an example of “Arab feudalism” epitomized by a class of absentee Arab landowners known as the *effendis*).

⁵¹ Dajani, *supra* note 44. George Bisharat, a professor of law at the Hastings College of Law, cites the foundation of the Rishon-le-Zion colony in 1881 near present-day Tel Aviv as the beginning of Zionist colonization in Palestine. Bisharat, *supra* note 16, at 496.

Ousted *fellaheen* had no registered property rights and therefore no recourse. Within the villages that remained, the customary system of communal land tenure was replaced with a landlord-tenant arrangement by village leaders usurping the *fellaheen*'s formerly enforceable property rights.⁵² The few *fellaheen* who actually registered individual land rights also lost their property rights because the registered description of the property was usually inaccurate. By the end of the Ottoman period, only about five percent of the land in Palestine had been registered,⁵³ and the Prophet Muhammad's admonition not to use one's property in a manner harmful to others was all but forgotten.⁵⁴

II. 1917-1948: BRITISH OCCUPATION

As World War I drew to a close, British forces defeated the Ottomans and occupied Palestine. The broad legislative and administrative powers conferred by the Palestine Mandate were tempered by the Mandate administration's policy of maintaining the pre-war "status quo."⁵⁵ Consequently, the British enacted most land ordinances as amendments to pre-existing Ottoman law, and avoided legislating a new land code.⁵⁶

⁵² Bisharat, *supra* note 16, 494-95.

⁵³ Kedar, *supra* note 6.

⁵⁴ The Prophet Muhammad said: "One should not harm himself or others." Badawi, *supra* note 22. The *Qur'an* echoes this belief by prohibiting the use of property in a fashion that would deprive others of their justly acquired property (2:188), and prohibiting the diversion of property held in trust for another for the trustee's personal benefit (2:2; 4:10). Ahmad, *supra* note 29. Outlawing the monopolization of necessities, Badawi, *supra* note 33, is yet another example. In terms of the *fellaheen*'s situation, village leaders violated *Shari'a* by appropriating the property rights they held in trust for their fellow villagers. Although the absentee Arab landlords were not in a similar situation of trust, disregard for the fate of their tenants is equally reprehensible. Ultimately, the *musha'* tenure system was likely the most in keeping with the Islamic faith at that time since a common vested interest amongst villagers engendered common courtesy with respect to the use of Palestinian property.

⁵⁵ Decreed by the League of Nations in 1922, the first Article of the Palestine Mandate provides: "The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this Mandate." The Mandate for Palestine, League of Nations, Art. 1, July 24, 1922, MODERN HIST. SOURCEBOOK, available at <http://www.fordham.edu/halsall/mod/1922mandate.html>; see Jeremy Forman & Alexandre Kedar, *Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor Al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective*, 4 THEORETICAL INQUIRIES L. 491, 519-520 (2003) (explaining the Mandate administration's policies and dictates).

⁵⁶ Dajani, *supra* note 44, at 23.

A. *British Interpretation of the Ottoman Land Code*

British authorities established Land Courts to regulate the Palestinians' registered and customary land rights which had been thrown into disarray at the end of the Ottoman Empire.⁵⁷ In the absence of superseding Mandatory property laws, the Courts attempted to enforce the Ottoman Land Code. The drive for individual registration of property rights was championed by Palestine's chief land reform expert Sir Ernest Dowson.⁵⁸ Nevertheless, innovative interpretation of the Code by British officials, coupled with the Mandatory's amendments to the Code, provided ample justification for the expropriation of Palestinian land.

The *Mewat Land Ordinance* (1921) was one of the most damaging Mandatory laws to Palestinian property interests. During Ottoman rule, the *fellaheen* were free to acquire property rights in barren lands provided they render them arable. The Ordinance, however, replaced the last paragraph of Article 103 of the Ottoman Land Code with the following provision: "Any person who without obtaining the consent of the Administration breaks up or cultivates any waste land shall obtain no right to a title-deed for such land and further, will be liable to be prosecuted for trespass."⁵⁹ Heretofore, no official permission was required. The rural and often illiterate farmers, already wary of the Mandatory's authority and the land registry system, now risked becoming trespassers on grounds they had been legally farming for years.

The British seizure of property as unregistered *mewat* land in Zor al-Zarqa and Barrat Qisarya illustrates the force of the Land Courts' authority to interpret the Ottoman Land Code in the Mandatory's favor.⁶⁰ The

⁵⁷ Bisharat, *supra* note 16, at 495.

⁵⁸ See Forman & Kedar, *supra* note 55, at 508-509 ("[Sir Dowson's] program . . . aimed to transform Palestine's land regime from one based primarily on usage rights, often communal in nature, to one based on secure individual ownership").

⁵⁹ The Palestinians were afforded some reprieve. If they had violated the Ordinance before it was enacted, they could apply for a title deed within two months of its publication. In practice, the Mandatory administration generally allowed for the registration of land rights even if the prescribed time for registration had lapsed. See Kedar, *supra* note 6, at 936 (quoting the *Mewat Land Ordinance*, and describing its application).

⁶⁰ Jeremy Forman, a Ph.D. candidate in the University of Haifa's Department of Land of Israel Studies, and Alexandre (Sandy) Kedar, a Lecturer in the University of Haifa's Faculty of Law, discuss the use of "colonial law" to resolve the disputes at Zor al-Zarqa and Barrat Qisarya. The "colonial law" of the Mandate legal system is defined as "the interpretation of Ottoman law by colonial officials, the use of foreign legal concepts, and the transformation of Ottoman law through supplementary legislation." See generally Forman & Kedar, *supra* note 55, at 491. They cite the historian Martin Bunton's case studies as support for their contention that "the concept of colonial law . . . cannot be limited to imported Western concepts alone." See *id.* at 502.

dispute began when Mandate authorities agreed to lease Zor al-Zarqa and Barrat Qisarya to the Palestine Jewish Colonization Association ("PJCA").⁶¹ The arguments advanced by Palestinian farmers facing eviction were: (1) the farmers had legally protected rights in the *mewat* property by virtue of their longstanding use of the land; alternatively, (2) the property could not be held in exclusive possession with a title deed because it was *matruka*. The PJCA and Mandate officials refused to acknowledge any of the legal rights asserted by the Palestinians on the grounds that their rights were not registered, and any rights they may have had were strictly "moral."⁶²

Norman Bentwich, the Mandate government's Attorney General, was in charge of the legal officials assessing the nature of Palestinian rights in the dispute.⁶³ Because the communities of Zor al-Zarqa and Barrat Qisarya were established as tent encampments, Bentwich did not accord them the status of a full-fledged village. Absent a village, he reasoned, there is no community with a vested interest in the public uses of the land. In addition, his report classified the Palestinians' traditional rights to the shared use of the land, such as for grazing or camping, as unenforceable "moral" rights. He identified any residual interests the villagers may have as "rights of common," an English common law concept similar to *matruka* but less restrictive (i.e. it does not prohibit expropriation). The Bentwich report concluded the property was *mewat* that could be legitimately leased to the PJCA with the exception of some cultivated lands.

Faced with the threat of expropriation, the residents of Zor al-Zarqa eventually agreed to settle their land claims. The Barrat Qisarya dispute, however, made its way to court where two out of three judges issued rulings

⁶¹ The Baron Edmond de Rothschild established several Jewish colonies in Palestine, and entrusted their administration to the Jewish Colonization Association. The Jewish Colonization Association's operations in Palestine were reorganized in the mid-1920s into the Palestine Jewish Colonization Association. *Id.* at 511. Mandate authorities often worked in concert with Jewish colonization officials in the spirit of the Balfour Declaration, a letter written by Lord Balfour to Lord Rothschild. The letter relays a "declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the [British] Cabinet" as follows: "His [Great Britain's] Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this objective, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country." Letter from Lord Arthur James Balfour, British Foreign Secretary, to Lord Lionel Walter Rothschild (Nov. 2, 1917), available at <http://www.yale.edu/lawweb/avalon/mideast/balfour.htm> (last visited Jan. 19, 2007).

⁶² The notion of "moral" rights is "an imported non-Ottoman term indicating a lack of legal basis." Forman & Kedar, *supra* note 55, at 517.

⁶³ See *id.* at 520-523 (elaborating on the conclusions of the Bentwich report).

favorable to the local residents.⁶⁴ Despite the farmers' failure to seek state approval for the cultivation of *mewat* land, which was a literal violation of the *Mewat Land Ordinance*, all three judges concurred in the decision to register cultivated lands in the names of their cultivators. Robert Drayton, then the British government's Solicitor General, concealed the rulings of Judges Ali Hasna and Said Tuqan regarding the remainder of the property. Those rulings qualified the property, mostly pastureland, as *matruka*. In accordance with the ruling of the third judge, British District Court President Plunkett, the British government decided the property was *mewat*. It granted the PJCA a concession to approximately one third of Barrat Qisarya.⁶⁵ Like the residents of Zor al-Zarqa, the people of Barrat Qisarya ultimately settled with the PJCA, albeit 15 years after the decision.

B. British Land Ordinances

In addition to creating the Land Courts, the British government advanced a number of land ordinances in an attempt to bring some order to the land tenure system in Palestine. The redress of aberrant registration began almost immediately after occupation. British authorities closed the *Tabu* in 1918, suspending registration of property rights for the two years it took the British administration to draft and pass the *Land Transfer Ordinance* (1920).⁶⁶ The *Palestine Order in Council* of 1922, which provided for the introduction of British common law and judicial structures in nearly all legal fields,⁶⁷ facilitated the implementation of future ordinances enacted by the Mandatory. As a result, the *Land (Settlement of Title) Ordinance* (1928) became so entrenched in the Palestinian legal system it survived the end of the Mandate, and remains in effect in Israel to the present day.⁶⁸

The *Land Ordinance* (1928) triggered an unprecedented survey of Palestinian lands, registering finite property rights and extinguishing ancient

⁶⁴ See *id.* at 528-532 (describing the legal proceeding and final settlement).

⁶⁵ The PJCA leased 10,000 of the 32,000 dunams (1 dunam = 1,000 square meters) that comprised Barrat Qisarya. *Id.* at 531-532.

⁶⁶ The *Land Transfer Ordinance* of 1920 primarily reformed land transactions between Arab landlords and Jewish purchasers. While it can be argued that the Ordinance's provisions are favorable to Jewish interests, they nevertheless effected improvements in the accuracy of the land registry. One clause, for instance, compels the grantor of a piece of property to provide alternative "viable lots" for "tenants in occupation." Although this usually imposed a duty on Arab landlords to vacate Palestinian tenants, at least the person(s) in possession of the property would coincide with the property's owner on file with the *Tabu*. *But cf.* Dajani, *supra* note 44, at 23 (suggesting a complete lack of genuine administrative rationale for the laws enacted by the British Mandate).

⁶⁷ Contracts remained subject to *Majalla*. U.N. Rule of Law Development, *supra* note 13.

⁶⁸ Kedar, *supra* note 6, at 938-939.

claims throughout the state. The British adopted a version of the Torrens system, a numbered bloc and parcel survey system based on precise mapping, tailored to accommodate the particular needs of Mandate Palestine.⁶⁹ Due to the inaccuracy of the property rights previously registered with the *Tabu*, a judicial investigation of each parcel of land occurred before title to it was settled.

Investigations obstructed claims to unregistered rights in the land by terminating the passage of time in cases of adverse possession at the outset of the inquiry, and by terminating all claims made prior to the inquiry at its close. Settlement of title was final. By the end of the British Mandate of Palestine, title to approximately twenty percent of Palestinian land had been settled.⁷⁰

C. *Loss of the Palestinian State*

Competing interests in Palestinian property rights gave rise to the Great Arab Revolt (1936-1939) between native Arab populations and Jewish settlers.⁷¹ Consequently, the Mandate administration enacted the *Land Transfer Regulations* (1940), considerably restricting Jewish immigration and land transfers.⁷² Mandate Palestine was split into three zones. Each zone had its own conditions precedent to obtaining government permission for the sale or lease of property.

Zones "A" and "B" were heavily restricted, and accounted for ninety-five percent of Palestinian territory. Only in the "free zone," zone "C," were

⁶⁹ See *id.* (describing British adaptation of the Torrens system in Palestine and the development of the *Land (Settlement of Title) Ordinance* of 1928).

⁷⁰ *Id.*; Dajani, *supra* note 44, at 23.

⁷¹ The Great Arab Revolt marked the beginning of organized military combat between Arabs and Jews that plagues the Middle East to this day. The Jewish paramilitary group Haganah became the foundation of the Israel Defense Forces (Israel's present-day armed forces), and terrorist Zionist military groups, such as the Irgun, were dissolved following the creation of the State of Israel. Constant warfare between Palestinian forces, such as the terrorist group Hamas, and Israeli forces later became the grounds for Israeli occupation of the Gaza Strip. E.g. Great Uprising, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Great_Uprising (last visited Sept. 23, 2006); Stacy Howlett, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 VAND. J. TRANSNAT'L L. 117, 125-126 (2001).

⁷² The *Land Transfer Regulations* were promulgated during World War II, following the issuance of a British White Paper in 1939. The McDonald White Paper, named after British Colonial Secretary Malcolm McDonald, was an official statement of policy wherein the British government made concessions to the Palestinians on a wide range of issues. Fearing Arab alliance with the Axis powers, the Government reversed course on their previous pledge in the Balfour Declaration (i.e. to support Zionist colonization) in order to curry favor with the Palestinians. See *British White Paper of June 1922* (June 10, 1922), available at <http://www.yale.edu/lawweb/avalon/mideast/brwh1922.htm>; see also Dajani, *supra* note 44, at 25 (expanding upon the particular provisions of the *Land Transfer Regulations*).

property transactions virtually unencumbered. Since the Gaza Strip straddled zones "A" and "B," the Palestinians kept title to seventy-five percent of Gaza.⁷³ Of the remaining land, twenty-one percent was publicly-owned (i.e. property of Mandate Palestine), and four percent was the property of Jewish-Zionist collectives.

In November 1947, as the Mandate was expiring, the United Nations adopted a "Partition Plan for Palestine." The Plan increased the property holdings of Jewish settlers in Palestine from the five percent they owned during the Mandate to fifty-five percent.⁷⁴ Although Palestinians were entitled to forty-five percent of the property in their State, many left their land.

Of the 757,182 Palestinians accounted for in the 1922 census, seventy thousand had departed by January 1948, and pressure from Jewish military operations was rising.⁷⁵ The armies of six neighboring Arab nations mobilized to meet the threat of Jewish conquest in Palestine. Another four hundred thousand Palestinians, close to half the final number of Palestinian refugees, evacuated by the time Israel declared itself an independent State on May 14, 1948.⁷⁶ The Arab armies subsequently failed to remove Jewish settlers from most of Palestine. The Palestinians, having already abandoned their property for what they thought would be a rapid defeat of Jewish forces, were left with little else than their keys.

III. 1948-1967: EGYPTIAN ADMINISTRATION

King Farouk of Egypt signed an Armistice Agreement with Israel in 1949, confirming Egyptian control of the Gaza Strip for nearly twenty years to follow. Although several administrative, procedural, and regulatory reforms were introduced, few changes were made to property laws affecting Palestinian interests. This absence of change is not surprising because both the Egyptian administration and the former Ottoman Empire interpreted *Shari'a* law from the perspective of the *Hanafi* School of Islamic juris-

⁷³ Figures are based on a land ownership and population distribution study performed by the United Nations from 1945 to 1946. *Id.* at 26.

⁷⁴ In the aggregate, fifty-six percent of Palestine was to become part of the "Jewish State" according to the provisions of the Partition Plan. In practice, however, Jews only controlled between eleven and fourteen percent of Palestinian territory. See, e.g., Bisharat *supra* note 16, at 501-502 (describing the Partition Plan and land distribution prior to and after its adoption by the United Nations); Dajani, *supra* note 44, at 27-28.

⁷⁵ Dajani, *supra* note 44, at 16, 28.

⁷⁶ *Id.*

prudence.⁷⁷ As a result, they generally reasoned similarly.⁷⁸ The *Basic Law* issued by the Egyptian administration in 1955 validated pre-existing law as applicable. It was, for the most part, the primary piece of legislation governing the Gaza Strip until Israeli occupation in 1967.⁷⁹

IV. 1967-2005: ISRAELI RULE

The Israel Defense Forces invaded Egypt on June 5, 1967, gaining control of the Gaza Strip after six days of combat. The military action was justified as a pre-emptive strike against an Egyptian attack the Israelis believed to be imminent.⁸⁰ Although Israel claimed it would retain pre-occupation law, subject to the occupant's power under the 1907 Hague Regulations,⁸¹ it enacted over 1100 military orders, effectively amending, changing, or repealing the laws in place during the Egyptian administration of Gaza.⁸²

⁷⁷ U.N. Rule of Law Development, *supra* note 13; *Palestine/Palestinian Territories of West Bank and Gaza Strip*, available at <http://www.law.emory.edu/IFL/legal/palestine.htm> (last visited Sept. 23, 2006). For a discussion of the *Hanafi* school of Islamic jurisprudence, see Abdal-Haqq, *supra* note 21, at 46-47; Kourides, *supra* note 20, at 392-93.

⁷⁸ Scholars of Islamic jurisprudence use *fiqh* (inferences drawn by scholars) to derive *Shari'a* from the *Qur'an*, and other sources of Islamic law. Each school of Islamic jurisprudence employs different methodologies in their interpretation of *Shari'a*. Since legal scholars (and lawyers and judges interpreting the law) are humans, their determinations regarding the law are not recognized by Islamists who believe only in the divine word of the *Qur'an*. E.g. Fiqh, WIKIPEDIA, <http://en.wikipedia.org/wiki/Fiqh> (last visited Sept. 23, 2006); Sharia, *supra* note 19.

⁷⁹ Whereas the *Basic Law* was issued as a new Constitution for the Gaza Strip, the *Constitutional Order*, issued in 1962 by the Egyptian administration, was enacted to maintain a distinct Palestinian identity, and is additional proof of Egyptian reluctance to take a more active role in the administration of Gaza. It provided that all laws and court decisions were to be issued in the name of the Palestinian people. U.N. Rule of Law Development, *supra* note 13.

⁸⁰ Egypt closed the Straits of Tiran to Israeli shipping, and deployed troops in the Sinai near the Israeli border. E.g. Six-Day War, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Six-Day_War (last visited Sept. 23, 2006). Israel then attacked Egypt. A month later, the Israeli Prime Minister claimed Israel acted in "legitimate defense." E.g. John Quigley, *Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory*, 10 PACE INT'L L. REV. 1, 5 (1998).

⁸¹ By proclamation in June 1967, the Regional Commander of the Israel Defense Forces declared the continued validity of prior existing law in the area, insofar as it did not conflict with any other Israeli regulations. E.g. Bisharat, *supra* note 16, at 528; see also Dajani, *supra* note 44, at 79 (elaborating on the application of the *Proclamation on Law and Administration*).

⁸² U.N. Rule of Law Development, *supra* note 13.

A. Compliance with International Law⁸³

International Law pertaining to belligerent occupation, codified in the 1907 *Hague Convention IV* ("Convention Respecting the Laws and Customs of War on Land"), prohibits the confiscation of private property.⁸⁴ It also requires that the occupying state administer the occupied territory "in accordance with the rules of usufruct."⁸⁵ Article 43 of the Convention, amongst others, allows some latitude to confiscate occupied property as follows: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all 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."⁸⁶ Accordingly, Israeli courts adjudicating land disputes justified the expropriation of property in the Gaza Strip as "necessary for peace-keeping" (i.e. for military use in order to keep the peace).

Both the military tribunals introduced throughout Gaza and the Israeli Supreme Court supervised Israel's compliance with international law.⁸⁷ Adjudication by the expert sensibilities of the High Court, however, was often of no avail to the Palestinians since the Court lacked the power of judicial review.⁸⁸ Irrespective of the underlying legality of property laws, the judges were constrained to rule in the state's favor unless a petitioner

⁸³ Since the focus of this article relates to property laws rather than issues of human rights, the Fourth Geneva Convention "Relative to the Protection of Civilian Persons in Time of War" (1949), and other international laws related to the treatment of persons, will not be addressed. It is worth noting, however, that when the Israeli Supreme Court has considered these issues, it ruled as follows: "From a legal viewpoint the source for the authority and the power of the military commander in a territory subject to belligerent occupation is in the rules of public international law relating to belligerent occupation (*occupatio bellica*), and which constitute a part of the laws of war." HCJ 393/82 *Almashulia v. IDF Commander in Judea and Samaria* [4], at p. 793 (quoted in HCJ 7015/02 *Ajuri v. IDF Commander*, a case related to an order of assigned residence). Settlements, when discussed, are analyzed in terms of the legal implications of confiscating property in a permanent fashion in order to settle civilians.

⁸⁴ Hague Convention IV. Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm> [hereinafter Hague Convention IV].

⁸⁵ Hague Convention IV. art. 55, *supra* note 84.

⁸⁶ Hague Convention IV. art. 43, *supra* note 84.

⁸⁷ The Israeli Supreme Court extended its "personal jurisdiction over all military government personnel operating in their official capacities" to land disputes in the Occupied Territories. Bisharat, *supra* note 16, at 529.

⁸⁸ Israel adopted the British model of Parliamentary supremacy. Alexandre (Sandy) Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda*, in 5 CURRENT LEGAL ISSUES, LAW AND GEO. 401, 427 (Jane Holder & Carolyn Harrison eds., Oxford University Press 2003).

persuaded them that the legislation authorizing dispossession was not applicable to the petitioner's property.

The *Beit El-Toubas* and *Elon Moreh* cases illustrate the state's ability to influence the judiciary. Although both cases involve the requisitioning of Palestinian land for "military purposes," they were decided differently. The opinion of Israeli Supreme Court Justice Berinzon sheds some light on the inconsistency:

We understand and appreciate the human goal and wish of the District Court Judges . . . to recognize the rights of [Palestinian] respondents to their property as equal citizens . . . [However] as judges we are not free to refrain from rendering the correct interpretation of the law just because the result might seem to us unsatisfactory.⁸⁹

Essentially, the landholders in the *Elon Moreh* dispute succeeded where those of the *Beit El-Toubas* case failed—they convinced the judges that seizure of their property was beyond the scope of applicable military ordinances. Had the ordinances applied, both cases would have been decided against the property interests of Palestinians.

Numerous military orders were issued during Israeli occupation, declaring areas of occupied Palestinian territory "closed" for "military purposes."⁹⁰ One such order resulted in the expropriation of land in the villages of Beit El and Toubas.⁹¹ A dispute arose when the Israeli government authorized its citizens to build homes on the expropriated land, land originally allocated for the expansion of Israeli army posts. The Palestinian petitioners argued their property, which had been seized on the basis of "essential and urgent military needs," served no security purpose as an Israeli civilian settlement. The Israeli Supreme Court disagreed.

⁸⁹ Justice Berinzon, of the Israeli Supreme Court, in *The Custodian of Absentee Property v. Samara* (1956), *id.*, at 401.

⁹⁰ See e.g., Bisharat, *supra* note 16, at 534 (describing Article 125 of the *Defense (Emergency) Regulations* as a tool for land acquisition in the Occupied Territories); see also Dajani, *supra* note 44, at 81-85 (cataloguing the many military orders requisitioning occupied property for "security" purposes, such as those declaring lands "closed areas" like *Military Order No. 151* and *Military Order No. 34*, both named *Order Concerning Closed Areas*).

⁹¹ Although the villages of both Beit El and Toubas are located in the West Bank, the Court's decision was applicable to and binding on Palestinians in the Gaza Strip, and is therefore relevant to this article. See, e.g., Bisharat, *supra* note 16, at 535-537 (describing the *Beit El-Toubas* dispute and resolution); see also Dajani, *supra* note 44, at 68-69 (expanding upon the final rulings of the Supreme Court in the *Beit El-Toubas* case).

In holding that the 1907 Hague Convention had not been violated, the Court adopted the Israeli position that the settlers served a military purpose by deterring and supervising terrorist Palestinian operations.⁹² Although the Court usually deferred to the military authority,⁹³ as was the case in Beit El and Toubas, it refused to validate a similar seizure of land for military purposes in the case of the Elon Moreh settlement.

Like the *Beit El-Toubas* incident, the dispute in the *Elon Moreh* case stemmed from Israeli requisitioning of occupied Palestinian land for supposed military use.⁹⁴ Once again the land seized was converted into an Israeli civilian settlement. Unlike the settlers of Beit El and Toubas, however, the Gush Emunim settlers of Elon Moreh staked their claim to Palestinian property squarely in terms of their religious and political right to settle the land of the Jewish people. A complete lack of military justification for the settlement of civilians on the privately owned property of an occupied territory is a direct breach of the 1907 Hague Convention. Therefore, the Israeli Supreme Court rejected the defense.

Drawing on the findings of legal anthropologist John Comaroff, legal geographers Jeremy Forman and Alexandre (Sandy) Kedar suggest “the use of the colonizer’s legal system in order to challenge existing power structures” is a frequent occurrence amongst subjugated peoples.⁹⁵ The Palestinians’ attempts to reclaim their land through appeals to the Israeli High Court in the *Beit El-Toubas* and *Elon Moreh* cases are no exception. Unfortunately, counter-hegemonic challenges to “the use of law as

⁹² Article 52 of the 1907 Hague Conventions provides that “requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.” Hague Convention IV. art. 52, *supra* note 84. The Court was of the opinion that such a need was satisfied since “terrorist elements . . . [do not operate as easily] in an area where there are also persons likely to look out for them and to report any suspicious movement to the authorities.” Dajani, *supra* note 44, at 68.

⁹³ In Israel at that time, the Minister of Defense would back affidavits issued by military commanders stating requisitioned land was needed “for security.” The Supreme Court would then accept the statements in the affidavits at face value, in accordance with Court precedent of the 1950s forward. Questioning the veracity of the “security reasons” in light of the factual evidence was effectively foreclosed. Israel Shahak, *Israeli Land Seizure in the Occupied Territories*, J. OF THE MIDDLE EAST POLY COUNCIL, available at http://www.mepc.org/public_asp/journal_shahak/shahak40.asp.

⁹⁴ Since the Court’s decision in the *Elon Moreh* case was applicable to and binding on Palestinians in the Gaza Strip, the case is relevant to this article even though the dispute occurred in the West Bank. See, e.g., Howlett, *supra* note 68, at 141-142 (expanding upon the drawbacks of the *Elon Moreh* decision from the perspective of Palestinian landholders); see also Bisharat, *supra* note 16, at 537-538 (summarizing the *Elon Moreh* case); see also Dajani, *supra* note 44, at 75-76 (describing the *Elon Moreh* case’s legacy in terms of the Israeli Government’s subsequent tactic of declaring land as “state land”).

⁹⁵ Forman & Kedar, *supra* note 55, at 495-496.

domination and warfare (or "lawfare," as Comaroff terms it)⁹⁶ have been historically unsuccessful.

In the United States, for instance, the Native Americans' appeals to American courts have, like the appeals of the *Beit El-Toubas* petitioners, traditionally fallen on deaf ears. As explained by Chief Justice Marshall of the U.S. Supreme Court in the landmark case of *Johnson v. McIntosh*:

Conquest gives a title which the Courts of the Conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.⁹⁷

Even though the Israelis were theoretically mere "occupiers" of the Gaza Strip, they usurped Palestinians' property rights, exercising the force of a conqueror. The Israeli Supreme Court usually deferred to the government's decisions rather than questioning the validity of title vested by the military. Had the Gush Emunim settlers proffered even the most tenuous security purpose for the establishment of their settlement, such as the potential deterrence of alleged terrorist activities, they might not have fallen prey to the limits of their own hegemony.

The Palestinians' victory in the *Elon Moreh* case was short-lived. The military administration subsequently provided an alternate means of legitimately expropriating occupied territory for the Gush Emunim settlers: designating Palestinian property as "state land."⁹⁸

⁹⁶ *Id.* at 496.

⁹⁷ *Johnson v. McIntosh*, 21 U.S. 543, 588-589 (Mar. 10, 1823).

⁹⁸ The Israeli Supreme Court's decision in the *Elon Moreh* case was limited to the seizure of privately owned lands. Accordingly, the *Elon Moreh* Settlement was established on nearby "state land." *E.g.* Bisharat, *supra* note 16, at 541; Dajani, *supra* note 44, at 76. Many articles address the seizure of Palestinian land in the Occupied Territories in the context of laws enacted during different Israeli Administrations to further the government's policies at the time. In that context, Israeli military law (discussed in section (IV)(B) of this article) first proliferated with the rise of the Likud government to power in 1977. During prior administrations, the taking of land in occupied Palestine was usually limited to military requisitions for security purposes. The establishment of the *Elon Moreh* settlement on "state land" after an adverse Supreme Court ruling is attributed to the actions in concert of Shimon Peres (while still a Minister of Defense), Ezer Weizmann (Minister of Defense after Peres), Aharon Barak (then Attorney General, current President of the Supreme Court), and Ms. Pli'a Albek (of the Israeli Ministry of Justice). *See, e.g.*, Howlett, *supra* note 71, at 140-41 (describing the policies and legislation of the Likud party); Dajani, *supra* note 44, at 73-77 (describing the Allon Plan, the Dayan Plan, the Sharon Plan, the Drobless (Drobles) Plan, and the Seven Stars Plan); Shahak, *supra* note 93 (discussing the particulars of the *Elon Moreh* settlement).

B. *Israeli Military Law*⁹⁹

After occupying the Gaza Strip in 1967, the Israeli Military assumed legislative functions.¹⁰⁰ In addition to seizing land for military purposes, the Military took Palestinian property by legalizing the expropriation of “state land,” land requisitioned for public purposes, and abandoned property. The courts (military tribunals and the Israeli Supreme Court), already lacking the authority to review the legality of the orders, were further restricted by them when attempting to settle the disputes they generated.

Military Order No. 841, for instance, empowered the Area Commander to close the investigation of a land dispute, or to refrain from proceeding with the case entirely.¹⁰¹ Issued on June 27, 1967, the *Law and Administration Ordinance (Amendment No. 11)* affirmed Israeli sovereignty in the Gaza Strip, thereby authorizing Israeli rule and laying the groundwork for the military orders that followed.¹⁰²

1. PRE-OCCUPATION LAW: “PUBLIC LAND”

One of the first proclamations issued by the Military authorized the Israeli Government to seize “state property.”¹⁰³ Of the five categories of land

⁹⁹ Negotiations between Palestinians and the Israeli government effected changes in Israeli military legislation and administration. For example, *Military Order No. 947, Order Concerning the Establishment of a Civilian Administration* (issued two years after the 1979 Israel-Egypt Peace Treaty), divested the Area Commander of much of his powers, transferring administration of many Military Orders to a Palestinian Civilian Administration. The Civilian Administration later served as a model for the establishment of the Palestinian Authority during the negotiation of the Oslo Accords. A complete discussion of the different legislative stages of the Israeli military, and the entire body of military orders, is beyond the scope of this article. See, e.g., Dajani, *supra* note 44, at 65-121 (detailing the process of land acquisition and settlement building in the Gaza Strip from 1967 to 1993).

¹⁰⁰ U.N. Rule of Law Development, *supra* note 13.

¹⁰¹ *Military Order No. 841, Order Concerning Closure of Investigation Files*, issued on May 15, 1980, provides as follows: “It is permissible for the Area Commander or the legal advisor to close an investigation or to refrain from proceeding with a certain case if they think that there is no public interest served by the investigation or the trial.” Dajani, *supra* note 44, at 102 (quoting *Military Order No. 841*).

¹⁰² The *Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967*, provides as follows: “The law, jurisdiction and administration of the State shall extend to any area of the Eretz Israel designated by the Government by order.” Other government orders specified which lands were included in Eretz Israel, such as the Gaza Strip. Like the many laws that followed, the Ordinance was an amendment to a prior law enacted after the declaration of an Israeli State (the *Law and Administration Ordinance of 1948*). Dajani, *supra* note 44, at 70.

¹⁰³ See Dajani, *supra* note 44, at 79-80 (discussing the *Proclamation on Law and Administration No. 1 and No. 2*).

enumerated in the Ottoman Land Code, none specifically equates to “state land.” That category was introduced by Great Britain’s 1922 *Palestine Order in Council*, which referred to “state land” as “public land,” and defined public property as: “all lands in Palestine which are subject to the control of the government . . . and all lands which are or shall be acquired for the public service or otherwise.”¹⁰⁴ The latter part of the definition became the basis for military orders sanctioning the expropriation of land for public purposes.¹⁰⁵

In keeping with the 1907 Hague Conventions, the Israeli government ostensibly enforced pre-occupation law, which was primarily the law of the British Mandate. Israeli and British enforcement of the law had some major differences. Neither the British nor the Ottomans intended to extinguish *tassaruf* rights in *miri*, and “state land” did not necessarily encompass all *matruka* and *mewat* lands.¹⁰⁶ The Israeli government’s land survey team sidestepped customary titles to property, and the military concomitantly declared unregistered *miri*, *mewat*, and *matruka* properties alike “state land.” “Declarations of state land” were presumptively valid,¹⁰⁷ and were issued by the “Custodian of Public (Government) Property,” which amounts to a second significant divergence from pre-occupation law.

Military Order No. 59, Military Order Concerning State Property, gives the Custodian of Public Property control of all “state property.”¹⁰⁸ The Order further removes the Custodian’s declarations from judicial review by exempting “good faith” transactions from cancellation, “even if it is proven that the property in question was not state property at the time when the transaction was made.”¹⁰⁹ Ultimately, manipulation of pre-occupation law divested landholders in Gaza of their property rights as effectively as the new laws enacted for the same purpose.

¹⁰⁴ The Palestine Order in Council, Part I., Aug. 10, 1922, United Nations Information System on the Question of Palestine, available at <http://domino.un.org/UNISPAL.NSF/0/c7aae196f41aa055052565f50054e656?OpenDocument>.

¹⁰⁵ A number of military orders applicable to the Gaza Strip were issued in the spirit of *Military Order No. 108, Order Concerning Amendment to Law of Land Expropriation (For Public Purposes)*, amending Jordanian laws of the West Bank that permitted the confiscation of property for public purposes. See generally Dajani, *supra* note 44, at 80-105.

¹⁰⁶ E.g., Bisharat, *supra* note 16, at 539; Howlett, *supra* note, 71 at 139-40.

¹⁰⁷ Bisharat, *supra* note 16, at 540.

¹⁰⁸ Dajani, *supra* note 44, at 89.

¹⁰⁹ See *id.* (quoting *Military Order No. 59*).

2. POST-OCCUPATION LAW: "ABSENTEE PROPERTY"

Enacted on July 23, 1967, *Military Order No. 58, Order Concerning Absentee Property (Private Property)*, was the foremost piece of new legislation authorizing the seizure of Palestinian property. Property owned or controlled by a resident of a "hostile" country, and "property whose legal owner, or whoever is granted the power to control it by law, left the area prior to 7 June 1967 or subsequently," was declared "abandoned" or "absentee" property.¹¹⁰ Included in the definition of "property" were "immovable" and "movable" properties, such as "stone quarries" and "business assets."¹¹¹

Much like the *Military Order Concerning State Property, Military Order No. 58* transferred the rights previously vested in the property's owner to a Custodian for safekeeping. Similar to the Custodian of Public Property, the "Custodian of Absentee Property" benefited from a "good faith" proviso in the Order, which validated transactions in land "even if it is subsequently proved that the property was not at that time Absentee Property."¹¹² Their functions, however, differed slightly since the Custodian of Absentee Property was primarily supposed to preserve property for its return to owners who credibly establish their property rights. Transferring the absentee property to the Development Authority, which was authorized to dispose of it, diminished the effects of the Custodian's limitations. Eventually, a single "Custodian of Government and Abandoned Property in Judea and Samaria" assumed the functions of both its predecessors (i.e. the Custodian of Public (Government) Property and the Custodian of Absentee Property), facilitating the declaration of "abandoned land" as "state land."¹¹³

While *Military Order No. 58* was novel in the sense that the Palestinians in Gaza had yet to lose land on the grounds that it was abandoned, it was not the first time abandoned property was confiscated in Gaza. *Order No. 25, Providing Regulations for the Administration of Jews' Property in the Areas Subject to the Control of the Egyptian Forces in Palestine*, granted an Egyptian Director General the right to manage Jewish property deserted in Gaza during the

¹¹⁰ See Dajani, *supra* note 44 (quoting *Military Order No. 58*), at 85; see also Bisharat, *supra* note 16, at 534-35 (describing the application of *Military Order No. 58*); see also Howlett, *supra* note 71 at 145-46 (describing the application of *Military Order No. 58*). For purposes of this section, discussion of the Absentee Property Law relates to the original Order (*Military Order No. 58, Order Concerning Absentee Property (Private Property) July 23 1967*) and its later amendments.

¹¹¹ See Dajani, *supra* note 44, at 85.

¹¹² *Id.*

¹¹³ Dajani, *supra* note 44, at 85.

1948 conflict.¹¹⁴ Despite the difference in rationales advanced for the enactment of the Israeli and Egyptian orders,¹¹⁵ they comparably resulted in the expropriation of property for public use or private leasing.

Jewish landholders demanding restitution of property seized pursuant to Egyptian *Order No. 25* presented the 1967 Israeli occupiers with a dilemma. The government could either maintain the pre-occupation practice of withholding expropriated Jewish property, or reverse course by returning the holdings of its citizens to their pre-1948 owners.

In an ironic turn of events, the Israeli military enacted *Military Order No. 78, Order Concerning Jews' Property (The Gaza Strip and North Sinai)*, which essentially validated an absentee property law adverse to Israeli citizens.¹¹⁶ *Military Order No. 78* transferred management of property formerly administered by the Egyptian Director General to a "Commissioner of Jews' Property." The Commissioner refused to re-vest title to the lands at his disposal in their original Jewish owners.¹¹⁷ Instead, he administered the property as usufructuary in compliance with the 1907 Hague Conventions.

C. Israeli Land Acquisitions

In order to circumvent the legal limits on the seizure of Palestinian property, the Israeli military frequently deprived Palestinians of their right to an appeal. Timely notification of intended property confiscations was crucial to the appeals process. The Israeli military nevertheless issued closure (of property) orders in the haphazard form of unnumbered and otherwise unorganized papers, or by charging unreliable Arab village elders (*mukhtars*) with the task of notifying the landholder personally.¹¹⁸

¹¹⁴ Issued in June 1948, *Order No. 25* was amended in 1956 to include the property of Arabs living in Israel. For the most part, however, Palestinians were fleeing to Gaza after the 1948 hostilities, not abandoning their property for Israeli land. Consequently, the original thrust of the Order (i.e. the confiscation of Jewish property) was largely intact throughout the period of Egyptian administration. See Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 304-5 (1995) (discussing the provisions of *Order No. 25*).

¹¹⁵ Whereas the Israeli military order was based on a rationale of absenteeism, the Egyptian order's sphere of application and substantive provisions suggest it was based on an enemy rationale. The fate of enemy property is "determined only pursuant to the making of a peace treaty." *Id.* at 304-5, 308.

¹¹⁶ See *id.* at 314-17 (describing *Military Order No. 78* and its application).

¹¹⁷ Although Article 9(a) of *Military Order No. 78* authorizes the Commissioner to transfer the property, or its proceeds, to its original owners, or to their successors "in his absolute discretion, in the time and manner he sees fit," that power has never been exercised. *Id.* at 314.

¹¹⁸ *Military Order No. 161, Order Concerning Interpretations (Additional Instructions 2)*, issued on November 5, 1967, authorizes, along with its supplements, any of the following types of notice: radio announcements, publication in the Area Commander's office, or communication via *mukhtars*. See Dajani, *supra* note 44, at 93 (quoting *Military Order No. 161* and explaining the disorderly enactment and

Consequently, Palestinians were rarely informed of the expropriation of their lands before the opportunity to file an appeal had lapsed.

Appeals were usually futile in any case since the laws, and the courts charged with enforcing them, operated in the military government's favor. By the early 1990's, the Israeli military government had acquired over thirty percent of the Gaza Strip's land area.¹¹⁹ Palestinians lost additional land to sales between Arab landholders and private Israeli land development companies and individuals.¹²⁰

Despite the apparent lack of restraint on the Israeli occupation of Gaza, the military government operated, to a certain extent, within the sphere of international laws and policies.¹²¹ It could not contravene the prohibitions of the 1907 Hague Convention after the *Elon Moreh* decision. The enforcement of pre-occupation law, albeit deliberately misconstrued, was actually in accord with the mandates of international law.¹²² The Israeli Supreme Court's most important holding in both the *Beit El-Toubas* and the *Elon Moreh* cases essentially validated the provisions of the 1907 Hague Convention. It declared Israeli control of land in the Occupied Territories temporary.¹²³

V. 2005: PALESTINIAN AUTHORITY

In August 2005, the Israeli government finally complied with the constraints of belligerent occupation. Israeli forces withdrew from the Gaza Strip. The PNA, charged with rebuilding the Palestinian nation, now has the opportunity to intervene in the historical dispossession of Palestinian property.

enforcement of military orders in the Occupied Territories); see also Howlett, *supra* note 71, at 143-44 (describing the ineffectiveness of relaying notice through a *mukhtar*).

¹¹⁹ Bisharat, *supra* note 16, at 526.

¹²⁰ *Id.* at 542-44.

¹²¹ In *Regional Council of Gaza Beach v. Knesset*, the Israeli Supreme Court affirmed the application of the customary international law of belligerent occupation to the Occupied Territories. See *Disengagement from Gaza - Legal Issues*, Chatham House, <http://www.chathamhouse.org.uk/pdf/research/il/ILP200605.pdf#search=%22disengagement%20from%20Gaza%20legal%20issues%22> (last visited on September 27, 2006) (quoting the Court's holding in the case, cited as HCJ 1661/05). *But see* Dajani, *supra* note 44, at 107 (arguing there was a *de facto* application of Israeli law in, and a *de facto* annexation of, the Occupied Territories).

¹²² See Hague Convention IV, art. 43, *supra* note 84 (requiring the occupying State to exercise its authority "while respecting, unless absolutely prevented, the laws in force in the country").

¹²³ See, e.g., Bisharat, *supra* note 16, at 535-36 (explaining the holdings of the Israeli Supreme Court in both cases); see also Hague Convention IV, art. 55, *supra* note 84 (indicating the temporary nature of the occupying State's authority by limiting its powers to the administration and safeguarding of occupied properties "in accordance with the rules of usufruct").

A. Current State of Affairs

In addition to the numerous United Nations Resolutions recognizing “the right to self-determination without external interference” and “the right to national independence and sovereignty” of the Palestinian people,¹²⁴ more than ninety countries recognized the “State of Palestine” after its proclamation by the Palestinian National Council in 1988.¹²⁵ International recognition of the Palestinian’s right of return is due to the “inadmissibility of the acquisition of territory by war.”¹²⁶ Although the Israeli “Disengagement Law” calls for Israel’s withdrawal from the Gaza Strip in the interest of State security rather than international acceptability, it nevertheless provided for Israel’s compliance with the demands of its world neighbors.

The law mandates the removal of 8,500 Israeli settlers from 21 Gaza settlements.¹²⁷ Upon completion of withdrawal, the disengagement plan specifies that “there shall no longer be any permanent presence of Israeli security forces in the areas of Gaza Strip territory which have been evacuated.”¹²⁸ However, the plan also includes the following provisions:¹²⁹

¹²⁴ United Nations General Assembly Resolution 3236 “reiterates the customary law of the right of return” specifically in terms of the quoted excerpts. G.A. Res. 3236 (XXIX), U.N. Doc. A/RES/3236 (Nov. 22, 1974). United Nations Security Council Resolutions 242, 338, and 1397 affirm the same. U.N. Question of Palestine, *supra* note 2, at 121.

¹²⁵ For a list of the 94 countries who recognized the State of Palestine after its proclamation by the Palestinian National Council meeting in Algiers in November 1988, see Government: International Recognition of the State of Palestine, http://www.pna.gov.ps/Government/gov/recognition_of_the_State_of_Palestine.asp (last visited Nov. 1, 2005) (on file with author).

¹²⁶ Lord Caradon, the principal author of United Nations Resolution 242, the primary resolution demanding Israeli withdrawal from the Occupied Territories, explained the Resolution’s “overriding principle” as quoted. U.N. Question of Palestine, *supra* note 2, at 122.

¹²⁷ The “Disengagement Law” provided for the removal of 600 settlers from four West Bank settlements in addition to withdrawal from the Gaza Strip. Both the Israeli Parliament (the Knesset) and the Israeli Supreme Court approved the law. *E.g. Israeli Court Backs Pullout Plan*, BBC NEWS, June 9, 2005, available at http://news.bbc.co.uk/go/pr/ft/-/1/hi/world/middle_east/4075736.stm; but cf. Margaret Coker, *Israeli High Court Clears Legal Hurdle for Gaza Pullout*, COX NEWS SERVICE, THE OXFORD PRESS, June 10, 2005, available at http://www.oxfordpress.com/news/content/shared/news/world/stories/06/10_ISRAEL_RULING.html (stating the number of settlers to be removed from Gaza is 8,500).

¹²⁸ See Disengagement from Gaza – Legal Issues, *supra* note 121 (quoting the provisions of the disengagement plan from the Israeli Cabinet Resolution of June 6, 2004).

¹²⁹ The border area with Egypt is an additional issue the Palestinian Authority claims negates actual cessation of occupation. The disengagement plan originally provided for Israeli military control of the “Philadelphia Route” between Egypt and Gaza. See Disengagement from Gaza – Legal Issues, *supra* note 121 (quoting the provisions of the disengagement plan from the Israeli Cabinet Resolution of June 6, 2004); see also *The Gaza ‘Disengagement’ is not an end to Occupation: Occupation of the Gaza Strip will continue in both its legal and physical form*, Palestinian Centre for Human Rights, PCHR Disengagement Fact Sheet

1. The State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.¹³⁰

2. The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.¹³¹

3. The State of Israel reserves its fundamental right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.¹³²

The PNA President, Dr. Mahmoud Abbas, criticized the seemingly victorious coup for the Palestinians. He believes “the legal status of the areas slated for evacuation has not changed.”¹³³ Amongst other things, the construction of buffer zones,¹³⁴ and control of the air, sea, and land borders, has led both Palestinians and some members of the Israeli government to deny the claim that Israeli occupation of the Gaza Strip has ended.¹³⁵ An American Ambassador frowned on the unilateral disengagement, saying the Gaza Strip “today was the largest fresh air prison.”¹³⁶

No. 1, <http://www.pchrgaza.org/files/campaigns/english/gaza/Fact%20Sheet%201%20-%20Not%20an%20End%20to%20Occupation.pdf> (last visited September 27, 2006); see also MINISTRY OF HOUSING, PALESTINIAN NAT'L AUTHORITY, MEDIUM TERM DEV. PLAN 247-248 (2005) [MTDP] (describing the disengagement plan and the official Palestinian position), available at http://www.mop.gov.ps/en/docs_archive/mop%5CMEDIUM%20TERM%20DEVELOPMENT%20PLAN%202005-2007.asp. In October, an agreement was reached to transfer control of the Rafiach crossing between Egypt and Gaza to the Egyptian and Palestinian authorities as long as European Union monitors continue to inspect the crossing, and report to Israel. *Israel Allows EU Presence on Gaza-Egypt Border*, IsraelNationalNews.com, Oct. 31, 2005, available at <http://www.israelnn.com/print.php3?what=news&id=92100>.

¹³⁰ See Disengagement from Gaza – Legal Issues, *supra* note 121 (quoting the provisions of the disengagement plan from the June 6, 2004 Israeli Cabinet Resolution).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Dore Gold, *Legal Acrobatics: The Palestinian Claim That Gaza is Still “Occupied” Even After Israel Withdraws*, Jerusalem Center for Public Affairs, 5 Jerusalem Issue Brief no. 3, Aug. 26, 2005, available at <http://www.jcpa.org/brief/brief005-3.htm> (quoting the President’s statement as published on the Palestinian Authority’s Ministry of Foreign Affairs website).

¹³⁴ *Israel to Build Security Buffer Zone in Gaza Strip*, CRIONline, Oct. 30, 2005, <http://en.chinabroadcast.cn/2239/2005-10-30/64@279265.htm>.

¹³⁵ See *The Gaza ‘Disengagement’ is not an end to Occupation*, *supra* note 129 (citing and quoting members of the Israeli government who say occupation will not end).

¹³⁶ *United Nations Latin American and Caribbean Meeting on Question of Palestine*, VHeadline.com, Dec. 15, 2005, <http://www.vheadline.com/readnews.asp?id=47434> (quoting Edward L. Peck). Other than the obvious implications of continued occupation, Palestinians also suffered by losing their jobs without compensation during the disengagement. The Israeli government promised Israeli settlers in Gaza between \$150,000 and \$400,000 for leaving their homes during disengagement, including

In spite of the debate over actual disengagement, the PNA is taking action to rebuild the Gaza Strip. From 1996 to 1998, the Ministry of Planning and International Cooperation outlined the guidelines for future land-use in a *Regional Plan for the Gaza Governorates* (“RPGG”), which operates in conjunction with the PNA’s 2005 *Medium Term Development Plan* (“MTDP”).¹³⁷ The PNA divided Gaza’s 360 km² of land into the following five governorates: Gaza, Khan Yunis, Rafah, Deir al-Balah, and North Gaza.¹³⁸ Gaza and Khan Yunis are to become the Gaza Strip’s two major cities. In the fourteen urban centers envisaged throughout Gaza as hubs of industrial activities, private and public services, and administration, construction has already begun.¹³⁹ Even so, the many people laying claim to the limited land available continue to obstruct the implementation of the RPGG.

Approximately 1.3 to 1.4 million people are currently living in Gaza’s governorates, making the Strip one of the most densely populated places on earth.¹⁴⁰ Most Palestinians did not desert their lands during the 1967 confrontation between Israel and its Arab neighbors as they had during the creation of the Israeli State.¹⁴¹ Many of the nearly four hundred thousand Palestinians living in Gaza after the Egyptian defeat were, in fact, refugees expelled from Palestine in 1948.¹⁴² By the time Israeli troops left Gaza in 2005, refugees comprised nearly eighty percent of the population.¹⁴³ To settle the refugees’ land claims, and those of Gaza’s native population, the PNA established land tribunals.

In spite of these major changes, some Palestinians feel that “this is a new colonialism” because “they [the Palestinian government] are stealing our

compensation for Israeli’s who were working in the Gaza Strip. The 3,200 Palestinians who were working for the Israelis who left, taking their jobs with them, were given nothing. Amira Hass, *Jewish Settlers Receive Hundreds of Thousands in Compensation for Leaving Gaza while Palestinians Working for Them Get Nothing*, DEMOCRACYNOW.ORG, Aug. 16, 2005, <http://www.democracynow.org/article.pl?sid=05/08/16/1326221>.

¹³⁷ MTDP, *supra* note 129, at 250. The MTDP was presented by the Palestinian Authority as a framework for the development process.

¹³⁸ *Id.* at 251.

¹³⁹ *Id.* at 252.

¹⁴⁰ *Id.* at 251; Gaza Strip, WIKIPEDIA, http://en.wikipedia.org/wiki/Gaza_strip (last visited September 27, 2006).

¹⁴¹ Whereas the majority of Palestinians left Palestine in 1948, less than half abandoned their property in 1967. *E.g.* Howlett, *supra* note 71, at 131; Bisharat, *supra* note 16, at 524.

¹⁴² Nearly 250,000 refugees fled to the Gaza Strip in 1948, almost tripling the population at the time. The 1967 population estimate is based on a September 1967 census. Dajani, *supra* note 44, at 71.

¹⁴³ *Id.*

land.”¹⁴⁴ The accusation stems from the fact that the Palestinian Land Authority only recognizes property rights recorded in the land registry. As a result, the Palestinians’ customary rights, traditionally identified on the basis of oral or written testimony by co-villagers, or by tax payments, are once again being compromised. Additionally, registered property, which only accounts for between four and nine percent of the land in Gaza,¹⁴⁵ can be confiscated if necessary to further the RPPG.

Two former Israeli colonies, Gush Katif and Morag, illustrate the differing fates of land under the PNA. The sand-dune areas in the south, where Gush Katif is located, contain valuable aquifers and landscapes. The RPPG provides that these areas will be integrated into Palestine under environmental protection against urban development. Morag, on the other hand, is located on the main road between Khan Yunis and Rafah. It is earmarked for use as a housing development or a research facility.

Morag’s history illustrates one man’s serial dispossession. Mohammed Duhair purchased land in Morag from the Egyptians in 1961. Nine years later, the Israeli government declared Morag a closed military zone, displacing the Duhairs, a clan with about 2,000 members. Having lost his land to the Israelis in 1970, Mohammed Duhair is losing it again in 2005 to the Palestinians. His property will be appropriated despite his land deed from the Egyptian administration.

Freih Abu Meddein, director of the Palestinian Land Authority, defended the appropriation’s incongruence with the MTDP, which states that “private land will be returned to the original owners, while public land will come under the jurisdiction of the Palestinian Land Authority.” He said, “[The Palestinian Land Authority] will only give back the land if it doesn’t serve a public use, like streets, schools, or any assets left behind by the Israelis.” In short, whether registered or not, property rights are as they have always been: subordinate to the state’s interest.

According to the Palestinian Foreign Minister Nasser al-Kidwa, “unless a range of problems in the Gaza Strip is resolved, it will turn into a huge prison camp.”¹⁴⁶ The Palestinian Land Authority headquarters in Gaza, which preserves documents related to Palestinian land ownership, has been

¹⁴⁴ Johnston, *supra* note 12 (quoting Matar Jumaa Duheir, a Palestinian unsuccessfully petitioning for the return of his land on property allocated for a housing project).

¹⁴⁵ El Deeb, *supra* note 12 (quoting an estimate by Palestinian officials).

¹⁴⁶ *Gaza May Turn Into Prison Camp – Palestinian Leader*, REUTERS, Oct. 31, 2005, available at <http://www.alertnet.org/thenews/newsdesk/SEO322706.htm>. With respect to violence specifically fueled by land disputes, a Palestinian land official echoed his concerns, saying “there are a lot of confrontations on the evacuated lands . . . they [the squatters] are there . . . every day we are in contact with the police and national security.” Johnston, *supra* note 12.

under attack since 2004.¹⁴⁷ In 2005, gunmen stormed the building, demanding settlement land as compensation for helping force Israeli withdrawal.¹⁴⁸ A senior land registrar met their demands with one of his own. A sign outside his office said, "Any claims to Government land should be settled with the head of the authority."¹⁴⁹

Of the people attempting to settle, most fail to reclaim their land. Undaunted, they vow to keep fighting for it, saying, "We came out from Jews' [occupation] unscathed . . . Now we won't let the Arabs take it."¹⁵⁰ Unsuccessful claimants usually resort to squatting on land, pitching tents in a strategy reminiscent of the tactics employed by the people of Barrat Qisarya during the British Mandate.¹⁵¹ Unfortunately, like the past residents of Barrat Qisarya, present day Palestinians will lose the lawfare by fighting with old evidence of de facto property rights.

B. *The Revival of Islam in Palestinian Law*

It is clear from the laws drafted by the Palestinian Legislative Council that the State embraces Islam. The *Basic Law* enacted in 2002 specifies that "Islam is the official religion in Palestine," and "the principles of Islamic *Shari'a* shall be the main source of legislation."¹⁵² What remains to be seen is the extent of moderation in the *Shari'a* actually enforced.

1. ISLAMIST FUNDAMENTALISM

The traditional Islamic precept of Arab unity, keeping Muslim lands whole, is both in line and at odds with Palestinian laws. Establishing a great Islamic State is Hamas' main goal and the duty of the Palestinian people per the first article of their *Basic Law*.¹⁵³ "To sum up," explains Mahmoud A-

¹⁴⁷ PCHR Calls Upon the Palestinian Authority to Investigate Attack Against Land Authority Headquarters, Press Release No. 37/2004, Palestinian Centre For Human Rights, Mar. 2, 2004, available at <http://www.pchrgaza.org/files/PressR/English/2004/31-2004.htm>.

¹⁴⁸ El Deeb, *supra* note 12.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ After the Israeli Supreme Court decision, and prior to the final settlement with the PJCA, residents of Barrat Qisarya fortified their presence during the 1930's by cultivating, digging, and building wells. Forman & Kedar, *supra* note 55, at 531.

¹⁵² BASIC LAW art. 4 (Palestine) available at <http://jurist.law.pitt.edu/world/palestbasic.htm>.

¹⁵³ *Id.* art. 1 ("Arab Unity is an objective which the Palestinian People shall work to achieve"); Mahmoud A-Zahhar said the main goal of Hamas is "to establish a great Islamic state, be it pan-Arabic or pan-Islamic." Yaniv Berman, *Exclusive Interview with Hamas Leader*, THE MEDIA LINE, Sept. 22, 2005, http://www.themedialine.org/news/print_news_detail.asp?NewsID=11354 (from the transcript of an

Zahhar, the leader of Hamas in the Gaza Strip, "the Islamic and traditional views reject the notion of establishing an independent Palestinian State."¹⁵⁴ The draft Constitution, however, recognizes the sovereignty of Palestine as an independent state in addition to the "Arab Palestinian" nature of its people.¹⁵⁵ The draft Constitution also calls for a free market economic order in Palestine,¹⁵⁶ and protects private property.¹⁵⁷

While the draft Constitution suggests the government is broadly construing *Shari'a*, the State imposes restrictions which validate the general view of Arab constitutional documents as "insincere promises of rights, freedoms, and democratic processes."¹⁵⁸ For example, the MTDP aims to reconnect the Palestinian economy to the Arab world by, inter alia, constraining economic arrangements with Israel.¹⁵⁹ In addition, the draft Constitution stipulates that "the law shall regulate the conditions of transfer of ownership of real estate to foreigners."¹⁶⁰ The regulations are usually applied strictly to prohibit the sale of land to Jews. In fact, Freih Abu Middein said "[the sale of Palestinian land to Jews] is a very dangerous act" when he served as a Palestinian Justice Minister, adding that "there has been a decision to ban it by putting anyone who sells even a centimeter on swift trial and to seek the death penalty against them."¹⁶¹ Considering the history of Jewish encroachment on Palestinian lands, and the Palestinian pledge to maintain the unity of Palestinian property, the regulations are somewhat justified. Still, threatening deadly force and restricting economic transactions should not be the first actions of a state supposedly committed to a free market economy.

The draft Constitution's purported protection of private property is also dubious. Like the principles related to safeguarding *al-mal* in Islam, the government recognizes the necessity of wealth, and pledges to provide for

interview with Mahmoud A-Zahhar posted by The Media Line).

¹⁵⁴ Berman, *supra* note 153 (quoting Mahmoud A-Zahhar).

¹⁵⁵ Whereas the draft Constitution repeatedly refers to a "Palestinian Arab people," and specifically says that "the Palestinian people are a part of the Arab and Islamic nations," it also stipulates as follows: "Palestine is an independent state with complete sovereignty that cannot be conceded." PALESTINE CONSTITUTION art. 4-5 available at <http://www.pcpsr.org/domestic/2001/conste1.html>.

¹⁵⁶ PALESTINE CONSTITUTION art. 21, *supra* note 155.

¹⁵⁷ PALESTINE CONSTITUTION art. 49, *supra* note 155.

¹⁵⁸ Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 FLA. J. INT'L L. 897, 919 (2004).

¹⁵⁹ MTDP, *supra* note 129, at 215.

¹⁶⁰ PALESTINE CONSTITUTION art. 50, *supra* note 155.

¹⁶¹ *Statements by Senior Palestinian Authority Officials Concerning Sale of Land to Jews*, Israel Government Press Office, May 21 1997, available at <http://www.likud.nl/viol01.html> (quoting Freih Abu Middein during an interview with Agence France Presse on May 5, 1997).

the realization of “economic growth and social justice” amongst its people.¹⁶² Having identified agriculture as the primary sector for economic development in Palestine,¹⁶³ the MTDP proposes to “protect” it by reclaiming and regulating cultivable lands.¹⁶⁴ Most cultivable lands, however, have been appropriated by the State. Even supposedly private property is being appropriated by the State. Without property, the people can not achieve economic prosperity, and will forever be subordinate to the State. Moreover, indefinite property rights constrict even the State’s economic development. While vesting title to all property in the government may have been in accordance with Islam as interpreted by the Ottomans, it is unlikely such an interpretation holds true today.

2. ISLAMIC MODERATION

Social empowerment is a critical difference between strict interpretations of *Shari’a* and more moderate views.¹⁶⁵ Islamic states adopting the notion that God alone, not His people, nor their will, reigns sovereign leave little leeway for an individual to exercise control over property in a Muslim state. Authority for adopting collective decisions, however, can be found in the *Qur’an*¹⁶⁶ and the *hadiths*.¹⁶⁷ Islam, therefore, does not necessarily prohibit vesting Muslim property in the hands of individual Muslims if such is their consensus (*ijma’*). Difficulties emerge when the notion of an Islamic nation subsumes individualism at the personal and the state levels.

Mahmoud A-Zahhar erroneously equates the successful establishment of a European Union with the potential for creating a Great Islamic State.¹⁶⁸ At the state level, the difficulty inherent in reconciling the differences amongst the many Muslim states is not in dispute. After all, if Egypt,

¹⁶² PALESTINE CONSTITUTION art. 51, *supra* note 155 (“The state shall protect the private economic activity of individuals in order to realize economic growth and social justice”).

¹⁶³ MTDP, *supra* note 129, at 204.

¹⁶⁴ *Id.* at 227.

¹⁶⁵ “No adequate machinery . . . is provided by the legal theory to protect the individual against the [Islamic] State . . . The problem, therefore, which today confronts those Muslim countries whose aim is the establishment of a system of guaranteed individual liberties is no small one. For the possibility of such a system is denied by the fundamental doctrines of the *Shari’a* itself.” Coulson, *supra* note 27, at 59-60.

¹⁶⁶ The *Qur’an* 42:38 states, “Whose affairs are a matter of consultation.” See *The Muslim World and Democracy*, Islam Online, July 5, 2004, available at http://www.islamonline.com/cgi-bin/new_services/spot_full_story.asp?service_id=781 (affirming the notion that decisions in Islam come through consensus, *ijma*).

¹⁶⁷ The Prophet Muhammad said, “My people will not agree on a mistake.” See *id.*

¹⁶⁸ See Berman, *supra* note 153 (referencing Mahmoud A-Zahhar’s comments regarding the “European example”).

Jordan, and Palestine were so similar, the pretext that absorbing Palestinian refugees would harm their case for the return to Palestine would likely have been abandoned. A-Zahhar believes that since European countries were able to live with their differences in a harmonious Union, so too can Arab countries. With such divergence between moderate and fundamental interpretations of Islam, however, they cannot. As explained by Ashirbek Muminov, a researcher on Islam at the Kazakh Oriental Studies Institute, “[i]n each place Islam has lots of local peculiarities and to gather all that in one place is very difficult.”¹⁶⁹

At the very least, all European countries can agree on their individual sovereignty and the individual rights of their people. The European Union, therefore, operates pursuant to laws adopted by agreement amongst the member states. Islamic countries, however, have yet to agree on a framework to interpret Islam (whether by popular consensus, or solely by reference to the divine word).¹⁷⁰ As a result, at the personal level, the rights of Europeans are protected by their laws whereas in some Arab countries the existence of individual rights remains questionable.

As for the Palestinians, their government has taken some action in accordance with moderate interpretations of *Shari'a*. The democratic election of Palestinian presidents is in accord with the democratic system that both the *Basic Law* and the draft Constitution claim rules the Palestinians.¹⁷¹ With respect to property, some of the restrictions imposed on its use, such as prohibiting its monopolization,¹⁷² are born of Islamic values which do not necessarily harm private property interests. Moreover, the PNA recognizes the importance of conclusive property rights to private investors, and is collaborating with international organizations to institute legal reform to that effect.¹⁷³

For example, Financial Markets International, Inc. (“FMI”) is working with Palestinian lawyers, bankers, the construction industry, and the Palestinian Land Authority to clear title to lands held by irrevocable power

¹⁶⁹ *Id.*

¹⁷⁰ “In early December, [Jordan’s King] Abdullah told the 56-member Organization of the Islamic Conference that failure to establish a clear framework to interpret Islam leaves the door open for radicals to strengthen their ranks.” See Brian Murphy, *Militants, Moderates Battle for Words*, MIAMI HERALD, Dec. 30, 2005, at 28A.

¹⁷¹ BASIC LAW art. 5, *supra* note 153; PALESTINE CONSTITUTION art. 5, art.10-11, *supra* note 155.

¹⁷² PALESTINE CONSTITUTION art. 20, *supra* note 155 (“Natural resources in Palestine are the property of the Palestinian people. They shall exercise their sovereignty over them and do not permit their monopolization”).

¹⁷³ MTDP, *supra* note 129, at 219-220 (describing the legal reform program of the Palestinian Authority and the World Bank).

of attorney ("IPA"). IPAs are like executory contracts to convey land.¹⁷⁴ Since they pertain to future land transactions, the property's owner does not technically change until the future conveyance. Therefore, IPAs were unregistered. Based on race statutes from American property law,¹⁷⁵ FMI's solution aims to develop the Palestinian mortgage finance industry by settling titles conveyed via IPA. Still, settling title to property is futile if the State continues to reclaim it.

C. *Building on Shari'a's Past*

[T]he failure to protect a set of interests as exclusive property rights leaves the people who assert those interests vulnerable to others. Both the creation and the failure to create a property right leaves people to harm, either at the hands of the state or at the hands of other persons. A central question, therefore, is how our legal system goes about defining and allocating property rights.¹⁷⁶

As noted by Professor Joseph Singer, the loss of Palestinian property is in some ways due to the failure of Palestinian laws to protect it. Of course, the incompatibility of *Shari'a* with the Western jurisprudential concepts introduced by foreign administrations resulted in the loss of some property rights. Also, conquest, and the failure of international law to protect against it, contributed to the Palestinians' demise. *Shari'a* nevertheless withstood each conquest, yet failed to protect the property rights of Palestinians. It must, therefore, have some shortcomings of its own.

1. WHAT IS "WESTERN"?

Whether referring to Western norms of secular governance, democratic governance, or both, Islamic rule is not so fundamentally different. For example, the United States is a secular democratic state and Israel is a Jewish democratic state, yet true separation of church and state does not necessarily exist in either nation. After all, religious beliefs prompted many of the first Western settlers in America to colonize the United States. Still today,

¹⁷⁴ See generally Howard DeNike & Khalil Ansara, *Mortgage Finance, Tenacious Inquiry, and Hernando de Soto*, Financial Markets International, Inc. Newsletter, Spring 2003, available at http://www.fmi-inc.net/dmt_spring_2003body.htm.

¹⁷⁵ As per the suggestion of Financial Markets International, Inc., the following system was developed: "[e]very holder of an IPA will be required to file a copy in a central registry maintained in the local *Tabu*. In the event of disputes, the claimant who filed first will win." *Id.*

¹⁷⁶ Kedar, *supra* note 6, at 998 (quoting Joseph Singer).

George W. Bush's politically correct "happy holiday" cards were purchased with American currency marked "In God We Trust."

Whether a true democracy exists is also unclear. George W. Bush is not the first American President to have lost the popular vote. As for Israel, even Mahmoud A-Zahhar seized on the fact that supposedly democratic countries do not necessarily follow the democratic way. When asked whether or not Hamas will recognize the State of Israel since the PNA has, and democratic governments normally uphold the agreements of their predecessors, A-Zahhar replied:

I'll ask you a question. When the Labor Party signed the Oslo agreement, the Likud Party was in the opposition. Did it [later on] accept the Oslo agreement? So the Likud was obliged to follow it, but it did not accept it, nor did it recognize it. And when it rose to power it completely terminated the Oslo agreement. The same is with us.¹⁷⁷

Conquest, and the rules that define its methodology, further demonstrates the fact that Western and Muslim nations are not so different. Like the Palestinians' struggle with the state for private ownership of some land, Justice Marshall recognized the incompatibility of absolute title to American soil in both the state and the Indians.¹⁷⁸ Across the globe, the solution is the same—ownership is vested in the state which can revoke the natives' right of occupancy at will. Moreover, all reason that "[t]hese claims have been maintained and established . . . by the sword."¹⁷⁹

Western and Ottoman administrators of Palestine were, as might be expected, also alike in many ways. During the British Mandate, Zionist colonizers defended their acquisition of Palestinian territory like the Mandate government defended its appropriation of Palestinian property,

¹⁷⁷ Berman, *supra* note 153 (quoted in the transcript of an interview with Mahmoud A-Zahhar, the leader of Hamas in the Gaza Strip).

¹⁷⁸ "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." *Johnson*, 21 U.S. at 588.

¹⁷⁹ The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. *Id.* at 588-589. Like the Americans, the Ottomans acquired title to land in battle (what Islam refers to as *jihad* by the sword).

with utility theories first advanced by English philosophers.¹⁸⁰ By depicting Palestine as a sparsely inhabited waste land faltering under the rule of Arab feudal lords, taking the land and putting it to better use seemed justified.¹⁸¹ The Ottoman Land Code proves Islam also promoted the maximization of land use. In accordance with John Locke's theories on the origins of private property, property rights in the Ottoman period were acquired by cultivating the land.

Even the military orders passed by the Israeli administration evinced commonalities with the Ottoman Land Code. Regulations protecting religious lands for their "historical" value,¹⁸² for instance, declared divine land inalienable just like the *waqf* category of property. To this day, the concept of sacred religious property gives rise to competing interests in Palestine. Israelis are currently objecting to the demolition of synagogues in the Gaza Strip,¹⁸³ and Hamas has always objected to a Jewish presence anywhere in Palestine.¹⁸⁴

2. WHAT IS THE RIGHT OF RETURN?

Reliance on international law for the return of private property is erroneous in two major respects. First, the right of return in international law does not equate to individual rights of repossession.¹⁸⁵ It is the law of

¹⁸⁰ See Forman & Kedar, *supra* note 55, at 508-11 (describing both British and Jewish colonizing interests, and explaining that "bringing European "development" and "progress" to indigenous populations was an important underpinning of the British colonial ethos").

¹⁸¹ See Bisharat, *supra* note 16, at 481-91 (examining the origins and purpose of "the image of arab feudalism"); see also Dajani, *supra* note 44 (elaborating on the notion of "arab feudalism").

¹⁸² The unnumbered *Military Regulation Concerning Antiquities*, enacted on Jan. 1, 1985, and the *Military Order Concerning Antiquities Law*, first passed on May 1, 1986 (amended many times thereafter), authorized the expropriation of Jewish historical and religious sites in the Occupied Territories. Dajani, *supra* note 44, at 105.

¹⁸³ Julie Stahl, *Gaza Synagogues Could Become 'Point of Contention,' Israeli Official Says*, CNSNEWS.COM, Sept. 6, 2005, available at <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=%5CForeignBureaus%5Carchive%5C200509%CFOR20050906d.html>; *Palestinian Centre for Human Rights Condemns Israel for not Destroying Synagogues*, Press Release No.110/2005, Palestinian Centre for Human Rights, Sept. 20, 2005, available at <http://www.imra.org.il/story.php3?id=26937>.

¹⁸⁴ See Dajani, *supra* note 44 (describing Hamas' contention that all of Palestine is inalienable *waqf*).

¹⁸⁵ A complete examination of the international right of return is beyond the scope of this paper. An analysis of the right would entail a study of its historical application in postwar arrangements. The treatment of both enemy and abandoned property after the Greco-Turkish War of 1919-1922, World War II, the partition of British India into India and Pakistan, the Turkish invasion of Cyprus in 1974, and after the collapse of Communist regimes in Eastern Europe, to name a few, illustrates the fact that international practice rarely recognizes the rights of owners to regain possession of their property. See generally Benvenisti & Zamir, *supra* note 114.

each sovereign nation that must secure the individual property rights of its citizens once they are afforded a right of return. Second, sovereign nations are not bound by the rules of international law. There is no global police force effectively enforcing international policy, and actions taken by nations which happen to be in accord with international rules were not necessarily motivated by them.

Consider lawfare for example. One might say present day imperialism is achieved through the courts of law given international disdain for traditional warfare. There are, however, other benefits to waging war with words rather than swords.¹⁸⁶ In addition to minimizing the cost of conquest in terms of human casualties and maintaining and supplying troops, lawfare conceals the expropriation of land while cloaking it with legitimacy. This in turn quells those who are occupied, satisfies the human rights activists among the occupiers, and fortifies the occupation's future.

The Israeli government, like all others, is no stranger to ulterior motives.¹⁸⁷ There is some force in the idealist argument that Israeli disengagement from Gaza was motivated by a desire to comply with international policy, or, alternatively, by the jurisprudence of regret that compels nations to atone for past injustices. Even the Israeli Supreme Court acknowledged that "Israel is not an isolated island."¹⁸⁸ Perhaps the Court recently forbade the Israeli Government from discriminating between Arab and Jewish citizens in their access to public land because "[Israel] is a member of an international system."¹⁸⁹

Many will argue, however, that the recent emergence of Israeli sympathies towards Palestinian interests is a ruse designed to obscure intensified assimilation of Palestinian territory.¹⁹⁰ Current acceleration of

¹⁸⁶ See generally Bisharat, *supra* note 16 (arguing that "the use of law under such circumstances [during colonization/occupation] 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"); see also Kedar, *supra* note 6, at 928-931 (describing the justificatory arguments supporting lawfare, and its benefits).

¹⁸⁷ See Bisharat, *supra* note 16, at 547-52 (discussing alternative explanations for Israel's legally oriented approach to land acquisition as well as specific instances when the Israeli government ignored international law).

¹⁸⁸ HCJ 4764/04, *Physicians for Human Rights etc. v. IDF*, available at <http://www.imra.org.il/story.php3?id=21004> (last visited on Sept. 28, 2006) (quoting the Israeli Supreme Court decision in HCJ 5592/02, *Yassin v. Commander of the Kziot Military Camp*).

¹⁸⁹ *Id.* See also Kedar, *supra* note 6, at 999-1000 (describing the holding of HCJ 6698/05 *Kaadan v. Katzir*, as the possible "beginning of a shift in the attitude of Israeli law toward its Arab minority in connection to land rights").

¹⁹⁰ The Palestinian Centre for Human Rights contends the Israeli government openly admitted the purpose of the disengagement plan was to create "facts on the ground" in the West Bank. *PCHR Disengagement Fact Sheet No. 2*, Palestinian Centre for Human Rights,

Israeli settlement in the West Bank, accompanied by lengthening of the wall separating Israel from the Occupied Palestinian Territories (“Wall”), substantiates the claim.¹⁹¹ These tactics violate international law since the “occupied” West Bank is supposed to be returned to the Palestinians, not further removed from them. As for enlarging the Wall, the International Court of Justice issued an advisory opinion in 2004 condemning the construction of a barrier wall, let alone its expansion.¹⁹²

Ultimately, the world at large frowning upon a state will only force its hand so far. Occupation inevitably results in the loss of property rights, whether by manipulating pre-occupation laws, by creating new laws to supersede them, or simply by developing irrefutable “facts on the ground” of adverse possession. Curtailing the dispossession of property is nevertheless possible. If the Ottoman Land Code better secured the private property rights of Palestinians, and if the Palestinians had private property to be secured in the first place, they would not be so vulnerable.

3. WHAT CAN BE DONE WITH *SHARI’A*?

In Gaza, *Shari’a* should be improved, not replaced, in order to better secure the property rights of Palestinians. Western law is not necessarily a different or better alternative, and, more importantly, Islamic governance appears to coincide with the general will of the people.¹⁹³ Not only is it more “democratic” to institute legal reform in a manner embraced by the native population, but, historically, it is more successful.¹⁹⁴

<http://www.pchrgaza.org/files/campaigns/english/gaza/Fact%20Sheet%20No%202%20-%20the%20real%20story.pdf> (last visited Dec. 20, 2005) (“In the framework of the disengagement plan, Israel will strengthen its control over those same areas in the Land of Israel which will constitute an inseparable part of the State of Israel in any future agreement” (quoting former Israeli Prime Minister, Ariel Sharon)).

¹⁹¹ For a detailed account of the expansion of settler activities and the Wall in the West Bank, see *id.*; See also James Brooks, *To Become an Occupier*, AL-JAZEERAH, Nov. 10, 2005, available at <http://www.aljazeeraah.info/Opinion%20editorials/2005%20Opinion%20Editorials/November/10%20/To%20Become%20an%20Occupier%20By%20James%20Brooks.htm>.

¹⁹² Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, A/ES-10/273 (July 13, 2004), available at <http://domino.un.org/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/05b3c70fd2d9e1e2685256ed2006dfb12!OpenDocument>.

¹⁹³ The demands of Christian Palestinians and other minorities are not considered since the majority of the Palestinian population is Muslim.

¹⁹⁴ See Ahmad, *supra* note 29 (explaining “that historical experience has shown that liberty in general is best promoted when the institutions advancing it conform to the local cultural milieu” with specific examples and logical reasoning).

Officially, the PNA agrees modernizing *Shari'a* is preferable and necessary.¹⁹⁵ The PNA President said the PNA has “. . . a plan: that all the lands [appropriated] in Gaza be used for public good.”¹⁹⁶ If so, that plan should be to return the land to the Palestinians, and to better define the laws related to its ownership. Given Islam's favorable disposition towards environments of economic prosperity, where the wealth of Muslims is well protected, only then will the public be best served.

A. EQUITABLE DISTRIBUTION

The PNA's present allocation of property rights endangers the welfare of its citizens, and the welfare of the State itself. Negative economic implications aside, vesting absolute title to all property in the State facilitates abusive expropriation by foreign conquerors. The *Elon Moreh* decision proves private property is one of the few assets safeguarded during belligerent occupation. Treating it like any other asset almost encourages its confiscation.

Hamas' vision of the Great Islamic State, a sort of corporation whose shareholders (citizens) have temporary interests in the form of revocable use rights, illustrates the danger. Such an uncertain structure is necessarily unstable, and can only work if each member of the State protects the State's shared interests. Reliance on fellow Arab nations, however, was historically of no avail to the Palestinians. Currently, even the MTDP suggests little has changed.¹⁹⁷

The Gaza Strip's precarious situation makes the PNA's duty to distribute private property all the more pressing. Domestically, the PNA's despotic hoarding of property rights engenders a hostility among Palestinians that

¹⁹⁵ MTDP, *supra* note 129, at 219.

¹⁹⁶ El Deeb, *supra* note 12 (quoting Palestinian President Mahmoud Abbas).

¹⁹⁷ Although the MTDP describes a number of helpful donations made by Arab countries, it repeatedly harps on the fact that export-driven growth is needed, but has not been achieved, and will not be achieved, “unless Arab countries take effective measures to increase Palestinian access to their markets.” The Government explains that “[it] hope[s] Arab countries will take measures to facilitate Palestinian access to their markets out of solidarity with the Palestinian struggle for independence, which has serious ramifications for the political and economic future of the Arab world.” MTDP, *supra* note 129, at 204, 215-19. This is not to suggest Arab countries do not aid the Palestinian cause. Rather, it is asserted that the support of Arab countries is limited, and insufficient (not to mention unlikely in more moderate countries) to enforce a land regime lacking private property rights. The Organization of the Islamic Conference, for instance, has launched programs “in support of the heroic uprising of the Palestinian people in Occupied Palestinian Territories.” See, e.g., The Final Communiqué of the First Islamic Conference of Information Ministers, available at <http://www.oic-oci.org/english/info/1/1st%20info-min-con.htm>.

manifests itself violently. Cognizant of the steady weakening of the institutions of Palestinian governance,¹⁹⁸ the PNA should be making efforts to bolster its control by gaining the good favor of its citizens. Fundamentalist factions, which do not recognize the PNA's authority,¹⁹⁹ already threaten the nation's survival by "deliberately creating havoc in Gaza."²⁰⁰ In addition, Israel explicitly reserved its right to self-defense after disengaging. That right might justify a renewed occupation if the PNA is unable to control the population.

B. DEFINITE EXCLUSIVE PROPERTY RIGHTS

Laws securing private property rights are the cornerstone of a healthy economy, and in their absence the Gaza Strip is suffering through economic decline and stagnation. By 2003, the unemployment rate in Gaza reached fifty percent.²⁰¹ In 2005, more than six hundred thousand Palestinians were unable to afford their basic needs for survival.²⁰² At the present time, almost half the Palestinian population is living below the official poverty line.²⁰³ Absent investment, the Palestinians will be hard pressed to stimulate economic growth. Without legally enforceable exclusive private property rights, investors are reluctant to supply funds.

The PNA is not oblivious to these facts. Realization of the MTDP depends largely on foreign investment,²⁰⁴ and foreign investors have asked the PNA to "establish clear and public mechanisms for determining property

¹⁹⁸ See MTDP, *supra* note 129, at 36-38 (describing the factors weakening the institutions of Palestinian self governance, and the measures that must be taken to strengthen and reform the Palestinian Authority).

¹⁹⁹ Hamas demands the establishment of a "high authority" to represent the interests of Palestinians living in Palestine, and the interests of Palestinians living abroad. See Berman, *supra* note 153 (quoting Mahmoud A-Zahhar's, the leader of Hamas in the Gaza Strip, answer in the negative when asked if he considered the Palestinian Legislative Council as the high authority).

²⁰⁰ *Palestinian Police Chief: The Palestinian Authority is a Leaky Boat*, DEBKAfile Special Report, Oct. 16, 2005, http://www.debka.com/article_print.php?aid=1097 (quoting the Palestinian Police Chief Gen. Ala Hussein's Oct. 12, 2005 address to Palestinian police and security commanders).

²⁰¹ MTDP, *supra* note 129, at 252.

²⁰² *Id.* at 200.

²⁰³ *Id.*

²⁰⁴ The very first page of the MTDP's foreword speaks of the Ministry of Planning's "Socio-Economic Stabilization Plan" as follows: "[it was developed] in an attempt to steer donor assistance towards meeting a set of PNA priorities that would help bring about some stabilization in the deteriorating social and economic environment." Additionally, the MTDP's framework for Palestinian socio-economic development includes detailed schedules of foreign investments the Palestinian Authority still requires, as well as those already acquired, to implement the MTDP. *Id.* at 128.

rights.”²⁰⁵ At that time, the Palestinian Government was already aware of the importance of precise definition. In the MTDP, the PNA reasoned the “well defined” borders of the Gaza governorate made it “the most suitable geographic unit that could be practically used for developing guidelines for the spatial distribution of projects and programs.”²⁰⁶ Additionally, the PNA charged the Israeli government with issuing a disengagement plan too ambiguous for the PNA to comfortably prepare for.²⁰⁷ Given these facts, one can only wonder why “modernizing the legal system” is addressed in two paltry paragraphs of the 272 page MTDP,²⁰⁸ which later states that “[f]or the most part . . . existing laws and the Palestinian judicial system are sufficiently capable of processing [land] claims.”²⁰⁹

Fashioned by fellow Muslims, the Ottoman Land Code was not enacted in order to deprive Palestinians of their property. The Code’s unanticipated adverse impact proves existing law is flawed. If the rules describing *matruka* and *mewat* were more clearly defined, they would not have been so easily circumvented. Opportunities seized by occupiers to enact rules like the British *Mewat Land Ordinance* may have been foreclosed if the Code, in general, was more fully developed. What little protection the 1907 Hague Regulations afforded Palestinian property interests was not because of the

²⁰⁵ The Palestinian Authority enlisted the help of the World Bank to identify those “aspects of the legal system that have a bearing on the economy,” and to reform them. *Id.* at 219. In December 2004, when USAID, the funding arm of the United States Government, proposed a plan for the use of the greenhouses in the evacuated Gush Katif settlements, the World Bank performed a study of the situation. After the settlement property is transferred to the Palestinians, the study determined that the question of property ownership is a crucial undecided issue that must be resolved before progressing with the USAID plan. Early on, the World Bank noted the discrepancies in titles to Palestinian property, and recommended the following: “the Authority establish clear and public mechanisms for determining property rights, and then either return the lands or offer owners compensation.” Charmaine Seitz, *USAID Proposes Palestinian Company ‘Caretaker’ for Gush Katif Lands*, WORLDPRESS.ORG, Feb. 25, 2005, http://www.worldpress.org/print_article.cfm?article_id=2155&dont=yes. A year after the World Bank’s study, which warned the Palestinian Authority that progress was not possible if property rights were not settled, the MTDP, which elaborates on investments needed for its implementation down to the last dollar and percentage, was issued, devoting but one sentence to property rights specifically: “To facilitate an optimal use of resources, property rights should be well defined.” See MTDP, *supra* note 129, at 219.

²⁰⁶ The precise definition of the governorates’ borders was one of six main reasons for adopting them as the geographic units for spatial analyses. MTDP, *supra* note 129, at 225.

²⁰⁷ “The ambiguity of the ‘disengagement’ plans published by Israel makes planning for these areas difficult. In the plans, the extent and scope of Palestinian access to and control of evacuated land is unclear. In the West Bank, the geographical delimitation of the area referred to in the ‘disengagement plan’ is poorly defined and several terms for describing the area are applied. Important concepts including “territorial continuity,” “evacuated area” and “continuous transport” remain subject to interpretation.” *Id.* at 42; see also *id.* at 247-49.

²⁰⁸ *Id.* at 219.

²⁰⁹ *Id.* at 245.

Regulations' requirement that pre-occupation law be enforced. It was the Regulations' specific prohibition of private property appropriations absent just cause that proved difficult to contravene.

Laws, although subject to interpretation, should only be interpreted within reason. Despite the PNA's rise to power, it is clear *Shari'a* is still being manipulated. Palestinians are the perpetual targets of what American jurisprudence refers to as "due process violations," without the benefit of a "rule of lenity" resolving ambiguities in their favor. They can, however, bring the vicious cycle to a close by joining the ranks of moderate Muslims regulating the interpretation of Islam.²¹⁰

The Organization of the Islamic Conference, for example, recently issued a ruling which both recognized intellectual property rights in Islamic law and ascribed a monetary value to such rights.²¹¹ The ruling underscores the potential for expansion of individual property rights in Islamic law through interpretation of legal terms of art such as *mal* (wealth or property), which is now understood to include intellectual property. The Advanced Legal Studies Institute identified the nature of ownership (*milkiyyah*), and the nature and meaning of possession (*milk al-yad*), as additional concepts in need of definition.²¹²

CONCLUSION

Whereas the written word is static, society is not. The Gaza Strip is no longer a sparsely populated stretch of indelible territory dotting the rural landscape of ancient Palestine. Islam's early architects were not faced with the present day global market. Blind to the forces of evolution, fundamentalists are ultimately waging war against themselves. There is no

²¹⁰ Kourides has identified four main approaches to reform: "(1) the eclectic technique in providing a synthesis of Islamic and Western legal provisions; (2) the use of procedural devices for confining the jurisdiction of *shari'a* courts; (3) the complete reinterpretation of the authoritative texts in the light of present day needs; and (4) overlapping with the first three, the use of legislative enactments to make changes justified by the doctrines of *siyasa* and *maslahah*. P. Nicholas Kourides, *Traditionalism and Modernism in Islamic Law: a Review*, 11 COLUM. J. TRANSNAT'L L. 491 (1972) (describing the legal evolution of countries that embrace *Shari'a*).

²¹¹ *Islamic Law of Property and Ownership*, Advanced Legal Studies Institute, <http://www.nyazee.com/islaw/property/property.html> (last visited Sept. 28, 2006); see also *Bureau for Arab Countries, Cooperation with Other Organizations*, WIPO, <http://www.wipo.int/arab/en/cooperation/organizations.html?printable=true> (last visited Sept. 28, 2006) ("WIPO signed a Cooperation Agreement with the Organization of the Islamic Conference on December 10, 2003 in Geneva. The agreement includes the invitation to each institution conferences as well as the joint cooperation in the promotion of intellectual property for each respective institution member states").

²¹² *Islamic Law of Property and Ownership*, *supra* note 211.

time like now, the early stages of nation building, for the Palestinians to take corrective action.

Violence is clearly the wrong course of action. Israel's newest political party, the Kadima Party, included support for "the establishment of a Palestinian state alongside Israel" as one of its main principles.²¹³ Why jeopardize the potential of a fresh Middle Eastern order ripe with opportunity for Palestinian self governance and prosperity? Effectively reforming the legal system will improve both Gaza's prospects and the prospects of its citizens. On a larger scale, reforming *Shari'a* will also benefit the entire Muslim world fiercely dear to Palestinians. As noted by Abdulssalam Al-Abadi, Jordan's former Religious Affairs Minister, "[Muslims] cannot keep having two versions of Islam: the correct and moderate views and the violent and extremists views. It's tearing apart the faith."²¹⁴ So, even a Muslim authority agrees, fix the faith before history repeats itself.

²¹³ *New Israeli Party Lays Out Principles: Sharon's Kadima Meets, Endorses Peaceful Palestinian State*, CNN.COM, Nov. 28, 2005, available at <http://www.cnn.com/2005/WORLD/meast/11/28/israel.politics/>; See also Jonathan Ferziger, *Barak Says Israel Should Leave West Bank Unilaterally*, BLOOMBERG.COM, Oct. 31, 2005, available at <http://www.bloomberg.com/apps/news?pid=71000001&refer=&sid+aI3L.QAL4Y5c> (describing former Israeli Prime Minister Ehud Barak's position in favor of withdrawal from the West Bank, another example of the potential shift in Israeli politics for the Palestinians' benefit).

²¹⁴ Murphy, *supra* note 170.

