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The Unexplored Option: Jewish Settlements in a Palestinian State

David Morris Phillips*

I. Introduction

The withdrawal of Israeli settlers and soldiers from the Gaza Strip in August and September 2005 inevitably focused both Israeli and world attention upon the fate of Jewish settlements on the West Bank.¹ World focus only intensified with formation of a new Israeli government led by the *Kadima* party and its head, Prime Minister Ehud Olmert,² following Hamas' victory in the Palestinian National Authority elections.³ In accord with prior campaign pledges,⁴ Olmert announced his intention to

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1. See Steven Erlanger, *The Gaza Withdrawal: The Evacuation; Tearfully but Forcefully, Israel Removes Gaza Settlers*, N.Y. TIMES, Aug. 18, 2005, at A1; Greg Myre, *Israel Lowers Its Flag in the Gaza Strip*, N.Y. TIMES, Sept. 12, 2005, at A10; see, e.g., Editorial, *The Battle for Israel's Future*, N.Y. TIMES, Aug. 31, 2005, at A18 ("Now that Mr. Sharon has demonstrated that he is able to carry out a territorial compromise, a necessity if there will ever be any chance for peace, he needs to extend the principle from Gaza to the crucially important West Bank."); Editorial, *Not Good Enough*, HAARETZ, Mar. 6, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=690437> (urging removal of West Bank settlements). As used currently, "West Bank" refers to the area of the Palestinian Mandate west of the Jordan River that Jordan captured in 1948 and Israel refers to as Judea and Samaria.

2. See Steven Erlanger & Greg Myre, *Israeli Voters, by Thin Margin, Support Parties Vowing Pullout*, N.Y. TIMES, Mar. 29, 2006, at A1; Greg Myre, *His Coalition in Place, Olmert Turns to Setting Israeli Borders*, N.Y. TIMES, May 5, 2006, at A6.

3. See Steven Erlanger, *Palestinian Landslide: The Elections: Hamas Routs Ruling Faction, Casting Pall on Peace Process*, N.Y. TIMES, Jan. 27, 2006, at A1.

4. See, e.g., Aluf Benn & Yossi Verter, *Olmert to Offer Settlers: Expand Blocs, Cut Outposts*, HAARETZ, Mar. 10, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=692632> (if *Kadima* forms next government, Olmert intends to

withdraw most settlements from the West Bank, “converge” other settlements into permanent settlement blocs, and move many displaced settlers into the enlarged settlement blocs.⁵ Although the details of this “convergence plan” remain obscure and indeed undecided,⁶ it calls for most settlements, but not settlers, to be removed. The Israeli-Hezbollah war in the summer of 2006 undermined support for Olmert’s plan, but debate about the feasibility and prospect of removing Jewish settlements from the West Bank in order to achieve lasting peace between Israel and the Palestinians continues within and outside of Israel.⁷

remove settlements beyond certain boarder, but expand settlement blocs within area); Mazal Mualem, *Netanyahu: Poll Is Referendum on Olmert’s Pullout Plan*, HAARETZ, Mar. 12, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=692852>.

5. Speaking at a recent press conference following a meeting with President Bush, Olmert stated Israel would “remove most of the settlements which are not part of the major Israeli population centers in Judea and Samaria. The settlements within the population centers would remain under Israeli control and become part of the State of Israel, as part of the final status agreement.” President George W. Bush, President Bush and Prime Minister Ehud Olmert of Israel Participate in Joint Press Availability (May 23, 2006), <http://www.whitehouse.gov/news/releases/2006/05/print/20060523-9.html>. Based on most statements by Olmert and *Kadima*, Olmert’s convergence plan envisions retention of settlements presently inhabited by 150,000 to 175,000 settlers, but removal of the majority of settlements and movement of 70,000 to 100,000 settlers. See Yaakov Katz, *Mofaz Presents Israel’s Final Borders*, JERUSALEM POST, Mar. 21, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395650626&pagename=JPost%2FJPArticle%2FShowFull> (Minister of Defense included *Ma’ale Adumim*, settlements in Jordan Valley, *Ariel*, *Kedumim-Karnei Shomron*, *Gush Etzion*, *Reihan-Shaked*, and *Ofarim-Beit Aryeh* within final border).

6. See Associated Press, *Kadima: West Bank Withdrawal Will Take a Year to Finalize*, HAARETZ, Mar. 29, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=700253>; Aluf Benn, *Convergence Panel to Submit Recommendations Soon*, HAARETZ, May 15, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=715436> (although panel established to address convergence, it “was not asked to draw the pullout line or determine which settlements will be evacuated”); David Horovitz & Tovah Lazaroff, *Only 20-30 Settlements to Be Removed*, JERUSALEM POST, May 23, 2006, <http://www.jpost.com/servlet/Satellite?cid=1148287843514&pagename=JPost%2FJPArticle%2FShowFull> (Uzi Keren, Olmert’s adviser for settlements, cast doubt on early estimates on number of settlements and settlers affected by convergence). Exactly which settlements Israel will evacuate remains a matter of disagreement as does whether evacuations will occur in stages or simultaneously. See Aluf Benn, *Olmert Favors West Bank Pullout in One Sweeping Operation*, HAARETZ, June 2, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=722026>.

7. See, e.g., Uzi Benziman, *Olmert’s Paradox*, HAARETZ, May 10, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=714122> (arguing convergence plan is premised upon managing conflict with Palestinians rather than ending it and hence will not bring peace or stability to Israel); Akiva Eldar, *Out of Uniform and into the Conflict*, HAARETZ, May 14, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=715456> (describing substantial doubts of former head of Israeli West Bank administration, Ilan Paz, on implementation of convergence plan). A recent Israeli poll, released in June 2006, indicates a majority of Israelis oppose the plan. See Yossi Verter, Aluf Benn & Jack Khoury, *Poll: Most Israelis Oppose PM Olmert’s Convergence Plan*, HAARETZ, June 9, 2006,

Excluding small outposts constructed without the permission of Israeli military administration⁸ and neighborhoods within Jerusalem,⁹ approximately 250,000 Israeli Jewish settlers presently live in nearly 150 settlements on the West Bank.¹⁰ While the exact amount of territory

<http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=724788>. Doubts exist about the plan's feasibility not only among the Israeli public, but much of its leadership. See Thanassis Cambanis, *Israelis Reassess Territory Strategy, Pullouts Shelved After Violent Year*, BOSTON GLOBE, Sep. 25, 2006, at A1. Whether the United States should support the plan is also a subject of some debate. Compare Dennis Ross & David Makovsky, *Lending a Helping Hand*, U.S. NEWS & WORLD REP., May 29, 2006, <http://www.usnews.com/usnews/news/articles/060529/29essay.htm> (moderately positive) with R. James Woolsey, *West Bank Terrorist State*, WALL ST. J., May 23, 2006, http://pqasb.pqarchiver.com/wsj/access/1040629651.html?dids=1040629651:1040629651&FMT=ABS&FMTS=ABS:FT&date=May+23%2C+2006&author=R.+James+Woolsey&type=8_90&desc=West+Bank+Terrorist+State (former head of C.I.A. terms Gaza pullout as utter failure that makes Israel and United States appear weak and urges Israel not to make same mistake with West Bank). The official White House reaction has been cautious and somewhat positive provided diplomatic channels are exhausted. See, e.g., Jim Rutenberg & Steven Erlanger, *West Bank Pullout Gets a Nod from Bush*, N.Y. TIMES, May 24, 2006, at A6 ("The Americans have many questions[:] . . . how many settlers will go; where the barrier will run; what will happen to the Israeli development plans for an area called E1, which would cut off East Jerusalem from the West Bank; how the Israeli Army would be deployed in the areas Israel abandons, or whether it would be withdrawn entirely.").

8. See generally Talya Sason, *Isr. Ministry of Foreign Affairs, Summary of the Opinion Concerning Unauthorized Outposts*, Mar. 10, 2005, <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary+of+Opinion+Concerning+Unauthorized+Outposts+-+Talya+Sason+Adv.htm>.

9. A 2004 map prepared by the Washington Institute for Near Policy shows all areas of Greater Jerusalem that fall outside the pre-1967 armistice lines, distinguishing between those areas largely inhabited by Jews, those largely inhabited by Arabs, and those with mixed populations. See Washington Institute, *Map of Greater Jerusalem*, <http://www.washingtoninstitute.org/mapImages/41de98e058452.jpg> (last visited Aug. 5, 2006). One neighborhood that falls outside the pre-1967 lines is *Gilo*, which lies in the direction of Bethlehem and has been the subject of many attacks. See Sheila MacVicar & Michal Zippori, *Bomb Kills 19 on Israeli Bus*, CNN, June 19, 2002, <http://archives.cnn.com/2002/WORLD/meast/06/18/mideast.violence/index.html>. The question of what areas of Jerusalem Israel should retain has now resurfaced, with talk of a "unified Jerusalem" under Israeli sovereignty less current than it had been under the Sharon government. See Nadav Shragai, *No More Talk of Unified Jerusalem*, HAARETZ, Mar. 7, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=690895>.

10. See Nadav Shragai, *Peace Now: No New West Bank Outposts, but More Settlers in 2005*, HAARETZ, Feb. 6, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=679476> (estimate of 250,000 at end of 2005); Mitchell Bard, *Am.-Isr. Cooperative Enterprise, Facts About Settlements*, <http://www.jewishvirtuallibrary.org/jsourc/Peace/settlements.html> (estimate of 246,000 as of August, 2005) (last visited Aug. 5, 2006); B'Tselem, *Land Expropriation & Settlements*, http://www.btselem.org/English/Settlements/Settlement_population.xls (estimate of 232,718 settlers at end of 2004) (last visited Aug. 5, 2006). Note that Palestinians, who characterize many parts of present Jerusalem (e.g., *Gilo*) as settlements, state much higher figures. See, e.g., EDWARD W. SAID, *THE END OF THE PEACE PROCESS: OSLO AND AFTER*, at xiii (2001) ("[T]here are about 350,000 Israeli Jewish settlers on Palestinian land.").

occupied by settlements on the West Bank is debated, most authorities place the area at less than two percent of its land mass.¹¹ In addition to Olmert's convergence plan, the agony caused by Israel's Gaza withdrawal¹² and the continued impetus to establish a Palestinian state according to the "Roadmap"¹³ underscore the importance of addressing whether Israel must remove West Bank settlements to resolve the Arab-Israeli conflict.

To some, including not only Palestinians¹⁴ and governments of

11. The percentage depends, to a large extent, upon whether the references are to the designated municipal borders of a settlement or the built-up area and whether the reference includes road construction ancillary to the settlement. See *infra* notes 266-70, 290 and accompanying text.

12. See Elie Wiesel, *The Dispossessed*, N.Y. TIMES, Aug. 21, 2005, at D11 ("The images of the evacuation itself are heart-rending. Some of them are unbearable. Angry men, crying women. Children, led away on foot or in the arms of soldiers who are sobbing themselves. Let's not forget: these men and women lived in Gaza for [thirty-eight] years."); *Paying the Price for Peace: The Human Cost of Disengagement* (Isr. Ministry of Foreign Affairs, Jerusalem, Isr.), July 28, 2005, <http://www.mfa.gov.il/NR/rdonlyres/5233145C-7437-4F7A-A97F-4F7842362A5B/0/PriceforPeace.pdf>; see, e.g., Raffi Berg, *Israel's 'Forgotten' Settlers*, BBC NEWS, Nov. 17, 2005, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle_east/4442106.stm; Dan Izenberg, *MK Eldad Demands Bassi Be Fired*, JERUSALEM POST, Mar. 7, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395557407&pagename=JPost%2FJPArticle%2FShowFull>; Nadav Shragai, *Abandoned Comrades*, HAARETZ, Dec. 13, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=657298> (describing the unemployment, homelessness, illness and other social problems of the evacuees); see also Anat Balint, *Haaretz Photographer Wins 1st Prize in World Press Photo Contest*, HAARETZ, Feb. 12, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=681472>; Pictorial, *Series of Pictures Taken by Haaretz Photographer Uriel Sinai, Winner of the World Press Photo Contest*, HAARETZ, Feb. 11, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=681483> (presenting pictorial of agony).

13. Press Statement, Office of the Spokesman, Dep't of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003), <http://www.state.gov/r/pa/prs/ps/2003/20062.htm>. The Roadmap called for the creation of a Palestinian state in certain stages, beginning in Phase I with "Ending terror and violence, Normalizing Palestinian Life and Building Palestinian Institutions." *Id.* However, the Israeli and Palestinian authorities failed to implement Phase I by its May 2003 deadline, and it has yet to be accomplished. Since its inception, disagreements over the various steps—e.g., whether the Palestinian Authority must disband various militant groups before Israel has any obligation to cease settlement construction—have surfaced. Nonetheless, the specifics of the Roadmap appear to have replaced the Oslo Accords. See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-Palestinian Liberation Organization, 32 I.L.M. 1525 [hereinafter Oslo Accords]. The Oslo Accords resulted from secret negotiations in Oslo between Israel and the Palestinian Liberation Organization and became the primary reference with respect to the mutual obligations of Israel and Palestinians. The Roadmap was adopted by the United States, UN, EU, and Russia and accepted with reservations by the Palestinian Authority and Israel. See Editorial, *Israel's Road Map Reservations*, HAARETZ, May 27, 2003, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=297230>.

14. See Associated Press, *Palestinian FM: Settlements Threaten Chance for Palestinian State*, HAARETZ, Nov. 30, 2005, available at

other Arab nations, but also members of the EU,¹⁵ much of the American press,¹⁶ the UN General Assembly,¹⁷ and occasionally even the U.S. government,¹⁸ the question hardly merits serious review. Aside from the security fence constructed by Israel and uncertainties surrounding the Hamas victory, West Bank settlements constitute *the* major obstacle to a peace settlement. Even commentators and scholars considered stalwart defenders of Israel¹⁹ and pro-Israeli American Jewish groups²⁰ decry the presence and expansion of Jewish settlements on the West Bank. Indeed, liberal Israeli politicians blame the settlers for every offense imaginable, including the ongoing conflict between Israel and Palestinian Arabs.²¹ In contrast, some Israelis consider the settlements as not an obstacle but a prerequisite for peace. These supporters believe the settlements serve as the first line of defense against an Arab attack from the East and/or

<http://www.christusrex.org/www1/news/haaretz-11-30-05a.html>; Glenn Kessler, *Palestinians Get Rare Bush Meeting, Policy Complaints Are Behind Session*, BOSTON GLOBE, Oct. 12, 2005, http://www.boston.com/news/world/articles/2005/10/12/palestinians_get_rare_bush_meeting?mode=PF.

15. See, e.g., Steven Erlanger, *Europeans Rebuke Israeli Jerusalem Policy*, N.Y. TIMES, Nov. 25, 2005, at A18.

16. See, e.g., Editorial, *Bush, Abbas Intentions*, BOSTON GLOBE, Oct. 21, 2005, at A16; Editorial, *Gaza First, but Not Last*, N.Y. TIMES, Apr. 13, 2004, at A24; Editorial, *One Step Back in the Mideast*, N.Y. TIMES, Mar. 23, 2005 at A22.

17. See, e.g., G.A. Res. 60/106, U.N. Doc. A/RES/60/105 (Jan. 18, 2006), available at <http://domino.un.org/UNISPAL.NSF/a06f2943c226015c85256c40005d359c/d28e6c316706c04385257106006ce8ca!OpenDocument>. Other resolutions to the same effect can be accessed at UN Information System on the Question of Palestine, <http://domino.un.org/UNISPAL.NSF/vGA!OpenView&Start=1&Count=150&Expand=121#121> (last visited Aug. 5, 2006); see also Associated Press, *UN Slams Israeli Settlements, E. Jerusalem Separation Fence*, HAARETZ, Dec. 3, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=651888>; Richard Schifter, *The First Word: Is the UN Improving?*, JERUSALEM POST, Dec. 15, 2005, <http://www.jpost.com/servlet/Satellite?cid=1134309585843&pagename=JPost%2FJPArticle%2FShowFull>.

18. See, e.g., Press Release, Margaret Tutwiler, Spokesperson, U.S. Dep't of State, Daily Press Briefing #180 (Dec. 4, 1991), available at http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1991/9112/180.html.

19. See, e.g., ALAN DERSHOWITZ, *THE CASE FOR PEACE: HOW THE ARAB-ISRAELI CONFLICT CAN BE RESOLVED* 13 (2005).

20. An organization called the Israel Policy Forum fits into this category. See Isr. Policy Forum, *Building a Bridge from Disengagement to Two States* (Nov. 2005), <http://www.ipforum.org/display.cfm?id=6&Sub=16&Dis=15>; Letter from "Prominent American Jewish Leaders" to Condoleezza Rice (Nov. 22, 2004), http://www.cephas-library.com/israel/israel_letter_by_prominent_american_jewish_leaders.html; see also Shlomo Shamir, *N.Y. Jewish Leaders Lobbied Rice on Gaza Border Deal*, HAARETZ, Nov. 18, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=646999>.

21. See Akiva Eldar, *Kadima Supporters and the Road Map*, HAARETZ, Nov. 28, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=650612>; Nehemia Shtrasler, *The Ashes on the Prophets' Eyes*, HAARETZ, Mar. 22, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=696534>.

Palestinian terrorism,²² and their growth provides the impetus for serious peace overtures by Palestinian representatives.²³

This article takes a different tack. Israeli settlements, first and foremost, need not be an obstacle to peace simply because, while relevant, they do not have to determine the eventual borders between Israel and a Palestinian state. *Just as Palestinians live within the predominantly Jewish State of Israel, Israeli Jews can live within a predominantly Palestinian nation.* If this conclusion is true, then much of the agony that accompanied the Israeli withdrawal from Gaza and recent evacuations of some illegal outposts on the West Bank²⁴ could be avoided, and final settlement negotiations between Israel and the Palestinian Authority eased.

It is useful to begin this discussion with an analogy. Imagine that many African-American families moved into an area exclusively inhabited by whites. Further, imagine the white community initiated a terroristic campaign against the newcomers, labeled those who sold land to African-Americans as “traitors and collaborators,” and executed the sellers without trial. Imagine, further, the “enlightened” liberal community blamed the African-American families for their own plight and repeated the mantra that if only the African-Americans would leave the community, all would be peaceful in race relations. While tragically such opinion was once widely held, it is totally unimaginable that it

22. See Editorial, *Extra!: West Bank*, CNN, Aug. 16, 2005, <http://www.cnn.com/2005/EDUCATION/08/14/extra.west.bank/index.html>.

23. See Hillel Halkin, *Why the Settlements Should Stay*, COMMENTARY, June 1, 2002, at 21, 23.

24. For example, there were difficulties in the recent evacuation of *Amona* on the West Bank. See Bradley Burston, *Brushfire Civil War: Israel, the New Enemy of the True Jew*, HAARETZ, Feb. 2, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=677531> (“Increasingly, the language of hardline settlers has taken on a note of estrangement, even divorce from institutions of the state, the police, the Supreme Court, the army, the prime minister. . . . By no means are they representative of settlers as a whole. . . . Theirs is a brushfire civil war. But brushfires can take directions and forms which no one can control.”); Jonathan Lis, Amos Harel, Gideon Alon, Lilach Weissman & Nadav Shragai, *B’Tselem to Mazuz: Investigate Police Violence During Amona Evacuation*, HAARETZ, Feb. 3, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=677685> (over 200 protesters and police injured in evacuation of *Amona*); Jonathan Lis & Gideon Alon, *Olmert Promises that Government will Maintain Dialogue with Settlers*, HAARETZ, Feb. 6, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=678953> (reporting on a Jerusalem rally, “The speeches expressed the growing feeling within the religiously observant camp that the justice system discriminates against the right and the settlers.”); Greg Myre, *Settlers Battle Israel’s Police in West Bank*, N.Y. TIMES, Feb. 2, 2006, at A1; Nadav Schragai, *Why the Settler Leaders Stood Silent*, HAARETZ, Feb. 2, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=677705> (referring to the evacuation of *Amona*, “The ‘consciousness searing’ that settler leaders spoke of so frequently in the months before the disengagement [from Gaza] occurred yesterday, five months after the disengagement.”).

reflects liberal and enlightened thinking today.

But, the reader might protest, if the African-American hypothetical intends to suggest that the nearly universal condemnation of Israeli settlements is intellectually inconsistent, the analysis is false.²⁵ Although African-Americans, or Jews for that matter, have a domestic right to freely settle in the United States, Jews do not have any collective right to settle in Palestine.²⁶ This article seeks to parse the assumptions which underlie the liberal inclination to differentiate Israeli settlements from typical minority settlers who desire to live among a majority group. Subject to certain conditions, the right of Jews to live in historic Palestine is a powerful imperative that cannot be dismissed simply because some, or even substantially all, Palestinian Arabs do not want Jewish communities in their midst—at least no more than the right of African-Americans to settle in predominately white communities can be abated by white opposition.

At the core of this position is a fundamental distinction almost universally overlooked in discussions about Jewish settlements:²⁷

25. One such party who rejects this premise is W. Thomas Mallison, whose views seem quite infected by a pronounced anti-Israel animus towards Israel as a Jewish state. See SALLY V. MALLISON & W. THOMAS MALLISON, *SETTLEMENTS AND THE LAW, A JURIDICAL ANALYSIS OF THE ISRAELI SETTLEMENTS IN THE OCCUPIED TERRITORIES* 7 (1982); W. Thomas Mallison, *Israeli West Bank Settlements, The Reagan Administration's Policy Toward the Middle East and International Law, Remarks at American Society of International Law Proceedings* (Apr. 25-27, 1985), in 79 *Am. Soc'y Int'l L. Proc.* 217, 226 (1987).

26. *Id.* In fact, Mallison disputes the whole concept of a Jewish people. See W. Thomas Mallison, *The Zionist-Israeli Juridical Claims to Constitute "The Jewish People" Nationality Entity and to Confer Membership in It: Appraisal in Public International Law*, 32 *Geo. Wash. L. Rev.* 983, 987-93 (1964). That position contrasts with his readiness to accept the Palestinian people, a recent Twentieth Century identity compared to the several millennia concept of a Jewish people. See W. THOMAS MALLISON & SALLY V. MALLISON, *AN INTERNATIONAL LAW ANALYSIS OF THE MAJOR UNITED NATIONS RESOLUTIONS CONCERNING THE PALESTINE QUESTION* at 39-41, U.N. Doc. ST/SG/SER.F/4, U.N. Sales No. E.79.I.19 (1979); *infra* note 318 and accompanying text. David Kretzmer made a more legitimate objection to this analogy based upon the power relationship between the parties. But, of course, the question of power depends upon the scope of the parties and relations considered. In the case of African-Americans, does one consider simply them and their white neighbors or the power of the federal government? In the case of Israelis and Arabs, does one consider not only the Palestinians but also twenty-two Arab nations hostile to Israel's existence, or even more, a larger number of other nations that seem to automatically vote for any resolution that would deny Jews a sovereign state equal to those insisted upon by other peoples? See, e.g., G.A. Res. 3376 (XXX), U.N. Doc. A/2399 (Nov. 10, 1975), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/000/89/IMG/NR000089.pdf?OpenElement> (equating Zionism and racism).

27. Seemingly, the sole published party taking exception to this view is the Israeli novelist, Hillel Halkin. See Hillel Halkin, *Beyond the Geneva Accord*, COMMENTARY, Jan. 2004, at 21 [hereinafter Halkin, *Beyond the Geneva Accord*]; Halkin, *supra* note 23, at 21-27; Hillel Halkin, Op-Ed., *Whose Land?, Why the Settlements Should Stay, Making*

settlements and sovereignty need not be coterminous. It is entirely possible, at least theoretically, to have Arab sovereignty over the West Bank and Jewish settlement within that sovereignty. Part II of this article explores the distinction between sovereignty and settlements in the context of an increasing and necessary realization of the incompatibility of Israel sovereignty over the West Bank and its identity as a Jewish democratic state.²⁸ Part III outlines those arguments, particularly those based upon liberal values, which support the continuation of Jewish settlements on the West Bank even after the creation of a Palestinian state. Part IV lays out the conditions that must be satisfied for this resolution to occur. In effect, these conditions also respond to arguments raised against Jewish settlements, including their legal status, and doubts concerning the viability of settlements in a future Palestinian state.

II. Sovereignty and Settlements

It is almost universally assumed that Jewish settlements equate to Israeli sovereignty. The nexus between settlements and sovereignty is critically important from both Palestinian and Israeli perspectives. From a Palestinian perspective, the continuation of Jewish settlements connotes Israeli sovereignty over much of the West Bank as the settlements are scattered over much of that area.²⁹ If interconnected or joined to Israel, the settlements preclude a contiguous Palestinian state with sensible borders; even if the settlements were disconnected, they nonetheless represent a serious infringement on Palestinian sovereignty. In either case, according to Palestinian sentiment, the settlements leave little room for Palestinian sovereignty outside a Bantustan-type Palestinian state or other self-governing entity. The issues of contiguity and sovereignty will be discussed later in this article.³⁰

From an Israeli perspective, if settlements remain and necessarily implicate Israeli sovereignty, it will be impossible to distinguish a meaningful border between Israel and a Palestinian state. The two

the West Bank Judenrein Is No Way to Bring Peace, OPINION J., May 29, 2002, <http://www.opinionjournal.com/extra/?id=110001769>.

28. Although Israel does not have a constitution, it has adopted certain "Basic Laws," one of which "protect[s] human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." See Basic Law: Human Dignity and Liberty, 5752-1992, S.H. 1391 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

29. The actual area covered by Jewish settlements constitutes approximately a fiftieth of the West Bank. B'Tselem, Land Expropriation & Settlements, http://www.btselem.org/english/Settlements/Land_Takeover.asp (last visited Aug. 5, 2006).

30. See *infra* notes 124-33 (discussing issue of contiguity); *infra* note 471 and accompanying text (discussing issue of sovereignty).

entities will become combined. Realistically, Israeli sovereignty over settlements constitutes de jure or de facto Israeli sovereignty over the West Bank. The inseparability of Israel from a Palestinian state will spell the demise of a two-state solution to the Arab-Israeli conflict, that is, predominantly Jewish and Arab states living side by side in the territory west of the Jordan River. This result cannot possibly favor the existence of Israel as a Jewish democratic state that adheres to the rule of law. With the exception of fringe elements within the Israeli political spectrum,³¹ even former stalwarts of the settlement movement and a Greater Israel now seemingly recognize this reality.³² Thus, Olmert has reiterated in various fora that Israel “must create a clear border that reflects the demographic reality that has been created on the ground as soon as possible.”³³ In the words of Michael Oren, “[a] solid majority of Israelis accept that they cannot continue to occupy the West Bank and Gaza without endangering the moral and demographic foundations upon which the Jewish state is built.”³⁴ To understand this reality and intelligently discuss the various options concerning Israeli settlements, consider the various possibilities of Israeli sovereignty, either de jure or

31. See Nadav Shragai, *Right-Wing Group Prepares to Build 15 New Illegal Outposts*, HAARETZ, Dec. 20, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=659860> (referring to group named, “Loyalists of the Land of Israel,” that intends to build additional illegal outposts on West Bank).

32. Belated recognition of this fact led even Ariel Sharon, the former prime minister of Israel presently in a coma and one of the champions of the settlement movement during the 1970s through the 1990s, to leave the Likud party, which he had helped to found, and to establish a new party, *Kadima*, in November of 2005. *Kadima's* platform includes territorial compromise in order to ensure “a Jewish and democratic state.” See Mazal Mualem, *Kadima Platform Calls for Jewish Majority, Territorial Concessions*, HAARETZ, Nov. 29, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=651003>; see also Aluf Benn, *Olmert: We Must Set Borders in Line with Demographic Reality*, HAARETZ, Jan. 25, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=673922>; Steven Erlanger, *How Reality Cut Likud's Vision down to Size*, N.Y. TIMES, Nov. 27, 2005, at 43.

33. See Aluf Benn, *Managing the Conflict*, HAARETZ, Feb. 1, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=677165>; Aluf Benn & David Ratner, *Olmert: If Kadima Wins, We Will Not Invest in Territories*, HAARETZ, Mar. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=691448>; Aluf Benn, *Olmert: Israel Will Separate from Most Palestinians*, HAARETZ, Feb. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=680081> (reporting on Olmert's first interview with media since assuming post as Acting Prime Minister, in which Olmert said Israel “will separate from most of the Palestinian population that lives in the West Bank, and that will obligate us to separate as well from territories where the State of Israel currently is”); Benn, *supra* note 32; David Ratner, *Olmert: We Will Freeze Spending on West Bank Construction*, HAARETZ, Mar. 7, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=691248>; see also sources cited *supra* note 7.

34. Michael B. Oren, *Hamas Has Won. What's Next?*, WALL ST. J., Jan. 28, 2006, at A8.

de facto, over the West Bank.

One possibility involves granting Arabs west of the Jordan River full Israeli citizenship including the right to vote. Over time, however, due to vastly differential birth rates,³⁵ the Palestinian population will

35. The Israel Central Bureau of Statistics ("ICBS") reports an Arab Moslem birth rate in Israel of between twice to one and one-half that of Jews during the ten-year period from 1996 through 2005. See Table of Israeli Live Births by Population Group, http://www.cbs.gov.il/yarhon/c1_e.xls (last visited Aug. 5, 2006). The Arab population of Israel grew from 1,069,400 at the end of 1997 to 1,372,800 at the end of 2005, an increase of 28.37 percent, while in the same time period the Jewish population of Israel grew from 4,701,600 to 5,302,600, or an increase of 12.78 percent. *Id.* The latter statistics may show some slight distortion given two factors that might affect the total populations: increase in the Jewish population of Israel resulting from immigration from other countries (a factor that would increase the Jewish population), and lack of consistency in the territory of Israel covered by the statistic (a factor that would increase the total Arab population). For example, Dr. Aziz Haider, a Hebrew University sociologist, claims the ICBS statistics are distorted by including the Druze on the Golan Heights and the Arabs of East Jerusalem, both of whom are not Israeli citizens. See Lily Galili, *We Are More Normal Than You Think*, HAARETZ, Feb. 21, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=685199>. Haider also believes the aggregate birth rate reported by the ICBS is misleading because the Bedouin in the south have much higher birth rates than Palestinian Israeli citizens who live in the north. In any event, it is believed the birth rate of Palestinians on the West Bank exceeds the current birth rate of Israeli Arab Muslims (three percent), but accurate figures with respect to the Arab population on the West Bank and birth rates are more difficult to establish and presently subject to enormous dispute among demographers. The Palestinian Central Bureau of Statistics ("PCBS") conducted a West Bank and Gaza census in 1997, deriving the figure of 2,895,683 Palestinian Arabs in the West Bank and Gaza. Making certain assumptions, including a birth rate of 4-5 percent, the PCBS projected a Palestinian population (excluding the Arabs in Israel) of 3.83 million by mid-2004. See Bennett Zimmerman, Roberta Seid & Michael Wise, Arab Population in the West Bank & Gaza: The Million and a Half Person Gap, Study Presented to the American Enterprise Institute (Jan. 10, 2005), http://www.aei.org/events/eventID.990/event_detail.asp (follow "Full Presentation" hyperlink under "Related Material"). If the Palestinian projections had been correct, 2,685,474 Palestinians would have resided on the West Bank by the end of mid-2004; if the Palestinian population of Jerusalem were included, the comparable figure would be 2,895,683. B'Tselem estimated the West Bank Palestinian population at two million. See Yehezkel Lein, *Land Grab: Israel's Settlement Policy in the West Bank*, COMPREHENSIVE REP. (B'Tselem, Jerusalem, Isr.), May 2002, at 95, available at http://www.btselem.org/Download/200205_Land_Grab_Eng.pdf. In contrast, adjusting for lower actual birth rates, lower fertility rates, net emigration from the West Bank rather than immigration, alternative counts for a resident population base and internal migration of Palestinians from the West Bank into Israel proper (within the Green Line), the Zimmerman Study concluded that, as of mid-2004, the resident-only population of West Bank Arabs (excluding Jerusalem) was 1,349,525. Taking into account the number of Palestinian Arabs in Israel, the same group recently concluded there is at least a 1.4 million person gap between the PCBS projection and the true Palestinian population in the West Bank and Gaza. The Zimmerman Study also concluded the gap between the Jewish population and the Arab population west of the Jordan was narrowing more slowly than most had initially projected. The Zimmerman Study has attracted some support. See, e.g., Nadav Shragai, *Deal with the Demography*, HAARETZ, Mar. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=690923>. But other demographers dispute this claim. For example,

surpass the number of the territory's Jews. Thus, Israel may remain democratic, but will cease to exist as a Jewish state.³⁶ Whether the territory's name remains Israel or, more likely, changes to Palestine or some other more palatable term is largely academic. An Arab political majority would certainly repeal the Law of Return,³⁷ and Israel's core identity as a haven for Jews in a still anti-Semitic world³⁸ would cease. In fact, just as Israel's Jewish majority implemented its "affirmative action" Jewish return policy, a dominant Arab population might adopt its own law of return, favoring the return of Arabs claiming some connection to "Palestine" and banning further Jewish immigration.

Alternatively, Israel may "transfer" Arabs from the land west of the Jordan. There is historic precedent for such a move, to take but one example, millions of people of German descent were "repatriated" to Germany from Eastern Europe in the immediate aftermath of World War II.³⁹ Numerous other population transfers have occurred in the twentieth century.⁴⁰ Despite prior "precedent," however, the "transfer" of Arabs to maintain a Jewish majority in Israel would be morally repugnant and clearly violate Article 49 of the Fourth Geneva Convention.⁴¹ Although

Sergio Della Pergola of Hebrew University states the Zimmerman Study "claim is based on several additional assumptions, such as a drastic decline in the fertility rate of the Palestinians, which has no basis in reality, and the anticipation of a large positive balance of Jewish immigration, which is not in sight in the present circumstances." See Sergio Della Pergola, *A Question of Numbers*, HAARETZ, Jan. 25, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=674640>. He notes, while original estimates called for a parity between the Jewish and Arab populations by 1910, "the trend of narrowing the Jewish majority [of the population west of the Jordan] until it is lost by 2020 is common to all the scenarios" and the Gaza withdrawal has merely delayed that reality by perhaps another twenty years. *Id.*

36. See Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT'L L.J. 453, 470 (2003) ("The Israeli government is not and cannot become sovereign over the entire Palestinian population of the West Bank and Gaza without forfeiting the expression of its own self-determination.").

37. The Law of Return gives every Jew the right to automatically acquire Israeli citizenship. Law of Return, 5710-1950, 4 LSI 114 (1950) (Isr.), available at [http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law of Return 5710-1950](http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law%20of%20Return%205710-1950).

38. See Mortimer B. Zuckerman, *A Shameful Contagion*, U.S. NEWS & WORLD REP., Oct. 7, 2002, at 34; Associated Press, *Britain's Chief Rabbi: 'Tsunami of Anti-Semitism' Sweeping the World*, HAARETZ, Jan. 1, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=664887>; U.S. Dep't of State, Excerpts: Anti-Semitism in Europe Increases in Recent Years (Jan. 5, 2005), <http://usinfo.state.gov/eur/Archive/2005/Jan/05-93928.html?chanlid=eur>.

39. See Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L. J. 207, 228 (1975).

40. See Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 322-24 (1995) (summarizing these exchanges).

41. See *infra* note 164. While this provision applies only in the case of belligerent occupation, it would be a ruse for Israel to end its occupation by annexing the West Bank and then forcibly to transfer its Palestinian residents.

Israel's political fringe might comfortably expel Arabs from the West Bank, it seems totally incongruous that Israel, as a matter of policy, would, in aftermath of the Holocaust, engage in a tactic of the Germans during World War II. Minimally, the "transfer" of Arabs from the West Bank would solidify the notion that the Arab refugees of 1948 were forced from Israel in a broad Zionist plan.⁴² While there were undoubtedly instances of force against Palestinians during the 1948 war, none of them seemly had the imprimatur of the Jewish Agency or, after the

42. Whether the Arab refugees voluntarily left Israel is heatedly debated among historians. See BENNY MORRIS, 1948 AND AFTER: ISRAEL AND THE PALESTINIANS 1-48 (1994) (summarizing both views) [hereinafter MORRIS, 1948 AND AFTER]. Morris identifies himself, among other Israeli historians, as a "new historian" who disagrees with the traditional Israeli view that refugees, answering calls of Arab leaders, departed Israel to facilitate the dismantling of the nascent Jewish state. In this work, as well as his earlier writing, BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949 (reprint ed. 1989), Morris concludes "what occurred in 1948 lies somewhere in between the Jewish 'robber state' and the 'Arab order' explanations." MORRIS, 1948 AND AFTER, *supra*, at 17. The work of Morris and other "new historians" has been criticized. EFRAIM KARSH, *Rewriting Israel's History*, in RETHINKING THE MIDDLE EAST 169, 169-85 (2003). Morris' own views have evolved. Replying to an article by Henry Siegman, see Henry Siegman, *Israel: The Threat from Within*, N.Y. REV. OF BOOKS, Feb. 26, 2004, at 15, Morris commented:

In his article, Siegman repeatedly "cited" things I had said—with a consistency of distortion that is truly mind-boggling. Just to give one key example: I most emphatically never stated anywhere that "the dismantling of Palestinian society . . . and the expulsion of 700,000 Palestinians [were] a deliberate and planned operation intended to 'cleanse' . . . those parts of Palestine assigned to the Jews." Quite the opposite. Had Siegman bothered to read my books, he would have discovered that mainstream (Haganah-Jewish Agency) Zionist policy, *until the end of March 1948*—meaning during the first four months of the war—was to protect the Arab minority in the Jewish areas and to try to maintain peaceful coexistence. Intentions changed only in April, when the Yishuv was with its back to the wall, losing the battle for the roads and facing potentially political and genocidal pan-Arab invasion. And even then, no systematic policy of expulsion was ever adopted or implemented (hence Israel's one-million-strong Arab minority today). The Arabs have only themselves to blame for the (unexpected) results of the war that they launched with the aim of "ethnically cleansing" Palestine of the Jews. (Contemporary Arab apologists, always full of righteous indignation, conveniently forget this.)

Benny Morris, *Israel: The Threat from Within: An Exchange*, N.Y. REV. OF BOOKS, April 8, 2004, at 77, 78 (emphasis added). More recently, reviewing a book by Salman Abu-Sitta, see SALMAN H. ABU-SITTA, *ATLAS OF PALESTINE: 1948* (2004), Morris wrote:

From reading this *Atlas*, the reader will not know that it was the Palestinian Arab onslaught on the Jewish community in Palestine in November to December 1947 that provoked Jewish counter-violence, which then triggered the Arab exodus; and that it was the follow-up invasion of the country by the armies of the surrounding Arab states in May to June 1948 that turned what might have been an ephemeral phenomenon into a still larger tragedy, consolidating and finalizing, as it were, the refugee status of the fleeing communities.

Benny Morris, *Details and Lies*, NEW REPUBLIC, Oct. 31, 2005, at 31, 32 [hereinafter Morris, *Details and Lies*].

establishment of Israel, its government.⁴³ It would be entirely academic that a one-sided narrative concerning the birth of the Palestinian refugee problem pertains to the events of a half-century ago.⁴⁴ Further, “transfer” would probably transform Israel into a pariah not only among other nations,⁴⁵ but also among the overwhelming majority of diaspora Jewry.⁴⁶

Nor do Arab and Muslim threats to “throw the Jews into the sea,”⁴⁷ “wipe Israel off the map,”⁴⁸ or, according to one of the many references to Israel and Jews in the Hamas Charter, “implement Allah’s promise . . . [to] fight the Jews (and kill them)”⁴⁹ negate or reduce the moral repugnancy of forced population transfer. While moral systems are frequently based upon the restraint “of self-interest in favor of promoting

43. See EFRAIM KARSH, *The Palestinians and the Right of Return*, in RETHINKING THE MIDDLE EAST, *supra* note 42, at 155, 155-68 [hereinafter KARSH, *Right of Return*]; EFRAIM KARSH, *Were the Palestinians Expelled?*, in RETHINKING THE MIDDLE EAST, *supra* note 42, at 127, 127-54 [hereinafter KARSH, *Palestinians Expelled?*].

44. See KARSH, *Palestinians Expelled?*, *supra* note 43, at 127-54.

45. This is, at times, not an entirely outrageous overstatement of Israel’s position as a result of Arab antagonism and increasing world-wide anti-Semitism, often expressed in the guise of anti-Zionism. See ALAN DERSHOWITZ, *Are Critics of Israel Anti-Semitic?*, in THE CASE FOR ISRAEL 208, 208-16 (2004); Mortimer B. Zuckerman, *Graffiti on History’s Walls*, U.S. NEWS & WORLD REP., Nov. 3, 2003, at 44, 44-51.

46. With respect to American Jews, some indication of this may be surmised by political affiliation. One survey listed fifty-four percent of American Jews as Democrats and the vast majority of the remainder, twenty-nine percent, as independents. AMERICAN JEWISH COMMITTEE, 2005 ANNUAL SURVEY OF AMERICAN JEWISH OPINION (2005), <http://www.ajc.org/site/apps/nl/content3.asp?c=ijTI2PHKoG&b=846741&ct=1740283> (follow “National Affairs” hyperlink). Thirty-four percent identified themselves as liberal, twenty-nine percent as moderate, and only twenty-seven percent as conservative. *Id.* (follow “National Affairs” hyperlink). Nearly one in four American Jews, twenty-three percent, identified themselves as “distant” from Israel and over sixty percent of respondents said Israel should dismantle all or some of the settlements as part of a permanent agreement with Palestinians. *Id.* (follow “Israel” hyperlink). Given the political affiliation of most American Jews and their preference for the dismantling of settlements, the percentage of American Jews feeling “distant” from Israel probably would rise appreciably, at least equal to the sixty percent favoring dismantled settlements if Israel were to adopt a forcible transfer policy to retain the West Bank. Another indication of some dissociation among American Jews from Israel is the sharp decline (thirty percent) in registration for the upcoming World Zionist Congress. See Daphna Berman, *Drop in U.S. Voter Sign-Up for World Zionist Congress*, HAARETZ, Feb. 10, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=681258>.

47. See David Horowitz, *Moment of Truth*, FRONTPAGE MAGAZINE, July 14, 2006, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=23362>.

48. Steven Erlanger, *Israel Wants West to Deal More Urgently with Iran*, N.Y. TIMES, Jan. 13, 2006, at A8 (Mahmoud Ahmadinejad, the president of Iran, has recently called for Israel to be “wiped off the map”).

49. The Charter of Allah: The Platform of the Islamic Resistance Movement art. 7 (Hamas) <http://www.palestinecenter.org/cpap/documents/charter.html> (last visited Aug. 6, 2006); see also Itamar Marcus, Palestinian Media Watch, The Palestinian Authority’s Beliefs = Hamas’ Charter (Dec. 1, 1999), <http://www.pmw.org.il/specprep-27.html>.

a reciprocal recognition of rights and interests,”⁵⁰ negative acts cannot be justified on the basis of “reciprocal intentions,” short of steps necessary to save lives and perhaps property. Neither could one rationalize forced population transfer by noting that continual pressure and persecution forced over 800,000 Jewish refugees to flee Arab countries in the period right before and after the creation of Israel, of which 580,000 were absorbed by Israel.⁵¹ Again, this would reflect an attempt to use reciprocity—an asserted population exchange—as the basis for a negative act not necessary to save lives. Moreover, this justification would be “double dipping”: regardless of the circumstances many Arabs fled Israel in 1948, Israel has already argued its numbers were far less than the Jewish refugees forced to abandon Arab countries and flee to Israel.⁵²

A third possibility is equally unpalatable. To include the West Bank within its sovereignty, Israel could simply deny citizenship, including the right to vote, to Arabs. Outright denial of citizenship would place Israel in the same camp as South Africa prior to the early 1990s, converting an outrageous analogy,⁵³ considering the present divestment efforts on college campuses and among certain Protestant church groups,⁵⁴ into an apt similarity.⁵⁵ Again, it would not matter in the least that other

50. David M. Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228, 252 (1982).

51. MARTIN GILBERT, *THE ROUTLEDGE ATLAS OF THE ARAB-ISRAELI CONFLICT* 48 (Routledge 2005) (1974).

52. See, e.g., DERSHOWITZ, *Did Israel Create the Arab Refugee Problem?*, in *THE CASE FOR ISRAEL*, *supra* note 45, at 78, 88-89.

53. The term apartheid is broadly and frequently applied to any measure Israel takes, including those that are security-related. See, e.g., Greg Myre, *Israel Considers Banning Palestinians on West Bank's Main Roads*, N.Y. TIMES, Oct. 20, 2005, at A10 (Saeb Erekat, chief Palestinian negotiator, described possible Israeli road plan in response to attacks on Jewish civilians on West Bank roads as “the official introduction of an apartheid system”); Chris McGreal, *Worlds Apart*, THE GUARDIAN, Feb. 6, 2006, <http://www.guardian.co.uk/israel/Story/0,,1703245,00.html> (“There are few places in the world where governments construct a web of nationality and residency laws designed for use by one section of the population against another. Apartheid South Africa was one. So is Israel.”). But see Dennis Ross, *Pretoria Calling*, N.Y. TIMES, Oct. 20, 2005, at A27 (“Yasir Arafat loved to equate the Palestinian struggle for statehood with the struggle of South Africans against apartheid, but his was always a false analogy.”); HonestReporting, ‘Road Apartheid’ Debunked, (Oct. 26, 2005), http://www.honestreporting.com/articles/45884734/critiques/Road_Apartheid_Debunked.asp; HonestReporting, *Guardian Promotes Apartheid Slur* (Feb. 12, 2006), http://www.honestreporting.com/articles/45884734/critiques/Guardian_Promotes_Apartheid_Slur.asp.

54. DERSHOWITZ, *supra* note 19, at 154-55; see also Rosner’s Blog, *Divestment Against Israel is Back in Town*, <http://www.haaretz.com/hasen/pages/rosnerBlog.jhtml?itemNo=680115&contrassID=25&subContrassID=0&sbSubContrassID=1&listSrc=Y&art=1> (Feb. 7, 2006, 20:36 EST).

55. See DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* 797 (2005) (“Olmert . . . declared in December 2003 that Israel

countries have long employed a modified apartheid, e.g., Japan's treatment of its Korean population⁵⁶ or even Lebanon's denial of citizenship to its Palestinian population.⁵⁷

But could the problem be finessed if Israel adopted law—for example, through a constitution—that guaranteed some modicum of political control to Jews regardless of subsequent population changes? To ensure its status as a Jewish safe haven, Israel would have to enshrine the Law of Return as fundamental, unchangeable law and divide political power so that, irrespective of whether Jews constituted the majority population, they would have a sufficient number of parliamentary seats to retain or significantly share power. Dictatorships, with or without the semblance of a Parliament, do just that. For example, the Alaouites, a small dissident sect originally derived from Shi'ite Islam, control Syria by retaining substantially all key military and political positions despite the overwhelming majority of Sunni Muslims.⁵⁸ Prior to the recent Iraq War, Sunni Arabs, and a smaller clan among them, the *Tikriti*, to which Saddam Hussein belongs, ruled Iraq to the disadvantage of Shi'a and Kurds who constituted over three-fourths of the population.⁵⁹ Even Lebanon, which purports to be an Arab democracy, has weighted its political structure so a Maronite is always President and, despite their dwindling numbers, Maronites retain significant political and economic powers over the country, a majority of whose citizens belong to other groups: Sunni Muslims, Shi'ites, and Druze.⁶⁰ Indeed, much of the

could not remain in the territories lest it lose its moral grounding and find its Jewish supporters internationally unable to defend an apartheid reality.”)

56. Hideki Tarumoto, *Multiculturalism in Japan: Citizenship Policy for Immigrants*, 5 INT'L J. ON MULTICULTURAL SOC'Y 88, 91 (2003), available at <http://www.unesco.org/shs/ijms/vol5/issue1/art6> (“[T]he myth of homogeneity has long been challenged by the presence of ethnic and national minorities, including ethnic Koreans and Chinese. Ironically, the idea has denied basic human rights to the “Oldcomers” who were Japanese subjects before 1947 and are now permanent non-national residents in Japan, where they were born and educated.”).

57. See UN Integrated Regional Information Networks, Lebanon: Palestinian Refugees Complain They Are Second Class Citizens (Oct. 2, 2005), <http://www.irinnews.org/print.asp?ReportID=49326>.

58. See Anthony Shadid, *Death of Syrian Minister Leaves a Sect Adrift in Time of Strife*, WASH. POST, Oct. 31, 2005, at A1; Mordechai Nisan, *Alawi Tribal Politics and Syria's Future*, JERUSALEM POST, Dec. 22, 2005, <http://www.jpost.com/servlet/Satellite?cid=1134309631221&pagename=JPost%2FJPArticle%2FShowFull> (describing degree of control, various personalities, and ministries controlled).

59. See Editorial, *Confrontation in the Gulf; for the Iraqi Ruler, Variations on a Name*, N.Y. TIMES, Aug. 25, 1990, § 1, at 6.

60. See Library of Congress Country Studies, Lebanon, Government and Politics, <http://www.presidency.gov.lb/presidency/history/after/after.htm> (last visited Feb. 12, 2006); U.S. Dep't of State, Background Note: Lebanon (Aug. 2005), <http://www.state.gov/t/pa/ei/bgn/35833.htm> (President is Maronite; prior to 1990, Christians and Muslims shared parliamentary seats in a ratio of six to five; under Ta'if

world supports Lebanon's refusal to deny voting rights and significant economic opportunities to Palestinian refugees on the need to protect that nation's delicate "ethnic balance."⁶¹

The quality of Israel's "democracy," however, is not appropriately judged by Lebanese standards. While differential voting is not uncommon in private organizations, for example, class voting in American corporate law, and characterizes the political structures of some nations, the principle of "one person-one vote" has become so enshrined in Western democracies that it is unlikely Israel could sustain such a transparently anti-democratic ruse for long. As a result, Israel would face criticism and ostracism not materially different from explicitly denying Arabs the right to vote.

If, then, Israel cannot retain both its sovereignty over the West Bank and its status as a Jewish and democratic state without discriminating against its Arab citizens, it must eventually relinquish sovereignty over the West Bank. If so, does it not follow automatically that most settlements—especially those not contiguous with the Armistice Demarcation Line, or "Green Line," established by the 1949 Armistice Agreement between Jordan and Israel—must be removed in order to permit Palestinian sovereignty over the West Bank?

Contrary to the assumption made by most commentators, academics, and policy makers,⁶² the removal of Jewish settlers from the West Bank is not the only option. Theoretically, three others exist: (1) Israel maintains sovereignty over the Jewish settlements, but relinquishes control over the remainder of the West Bank; (2) a land swap occurs where the settlements become part of Israel and the Arab communities in Israel become part of Palestine; or (3) the settlements become part of a sovereign Palestine.⁶³

Agreement, ratio was changed to ratio of fifty to fifty). As of 1987, it was estimated that only sixteen percent of Lebanon's population was Maronite, *see* Lebanon Maronites, http://www.photius.com/countries/lebanon/society/lebanon_society_maronites.html (last visited Aug. 6, 2006), a figure that might well be lower today.

61. *See* Orly Halpern, *Damascus Torpedoed Jordan's Peace Offer*, JERUSALEM POST, Mar. 24, 2005, at 1.

62. For example, prior to the last Israeli elections, Amir Peretz, the Labor party chairman, stated if Labor formed the next Israeli government, it would evacuate West Bank settlements that do not fall into Israel's future borders. *See* Lilach Weissman, Nir Hasson & Mazal Mualem, *Peretz: Settlers Who Leave West Bank Will Be Fairly Compensated*, HAARETZ, Jan. 24, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=673863>. Similarly, prior to the Israeli-Hizbullah war in the summer of 2006, Ehud Olmert intended to follow a similar path with a *Kadima*-dominated government. *See* Aluf Benn & Lilach Weissman, *Olmert: We Must Separate from Palestinians, Draw Final Borders*, HAARETZ, Feb. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=679959>.

63. A recent proposal, which was earlier said to become part of Labor's plank for the last election, would combine the continuance option with a lease arrangement, whereby,

Partial sovereignty would allow Israel to retain sovereignty over all Jewish settlements.⁶⁴ All remaining land on the West Bank would be transferred to Arab sovereignty. Indeed, Palestinian negotiators have characterized the plan pressed by President Clinton and accepted by Israeli Prime Minister Ehud Barak at the 2000 Camp David Summit as the partial sovereignty option.⁶⁵ This outcome would leave islands of Israeli sovereignty within a much larger geographical area of Palestine. Precedents for partial sovereignty do exist, including the limited sovereignty exercised by Native American reservations within the United States,⁶⁶ the sovereignty of the Vatican within Italy,⁶⁷ the sovereignty of Monaco within France,⁶⁸ and technically, the sovereignty afforded to national embassies.⁶⁹ But to Palestinians, the partial sovereignty option would be an infringement on their own sovereignty. Issues of security and police forces aside, matters of trade, taxation, and the like would transcend Palestinian authority.

A second theoretical option that resurfaced recently is the land swap option,⁷⁰ which would incorporate almost all of the settlements into Israel in exchange for Arab communities in Israel. True, substantially all peace

although Palestinian sovereignty is agreed upon, the settlement areas, or at least the large blocs of settlements, are then leased back to Israel under a Hong Kong arrangement for a period of 99 years. See Mazal Mualem & Nir Hasson, *Labor to Call for Leasing Settlements from PA*, HAARETZ, Dec. 28, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=663117>. It does not appear, however, that this idea became part of Labor's platform. See sources cited *supra* note 62.

64. See Akiva Eldar, *Kadima Supporters and the Road Map*, HAARETZ, Nov. 28, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=650612> (criticizing this possibility).

65. See ROSS, *supra* note 55, at 668, 691. This is shown graphically in maps prepared by the Washington Institute for Near East Policy, one depicting the actual proposal tendered to the Palestinians by President Clinton and the other map depicting the Palestinian's view of the proposal. See Wash. Inst. for Near E. Policy, *Maps of Camp David*, <http://www.washingtoninstitute.org/mapImages/41db110b8ca1f.jpg> (last visited Aug. 7, 2006); see also Benny Morris, *Camp David and After: An Exchange (I. An Interview with Ehud Barak)*, N.Y. REV. OF BOOKS, June 13, 2002, at 42, 43-44 (describing Barak's refutation of Arafat's contention that proposal amounted to "collection of 'bantustans' or 'cantons'" and characterization of Arafat's claim as fear of Palestinian reaction if they came to know real content of proposal and map).

66. See Indian Reorganization Act of 1934, 25 U.S.C. § 476 (2000).

67. See CIA, *The World Factbook: Holy See (Vatican City)*, <https://www.cia.gov/cia/publications/factbook/geos/vt.html> (last visited Aug. 7, 2006).

68. See *id.*

69. See Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

70. See Uzi Arad, *Swap Meet: Trading Land for Peace*, NEW REPUBLIC, Nov. 28 & Dec. 5, 2005, at 16 (Arad, former Director of Intelligence in Mossad, is founding head of Institute for Policy and Strategy at Lauder School of Government of Interdisciplinary Center, Herzliya); Yoav Stern, *Geographers Propose Transfer of Israeli Arab Towns to PA*, HAARETZ, Jan. 23, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=673813>.

proposals, including that of President Clinton at the Camp David summit in the summer of 2000 and the subsequent meeting at *Taba* in December of that year,⁷¹ include some concept of a land swap with the largest settlements contiguous to the 1967 borders incorporated into Israel and some Israeli land, usually that in the Negev adjacent to Gaza, incorporated into Palestine. But Uzi Arad, the former head of Israel's intelligence agency, has larger ambitions. In order "to increase ethnic homogeneity and to preserve each side's basic territorial reach,"⁷² Arad proposes a land swap transferring not only vacant Israeli land, but areas of Israel with large Palestinian and Bedouin populations to Palestine.⁷³ According to one study, the Jewish population of Israel will decline to seventy-four percent by 2050, but may remain at eighty-one percent by performing a land swap.⁷⁴ Arad's suggestion seems not to depend upon whether Israeli Arabs consent to become part of a sovereign Palestine. Moreover, if a land swap did not solve the demographic problem, Arad would seemingly favor a transfer of Arab Israeli citizens to Palestinian sovereign territory. However, whether one speaks in terms of a land exchange, where Arab villages now part of Israel become part of a Palestinian state, or a "population transfer," even Arad acknowledges most Israeli Arab citizens—irrespective of their increasing nationalist identity as Palestinians⁷⁵—wish to remain citizens of Israel. The rebuke to this proposal has been fast in coming. Arik Carmon, the head of the Israel Democracy Institute that has spearheaded an effort to establish a written constitution, termed "Arad's arguments . . . racist in nature,

71. See Miguel A. Moratinos, *The Taba Negotiations (January 2001)*, J. OF PALESTINE STUD., Spring 2002, at 79, 79-80, available at <http://domino.un.org/UNISPAL.NSF/9a798adb322aff38525617b006d88d7/cea3efd8c0ab482f85256e3700670af8!OpenDocument> ("Both sides accepted the principle of land swap but the proportionality of the swap remained under discussion.").

72. Arad, *supra* note 70, at 16.

73. Arad also writes approvingly of a trilateral land swap involving Israel, Palestine and Egypt, again designed for the same demographic and geographic purposes. *Id.* at 18. The leader of *Yisrael Beiteinu*, considered a "far-right" party, has also reiterated a similar proposal incorporating Jewish settlement strongholds into Israel in exchange for "areas within the 1967 border populated mostly by Israeli Arabs to be handed over to the PA." Lilach Weismann & Lily Galili, *Lieberman Says He's Ready to Evacuate His Own Settlement*, HAARETZ, Jan. 30, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676593>. Even former Secretary of State Henry Kissinger seems to advocate a land swap that would involve "territories in present-day Israel with significant Arab populations" and asserted that "[t]he rejection of such an approach, or alternative available concepts, which would contribute greatly to stability and to demographic balance, reflects a determination to keep incendiary issues permanently open." Henry A. Kissinger, *What's Needed from Hamas*, WASH. POST, Feb. 27, 2006, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022601263.html>.

74. Arad, *supra* note 70, at 16.

75. See *infra* note 469 and accompanying text.

damaging to human rights—and of course to the foundations of democracy— . . . in contradiction to international norms[,] and . . . unrealizable.”⁷⁶ As Carmon opined, “[t]he termination of an individual’s citizenship, according to international law, cannot occur unless he relinquishes it by agreement.”⁷⁷ A similar suggestion by a group of academic geographers was rejected by Ahmed Tibi, a member of the *Knesset* from *Hadash-Ta’al*, as “making its Arab population feel like a rejected enemy.”⁷⁸

Unlike the partial sovereignty and land swap options, with or without the transfer of Arabs, only two options—the removal option and the continuance option—do not infringe on Palestinian sovereignty or result in the forced removal of Arabs from Israel in order to retain its Jewish majority and character. Of the two, the removal option is almost universally assumed to be necessary and inevitable, while the continuance option remains overlooked by substantially all commentators.

In sum, Israeli sovereignty over the West Bank is incompatible with both Israel’s continued status as a democratic Jewish state and the creation of a viable sovereign Palestinian state. That conclusion does not necessarily mean that removal of Jewish settlements is the only option. Concentrations of Jewish and Arab populations should definitely influence the de jure border between Israel and Palestine, but they need not dictate sovereignty. If so, the continued presence of Jewish settlements, per se, is not an obstacle to the creation of a Palestinian state. Part III explores why the settlements’ continued presence in Palestine is, at least in theory, a more desirable option than their removal, while Part IV posits and analyzes the necessary conditions and prerequisites to this resolution.

III. Reasons in Support of Continuance Rather than Removal

The preceding section analyzed the incompatibility between Israeli sovereignty over the West Bank and Israel’s continued status as a democratic Jewish state. Jewish settlements bordering Israel’s 1948 armistice lines can be incorporated into Israel consistent with that status with or without some land swap of unpopulated or sparsely populated Israeli territory in the Negev contiguous to Gaza. But two options remain with respect to other settlements: removal, that is, the destruction

76. Arik Carmon, *A Blot on Israeli Democracy*, HAARETZ, Dec. 12, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=656513>.

77. *Id.*

78. Yoav Stern, *Geographers Propose Transfer of Israeli Arab Towns to PA*, HAARETZ, Jan. 23, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=673813>.

of the settlements and the return of their residents to Israel, or continuance, that is, their continued presence in a Palestinian state. This section analyzes why the latter option is preferable.

A. Reversing an Exclusionary Policy: Jews, Too, Have the Right to Live in the Historic Land of Israel

In drawing borders between Israel and a Palestinian state, the location of Jewish and Palestinian communities is not irrelevant: while the location of these communities need not determine the borders between the states, they should surely influence those borders. The great bulk of Jews living west of the Jordan River should be within Israel, just as the great bulk of Arabs should be within Palestine. From Israel's perspective, that proposition follows from Israel's basic identity: it cannot serve as a "homeland" for Jews, especially Jews oppressed in other countries, unless it is predominantly Jewish. The same holds true for a future Arab juridical entity—it too must be predominantly Arab. Otherwise, the very desire for political rights that drives the Palestinian political struggle would be thwarted.

But complete separation is impossible. Israel will always include minorities and, as should be the case, strive for inclusion of those minorities on a non-discriminatory basis. This proposition follows from Israel's identity not only as Jewish state, but a democratic one. Approximately twenty percent of Israel's present population is Arab.⁷⁹ Arab political parties exist, such as the *Hadash-Ta'al*, National Democratic Assembly, and United Arab List,⁸⁰ Arabs belong to larger Israeli parties, especially Labor,⁸¹ and Arabs serve in the Israel

79. Editorial, *Population on Eve of 2006 Stands at 6,986,300*, JERUSALEM POST, Dec. 28, 2005, <http://www.jpost.com/servlet/Satellite?cid=1135696353179&pagename=JPost%2FJPostArticle%2FShowFull> (Central Bureau of Statistics report population of 6,986,300 in Israel at end of 2005, of whom seventy-six percent are Jews, twenty percent Arabs, and four percent non-Arab Christians).

80. See *Current Members of Seventeenth Knesset Circuit by Faction*, http://www.knesset.gov.il/mk/eng/MKIndex_Current_eng.asp?view=1 (last visited Aug. 7, 2006); see also Yoav Stern, *Two Parties, and No More*, HAARETZ, Feb. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=680069> (describing differences between three Arab parties represented in *Knesset* and necessity for Arab representation).

81. For example, two present Arab *Knesset* members representing Labor are Raleb Majadele and Saleh Tarif. However, a poll taken prior to the last election indicated that of the approximately twenty percent of Israeli Arabs that intended to vote for predominantly Jewish parties, a plurality would vote for *Kadima*. See Jack Houry, *Poll: 20% of the Arab Public Will Vote for Predominantly Jewish Parties*, HAARETZ, Mar. 9, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=692250> (according to poll, *Kadima* will receive nearly 10 percent of Arab vote, compared to 7.5 percent for Labor). The same poll indicated that sixty-six percent of Israeli Arabs intended to exercise their right to vote.

parliament, the *Knesset*,⁸² and occasionally voice views quite antagonistic to the very existence of Israel.⁸³ Arabs have served on the Israeli Supreme Court⁸⁴ and in the ministerial *ranks* of the government.⁸⁵ Unlike Israeli Jews, who typically face compulsory army service, Arabs can choose whether to serve in the Israeli military. With rare exceptions, Palestinian Arabs do not serve, but a larger number of Bedouin⁸⁶ and Druze do volunteer.

No one should be deceived by the above sketch that Israel's record of inclusion of its Arab minority has been stellar — quite the contrary.⁸⁷

82. See All Knesset Members, http://www.knesset.gov.il/mk/eng/mkdetails_eng.asp (complete listing of *Knesset* membership, including at least twelve Arabs) (last visited Aug. 7, 2006).

83. Included within this group of *Knesset* members are Azmi Bishara, Ahmad Tibi, Talab El-Sana, Abdulmalik Dehamshe, and Mohammad Barakeh. See Ze'ev Segal, *MK Bishara's Liberty*, HAARETZ, Feb. 6, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=679104> (describing MK Bishara's expressions with respect to terrorism and a recent Supreme Court decision permitting his continued presence in *Knesset*); Alexander Yakobson, *Assad's Advocates*, HAARETZ, Jan. 3, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=665417> (three Arab MKs alleged UN investigation into death of former Lebanese Prime Minister, Rafik Hariri, was influenced by Israel, wanting to maintain tension with Syria); Editorial, *Bishara's Blast*, JERUSALEM POST, Dec. 21, 2005, <http://www.jpost.com/servlet/Satellite?apage=1&cid=1134309618537&pagename=JPost%2FJPArticle%2FShowFull> (quoting Bishara as having said, among other things, "We Arabs aren't interested in your democracy. Give us Palestine and take your democracy with you."). More recently, the Israeli Arab *Knesset* members from the Ballad party met with senior Hamas officials, despite an official Israeli ban on such contacts. See Jack Khoury, Nir Hasson & Arnon Regular, *Ballad MKs Meet Hamas Despite Police Intervention*, HAARETZ, Apr. 21, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=707653>.

84. In March 1999, Hamad Abdel Rahman Zuabi was appointed to a nine month seat on Israel's Supreme Court, and, in May 2004, Salim Joubran became the first Arab to obtain a permanent seat. See Greer F. Cashman, *It Was Joubran's Day*, JERUSALEM POST, May 25, 2004, at 5.

85. For example, in the thirtieth Israeli government, Ruhama Avraham served as Deputy Minister of the Interior and Majalli Whbee served as Deputy Minister of Education, Culture and Sport. See Isr. Ministry of Foreign Affairs, Ministers and Senior Officials of the 30th Government of Israel, <http://www.mfa.gov.il/MFA/Government/Previous+governments/Ministers%20and%20Senior%20Officials%20of%20the%2030th%20Governm> (last visited Aug. 7, 2006). Salah Tarif served as Minister without Portfolio in the twenty-ninth government. See Isr. Ministry of Foreign Affairs, The Governments of Israel- 29th Government, http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/3/The+Governments+of+Israel+29th+Government+-+March.htm (last visited Aug. 7, 2006). Nawaf Massalha served as Deputy Minister of Foreign Affairs in the twenty-eighth government of Israel. See Isr. Ministry of Foreign Affairs, Ministers and Senior Officials of the 28th Government of Israel, <http://www.mfa.gov.il/MFA/Government/Previous+governments/Ministers%20and%20Senior%20Officials%20of%20the%2028th%20Governm> (last visited Aug. 7, 2006).

86. See David Ratmer, *Bedouins to Staff Public Transportation Security Unit in South*, HAARETZ, Dec. 20, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=660306>.

87. See, e.g., Dan Rabinowitz, *A Lesson in Citizenship*, HAARETZ, Dec. 20, 2005,

But, of present relevance, Israeli Jews, subject to certain conditions explored in Part IV, should have similar rights to live within a Palestinian state.⁸⁸ The continuance option, in contrast to removal, allows Jews to live within their historic Jewish homeland, *Eretz Yisrael*, the land of Israel, although they would not be living within the State of Israel, *Medinat Yisrael*. Indeed, the single most important reason supporting continuance over removal of settlements is that it upholds the liberal principle that Jews, qua Jews, are not forbidden to live in a particular place. Removal undermines, if not denies, that right. Jordanian law forbade ownership of land by Jews.⁸⁹ Similarly, the Palestinian Authority considers a sale of land by an Arab to a Jew a capital offense, and sellers of land to Jews have been executed.⁹⁰ Are these truly policies that deserve reinforcement in a peace agreement between Israel and the Palestinian Authority to create a Palestinian state?

The principle that Jews should not be excluded from maintaining communities on the West Bank is particularly important for reasons of Jewish identity and history. Jewish identity began in the territory that the Roman Emperor Hadrian, following the Jewish revolt of the second

<http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=659905> (detailing how Interior Ministry's decision to reject request of predominantly Arab town to expand favors Jewish population in same area); Ruth Sinai, *Arab Woman Petitions High Court Against Link Between Army Service, Mortgage Rights*, HAARETZ, Jan. 3, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=665372> (suit filed with Supreme Court, alleging army service and alternative national service, which are not mandatory for Arabs, discriminate against Arabs because mortgage law gives additional points for service). On the other hand, there are ongoing efforts at greater inclusion. See, e.g., Gideon Alon, *Knesset Panel Recommends Building New Israeli Arab Town from Scratch*, HAARETZ, Feb. 16, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=683443> (planning advisor of Knesset Interior and Environment Committee recommended building new Arab town to deal with shortage of space in existing Arab communities); see also Raday, *supra* note 36, at 479-98 (legal discussion of ongoing efforts).

88. It should be noted that this question differs from whether there is a "right of return" for Palestinian refugees. See Ruth Lapidot, *Isr. Ministry of Foreign Affairs, Do Palestinian Refugees Have a Right to Return to Israel?* (Jan. 15, 2001), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Do+Palestinian+Refugees+Have+a+Right+to+Return+to.htm>. Recognition and implementation of a right of return would mean Israel would cease to exist as a predominantly Jewish state. Recognizing a Jewish right to live in Palestine, particularly in the numbers that a final settlement with some border adjustments would imply, would not in any way undermine the future of Palestine as a predominantly Arab state.

89. DERSHOWITZ, *Conclusion: Israel—the Jew among Nations*, in *THE CASE FOR ISRAEL*, *supra* note 45, at 222, 233; DERSHOWITZ, *Was the U.N. Partition Plan Unfair to Palestinians?*, in *THE CASE FOR ISRAEL*, *supra* note 45, at 63, 65; Benvenisti & Zamir, *supra* note 40, at 315; Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39, 47-48 (1980).

90. See JUSTUS REID WEINER, *HUMAN RIGHTS OF CHRISTIANS IN PALESTINIAN SOCIETY* 13 (2005), available at <http://www.jcpa.org/text/Christian-Persecution-Weiner.pdf>; Benvenisti & Zamir, *supra* note 40, at 315.

century, renamed *Syria Palaestina* in order to expunge its Jewish identity.⁹¹ The formation of the Jewish people occurred between circa 1200 B.C.E. and the first several centuries A.D. During that time, Jews migrated to the West Bank, were forced into exile by the Babylonians, returned to rebuild the Solomon's Temple in Jerusalem, and transformed their religious practice from one based upon priestly sacrifice to prayer.⁹² Excluding perhaps Jerusalem, specific areas of the West Bank that almost certainly would become part of a Palestinian state, such as Hebron, are more central to Jewish identity than areas west of the Jordan that would remain part of Israel.⁹³ Jews inhabited Hebron continually for millennia and continuously for at least 500 years prior to a Jewish massacre by Muslim Arabs in 1929 supported by Haj Amin al-Husseini, the British appointed grand mufti of Palestine. Al-Husseini later, living in Berlin as an adviser to Adolf Hitler, encouraged the extension of the Final Solution to Jews living in the Middle East.⁹⁴ Israel sits in the general area most frequently labeled either the "Middle East" or "Near East." Jews in this area have either been expelled⁹⁵ or subject to recurrent second-class status (*dhimmitude*),⁹⁶ persecutions, and expulsions. In the words of one scholar:

[While] persecution of Jews in the Islamic world never reached the

91. Following the Jewish revolt led by Simon bar Kokhba against Roman rule (132-35 C.E.), the Roman Emperor Hadrian took various measures against the Jews, including changing the name of the territory from Judaea (Israel) to Syria Palaestina. See A HISTORY OF THE JEWISH PEOPLE 334 (Hayim H. Ben-Sasson ed., 10th ed. 1997).

92. *Id.* at 342; see also GILBERT, *supra* note 51, at 1-2.

93. PALESTINE ROYAL COMMISSION REPORT 2 (1937) ("[B]y about 1100 B.C.[E.] the Israelites had occupied most of the hill-country in Palestine and . . . were already distinguished from the peoples of the coast.") [hereinafter PEEL REPORT]; Bradley Burston, *Want Greater Israel? Vote for the Left*, HAARETZ, Feb. 10, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=681161> ("Netanyahu . . . gave away nearly all of Hebron, a holy city second only to Jerusalem in its sanctity to Jews.").

94. DERSHOWITZ, *Were the Jews Unwilling to Share Palestine?*, in THE CASE FOR ISRAEL, *supra* note 45, at 39, 40-44.

95. For example, Jews were slaughtered and expelled from most of the Arabian Peninsula. See Hayim J. Cohen, *Arabia*, in 3 ENCYCLOPAEDIA JUDAICA 231-35 (reprint ed., Coronet Books 1994) (1972); 3 HEINRICH GRAETZ, HISTORY OF THE JEWS 76-85 (Jewish Publ'n Soc'y, Philadelphia 1894); U.S. Dep't of State, Reports on Human Rights Practices in Saudi Arabia (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm>.

96. See MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS: SHAYBĀNĪ'S SIYAR 11 (Majid Khadduri, trans., Johns Hopkins University Press 1966) ("[T]he tolerated religious communities collectively called the 'People of the Book' or Dhimmīs . . . preferred to hold fast to their own law and religion at the price of paying a poll tax (*jizya*) to Islamic authority. The Muslims enjoyed full rights of citizenship while the followers of the tolerated religions enjoyed only partial civil rights. . . .") (emphasis added). The term "dhimmi" initially implied a protected status, but as time went on it connoted an unequal and inferior status which subjected Jews to harsh treatment.

scale of Christian Europe[,] . . . that did not spare the ‘Jews of Islam’ (to use the phrase of the historian Bernard Lewis) from centuries of legally institutionalised inferiority, humiliating social restrictions[,] and the sporadic rapacity of local officials and the Muslim population at large.⁹⁷

At least prior to the influx of Russian Jews in the late 1980s and 1990s, a majority of Israel’s Jewish citizenry were exiles from Arab lands, or the children or grandchildren of such exiles.⁹⁸

Equally important to Israel’s identity and statehood was its emergence in the aftermath of the Holocaust,⁹⁹ with the horrendous death of a majority of the relatives of most Ashkenazi Jews in Israel. An essential Nazi idea, precedent to the Holocaust itself, was the alleged “despoliation” of the Aryan race by the presence of Jews in Germany and Austria. Nonetheless, Israel established relations with the Federal Republic of Germany. Suppose, however, Germany had insisted in exchange that no Jew could thereafter live or own property within Germany. Is it conceivable Israel would have signed such a peace treaty? For Israel to accept that Jews cannot live in a predominantly Arab governed polity would sever a nerve connected to its important historical underpinning.¹⁰⁰

The removal and destruction of settlements from Gaza together with the withdrawal of Israeli forces, produced much soul-searching and agony among Israelis, but did not present the same emotional, historical, and geographic challenges presented by the removal of settlements from the West Bank.¹⁰¹ Nonetheless, the Gaza removal, like an earlier

97. EFRAIM KARSH, *The Long Trail of Arab Anti-Semitism*, in RETHINKING THE MIDDLE EAST, *supra* note 42, at 97, 98.

98. See Sarah Sennott, *It Is Now or Never*, NEWSWEEK, Apr. 9, 2004, <http://msnbc.msn.com/id/4703546/>.

99. See generally AMOS ELON, THE ISRAELIS: FOUNDERS AND SONS 198-204 (Penguin 1993) (1971); TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST (Haim Watzman, trans., 2000) (1993).

100. For sure, there are those who like former Prime Minister Menachem Begin, who negotiated the Israeli-Egyptian peace treaty precisely to that position: as part of that peace treaty, Israel completely evacuated *Yamit*, an Israeli settlement, without any attempt to negotiate its continued existence as part of Egypt. Similarly, Prime Minister Ariel Sharon masterminded and successfully effected the evacuation of all Jewish settlements from Gaza. But, to Jews, the Sinai and even Gaza do not have the same standing as the West Bank from religious, historical or geographical perspectives. See sources cited *supra* note 93 and accompanying text; sources cited *infra* note 101 and accompanying text.

101. See Rafael D. Frankel, *Security and Defense: Has Unilateralism Run Its Course?*, JERUSALEM POST, Feb. 16, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395428454&pagename=JPost%2FJPArticle%2FShowFull> (“[T]he West Bank was never viewed in the same light as Gaza by many Israelis. For years, a large segment of the country supported leaving the tiny coastal strip for demographic reasons, since only

decision by Prime Minister Menachem Begin to abandon *Yamit* in the 1979 Israeli-Egyptian peace treaty,¹⁰² does offer precedent for the removal option. At the same time, another aspect of the Gaza withdrawal may actually offer an apt analogy to the emotional agony of the removal of West Bank settlements. In response to public outcry and its own soul-searching, the Israeli cabinet did not destroy the synagogues in Gaza.¹⁰³

In sum, the continued existence of Jewish settlements in the West Bank, like Arab communities in Israel, supports the principle that a minority can maintain communities among a larger and different ethnic group. The removal option contradicts this principle in the same way as would any transfer of Palestinian Arabs from Israel to Palestine. There are limits to the exercise of this principle, as explored in Part IV, but the principle remains a weighty guide.

B. Jewish Settlements as a Metaphor of Acceptance

The settlements should stay for another powerful reason. The Arab-Israeli dispute has been characterized by two competing narratives.¹⁰⁴

8,000 Jews lived among 1.3 million Arabs. This sector also sought to stem what they considered to be the hemorrhaging of resources that providing security for the settlers there drained in terms of both money and blood. Moreover, Gaza was not the crucial security corridor that the West Bank is, nor were its sand dunes once home to the tribes of Israel, as were the hills and gullies of Judea and Samaria.”). The recent evacuation of an illegal settlement on the West Bank, Amona, gives some indication of the emotional and political complications of evacuating West Bank settlements in general. See Amos Harel, Arnon Regular, Nadav Shragai, & Jonathan Lis, *Security Forces Demolish Amona Homes Amid Violent Clashes*, HAARETZ, Feb. 2, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676627> (over 200 wounded settlers and police officers, along with several members of *Knesset* from parties supportive of settlers). In the words of Hillel Halkin:

There is indeed something unacceptable about telling Jews that although they may live anywhere they wish, in New York and London, in Moscow and Buenos Aires, there is one part of the world they may not live in—namely, Judea and Samaria, those regions of the land of Israel most intimately connected with the Bible, with the second Temple period, and with Jewish historical memory, and most longed-for by the Jewish people over the ages.

Halkin, *supra* note 23, at 24.

102. See Treaty of Peace Between Egypt and Israel, Egypt-Isr., Mar. 26, 1979, 18 I.L.M. 362.

103. See Steven Erlanger, *Synagogue Dispute Clouds Gaza Transfer*, N.Y. TIMES, Sept. 10, 2005, at A7 (“But, the expected occurred, and the synagogues were razed by the Palestinians after the Israelis departed.”); Greg Myre, *Israel Lowers Its Flag in the Gaza Strip*, N.Y. TIMES, Sept. 12, 2005, at A10 (“Hours after the Israelis left the settlement of *Neve Dekalim*, young Palestinians were tearing aluminum window frames and metal ceiling fixtures out of the main synagogue there, as fires burned inside.”) (emphasis added).

104. See DERSHOWITZ, *Did European Jews Displace Palestinians?*, in THE CASE FOR ISRAEL, *supra* note 45, at 22, 24.

Each narrative incorporates both an “affirmative” case relating the Jewish or Arab nexus to the land and a “negative” brief that denies the nexus asserted by the other. Unfortunately, the affirmative and negative components are often so intertwined that separating them becomes difficult.¹⁰⁵

Many of the affirmative elements of the Jewish narrative have been presented above.¹⁰⁶ Its core is the several millennia nexus between the Jewish people and *Eretz Yisrael*.¹⁰⁷ Historically, Israel’s affirmative case

105. “We were here *first*,” even without the accompanying negation of the conflicting narrative, can be understood as, “You were here *second*.”

106. See sources cited *supra* notes 91-98 and accompanying text.

107. See, e.g., Dore Gold & Jeff Helmreich, *An Answer to the New Anti-Zionists: The Rights of the Jewish People to a Sovereign State in Their Historic Homeland*, JERUSALEM VIEWPOINTS, Nov. 16, 2003, available at <http://www.jcpa.org/jl/vp507.htm>. Gold is a former representative of Israel to the UN. Other prominent parties who have described these narratives are Yehoshua Porath, Professor Emeritus from Hebrew University, see Yehoshua Porath, *Mrs. Peters’s Palestine*, N.Y. REV. OF BOOKS, Jan. 16, 1986, at 36, and Walter Reich, former director of the U.S. Holocaust Museum, 1995-98, and Professor of International Affairs, Ethics and Human Behavior at George Washington University, see Postings of Walter Reich to Rosner’s Guest, <http://www.haaretz.com/hasen/pages/rosnerGuest.jhtml?itemNo=670656> (Jan. 16, 2006). Porath, writing a critical review of Joan Peters’ work, see JOAN PETERS, *FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE* (2001), writes somewhat critically of some elements of the Jewish narrative, at least in its unquestioned form:

Jews, and Zionists especially, developed their own myths about Palestine. First they interpreted ancient Jewish history according to the ideology of modern nationalism, equating the old Israelite and Judean kingdoms with modern nation-states. The Maccabean revolt and the period of Hasmonean rule were seen as typical manifestations of the struggle for modern national liberation. During the years when most Jews lived in exile, it was argued, they always kept a separate national identity: they never converted of their free will to another religion, and they preserved the memory of their ancestral land, to which they always hoped to return. Indeed, against all odds, some never left.

Special emphasis was put on this last group. Every bit of evidence that could be found, however trivial it may have been, was used to prove the continuity of the Jewish presence in Eretz Israel and to show that it was central to the life of Jews in exile. . . . The Zionists argued that Jewish identity and the yearning to return to Palestine were strengthened by the persecutions of the Jews in all parts of the world, including the Islamic and Arab countries.

The return itself was mainly perceived as a matter of Jewish resolve to establish a homeland, which required struggle against Palestine’s foreign rulers—the Ottoman Empire first, and then the British Mandate.

Porath, *supra*, at 36. Reich describes the Jewish narrative thus:

It was a story that saw that the Jewish claim to the land as ancient and unbroken.

Central to this story was the understanding that the Jews had lived in that land for over a thousand years; that it was the core of their cultural, moral and religious achievements; that while there they had developed the teachings that had spawned the three great religions of the West; that it was the place of their Temples and the site of their worship and their Zion; that ultimately most of the Jews were exiled from that land; that many nevertheless remained in it; that the exiles continued to pray, three times a day, for a return to it; that while they

was supplemented by its negative brief: Palestine was barely inhabited when modern Jewish immigration began; many Arabs came to Palestine attracted by the economic development produced by modern Zionism prior to the establishment of the State of Israel; Palestinians never considered themselves to be a separate people in a separate polity apart from other Arabs; and, in general, Arab states and the Palestinians have pursued repeated warfare and terrorism against Israel and the Jews.¹⁰⁸ Combining its affirmative and negative elements, the Israeli narrative has historically portrayed the conflict as the unwillingness—carried to the extreme by Arab encouragement of the Holocaust, successive wars against Israel, and repeated acts of terrorism during the years of Israel's existence—to permit the existence of a sovereign Jewish nation in the Middle East despite the demonstrated connection between the Jewish people and the land.

As might be expected, the Palestinian narrative is substantially different. Its affirmative case stresses that at the end of the nineteenth century Palestine *was* inhabited, Arabs formed the majority of the population, and Arabs lived in villages—i.e., they were more than Bedouins roaming across the deserts. More recently, Palestinians have sought to buttress their claim to the land with the assertion that they descended from the Canaanites and therefore have always inhabited the land, preceding even the ancient Hebrews. It is the Palestinian negative brief, however, that has seemed to merit the most repetition. Walter Reich, former director of the U.S. Holocaust Museum and now Professor

were in exile in Europe they were constantly abused and repeatedly and genocidally massacred; that as a result, in the nineteenth century, Herzl and other political Zionists created a movement, Zionism, to bring Jews back to their homeland, their Zion, where they could [sic] a normal nation, determine their own destiny and protect themselves; and that the creation of Israel was a just achievement based on the origin of the Jews in that land and a necessary achievement based on the centuries of massacres and genocide the Jews had endured in exile, of which the Holocaust was the most recent and most stunning example.

Postings of Walter Reich to Rosner's Guest, *supra*.

108. Porath describes the negative brief as follows:

The Arab population was not presented as a major obstacle since, it was said, it was so small. Palestine during the late Ottoman and early British periods was portrayed as a barren land, hardly inhabited, whose tiny Arab population consisted mostly of wandering Bedouin tribes whose presence was only temporary.

According to the Zionist myth, only modern Jewish colonization brought about the economic development of Palestine and improved the hard conditions there. These developments, it was said, attracted poor Arabs from the stagnant neighboring countries. Their numbers grew faster than the Jewish immigrants because the malicious British authorities always encouraged them to come and did much to help to absorb them, both economically and legally.

Porath, *supra* note 107, at 36.

of International Affairs, Ethics and Human Behavior at George Washington University, describes its elements as follows:

In the Palestinian narrative, Jews have no right to the land, and even had nothing, or little, to do with it in the past. The Jews of today are seen as unrelated to the Hebrews who lived there two thousand years ago; according to some versions of this narrative, European Jews were simply the offspring of converts in Europe, and were not descended from the Hebrews who used to live in what is now Israel and the West Bank. So important is it for the Palestinian “narrative” to deny the Jewish connection with the land—and therefore the justice of the Zionist return—that even the existence of the Temples is denied.

....

By creating Israel, Europeans were colonizing Palestine, coming there without any basis for their arrival, much as the French had colonized Algeria and the Boers and British had colonized South Africa.¹⁰⁹

According to this view, Israel’s creation—a European colonial enterprise to deny Palestinians, the indigenous population, their right to the land and sovereignty¹¹⁰—was “utterly unjust.”¹¹¹

109. Postings of Walter Reich to Rosner’s Guest, *supra* note 107.

110. This view suffuses and affects the legal analyses of some authors. See, e.g., Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 72-78, 101 (2003); sources cited *supra* notes 25-26. It is also repeatedly emphasized in the various writings of Edward Said and his disciples. See, e.g., SAID, *supra* note 10; John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 PENN ST. INT’L L. REV. 363 (2002) (applying Said’s methodology and supporting the colonialist narrative). Summarizing Said’s writing on the subject, Karsh characterizes Said’s view as “the local populations of the Middle East, the Arabs in particular, as the hapless victims of an alien encroachment.” See EFRAIM KARSH, *Preface* to RETHINKING THE MIDDLE EAST, *supra* note 42, at xi. Porath describes the Palestinian “myths” in the following terms:

The Arab side tried to prove that first of all the Jews were not a nation in the modern sense of the term and consequently did not require a state of their own. In the tradition of both Western liberal and doctrinaire socialist thinking, the Arabs argued that the Jews were only a religious community; that peoples could not return to their ancient homelands without turning the entire world upside down; and, most important, that Palestine had been settled since the seventh century [C.E.] by Arabs. Over the years many Arab ideologists even claimed that Arabs had occupied the land in pre-Biblical times because of the “Arab character” of Canaanites.

Zionism, the Arab argument continued, if it had any grain of historical justification at all, emerged only in a European setting. It came about as a reaction to Western Christian or secular and racist anti-Semitism, with which

To what degree have Jews and Arabs remained steadfast in believing in and/or adhering to these narratives? Most Israelis still believe in the positive core of their narrative—that Zionism and the resultant State of Israel represented the act of self-determination by a people with an extraordinarily strong physical, emotional, and religious nexus to the land¹¹²—but have abandoned key elements of their negative brief.¹¹³ In doing so, most Israelis understand that the Jewish/Arab struggle is, in the words of Chaim Weizmann, the first president of Israel, “not the clash of right and wrong, but the clash of two rights.”¹¹⁴ It is unclear, however, whether Arabs, in general, and Palestinians, in particular, have similarly abandoned those narrative elements that would

the Arabs had nothing to do; therefore, they should not be required to pay the costs of remedying it. In Arab and Islamic countries Jews suffered none of the terrible treatment that Western Jews had suffered. On the contrary, the Muslims in general and the Arabs in particular treated their religious and ethnic minorities with full equality and enabled both Christians and Jews to take part in public life, to rise to high positions of state, and, in recent times, to become full members of the modern and secular Arab nation living in its various states. The Jews living in the Arab and Muslim countries, moreover, did not take part in the Zionist movement. They even actively opposed it and did not want to emigrate to Israel. That most of them eventually did so the Arabs attribute to the machinations of Israel working with corrupt Arab rulers who were “stooges of imperialism.”

After the 1948 war Arab propaganda added an important new claim: since the Jews wanted Palestine empty of Arabs, they used the opportunity of the war to systematically expel the indigenous Arab population wherever they could do so. Some Arab writers, and others favorable to their cause, have gone so far as to claim that the war itself was set off in December 1947 by the Jews in order to create the right circumstances for the mass expulsion of Palestinian Arabs from their homeland.

Until the mid-1960s the Arab claims were usually presented as part of the ideology of Arab nationalism. Palestine was (and ideologically speaking still is) considered part of the greater Arab homeland and the Palestinians part of the greater Arab nation. The aim of the Arab struggle was to preserve the Arab character of Palestine from the Jewish-Zionist threat. The Palestinian case was at best secondary when it was made at all. Only since the middle of the 1960s and particularly after 1967 has the distinctively Palestinian component become relatively stronger among the factors that shape the identity of the Palestinian Arabs.

Porath, *supra* note 107, at 36.

111. Postings of Walter Reich to Rosner’s Guest, *supra* note 107.

112. See Raday, *supra* note 36, at 461-68.

113. This is not to say that all elements of the Israeli negative brief are incorrect, any more than that there is no truth to the Palestinian negative brief. For example, Kenneth Stein’s exhaustive study of Middle East history revealed that “[b]efore 1950, Arab histories that treated Palestine or the Palestinian Arabs as separate historical entities were extremely rare.” Kenneth W. Stein, *A Historiographic Review of Literature on the Origins of the Arab-Israeli Conflict*, 96 AM. HIST. REV. 1450, 1454 (1991). He added, “Most Arab historians viewed Palestine as a geographic adjunct to greater Syria and Palestinians as a small but integral portion of a larger Arab nation.” *Id.* at 1455.

114. Eugene V. Rostow, *Correspondence*, 84 AM. J. INT’L L. 717, 720 (1990).

deny any legitimacy to Jewish historical claims.¹¹⁵ Approximately fifteen years ago, Michael Curtis noted:

[I]t needs to be reiterated that the core of the Arab-Israeli conflict remains what it has been for some seventy years, the implacable opposition by Arab states, except Egypt since 1979, to the Jewish presence in the Mandate area of Palestine and, since 1948, to the existence of the [S]tate of Israel.¹¹⁶

While in the subsequent fifteen years Jordan made peace with Israel, and the Palestine National Council met to revise the Palestinian Liberation Organization Charter,¹¹⁷ also referred to as the Palestine National Charter, the only publicly available version of the Charter still calls for the destruction of Israel¹¹⁸ as does the even harsher representation of Israel and Jews in the Hamas Charter.¹¹⁹ As recently as the Camp David summit between then Israeli Prime Minister Ehud Barak, President Yasir Arafat of the Palestinian Authority, and President Clinton, Arafat reportedly insisted on “repeat[ing] old mythologies and invent[ing] new ones, like, for example, that the Temple was not in Jerusalem.”¹²⁰

To the Israelis, the question is an existential one: can Jews, as Jews, maintain a degree of power without dhimmi status in the Middle East? That is, is there some acceptance of the Jewish narrative of a permanent and continual connection between the Jewish people and the land? Whether Jews are permitted to live within a Palestinian state, in effect, then, is a metaphor as to whether Israel, as a Jewish nation, can live in a sea of twenty-two or, once Palestine is established, twenty-three different Arab nations.¹²¹ If the answer is negative—that is, any Palestinian state

115. DERSHOWITZ, *supra* note 104, at 24.

116. Michael Curtis, *International Law and the Territories*, 32 HARV. INT’L L.J. 457, 460 (1991).

117. Permanent Observer Mission of Palestine to the UN, *Decisions & Actions Related to the Palestine National Charter* (Apr. 26, 1996), http://www.palestine-un.org/plo/pna_one.html.

118. See PALESTINIAN NATIONAL CHARTER arts. 19, 22, available at http://www.palestine-un.org/plo/pna_three.html.

119. See sources cited *supra* note 49; see also Richard Cohen, *A Disturbing Invitation*, WASH. POST, Feb. 14, 2006, at A15 (discussing extent to which Hamas is not only anti-Israel but virulently anti-Semitic).

120. Dennis Ross & Gidi Grinstein, *Camp David: An Exchange*, N.Y. REV. OF BOOKS, Sept. 20, 2001, at 90, 90.

121. See Halkin, *Beyond the Geneva Accords*, *supra* note 27, at 26 (“The issue, it should be clear, is not one of sovereignty. There is no reason why, under conditions of peace, Jewish towns and villages should not exist in a sovereign Palestine as Arab towns and villages exist in a sovereign Israel. On the contrary: if a sovereign Palestine cannot tolerate the presence of Jews, in what sense has it made peace with a Jewish state?”); Halkin, *supra* note 23, at 27 (“One thing should be clear. A West Bank without Jews means a Palestine and Israel without a normal relationship.”).

must exist without Jewish settlements—the answer portends that such state, once established, will not truly support the two-state solution. To Israel, the question of establishing a legal entity of Palestine depends upon whether it brings an end to the conflict—an acknowledgement that Jews, too, have a right to the land (as Israel, in recognizing such a Palestinian state, would reciprocally be acknowledging)—or simply represents a strategic move to be supplanted in the future by one predominantly Arab state.¹²²

122. See Giora Eiland, *The Palestinian Authority and the Challenge of Palestinian Elections*, JERUSALEM ISSUE BRIEF (Jerusalem Ctr. for Pub. Affairs, Jerusalem, Isr.), Feb. 1, 2006, at 5, available at <http://www.jcpa.org/brief/brief005-16.htm> (“The second strategic decision that the Palestinians have yet to make is to recognize that a two-state solution means that on one side there will be a Palestinian state, but on the other side there will be a Jewish state.”). Eiland, who is head of Israel’s National Security Council, adds, “I have never heard any real Arab leader say loud and clear that Israel has the right to exist as a Jewish state. We are looking for real recognition of the right of a Jewish state to exist alongside a Palestinian state and we have not yet heard it.” *Id.* (emphasis added); see Kissinger, *supra* note 73 (“Even relatively conciliatory Arab statements, such as the Beirut summit declaration of 2003, reject Israel’s legitimacy as inherent in its sovereignty; they require the fulfillment of certain prior conditions. Almost all official and semi-official Arab and Palestinian media and schoolbooks present Israel as an illegitimate, imperialist interloper in the region.”); Daniel Pipes, *Why Hamas Leaves Me Neutral*, N.Y. SUN, Jan. 31, 2006, <http://www.nysun.com/article/26722> (“[T]he elections might bring benefits, prompting Israelis finally to recognize the deep and pervasive anti-Zionism in the Palestinian Arab body politic.”). Even Robert Malley and Hussein Agha, who are in the minority in not ascribing all responsibility for the breakdown of the summer 2000 Camp David talks to Arafat and the Palestinians, see *infra* note 204, describe the Palestinian perspective in the following terms:

For all the talk about peace and reconciliation, most Palestinians were more resigned to the two-state solution than they were willing to embrace it; they were prepared to accept Israel’s existence, but not its moral legitimacy. The war for the whole of Palestine was over because it had been lost. Oslo, as they saw it, was not about negotiating peace terms but terms of surrender.

Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N.Y. REV. OF BOOKS, Aug. 9, 2001, at 59, 62. Hamas has been even more explicit about its aim of liberating all of Palestine even if, after the Parliamentary elections, it extends the *hudna*, or truce, against Israel. As the leader of Hamas remarked:

By Allah, I know that all Arab leaders—and I have met many of them—deep inside want the resistance in Palestine to be victorious, and want Palestine to be liberated. Perhaps the need for flattery and for diplomacy, and the American hegemony, force other things on them, but in their hearts they are happy when we are victorious.

Khaled Mash’al, Hamas Leader, Address at the Al-Murabit Mosque in Damascus (Feb. 3, 2006), available at <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP108706>; see Asaf Maliach, *Hamas’ Post-Election Strategy: Step-by-Step to the Liberation of Palestine*, INST. FOR COUNTER-TERRORISM, Feb. 5, 2006, <http://www.ictconference.org/s119/apage/5232.php> (“Hamas’ [sic] calls for the ‘Hudna’ with Israel is merely an ancient maneuver commonly used by radical Islamic organizations to reestablish and strengthen their power without being exposed to danger from their adversaries. The ‘Hudna’ is intended to serve the *step by step* program that Hamas advocates for the liberation of all of Palestine, from the sea to the river.”) (emphasis added). Even more recently, after it won a majority of seats in the

C. *Contiguity and Borders*

If the Palestinian Authority succeeds in establishing order and a functioning self-governing entity in Gaza,¹²³ and Hamas' recent victory in Palestinian parliamentary elections does not foreclose future peace efforts, it is inevitable that a Palestinian state, the geographic bulk and center of which will consist of much of the West Bank, will be established. In addition to the question of how Gaza and the West Bank will be connected, a key focus now has become whether the Palestinian West Bank will be a contiguous unit with sensible borders or a group of loosely tied districts. Given the very small area west of the Jordan, only 10,871 square miles,¹²⁴ drawing borders with the clarity that often characterized colonial borders is impossible, and contiguity for both a predominantly Jewish and Arab Palestinian state cannot easily be achieved. The Peel Commission Partition Plan of July 1937 would have allowed for a contiguous Arab state, but not a contiguous Jewish state;¹²⁵

Parliamentary elections and was asked to form the next Palestinian Authority government, Hamas submitted for approval a "cabinet with hardliners." Stephen Farrell, *Defiant Hamas Packs Cabinet with Hardliners*, TIMES (London), Mar. 21, 2006, <http://www.timesonline.co.uk/article/0,,251-2095266,00.html>.

123. As of this date, lawlessness in Gaza undermines attempts to organize a civil society, a prerequisite for statehood. See, e.g., Sarah El Deeb, *Palestinian Police Storm Gaza-Egypt Border*, CHINA DAILY, Dec. 30, 2005, http://www.chinadaily.com.cn/english/doc/2005-12/30/content_508202.htm (describing Palestinian police officers storming border to prevent feuding families from crossing to consternation of European monitors); Stephen Farrell & Ian MacKinnon, *Red Cross Leaves 'Lawless' Gaza*, TIMES (London), Aug. 10, 2005, <http://www.timesonline.co.uk/article/0,,251-1729052,00.html>; Ian MacKinnon, *Increase in Seizures Prompted Exodus of Foreigners*, TIMES (London), Dec. 30, 2005, <http://www.timesonline.co.uk/article/0,,251-1963176,00.html> ("Security has deteriorated to such an extent over the past year that only a few dozen international staff dare to live and work in Gaza. . . . [T]he authority has caved in to the kidnappers' demands, fuelling the cycle of seizures by clans or groups of renegade gunmen who have seen the snatching of foreign staff as a quick way to resolve their difficulties."); Ze'ev Schiff, *Escalation Is Inevitable*, HAARETZ, Dec. 30, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=664152> (describing which assumptions have proved incorrect since Gaza withdrawal and cessation of Palestinian rockets targeting Israel); Conal Urquhart, *Frantic Search for Aid Worker and Parents as Gang Fails to Make Contact*, GUARDIAN, Dec. 30, 2005, <http://www.guardian.co.uk/israel/Story/0,2763,1675137,00.html> (describing growing anarchy in Gaza resulting from "the inability of the PA to impose its authority over the armed men who fought against Israeli forces since the beginning of the second intifada in 2000"); Editorial, *Democracy in Palestine*, TELEGRAPH, Dec. 30, 2005, <http://www.telegraph.co.uk/opinion/main.jhtml;jsessionid=?xml=/opinion/2005/12/30/dl3002.xml&sSheet=/news/2005/12/30/ixnewstop.html> ("Mahmoud Abbas's chronic inability to contain Palestinian violence has been demonstrated this week in both parts of the Occupied Territories.").

124. JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 17 (1981).

125. See PEEL REPORT, *supra* note 93, at 382-86; GILBERT, *supra* note 51, at 22. King Edward VIII of England appointed the Peel Commission to determine the causes of the Palestine riots in 1936 and make recommendations to prevent their recurrence.

a 1938 Jewish proposal for partition foresaw both a Jewish and an Arab state in several sections;¹²⁶ a British proposal for partition of the same year envisioned a Jewish state in two sections and an Arab state that included, but was physically cut off from, Jaffa;¹²⁷ and pursuant to the 1947 UN Partition Plan accepted by the Jews, but rejected by the Arabs, both Israel and the Palestinian state would have had three different segments. Perhaps most significant to the present discussion, even a cursory look at a map of Israel slightly north of Tel Aviv, its largest city, reveals a pre-1967 “waist-line” of only approximately fifteen kilometers with a population even denser than the Gaza Strip.¹²⁸ It has been suggested that if the largest of the settlements, *Ma’ale Adumim*, remained under Israeli sovereignty and was connected to Jerusalem by construction in the several kilometer stretch between the two, a Palestinian state would lack contiguity; however, that area of the Palestinian state would still have the same width, fifteen kilometers, as does Israel at its narrowest point. In other words, continuance of Israeli settlements on the West Bank, even if they remained under Israeli sovereignty, would probably not result in a Palestinian state any less convoluted than Israel.

Nonetheless, contiguity has seemingly been elevated from wise policy, to the extent it can reasonably be achieved, to principle, and its violation has become a frequent allegation leveled against Jewish settlements.¹²⁹ Thus, if the presence of settlements with Israeli Jews prevents a contiguous state with sensible borders, the facile solution is to remove rather than tolerate them.¹³⁰ Both principle and policy, however,

126. See GILBERT, *supra* note 51, at 26.

127. See *id.* at 27.

128. See GILBERT, *supra* note 51, at 53; Ricki Hollander & Gilead Ini, *Updated: The Contiguity Double Standard*, CAMERA MEDIA REPORT, Fall 2005, at 15, 15-16; Uri Elitzur, *It’s Crowded Around Here*, YNET NEWS, Sept. 30, 2005, <http://www.ynetnews.com/articles/0,7340,L-3149627,00.html>.

129. See Lein, *supra* note 35, at 42 (“[M]any settlements block the territorial continuity of dozens of Palestinian enclaves. . . . This lack of contiguity prevents the establishment of a viable Palestinian state, and therefore prevents realization of the right to self-determination.”); Editorial, *Bush, Abbas Intentions*, BOSTON GLOBE, Oct. 21, 2005, at A16 (“Palestinians perceive continued thickening of settlements as proof that Israel has no intention of allowing a viable Palestinian state on land that is not divided into multiple separate enclaves.”). For example, it has been charged that Israeli construction of housing on the several kilometers of land between Jerusalem and *Ma’ale Adumim*, the largest West Bank settlement, would preclude contiguity for a state of Palestine. In fact, however, such a state to the east and southeast of *Ma’ale Adumim* would still have a waist as wide as Israel in the *Qalkilya-Kfar Saba* area. See HonestReporting, *Orla Guerin’s Lack of Contiguity* (May 2, 2005), http://www.honestreporting.com/articles/45884734/critiques/Orla_Guerins_Lack_of_Contiguity.asp; see also Lein, *supra* note 35, at 102 (describing specific examples of smaller settlements that may interfere with Palestinian community contiguity south of Jerusalem).

130. That is the Palestinian view, voiced over and over in various meetings and

militate in favor of continuance over removal.

The principled reason has already been explored: removal only achieves contiguity at the expense of the principle that Jewish communities, just *because* they are Jewish, should not be automatically excluded from the land of Israel. The continuance option, on the other hand, by separating the concept of Jewish settlements from Jewish sovereignty, allows for both contiguity and that principle.

The policy reason takes account of political reality. With its implicit equation of Jewish settlements and Israeli sovereignty, the removal option puts tremendous stress on the question of the exact location of the border between Israel and a state of Palestine. This phenomenon is reflected, for example, in pressure to expand Jerusalem eastward so that Jews inhabit a geographic continuum between Jerusalem and eastern settlements.¹³¹ In contrast, if Jews could be assured that, as Jews, they would be allowed to live safely and freely within *Eretz Yisrael*, albeit outside of Israeli sovereignty, less opposition can be expected to a proposed border.¹³² The weight held by the question (does the final resolution involve the forced removal of 50,000 to 100,000 settlers, including Jews who perceive their communities in religious terms or merely acknowledging Palestinian sovereignty without interfering with the lives of the people in these communities?) bears not only on the probable success of negotiations, but the time required to arrive at a resolution. In short, it is actually the continuance option that offers the greater prospect for a Palestinian state, Gaza aside, that minimally has borders as sensible as the Green Line.

pronouncements. For example, Palestinian aids of Abbas expressed this view to President Bush in a recent meeting. See Kessler, *supra* note 14.

131. See Caroline Glick, *Column One: Where Olmert Leads, Israel Mustn't Follow*, JERUSALEM POST, Feb. 10, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395379720&pagename=JPost%2FJPArticle%2FShowFull> (criticizing Olmert government for not building Jewish neighborhood connecting *Ma'ale Adumim* to Jerusalem and, in changing security fence to exclude Palestinian village of *Japba*, for endangering movement between *Gush Etzion* and central Israel); Nadav Shragai, *Expand J'lem Beyond the Green Line, Panel Urges*, HAARETZ, Dec. 27, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=662691> (describing proposals by Zionist Council in Israel for widened corridors and housing connecting Jerusalem to settlements to North, East and South rather than continuing to build Jerusalem westward); Nadav Shragai, *No More Talk of a Unified Jerusalem*, HAARETZ, Mar. 7, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=690895> (describing sharp disagreement over which neighborhoods in and around Jerusalem will remain in any "division" of city).

132. The role of sovereignty has diminished in its classical sense. See sources cited *infra* notes 470-71. Analogously, Israel's peace treaty with Jordan recognized Jordan's sovereignty over certain areas effectively leased back to Israel for an initial period of twenty-five years. See Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jordan, Annex I, Oct. 24, 1994, 34 I.L.M. 43.

D. Cost Considerations

Continuance of Jewish settlements is also the least expensive way of creating a Palestinian state. Although the Roadmap called for the creation of a Palestinian state by 2005, there is still great impetus for that reality to be created sooner rather than later. Three sets of cost considerations need to be considered: the costs associated with establishing a viable Palestinian state; the costs associated with resolving the Palestinian and Jewish refugee problems; and, if removal rather than continuance is effected, the cost to Israel of removing and resettling all settlers not within Israel's final borders once a peace agreement is concluded.

The first broad category of costs includes those associated with insuring the viability of the new Palestinian state. To bolster the Palestinian economy and provide the other practical prerequisites of statehood will require billions of dollars.¹³³ Even in anticipation of Israel's withdrawal of settlements from Gaza, the World Bank estimated an additional \$1.8 billion of necessary donor aid.¹³⁴ The costs for insuring the economic viability of a Palestinian state following an Israeli withdrawal from the West Bank would be exponentially higher. While much of its economic success depends upon the ability of a high number of Palestinians to find labor in Israel, as in the period prior to the 2000 intifada, increasing Palestinian economic independence is highly desirable.¹³⁵ The most recent World Bank report on the Palestinian economy credited eight to nine percent growth of gross domestic product in 2005 to large increases in both credit to the private sector (thirty percent) and donor disbursements (twenty percent) to \$1.1 billion.¹³⁶ It concludes "[t]he only satisfactory way forward is to combine good policies by both sides with more money"¹³⁷ and calls on "[d]onors . . . to increase their assistance levels" further.¹³⁸

133. By way of example, according to one study, the Palestinian Authority could require up to \$7.7 billion to build an internal security infrastructure over its first decade. See Editorial, *Rand: Palestinian State Will Need Crack, \$7.7 Billion Security System*, WORLD TRIB., May 9, 2005, http://www.worldtribune.com/worldtribune/WTARC/2005/me_palestinians_05_09.html.

134. WORLD BANK GROUP, *DISENGAGEMENT, THE PALESTINIAN ECONOMY AND THE SETTLEMENTS 5* (2004), available at [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Disengagement+Paper/\\$File/Disengagement+Paper.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Disengagement+Paper/$File/Disengagement+Paper.pdf).

135. WORLD BANK GROUP, *THE PALESTINIAN ECONOMY AND THE PROSPECTS FOR ITS RECOVERY: ECONOMIC MONITORING REPORT TO THE AD HOC LIAISON COMMITTEE 22* (2005), available at <http://siteresources.worldbank.org/INTWESTBANKGAZA/Data/20751555/EMR.pdf>.

136. *Id.* at 1, 4.

137. *Id.* at 2.

138. *Id.* at 5.

The creation of a *de jure* Palestinian state, with recognition by Israel, the United States, and others, will almost certainly require a permanent resolution to the Palestinian and Jewish refugee problems. Otherwise, the grievances that have made peace between Israel and Palestinians in the Middle East so illusive will continue to hamper true reconciliation. The Palestinian refugees, and their descendants, who fled Israel or the territory that became Israel in the 1947-48 period must abandon their right of return. It matters little whether international law supports such a right of return¹³⁹ or the exact circumstances of the exodus. Some small number of refugees may be allowed to reunite with family in Israel, but, for most, resolution will entail resettlement or reintegration in other Arab states with compensation for property losses within Israel, which may cost tens of billions of dollars.¹⁴⁰ Jewish refugees forced to flee from Arab countries after the establishment of Israel are similarly seeking compensation for the loss of value of their homes and businesses.¹⁴¹ In the words of Julius Stone, "any rule of international law requiring rights of return or compensation would have to apply equally to Jewish refugees from Arab countries."¹⁴²

If the removal option were to be exercised, the total cost of a final settlement would necessarily increase to include the cost of evacuating and resettling any settlements outside of Israel's negotiated borders. The aggregate cost of removing and resettling 7,000 settlers from Gaza exceeded \$1 billion.¹⁴³ As of four years ago, one party estimated over

139. Some doubt that international law supports such a right of return. See STONE, *supra* note 124, at 67-69; Ruth Lapidot, *Legal Aspects of the Palestinian Refugee Question*, JERUSALEM LETTER/VIEWPOINTS, Sept. 1, 2002, at 3-4, available at <http://www.jcpa.org/jl/vp485.htm>.

140. While no exact figures have been discovered, over eight million Palestinians claim refugee status, and UN figures show over four million refugees as of June 2004. See Palestinian Refugee ResearchNet, *Palestinian Refugees: An Overview*, http://www.arts.mcgill.ca/mepp/new_prn/background/index.htm (last visited Aug. 8, 2006). Using the larger figure, a cost of \$1,000 per refugee would exceed \$8 billion; raising the amount to \$10,000, the total cost would exceed \$80 billion.

141. See Am. Sephardi Fed'n, *Jewish Refugees from Arab Countries*, http://www.americansephardifederation.org/sub/sources/jewish_refugees.asp (last visited Aug. 8, 2006). See generally ITAMAR LEVIN, *LOCKED DOORS: THE SEIZURE OF JEWISH PROPERTY IN ARAB COUNTRIES* (Rachel Neiman, trans., 2001) (providing detailed study of seized property).

142. STONE, *supra* note 124, at 67.

143. Different sources report different calculations. Compare Meirav Arlosoroff, *Billion-Shekel Culture Shock*, HAARETZ, Dec. 7, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=654026> ("The civilian cost of evacuating Gaza, the cost of moving just 1,700 families, has already reached NIS 5 billion to NIS 6.5 billion[, or about \$1.08 to \$1.4 billion]."), with Moti Bassok, *Fischer: Israel's Credit Rating Could be Raised with Stable Fiscal Responsibility*, HAARETZ, Dec. 21, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=660416> ("The total civil cost to the state of disengaging from the Gaza Strip has reached NIS 4.8 billion[, or about

twenty billion dollars to evacuate all the settlements,¹⁴⁴ an amount that would have to be adjusted to account for real estate inflation within the pre-1967 borders of Israel. Moreover, the definition of “cost” becomes relevant. The term as typically used in the Gaza context referred to the cost of compensating Gaza residents for loss of housing. Necessarily, any measure of compensation suffers from being simultaneously highly subjective and objective. The scheme is highly subjective as politics and availability of funds determine compensation just as much as rigorous effort to determine the financial costs of resettlement.¹⁴⁵ Three months after the disengagement from Gaza, three-quarters of the evacuees were left unemployed and a substantial number still living in tents.¹⁴⁶ The scheme is highly objective in the sense that rather than an individualized and highly particularized calculation, settlers are treated in broad categories. While the exact number of settlers that would have to be compensated varies depending upon which settlements would remain in Israel, the number is usually presented as upwards of 70,000 people. Moreover, with increased opposition to the removal of West Bank settlements, the cost of implementation may well exceed the enforcement expenses in evacuating the Gaza settlements.¹⁴⁷ Inevitably, Israel would necessarily turn to the international community, and especially the United States, to aid with resettlement. However, at the same time, that international community must cope with the enormous financial demands

\$1.04 billion], according to Yonatan Bassi, head of the Disengagement Administration. . .”). Neither figure appears to include the full costs, including the evacuees’ lost income (most are unemployed), psychological and similar personal related costs, and military costs of removal. All of these are considerable. The military costs would include costs of mobilizing and devoting a sufficient number of appropriate military personnel to handle the removal. A recent report of the cost of evacuating the Gaza settlements estimates NIS 11 billion, or approximately \$2 to \$2.5 billion. See Zvi Bar’el, *Pullout Pipe Dream*, HAARETZ, Mar. 26, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=698427>.

144. Halkin, *supra* note 23, at 22.

145. Arlosoroff, *supra* note 143.

146. Nadav Shragai, *75% of Pullout Evacuees Jobless*, HAARETZ, Nov. 9, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=643163>.

147. For example, costs to evacuate settlers from *Amona* were enormous given the large number of protesters. Jonathan Lis, *Amona Evacuation Cost NIS 7.5M, Most of It from Money Earmarked for War on Crime*, HAARETZ, Feb. 9, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=680575>. In the words of Brigadier General Ilan Paz, former head of the Israeli administration on the West Bank and strong proponent of a peaceful, negotiated settlement:

“The evacuation of places like *Kiryat Arba*, *Elon Moreh*, *Shilo* and *Eli* would not at all be like the *Gush Katif* evacuation. . . .” “You cannot compare the religious and historical connection to the lands of Judea and Samaria to the settlers’ connection to Gaza. Evacuation of these ideological settlements is liable to bring us to the brink of civil war.”

Eldar, *supra* note 7 (emphasis added).

of constructing a new Palestinian state and resolving the Palestinian and Jewish refugee problems.

In sum, conditioning the creation of a Palestinian state on removal of Jewish settlements within its borders would substantially aggravate the calculus of the total costs of that creation. Correlatively, the fastest and least expensive means of achieving a Palestinian state is to allow Jewish communities to remain within its borders.

IV. Conditions Precedent for Israeli Jewish Settlements in a State of Palestine

All other things being equal, continuance is preferable to removal based upon considerations of principle, contiguity, cost, and final resolution of the conflict. But are other things equal? It has been argued that Jewish settlements stand on "Arab" land, violate international and other law, and prevent the establishment of a viable, sovereign Palestinian state, and that neither Jews nor Arabs would find it practical to have Jewish settlements continue to exist in that state. These arguments, in effect, posit several necessary conditions for Jewish settlements to remain in Palestine: that settlements are not shown to have been established on "Arab" land; that their establishment is not demonstrated to be "illegal" under international law; that their presence does not prevent the creation of a viable, sovereign Palestinian state; and that continuance rather than removal is a pragmatic solution.

These are necessary conditions not only because they respond to arguments and concerns that have been voiced against Jewish settlements on the West Bank, but also for independent good cause. The condition that Jewish settlements not lie on land that legally belongs to another is based upon the principle that military victory does not justify theft of property.¹⁴⁸ Abstractly, at least, the condition that the creation or continued presence of the settlements not be demonstrated to have violated international law is premised both upon respect for that body of law and the instrumental consideration that if actions contrary to law are validated, one simply invites additional breaches. Exploring the legality of Jewish settlements is quite difficult, which is why this condition has been stated in the negative.¹⁴⁹ Because the question of land ownership

148. Admittedly, this principle is often violated more in breach than observance as evidenced by the difficulty of original owners of artwork or land in retrieving or laying successful claim to property after the Holocaust, even in European nations that pledge adherence to this principle.

149. The condition, as stated, asserts that Israeli settlements *have not been demonstrated to violate* international law rather than claiming that Israeli settlements *are demonstratively consistent with* international law. This condition is intentionally stated in the negative because political stances underlie most legal arguments. Given the

and use implicates questions of international law, the condition related to land ownership is considered below as part of the overall discussion of international law.

The condition that Israeli Jewish settlements not prevent the creation of a viable Palestinian state is necessitated by the desirability of the two-state solution. As explored previously, any solution other than two states would eventually mean the cessation of Israel or, as previously discussed, apartheid-like or forced transfer options that would negate Israel's status as a democracy. The pragmatic condition responds to arguments made by parties that do not necessarily accept the notion that Jewish settlements are illegal or interfere with the creation of a viable Palestinian state. If the continuance option is impractical, most particularly if Jews could not live in a Palestinian state based on security or other concerns, then the continuance option advanced in this article is at best academic. Both the state viability condition, which deals primarily with Palestinian interests, and the pragmatic condition, which addresses primarily Israeli interests, question what it would mean for Israeli Jews to live under Palestinian Arab sovereignty.

A. The Condition that Israeli Settlements Are Not Demonstrably Illegal: Occupation, Land, and Transfer Issues

Well over one hundred scholarly works weigh in on the question of whether Israeli settlements are "illegal."¹⁵⁰ When this body of work gets condensed in the popular press, the dominant notion concludes the settlements are illegal, and the more popular commentators and politicians hostile to Israel repeat this, the more it is believed.¹⁵¹ The task here is not to repeat or refute every scholarly argument, but it is interesting to reflect both on the extent to which these arguments have changed over time and the weaknesses inherent in the arguments of both supporters and opponents of the settlements.

The arguments on both sides are well rehearsed and extraordinarily

inconclusive character of the legal arguments, other considerations, both for and against the settlements, merit greater weight. *See infra* notes 458-508 and accompanying text.

150. *See* Peter Malanczuk, *Israel: Status, Territory and Occupied Territories*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1468, 1497-1501 (Rudolf Bernhardt, ed., 1995).

151. As Minow noted in reference to the persistence of belief in the Czarist forgery, *THE PROTOCOLS OF THE LEARNED ELDERS OF ZION* (Victor E. Marsden, trans., Liberty Bell Publ'ns 2004), "mere resonance and reverberation lends credibility." Martha L. Minow, *The Persistence of Falsehood and the Protocols of the Elders of Zion*, in *FROM THE PROTOCOLS OF THE ELDERS OF ZION TO HOLOCAUST DENIAL TRIALS: CHALLENGING THE MEDIA, THE LAW AND THE ACADEMY* 47, 47 (Deborah R. Kaufman et al. eds., forthcoming 2006).

heated.¹⁵² Unfortunately, as Michael Curtis has observed, “[n]o doubt, customary and conventional international law have often been used to buttress tendentious political positions, and it would be unrealistic to expect otherwise.”¹⁵³ Commenting on the views of two such scholars who have sought to support Palestinian violence,¹⁵⁴ Curtis characterized their argument as “infused with an animus that exceeds the usual boundaries of scholarly discourse while paying scant attention to the realities of the Arab-Israeli conflict.”¹⁵⁵ Some commentators start from such a strong position that the creation of the State of Israel is “unlawful” or “wrongful” that their particular position with respect to Israeli settlements on the West Bank is both predetermined and suspect.¹⁵⁶

International law based arguments concerning Israeli settlements rest primarily upon two sources of international law: the 1907 Hague Regulations¹⁵⁷ and the 1949 Fourth Geneva Convention.¹⁵⁸ In particular, Articles 43,¹⁵⁹ 46,¹⁶⁰ 52,¹⁶¹ and 55¹⁶² of the Hague Regulations and

152. See, e.g., Craig Jackson, *Israeli West Bank Settlements, the Reagan Administration's Policy Toward the Middle East and International Law*, 79 AM. SOC'Y INT'L L. PROC. 217 (1987) (quoting remarks of Francis A. Boyle, Allan Gerson, Eugene V. Rostow, and W. Thomas Mallison from April 25-27, 1985).

153. Curtis, *supra* note 116, at 457.

154. Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991).

155. Curtis, *supra* note 116, at 457.

156. See, e.g., W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* (1986). The work denigrates the concept of a “Jewish people” and the Zionist movement, *see id.* at 5-17, the Balfour Declaration calling for the creation of a Jewish state in the Palestinian Mandate, *see id.* at 18-78, the Jewish Agency that purchased most of the land on which Jewish settlers reside within the Green Line, *see id.* at 79-141, the UN resolution calling for the creation of two states in the Palestine Mandate west of the Jordan River, *see id.* at 142-73, and, hence, its “juridical analysis” of Israeli settlements is totally predictable and pre-ordained, *see id.* at 240-75. A similar analysis pervades the Mallisons’ earlier work, “prepared and published at the request of the Committee on the Exercise of the Inalienable Rights of the Palestinian People.” MALLISON & MALLISON, *supra* note 25; *see* Mallison, *supra* note 26.

157. See Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations]. While Israel is not a signatory of the Convention, the Israeli Supreme Court held it applies to Israel as customary international law and is enforceable as municipal law.

158. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3365, 75 U.N.T.S. 973 [hereinafter Fourth Geneva Convention]. Although Israel signed the Convention, subject to several reservations, the Israeli Supreme Court ruled the *Knesset* must adopt it as municipal law to bind Israel. Nonetheless, the court has measured the actions of the Israeli military against the Convention. See *infra* notes 429-40 and accompanying text.

159. “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Hague Regulations, *supra* note 157, art. 43. Benvenisti

Article 49¹⁶³ of the Fourth Geneva Convention have been cited both against and in support of the settlement activity. Article 43 of the Hague Regulations generally obligates an occupying power to “ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country”;¹⁶⁴ Article 46 bars the confiscation of private property; Article 52 bars requisitions from municipalities or inhabitants “except for the needs of the army of occupation”; and Article 55 obligates the occupying power to “safeguard the capital of . . . [the real estate of the hostile State], and administer them in accordance with the rules of usufruct.”¹⁶⁵ More generally, these provisions, along with others such as Article 23(g),¹⁶⁶ create a standard

uses the term “civil life,” deeming it a more accurate translation of the French than the term “safety,” which has been used in English sources. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 7 & n.1 (2004).

160. “Private property cannot be confiscated.” Hague Regulations, *supra* note 157, art. 46.

161. “Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.” *Id.* art. 52.

162. “The occupying State shall be regarded only as administrator and usufructuary of . . . real estate . . . belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” *Id.* art. 55.

163. Article 49 provides:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons do demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Fourth Geneva Convention, *supra* note 158, art. 49.

164. Hague Regulations, *supra* note 157, art. 43.

165. *Id.* art. 55.

166. Article 23(g) provides, “[I]t is especially forbidden . . . [t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the

of "military necessity" by which to judge the actions of an occupying army. Although the Hague Regulations do protect the inhabitants of an occupied territory, they were primarily designed to protect the interests of a temporarily ousted sovereign¹⁶⁷ in the context of a short-term occupation:

[T]he Regulations placed emphasis on a settlement whereby reversion of control to the ousted power, in whole or in part, would occur. The predominant theme . . . was the provisional character of occupation, wherein the ousted power retains sovereignty, his authority being merely in a state of abeyance. Interference in the ousted power's legislative and institutional system was thus prohibited [sic], for fear of being inimical to the settlement process. . . . To preserve the rights and authority of the ousted sovereign, the Hague Conventions proscribed any activity on the part of the occupant that might tend to undercut it, with changes in existing laws and institutions being the foremost concern.¹⁶⁸

In contrast, the Fourth Geneva Convention is unabashedly humanitarian law that primarily seeks to protect persons caught up in warfare and its aftermath. Article 49 thereof generally seeks to prohibit the forced movement or use of people; the extraordinarily negative behavioral models primarily underlying Article 49 were the deportations and slave labor practices of the Nazis during World War II, which had a felt immediacy at the 1949 Geneva Conference of Delegates and the preparatory conferences that preceded it.¹⁶⁹ Article 49(6) specifically

necessities of war." *Id.* art. 23(g). Unlike Articles 43, 46, 52 and 55, which are part of Section III of the Hague Regulations dealing with occupied territory, Article 23(g) applies in hostilities, i.e., the warfare prior to belligerent occupancy.

167. For example, the Russian delegate Alexander Nelidow emphasized both themes in an address to the Hague Conference and the President of the Conference:

This task . . . consists of two parts: on the one hand, we must endeavour to discover a method of settling amicably differences which may arise between States, and thus prevent ruptures and armed conflict. On the other hand, we must endeavour to lighten the burdens of war—in case it breaks out—both as regards the combatants and those may be indirectly affected by it.

REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 197 (James B. Scott ed., 1917).

168. ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 9 (1978) (footnote omitted).

169. Max Petitpierre, Head of the Swiss Federal Political Department, who presided over and convened the first plenary session of the Conference considering the Convention, declared, in relation to the Fourth Geneva Convention:

Most important of all, the second World War showed that the Geneva Conventions would be incomplete if they did not also assure the protection of civilians. It has become an imperative necessity to give such persons certain moral and material guarantees. In 1859 it was the groans of the wounded abandoned on the battlefield of Solferino which upset Henry Dunant. Today another still more tragic appeal is being made to us—that of the millions of

prohibits an occupying power from transferring or deporting its own civilians into occupied territory.

The contentions about the illegality of the settlements usually take one of three interrelated forms, or variants of such: (1) the settlements are illegal because Israel illegally occupies the West Bank; (2) the settlements are illegal because they are on "Arab" land and not justified by military necessity under the Hague Regulations; and (3) the settlements, as a transfer by Israel of its citizens into occupied territory, violate Article 49(6) of the Fourth Geneva Convention. The corresponding contentions, by supporters of the settlements, stress the disputed nature of the West Bank, the "military necessity" of settlements to combat terrorism and protect Israel from an eastern attack, the "public" or "state" lands on which settlements have been situated since 1979, the voluntary rather than forced nature of the settlement activity, and, in general, either the inapplicability of international law to Israeli actions on the West Bank or the conformity of Israeli actions with that law.

Before the particulars of these conflicting arguments are explored, it is instructive to note the uniqueness of Israel's position from both an institutional and a temporal perspective. Although the Israeli government's stance has vacillated with respect to whether the West

civilians who perished in the horrors of the concentration camps or died a miserable death, even though they had taken no part in military operations.

It lies with us to give civilians the protection which has become a necessity.

This is perhaps the most important part of our mission.

2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 10 (2005) [hereinafter FINAL RECORD]. Even more generally, German conduct during World War II was the negative paradigm underlying the provisions of the Fourth Geneva Convention. Revising perhaps the most prestigious international law text used in the English language after World War II—a revision that took account of the Fourth Geneva Convention—Hersh Lauterpacht commented:

In the part devoted to rules of warfare, the account and analysis of the new developments are based, to a considerable extent, on the record of the violation of the law of war by Germany and her allies and of the decisions of the various war crimes tribunals which were called upon to adjudicate upon them.

Hersh Lauterpacht, *Preface* to 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, at v (Hersh Lauterpacht, ed., Routledge 1952) (1905-06); see G.I.A.D. DRAPER, *The Historical Background and General Principles of the Geneva Conventions of 1949*, in *REFLECTIONS ON LAW AND ARMED CONFLICTS* 54, 58 (1998) ("This Civilians' Convention was called into being by the civilized States of the community of nations as a direct result of the experience of the Second World War. In that conflict, as we know, the civilian population suffered in death, torture, and starvation to an extent that has never been witnessed in the recorded history of humankind. In Auschwitz Concentration Camp alone [4.5] million civilians died by gassing, let alone the tens of thousand who perished there from shooting, flogging, torture, hanging, starvation, typhus and tuberculosis."); GERALD IRVING, A. DARE DRAPER, *THE RED CROSS CONVENTIONS* 26, 34-35, 47-48 (1958) (reflecting influence of "Holocaust" on drafting of Fourth Geneva Convention) [hereinafter DRAPER, *THE RED CROSS CONVENTIONS*].

Bank is “occupied territory” within the meaning of the Hague Regulations and Geneva Convention,¹⁷⁰ it did in fact establish a military administration overseeing the West Bank in accordance with the Hague Regulations and has also asserted that its conduct with respect to the West Bank and the Palestinians conforms to the humanitarian standards of the Fourth Geneva Convention. In the words of Eyal Benvenisti, a critic of Israeli settlements:

[T]his is the only occupation since World War II in which a military power has established a distinct military government over occupied areas in accordance with the framework of the law of occupation[, whereas] [a]ll other modern occupants who have assumed control over a foreign territory have rejected this body of laws as inapplicable and irrelevant.¹⁷¹

The temporal singularity of Israel’s position is that its control over the West Bank has continued for close to forty years. This radically differs from a “classical” sequence of events related to occupation: belligerent occupation is fairly quickly followed by a surrender (post-surrender occupation), which then results in a peace agreement according to which either the defeated sovereign regains control over the occupied territory status quo ante or the occupying power retains some or all of the occupied territory with the border redrawn to accommodate the victorious nation.¹⁷² Most of the international law of occupation, particularly the Hague Regulations, is premised upon this model of short-term rather than long-term occupations,¹⁷³ making the issue of the

170. See Benvenisti & Zamir, *supra* note 40, at 305-06.

171. BENVENISTI, *supra* note 159, at 107. Geoffrey Best, another party somewhat critical of Israel’s policies, echoes this thought:

Whatever reservations may be discerned behind the Israeli Government’s refusal to recognize the de jure applicability of the fourth Geneva convention, it has at least acknowledged “the relevance of international legal standards” as for instance have not, in comparable circumstances, the USSR in Hungary, Czechoslovakia, and Afghanistan, the Republic of South Africa in Namibia, and, one might add, Indonesians in East Timor. Israel’s military authorities have allowed the [International Committee of the Red Cross] considerable freedom of access to the occupied territories and its Supreme Court has affirmed the applicability of the Hague Regulations. It is relevant to remark also that the Israel Defence Forces’ commitment to the three other Geneva Conventions has never been in doubt, and that Israel has permitted an almost unexampled latitude of comment, from within its armed forces as well as from without, on the compatibility of their operations with their legal and ethical obligations.

GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 316 (reprint ed. 1997).

172. GERSON, *supra* note 168, at 20-21.

173. Benvenisti explores the tension between a body of law primarily directed towards short-term contexts and the needs of the people of occupied territory in longer term occupations. See generally BENVENISTI, *supra* note 159, at 7-31. But even the

applicability of international law to Israel's occupation of, or control over, the West Bank somewhat especial.¹⁷⁴ In short, there is scant precedent in discussing the legal issues.

1. The "Occupation" Issue: Israel's Legal Status on the West Bank

The claim has frequently been made that Israeli settlements on the West Bank are illegal because Israel's occupation of the West Bank is illegal.¹⁷⁵ Such reasoning perhaps falsely equates the two: Israeli settlements on the West Bank might be illegal even if Israel's occupation accords with international law; conversely, Jewish settlements on the West Bank theoretically could be quite legal even if Israel's occupation were illegal. Nonetheless, enough of a connection between occupation and settlements has been drawn to merit review of the differing views regarding the legality of Israel's control over the West Bank, including the legality of its initial occupation, the legality of its continuing occupation, and the implications of those questions on the legality and status of Israeli settlements.

a. "Disputed" or "Occupied": The terminological debate

Initially, one might differentiate, however subtly, between a *people* under occupation and a *territory* under occupation. From one perspective, all *people* not in control over the governing authority who reject the legitimacy of that authority might be considered *occupied*. So, for example, many Sunnis in present day Iraq might well consider themselves occupied, in the sense they both do not control the authority that governs them and reject that government. The Palestinians similarly and rightly feel they are occupied by a power in whose government, army, and society they do not participate. To what extent can we also say that the West Bank is occupied *territory* in a legal sense?

This question of whether Israel is "occupying" Palestinian territory in a legal sense has been debated as long as Israel has had control over the territory. One cited problem is that "occupation" of a territory implies "the effective control of a power . . . over a territory to which that power has no sovereign title, without the volition of the sovereign of that

Fourth Geneva Convention has been described as premised on an occupation of "limited and temporary" nature. See DRAPER, THE RED CROSS CONVENTIONS, *supra* note 169, at 39.

174. BEST, *supra* note 171, at 316.

175. See, e.g., Sally V. Mallison & W. Thomas Mallison, *The Central Role of Law in the International Peace Conference on the Middle East*, in UN DIV. FOR PALESTINIAN RIGHTS, QUESTION OF PALESTINE: LEGAL ASPECTS 87, 87-100 (1992).

territory.”¹⁷⁶ The question then arises: what is the “sovereignty” that Israel’s control over the West Bank cannot negate? Jordan occupied the West Bank in 1948, contrary to a UN General Assembly resolution that called for the creation of a Palestinian state alongside a Jewish state in the territory west of the Jordan River.¹⁷⁷ Further, its annexation of the West Bank was never internationally recognized, except by Pakistan and Great Britain.

In the aftermath of the 1967 War, Yehuda Blum, an international law scholar later to become Israel’s ambassador to the UN, argued that since Transjordan had attacked and occupied the West Bank in an aggressive rather than defensive war, it lacked even the status of a “belligerent occupant”¹⁷⁸ with the rights to control the West Bank according to the standards of belligerent occupancy, including the power to regulate it according to military necessity. At best, Jordan was a “belligerent occupant,” but “her rights could not amount to those of a legitimate sovereign . . . [a] conclusion which is of decisive legal significance as regards the nature and scope of the present rights of Israel over these territories.”¹⁷⁹ Because Jordan could not be considered the sovereign, according to Blum, he described the West Bank as having a “missing reversioner.” Because Jordan had no sovereign right over the West Bank, Israel cannot be said to have occupied Jordanian land. Moreover, in Blum’s view:

[Because the] assumption of the concurrent existence, in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law. . . . [T]hose rules of belligerent occupation directed to safeguarding that sovereign’s reversionary rights ha[d] no application [to the West Bank].¹⁸⁰

In any event, Jordan renounced any claim to the West Bank on July 31,

176. BENVENISTI, *supra* note 159, at 4. Indeed, “[t]he foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force.” *Id.* at 5. While the Hague Regulations state, “Territory is considered occupied when it is actually placed under the authority of the hostile army,” Hague Regulations, *supra* note 157, art. 42, Article 42 is the first article in Section III entitled, “Military Authority over the Territory of the Hostile State.” *Id.* (emphasis added).

177. See G.A. Res. 181 (II), U.N. Doc. A/RES/181 (Nov. 29, 1947), available at <http://domino.un.org/UNISPAL.NSF/a06f2943c226015c85256c40005d359c/7f0af2bd897689b785256c330061d253!OpenDocument>.

178. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 292 (1968).

179. *Id.* at 293.

180. *Id.*; see Curtis, *supra* note 116, at 463-65; Robbie Sabel, *The International Court of Justice Decision on the Separation Barrier and the Green Line*, 38 ISR. L. REV. 316, 318 (2005).

1988.¹⁸¹

Picking up on Blum's analysis, well prior to Jordan's relinquishment of any claim to the West Bank, Eugene Rostow, former Dean of Yale Law School and Undersecretary of State for Political Affairs in 1967 during the Six-Day War, considered the West Bank "unallocated territory."¹⁸² Once part of Ottoman Empire and placed under the trusteeship of the British, the West Bank, in Rostow's view, was still under the trust mandate sanctioned by the League of Nations continued by Article 80 of the UN Charter. From this vantage point, Israel, rather than simply "a belligerent occupant," had the status of a "claimant to the territory." He concluded, "Jews have a right to settle in it under the Mandate," a right he declared to be "unchallengeable as a matter of law."¹⁸³

In accord with these views, the Israeli government historically was careful to characterize the West Bank as "disputed territory."¹⁸⁴ Many advocates of Israeli settlements still use that term,¹⁸⁵ while other Israeli Jews, many of whom perceive of the West Bank in religious terms, use language indicating an even greater right to Jewish possession of the land. In the eyes of the latter, all of the West Bank "belongs" to Israel, thereby equating *Eretz Yisrael* with *Medinat Yisrael*.¹⁸⁶ With greater widespread recognition of the threat that eventual sovereignty over the West Bank posed to Israel's status as a Jewish state, the "Greater Israel" movement lost much of its former following, and, today, most Israelis accept the necessity of a two-state solution. More recently, the Israeli

181. John Kifner, *Hussein Surrenders Claims on West Bank to the P.L.O.; U.S. Peace Plan in Jeopardy; Internal Tensions*, N.Y. TIMES, Aug. 1, 1988, at A1.

182. See Eugene V. Rostow, "Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate, 5 YALE STUD. WORLD PUB. ORD. 147 (1979).

183. See Jackson, *supra* note 152, at 225 (remarks of Eugene V. Rostow); see also Eugene V. Rostow, *Resolved: Are the Settlements Legal?*, NEW REPUBLIC, Oct. 21, 1991, at 14.

184. Isr. Ministry of Foreign Affairs, Israeli Settlements and International Law (May 20, 2001), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm> ("Politically, the West Bank . . . is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations. Israel has valid claims to title in this territory based not only on its historic and religious connection to the land, and its recognized security needs, but also on the fact that the territory was not under the sovereignty of any state and came under Israeli control in a war of self-defense, imposed upon Israel."). Dore Gold, a former Israeli Ambassador to the UN, has repeatedly echoed this view. See Dore Gold, *From "Occupied Territories" to "Disputed Territories"*, JERUSALEM LETTER/VIEWPOINTS, Jan. 16, 2002, available at <http://www.jcpa.org/jl/vp470.html>.

185. *Id.*

186. See, e.g., Mark Rosenblit, *International Law and the Jewish People's Collective Rights of Settlement and Self-Determination in the Land of Israel*, <http://www.rosenblit.com/Law.htm> (last visited Aug. 9, 2006).

government has itself used the term “occupation” in a practical if not in a legal sense.

b. Defensive occupation

Even if, for purposes of international law “occupied” is equally as, if not more, appropriate an appellation than is “disputed” to characterize the West Bank under Israeli control, the analysis cannot stop there. To the extent the legality of Israeli settlement activity may depend upon the legality of Israel’s occupation of the West Bank, it bears repeating that “occupation” in itself is not unlawful. Yoram Dinstein has articulated why:

Some Arabs claim that belligerent occupation, as such, is intrinsically unlawful. But this is a spurious contention. In every war which is not confined to a Sitzkrieg, armies are on the move. When the situation stabilizes, the zones between the frontiers and the frontlines are subjected to belligerent occupation. While belligerent occupation does not transfer title (sovereignty), it does mean that the occupying Power has a temporary right of possession (which can continue as long as peace is not concluded).¹⁸⁷

Moreover, international law has long recognized a distinction between a lawful occupation, for example, occupation in self-defense, and an unlawful occupation. From the latter, based upon the principle of *ex injuria just non oritur*, no rights can arise.¹⁸⁸ Conversely, annexation of territory can result from the former and has often followed after war. As Alan Gerson has noted:

Any other rule would impose no sanction on aggressive behavior and thus defeat the basic quest of international law, or any law, in distinguishing lawful from unlawful behavior. A rule or policy requiring lawful entrants to relinquish gains in bargaining power gained in reacting against unlawful behavior would condone aggression and penalize defensive action.¹⁸⁹

c. The legality of Israel’s initial occupation of the West Bank

Turning to the issue of whether Israel’s initial occupation of the West Bank was lawful, Israel acquired control over the West Bank

187. See Yoram Dinstein, *The International Legal Dimensions of the Arab-Israeli Conflict*, in ISRAEL AMONG THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL’S 50TH ANNIVERSARY 137, 150 (Alfred E. Kellerman, Kurt Siehr, Talia Einhorn eds., 1998).

188. GERSON, *supra* note 168, at 14.

189. *Id.* at 75.

during the 1967 War, about which volumes have been written.¹⁹⁰ Most impartial observers acknowledge that Israel fired the “first” shot against Egypt, but also that Israel had little choice in doing so: Nasser had imposed a blockade on all Israeli shipping through the Suez Canal and the Straits of Tiran, ordered the UN troops and observers between the Israeli and Egyptian borders to leave (a demand inexplicably complied with by UN Secretary-General U Thant), and had planes fly over Israeli bases.¹⁹¹ In short, Israel fired the first shot (attacked the Egyptian airfields), but not before Egypt signaled it was ready to attack Israel. More importantly, Israel, through intermediaries, twice asked Jordan not to attack Israel and join in the war.¹⁹² Only after Jordan rejected these pleas and attacked Israel did Israel capture the remainder of Jerusalem (including the Jewish section of the Old City and the Western Wall, considered the holiest site in Judaism) and the West Bank. In short, Israel occupied the West Bank in a defensive war, and its occupation, therefore, could not violate international law.¹⁹³

d. The legality of Israel’s continued occupation of the West Bank

Nor does it appear that Israel’s control over the West Bank since the cessation of hostilities in 1967 has been illegal. The generally accepted, operative international legal document pertaining to this question is Security Council Resolution 242,¹⁹⁴ passed by the UN Security Council

190. See, e.g., MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2002).

191. See *id.* at 61-126.

192. See Arye Naor, *The Six-Day War and Its Aftermath: A Case for Professionalism in Policy Planning*, in *PUBLIC POLICY IN ISRAEL: PERSPECTIVES AND PRACTICES* 109, 114-15 (Dani Korn ed., 2002) (“On the day before the war broke out (6.4.67) Dayan gave the General Staff permission to plan only the conquest of Latrun, which was not to be implemented if the Jordanians did not enter the war. Two messages were sent to Jordan’s King Hussein on the first day of war, warning him not to get involved and promising him no harm if he stayed out of the hostilities which Israel blamed on Egypt. The Jordanians responded with artillery fire on civilian and military targets, including Jerusalem and Tel Aviv.”).

193. See, e.g., Ruth Lapidot, *Security Council Resolution 242 at Twenty Five*, 26 *ISR. L. REV.* 295, 303 (1992) (“[I]t is generally recognized that occupation resulting from a lawful use of force, i.e. from an act of self-defence, is legitimate.”).

194. S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967); see Lapidot, *supra* note 193 (discussing drafting history and intent of Resolution 242). Failure to refer to Security Council Resolution 242 is one of several gaps in a recent attempt to argue the illegality of Israel’s continued occupation of the West Bank. See Orna Ben-Naftali, Ayal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 *BERKELEY J. INT’L L.* 551 (2006). The authors measure the legality of occupation by three basic propositions: (1) occupation does not equate with sovereignty or title; (2) an occupying power is entrusted to manage the occupied territory “in view of the principle of self-determination,” *id.* at 554; and (3) an occupation is temporary. See *id.* at 554-55. The first proposition is generally unobjectionable, but it is

in the immediate aftermath of the 1967 War, later supplemented by Resolution 338 passed during the 1973 War.¹⁹⁵ While various resolutions were considered by the Security Council, only the compromise British draft was voted upon, and it was adopted unanimously.¹⁹⁶ Its English version called for Israel, in return for “[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace

a non sequitur to infer illegality of occupation from lack of title. The second proposition as to trusteeship makes a huge leap. Recognizing that the absent former sovereign was the intended beneficiary under the Hague Regulations, and acknowledging that Jordan’s own sovereignty was suspect, the authors attempt to reformulate the trusteeship as one enabling the native population to exercise its right of self-determination. *See id.* at 563-67. But the leap fails because Israel is not a signatory to the primary legal support adduced by the authors, namely the 1977 Additional Protocol to the Fourth Geneva Convention. *See id.* at 566. The third proposition is objectionable inasmuch as the authors’ argue “temporary” means “reasonable time” and, ipso facto, because Israel’s occupation of the West Bank has been lengthy, a reasonable time has passed. The authors dismiss judging the legality of occupation by its defensive nature or the failure of Arab States or the Palestinian Authority to conclude peace with Israel. *See Ben-Naftali et al., supra*, at 570-73. While automatically terming Israel’s occupation of Palestine unreasonable, the authors do not seriously engage the security factors underlying it, and, in effect, try to cast the causal arrow back towards Israel with respect to events like the intifada. *See id.* at 591. However, this distorts a history of continued refusal by Arab nations and Palestinians to make peace with Israel. Their proposal to replace Israeli with international forces is hardly realistic in light of the withdrawal of UN peacekeepers from Sinai, one of the precipitating events of the 1967 war, the failure of international forces in Bosnia, and the present failure of a regional peace force in Darfur. *See id.* at 613. The experience of Israel’s withdrawal from Gaza has not been positive; similarly rocket fire from the West Bank, given the small width of Israel’s waistline in the densely populated area north of Tel Aviv, might well result in numerous casualties. In no way should the right to, or importance of, self-determination be denigrated, but the path to Palestinian self-determination lies in a realistic peace between Israel and the Palestinians (and, for that matter, other Arab states), rather than the imposition of another international force. Applying their construct specifically to the settlements, the authors largely rely upon and repeat the arguments made by other authorities, e.g., B’Tselem and Raja Shehadeh with respect to land issues. *See sources cited infra* notes 265-83 and accompanying text (responding to these arguments). They do have a telling point in elaborating how, under occupation, Israeli settlers and Palestinian residents largely live under different legal regimes. *See Ben-Naftali et al., supra*, at 583-85. One would not expect Israel to enforce, for example, Jordanian or Palestinian Authority law that declares it a capital offense to sell land to Jews. *See infra* text accompanying note 210. As to voting, Israelis vote in Israeli elections and Palestinians vote in Palestinian Authority elections simply because, otherwise, the occupation would turn into sovereignty and would expressly violate the authors’ first proposition (that occupation does not equate to sovereignty). While the authors are rightly concerned with the status and rights of Israeli Arabs, *see Ben-Naftali et al., supra*, at 611 n.336, they are strangely antagonistic to the presence of a much smaller Jewish minority in territory that undoubtedly will become part of a Palestinian state. The exercise of the Palestinian right of self-determination need not equate to an exclusion of Jewish communities from that state.

195. S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973).

196. Lapidoth, *supra* note 193, at 297.

within secure and recognized boundaries free from threats or acts of force,” to withdraw from “territories” captured in the 1967 War.¹⁹⁷ Parties who participated in drafting Resolution 242 have testified to the significance and intentionality of the omission of the article “the” prior to “territories” from the English text, thereby signifying Israel’s right to insist on border adjustments in the context of a peace settlement with the Arab nations.¹⁹⁸ Israel, of course, has always advanced this interpretation, while Arab nations and Palestinians have always disagreed. As Ruth Lapidoth reports:

Israel’s interpretation is based [not only] on the plain meaning of the English text of the withdrawal clause which was the draft presented by the British delegation[, but also] the fact that proposals to add the words “all” or “the” before “territories” were rejected; and on the idea that in interpreting the withdrawal clause one has to take into consideration the other provisions of the Resolution, including the one on the establishment of “secure and recognized boundaries.”¹⁹⁹

Even if Resolution 242 did not contemplate border changes, Israel was not required to withdraw prior to termination of all states of belligerency against it. Rather than pursuing peace, Arab leaders convened a summit conference in Khartoum, and, reacting to their defeat in the 1967 War and the resultant UN Security Council Resolution 242, restated that there would be no negotiations, recognition, or peace with Israel.²⁰⁰ Moreover, after Jordan relinquished its claim to sovereignty

197. S.C. Res. 242, *supra* note 194.

198. See Rostow, *supra* note 183, at 14. Rostow helped draft and negotiate the text of Resolution 242. He writes:

Resolution 242, which as undersecretary of state for political affairs between 1966 and 1969 I helped produce, calls on the parties to make peace and allows Israel to administer the territories it occupied in 1967 until “a just and lasting peace in the Middle East” is achieved. When such a peace is made, Israel is required to withdraw its armed forces “from territories” it occupied during the Six-Day War—not from “the” territories, nor from “all” the territories. . . .

Five-and-a-half months of vehement public diplomacy in 1967 made it perfectly clear what the missing definite article in Resolution 242 means. Ingeniously drafted resolutions calling for withdrawal from “all” the territories were defeated. . . .

Id. Arthur Goldberg, the U.S. Representative to the UN echoed this interpretation, see Arthur J. Goldberg, *United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East*, 12 COLUM. J. TRANSNAT’L L. 187, 190-91 (1973), as did Lord Caradon, the UK ambassador to the UN, see Lapidoth, *supra* note 193, at 307-10; Wash. Inst. for Near E. Policy, *supra* note 65. Specifically, a return to the 1949 armistice lines was not called for because “it was felt that a return to those lines would not guarantee peace in the area as the 1957 precedent had proven.” Lapidoth, *supra* note 193, at 296 (refers to withdrawal of Israel from Sinai Peninsula in 1957 in return for guarantees of safe shipping through Suez Canal).

199. *Id.* at 307.

200. See The Khartoum Resolutions, Sept. 1, 1967, available at Isr. Ministry of

over the West Bank, no legal entity existed with whom Israel could negotiate a withdrawal until 1993 when Israel and the Palestine Liberation Organization signed the Oslo Accords,²⁰¹ establishing the Palestinian National Authority.

Later interim accords between Israel and the Palestinian Authority led to greater degrees of Palestinian self-government and control over the West Bank²⁰²—with the exception of Israeli settlements and external border controls—until the breakdown of the prolonged negotiations in 2000 between Israel and the Palestinian Authority, first at Camp David and then at *Taba*. The breakdown was followed by the second Palestinian intifada and the renewal of Israeli military control over West Bank population centers. Most observers have placed the onus for that breakdown on the Palestinian Authority and its then head, Yasir Arafat.²⁰³ While Israel unilaterally withdrew from Gaza²⁰⁴ and, prior to

Foreign Affairs, <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Khartoum%20Resolutions>.

201. See Oslo Accords, *supra* note 13.

202. See Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-Palestinian Liberation Organization, 33 I.L.M. 622; Agreement on the Preparatory Powers and Responsibilities, Aug. 29, 1994, Isr.-Palestinian Liberation Organization, 34 I.L.M. 455; Agreement on the Temporary International Presence in the City of Hebron, January 21, 1997, Isr.-Palestinian Liberation Organization, 36 I.L.M. 547; Agreement on the Temporary International Presence in the City of Hebron, January 21, 1997, Isr.-Palestinian Liberation Organization, 36 I.L.M. 547; Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-Palestinian Liberation Organization, 36 I.L.M. 551 [hereinafter Interim Agreement]; Protocol Concerning the Redeployment in Hebron, Jan. 21, 1997, Isr.-Palestinian Liberation Organization, 36 I.L.M. 650; The Wye River Memorandum, Oct. 23, 1998, Isr.-Palestinian Liberation Organization, 37 I.L.M. 1251; Agreement on the Temporary International Presence in the City of Hebron, May 9, 1996, available at Isr. Ministry of Foreign Affairs, <http://www.mfa.gov.il/NR/exeres/CE8DE4D5-C645-418F-AE5D-1C7C079B42A5.htm>; Final Statement, William Clinton & Hosni Mubarak, Summit Of Peacemakers: Sharm el-Sheikh (Mar. 13, 1996), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Summit+of+Peacemakers+-+Sharm+el-Sheikh+-+March+13-.htm>.

203. See, e.g., BILL CLINTON, MY LIFE 937-38, 943-45 (2004) (“Arafat’s rejection of my proposal after Barak accepted it was an error of historic proportions.”); see also ROSS, *supra* note 55, at 753-58 (“Barak says yes; Arafat equivocates.”); SHLOMO BEN-AMI, SCARS OF WAR, WOUNDS OF PEACE: THE ISRAELI-ARAB TRAGEDY 270-77 (2006). But see Malley & Agha, *supra* note 122. Malley and Agha’s revisionism was followed by interchanges with Dennis Ross and Gidi Grinstein, writing separate letters, see Ross & Grinstein, *supra* note 120, at 90-91, and Benny Morris and Ehud Barak, see Morris, *supra* note 65, at 42-45; Benny Morris & Ehud Barak, *Camp David and After—Continued*, N.Y. REV. OF BOOKS, June 27, 2002, at 47, 47-49. Yet, Malley and Agha stress the perceived flawed process of the negotiations rather than the substance. They concede:

If there is one issue that Israelis agree on, it is that Barak broke every conceivable taboo and went as far as any Israeli prime minister had gone or could go.

. . . .

[T]he Palestinians’ principal failing is that from the beginning of the Camp

the Israeli-Hezbollah war in the summer of 2006, a substantial percentage of Israel's population was prepared to repeat the exercise on the West Bank,²⁰⁵ withdrawal from the West Bank without a peace treaty is much more difficult. The West Bank lies contiguous for several hundred miles to Israel's heartland, and thus Israel lacks the same option allegedly available to other nations, for example, the United States in Iraq,²⁰⁶ to simply withdraw.

e. Relationship between lawful occupation and Jewish settlements

If one is prepared to accept the fact that Israel's occupation of the West Bank is lawful, but not the position of Blum and Rostow that Israel's rights to the West Bank exceed that of a occupying power, how do Israeli Jewish settlements on the West Bank fare under the Hague Regulations? It is difficult to respond to the question for two previously noted reasons: (1) Jordan's abrogation of sovereignty over the West Bank; and (2) the admittedly short-term occupation envisioned by the Hague Regulations.

Consistent with Article 43 of the Hague Regulations, which calls on the occupant to "respect[,] . . . unless absolutely prevented, the laws in force in the country,"²⁰⁷ Israel has for the most part continued to follow Jordanian law on the West Bank, despite its position that Jordan illegally occupied the West Bank. Israel's stance has been criticized as contradictory,²⁰⁸ but general continuance of Jordanian law by the military administration can be justified on grounds of legal stability, long-term reliance and equitable grounds reflected in international as well as other law. Israel, however, has distinctly abrogated Jordanian law that criminalized land sales to Jews as a capital offense. It is inconceivable that any country would retain such law against its own citizens,²⁰⁹ any

David summit onward they were unable either to say yes to the American ideas or to present a cogent and specific counterproposal of their own.

Malley & Agha, *supra* note 122, at 62.

204. This is still the subject of some debate in light of continued attacks, particularly Qassam rockets, from Gaza. See *infra* note 219.

205. See Karby Leggett, *Israel's Next Struggle May Be Internal: Rising Support for Pullback From West Bank Presages Power Shift*, *Societal Strife*, WALL ST. J., Feb. 13, 2006, at A6.

206. See, e.g., Theodore C. Sorensen & Arthur Schlesinger, Jr., Op-Ed., *What Would J.F.K. Have Done?*, N.Y. TIMES, Dec. 4, 2005, § 4 at 13.

207. See Hague Regulations, *supra* note 157, art. 43.

208. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 98 (1990).

209. As Alan Gerson points out, the language "absolutely prevented" in Article 43 of the Hague Regulations, as well as limitations in other articles, "have been interpreted liberally rather than literally." GERSON, *supra* note 168, at 8.

more than the new State of Israel in 1948 would “give effect to the White Paper of 1939 regarding the prohibition of land sales to Jews, and the prohibition of Jewish immigration into the country”²¹⁰ or the American occupation of Germany following World War II would continue to implement the Aryan laws against the Jews.

Most Israeli settlements on the West Bank are not on land purchased by Jews, however. While some early settlements, particularly those in the Jordan Valley established according to the Allon Plan under Labor-led governments, were on land requisitioned from Arab owners, the great bulk of Jewish settlements were established after 1979 pursuant to Israeli law on “state” or “public” lands. The development and controversy over these lands is explored more fully in Part III.A.2. Scholars raise two cogent arguments against the settlements on the basis of the Hague Regulations: (1) the incompatibility of *civilian* settlements with a justification based upon *military* necessity under Article 52 (the requisitioning of private property); and (2) the incompatibility of *permanent* civilian settlements with the obligation of an occupying power, consistent with military necessity, to ensure the continued civil life of the occupants of the territory under Article 43—arguably to maintain the status quo ante—and hold real estate belonging to the hostile state as a usufructuary²¹¹ under Article 55 of the Hague Regulations.²¹²

210. Shabtai Rosenne, *Revisiting Some Legal Aspects of the Transition from Mandate to Independence: December 1947–15 May 1948*, in ISRAEL AMONG THE NATIONS, *supra* note 187, at 311, 318.

211. “Usufruct” is a right of use; its roots extend back to Roman law. According to Von Glahn:

In accordance with Roman law (*ususfructus est jus alienis rebus utendi, fruendi, salva rerum substantia*) the occupant is obliged to respect the substance, the capital, of the enemy public property but is entitled to its use and to complete control over the product or proceeds arising out of the property in question.

GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 176-77 (1957).

212. In urging this incompatibility or inconsistency between settlements and the occupying power’s obligations under the Hague Regulations, Kretzmer, among others, would stress the *intention* of the settlers to permanently settle the land and the Likud government, which encouraged settlement in the late 1970s, rather than the observable fact that settlements were removed from Sinai in the earlier Egyptian-Israel peace treaty and later from Gaza as a unilateral move on Israel’s part. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 88, 93 (2002). Kretzmer’s stress on the settlers’ intention accords with the Israeli Supreme Court’s emphasis on the settlers’ intentions in *Elon Moreh*. See HCJ 390/79 Dwaikat v. Israel [1980] IsrSC 34(1) 1; sources cited *infra* notes 240-54 and accompanying text. However, in that case, the court focused upon the settlers’ intention in discussing the justification for the settlement’s establishment, not the settlement’s continued existence. Moreover, once Jordan relinquished claim to the West Bank, it became impossible to allege its public lands are “real estate belonging to a hostile state”

Few would dispute the initial strategic relevance of the earliest settlements established according to the Allon Plan,²¹³ primarily in the Jordan Valley. Recent instances of terrorism in Jordan and by terrorist groups with leadership in Syria have reinforced the view that an Israeli presence on the West Bank is still necessitated to deter terrorism and other threats from sources to the east of Israel,²¹⁴ although debate continues about whether military bases or civilian settlements best serve that strategic function. Elsewhere on the West Bank, perhaps the most contentious settlements are located across and to the west of the central mountain ridge, fairly close to Palestinian populated areas. While it has been contended these settlements inhibit the expansion of Palestinian communities and economic activity,²¹⁵ it is also true settlements may inhibit Palestinian terrorism.²¹⁶ The proximity of some of the most contested areas to Ben Gurion International Airport and Israel's major population centers is a subject of considerable concern.²¹⁷ The showering of *Qassam* rockets from the Gaza Strip, most frequently from territory once occupied by Israeli settlements, strengthens the argument that civilian settlements serve as a security buffer and undercuts the theory that they play no strategic or military role.²¹⁸ In the reality of

under Article 55.

213. Yigal Allon, who served as head of the Ministerial Committee on Settlements in the later 1960s and early 1970s, prepared a strategic plan for the establishment of settlements on the West Bank, "which the plan's proponents argued was necessary to ensure state security." Lein, *supra* note 35, at 12. It was this plan that was followed during the Labor governments that lasted until 1977. *See id.* at 12-13.

214. *See* Dore Gold & Jonathan D. Halevi, *Al-Qaeda, Zarqawi, and Israel: Is There a New Jihadi Threat Destabilizing the Eastern Front?*, JERUSALEM VIEWPOINTS, Jan. 1, 2006, available at <http://www.jcpa.org/jl/vp538.htm>. A group of Israeli defense experts has opined, in particular, it would be dangerous for Israel to relinquish control of the Jordan Valley. *See* Rafael D. Frankel, *Defensible Borders Are Key to Israel's Safety*, JERUSALEM POST, Jan. 24, 2006, <http://www.jpost.com/servlet/Satellite?cid=1137605901492&pagename=JPost%2FJPArticle%2FShowFull>; Yaakov Katz, *Naveh: Zarqawi Trying to Get Better Grip*, JERUSALEM POST, Feb. 22, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395468413&pagename=JPost%2FJPArticle%2FShowFull> (Central Command Major General Yair Naveh remarks that Jordan Valley is "strategic security asset" in fighting terrorism); Moshe Ya'alon, Former Chief of Staff, *Isr. Def. Force, The Security Implications of a Hamas-Led Palestinian Authority* (Feb. 16, 2006), <http://www.washingtoninstitute.org/templateC05.php?CID=2444>.

215. Lein, *supra* note 35, at 96-102.

216. *See, e.g.,* Amir Buhbut, *ורמושה בלב האצמנ מסק חטקר* [*The Rockets Are Getting Closer: IDF Finds Kassam in West Bank*], NRG (Isr.), Feb. 22, 2006, <http://www.nrg.co.il/online/1/ART1/051/546.html>.

217. *See* Ya'alon, *supra* note 214.

218. *See* Moshe Arens, *The Wages of Unilateralism*, HAARETZ, Jan. 31, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676700> ("In August 2005, 10,000 Israelis were forcibly removed from their homes in Gush Katif[,] . . . while Kassam rocket launching sites were allowed to move into areas formally occupied by the settlements of *Elei Sinai*, *Nissanit*, and *Dugit*, thus moving them into range of Ashkelon,

terrorism, disrupting the “territorial contiguity of Palestinian communities”²¹⁹ has both negative and positive effects. In the absence of terrorism and the protection of all, neither effect would be felt or relevant.

Recent history also undermines the argument that there is an inherent contradiction between “permanent” civilian settlements and Israel’s rights and obligations under Articles 43, 52, and 55 of the Hague Regulations. Israel has demonstrated such settlements can be removed; for example, it has evacuated and removed or destroyed civilian settlements in Sinai (after the Egyptian-Israeli peace treaty), Gaza, and the West Bank (during and following the Gaza withdrawal). The question, of course, remains whether settlements should be removed. To fully explore this question, it is necessary to inquire into whether the settlements were established on “Arab” land.

2. The “Land” Issue: The Charge that Israeli Settlements Have Been Illegally Placed on “Arab” Land

This commonly made and accepted charge merits deconstruction, as it conflates and therefore masks several different possible assertions: (1) Jewish settlements have been established by expropriating or requisitioning,²²⁰ without military necessity, privately owned Arab land; (2) settlements have been established on land belonging to specific Arab

one of Israel’s larger cities.”); Boaz Ganor, *Don’t Be Fooled by Calm: Israel Continues to Face Three Strategic Threats*, YNET NEWS, Jan. 16, 2006, <http://www.ynetnews.com/articles/0,7340,L-3201230,00.html> (“The vacuum created in the Gaza Strip after Israel’s departure and Abbas’ failure have allowed global Jihad to rank up its terrorist abilities in Gaza, and eventually they will probably do so in the West Bank as well.”); Amos Harel, *Two Killed in Ninth Targeted Killing in Last Four Days*, HAARETZ, Feb. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=680070> (“[T]he Israel Defense Forces have resumed enforcing a ‘no man’s land’ in northern Gaza that Palestinians are not allowed to enter. This area, the site of three former Israeli settlements, has been a favorite launch site for Qassam crews.”); Aaron Lerner, *Israel Radio: Palestinians Launching Rockets from Abandoned Communities on Northern Gaza Border*, INDEP. MEDIA REV. ANALYSIS, Dec. 16, 2005, <http://www.imra.org.il/story.php3?id=27832> (“Palestinians are now exploiting the abandon Israeli communities on the northern border of the Gaza Strip as rocket launching sites that are considerably closer to such strategic Israeli targets as a power plant and a large fuel storage area located south of Ashkelon.”).

219. Lein, *supra* note 35, at 102.

220. “Expropriation” usually refers to a taking of land without compensation although it can refer to a taking with compensation, such as eminent domain. The former clearly violates Article 45 of the Hague Regulations as a “confiscation of private property.” Hague Regulations, *supra* note 157, art. 46. “Requisition,” which under Article 52 of the Hague Regulations “shall not be demanded . . . except for the needs of the army of occupation,” *id.* art. 52, retains original ownership, but involves use by the occupant for a fee. Thus, requisition is similar to rental, except by an involuntary rather than voluntary transaction.

villages or communities; and/or (3) the land, while not privately owned by individual Arabs or collectively owned by certain Arab communities, belongs to a general Arab “polity” having rights to the land. Each of these assertions bears exploration, both in terms of its own validity as well as the implications flowing from each. Each is also, in large part, dependent upon the proper characterization of the land upon which most settlements lie.

a. Privately owned Arab land

Excluding Jewish development in East Jerusalem,²²¹ a few early Jewish settlements constructed on uncultivated land specifically requisitioned for military needs,²²² and some illegal West Bank outposts established by Israeli Jews without permission of the military administration,²²³ substantially no present Jewish settlement on the West Bank has been established on land that Israel considers to be privately owned. Further, with some exceptions,²²⁴ no settlements have been established on land privately owned by Jews prior to 1948. Despite Israel’s reversal of Jordanian law barring the sale or ownership of land

221. This exclusion seems reasonable in that most realists acknowledge that Jewish neighborhoods in Jerusalem, regardless of whether the territory is characterized as East or West, would remain part of Israel in any final settlement. Hence, the subject matter of this article pertains to those areas that would most probably become part of a Palestinian juridical entity.

222. As the Israeli Supreme Court noted in *Mara’abe v. Prime Minister of Israel*, HCJ 7957/04 Mara’abe v. Prime Minister of Israel (Sept. 15, 2005), http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf, requisitioning of property differs from expropriation and does not involve a change of ownership, but rather a change in possession:

Taking of possession is temporary. The seizure order orders its date of termination. Taking of possession is accompanied by payment of compensation for the damage caused. Such taking of possession—which is not related in any way to expropriation—is permissible according to the law of belligerent occupation.

Id. at *10 (citations omitted).

223. See Sason, *supra* note 8; Yuval Yoaz, Amos Harel & Nadav Shragai, *IDF and Hebron Settlers Holding Secret Talks on Evacuation of Market Area*, HAARETZ, Jan. 29, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676051> (Israeli Supreme Court turned down petition to halt evacuation of Amona, illegal settlement and focal point of dispute between settlement activists and government). However, one observer pled to delay the evacuation, partly on the ground that there are numerous Arab housing projects built illegally but not torn down. See Nadav Shragai, *Compromise Building in the Outposts*, HAARETZ, Jan. 29, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=675859>. Even more recently, the Civil Administration in the West Bank announced a plan to map the illegal outposts and implement demolition orders against those constructed on private Arab land. See Yuval Yoaz, *W. Bank Outposts to Be Mapped, then Razed*, HAARETZ, May 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=713258>.

224. Benvenisti & Zamir, *supra* note 40, at 311.

by Jews, Israel has “de facto recognized the actions carried out by Jordan regarding the property of Israelis.”²²⁵ Jordan, under its statutory and administrative “trading with an enemy” corpus of law, regarded Jewish-owned land as state land. Thus, contrary to popular opinion, substantially all Israeli settlements established after 1979 are either on land purchased by Jews from Arabs after 1967,²²⁶ a small minority of settlements, or on property designated as “state land.” To understand this development requires, in turn, a review of two seminal Israeli Supreme Court cases decided in 1979, *Ayyub v. Minister of Defence*,²²⁷ popularly known as the *Beth-El* case; and *Dwaikat v. Israel*,²²⁸ known as the *Elon Moreh* case, and an understanding of the role of Israel’s Supreme Court in relation to the Israeli government and military.²²⁹

The Israeli Supreme Court, sitting as a High Court of Justice,²³⁰ has

225. *Id.* at 304. Interestingly, even land owned by Israelis in East Jerusalem has not been returned to the owners. According to Eyal Benvenisti and Eyal Zamir:

[S]uch practical recognition [of the Jordanian treatment of such property] is . . . found in the fact that Israeli assets that were purchased or used for public purposes during the Jordanian rule, and for which the public need did not cease after 1967, were not returned to their owners. In these cases, the owners received monetary compensation only.

Id. at 309. The authors relate that, after 1967, the Israeli military authorities faced a choice: either return the property to its original owners or administer the property as the Jordanians had. They then explore why, despite both logical and humanitarian reasons, *see id.* at 311, the military authorities selected the latter alternative to continue the Jordanian treatment of Jewish owned property on the West Bank. As a result, Jewish owned land became public property just as Arab absentee owned land. *Id.* at 313. A somewhat related question is whether Jews in the territories may rightfully settle on land owned by Jews prior to the establishment of Israel, although the settlers do not have a claim based upon original ownership. For instance, Jews attempted to settle in homes owned by Jews prior to the Hebron massacre of 1929; the Israeli government considers the settlement illegal and evicted the settlers following a court order. *See* Amos Harel, *Four Policemen Lightly Injured in Clash with Hebron Settlers*, HAARETZ, Jan. 4, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=665699>.

226. Benvenisti & Zamir, *supra* note 40, at 299.

227. HCJ 606/78 *Ayyub v. Minister of Def. (Beth-El)* [1979] IsrSC 33(2) 113, *translated in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 371 (Meir Shamgar ed., 1982) [hereinafter MILITARY GOVERNMENT IN THE TERRITORIES].

228. HCJ 390/79 *Dwaikat v. Israel (Elon Moreh)* [1980] IsrSC 34(1) 1, *translated in* 1 MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 227, at 404; *see* GERSHOM GORENBERG, *THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS, 1967-1977*, at 281-95, 306-10, 329-38, 342-61 (2006) (describing varied attempts, some surreptitious, of Israeli settlers to establish *Elon Moreh*).

229. Pnina Lahav credits two features of the Judges Law, enacted in 1953, as key factors in the Israeli Supreme Court’s independence: judicial tenure and the selection of judges by committee, which replaced a political process with one that “emphasized . . . professionalism and apolitical content of judicial decision-making. *See* Pnina Lahav, *The Supreme Court of Israel: Formative Years, 1948-1955*, *STUD. IN ZIONISM*, Spring 1990, at 45, 55.

230. *See* KRETZMER, *supra* note 212, at 10-11 (describing dual role of Israeli Supreme

considered claims of international law violations made against Israel and its military to a degree unimaginable in other national courts with respect to actions of their governments or military in armed conflict. As Eyal Benvenisti noted, "Although the legality of occupation measures has been examined by many national courts on various occasions, never have these measures been scrutinized by the occupant's own judicial system."²³¹ While "[t]he Act of State doctrine (in the British or American sense), the sovereign immunity doctrine[,] . . . and questions of justiciability and standing have proved to be high hurdles for claimants in other jurisdictions, . . . the [Israeli] Supreme Court has flatly and consistently rejected these arguments."²³² In *Beth-El*, the Court considered whether military authorities could requisition private

Court as both appellate court from district court decisions and High Court of Justice).

231. Eyal Benvenisti, *Judicial Review of Administrative Action in the Territories Occupied in 1967*, in PUBLIC LAW IN ISRAEL 371, 372 (Itzhak Zamir & Allen Zysblat eds., 1996). Benvenisti adds: "Indeed, the [Israeli] Supreme Court's willingness to permit judicial review of occupation measures stands in marked contrast to the attitude of the U.S. courts, which refused to entertain claims of Panamanian citizens and firms against the U.S. military, following the occupation of Panama in December 1989." *Id.* Allan Gerson made much the same point in an earlier work when he asked the question, "Does the occupied populace, however, have a right under international law to appeal to domestic courts of the occupant for the purpose of questioning whether military orders and promulgations were within the scope of the issuer's legitimate authority?" GERSON, *supra* note 168, at 127. Gerson answered, "In no instance of belligerent occupation, other than the Israeli case, is there any record of such practice." *Id.*

232. Benvenisti, *supra* note 231, at 374. Kretzmer elaborates on the Israeli Supreme Court's assumption of jurisdiction (initially, perhaps on account of the government not contesting such) and its bypassing questions of justiciability and standing that have characterized courts of other nations in similar contexts. See Kretzmer, *supra* note 212, at 19-25. Another opponent of the settlers, Adam Roberts, expressed somewhat similar views, comparing Israel's position with that of other countries:

Israel deserves credit for acknowledging openly, albeit inadequately, the relevance of international legal standards. Its position contrasts with those of the many occupying powers in the past [forty] years that have avoided expressing any view on the applicability of international legal agreements: such powers have included the Soviet Union in Hungary (1956), Czechoslovakia (1968) and Afghanistan (1979); and South Africa in Namibia. Israel also deserves credit for cooperating with the International Committee of the Red Cross, which has played an important role in the occupied territories by performing a wide range of tasks, including, in particular, monitoring conditions of detention.

Roberts, *supra* note 208, at 63 (footnote omitted). The Israeli Supreme Court seems destined to rule upon the Israeli military's targeted assassination of terrorists where the Palestinian Authority refuses to assist in arrests. See Ze'ev Segal, *Targeting the High Court*, HAARETZ, Dec. 12, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=656512>. On the other hand, like the United States Supreme Court, the Israeli Supreme Court will not decide a case in the absence of a concrete dispute. For this reason, a three-judge panel of the Israeli Supreme Court, sitting as the High Court of Justice, refused to hear a general political challenge to civilian settlements in the West Bank and Gaza. See HCJ 4481/91 Bargil v. Israel [1992] IsrSC 47(4) 210.

property²³³ for a civilian settlement upon proof of military necessity. *Elon Moreh* more deeply explored the definition of military necessity and effectively precluded further requisitioning of Palestinian privately-held land for civilian settlements without regard to military necessity.

Beth-El involved two joined cases in which Palestinian petitioners sought relief for lands that had been requisitioned by the military for the use of civilian settlements. In *Beth-El*, the owners neither resided on nor cultivated the land, while in the other, *Beka'ot*, the petitioners had cultivated the land. In both cases, the petitioners challenged the consistency of justifying the requisition of land on grounds of military necessity for use as civilian settlements. They also challenged more generally the legality of such requisitioning under international law.

Writing the court's majority opinion, Justice Witkon rejected the contention that use of land for civilian settlement is necessarily contradictory to its taking based upon military necessity. He stressed the strategic location of the settlements,²³⁴ the threat of terrorism, the reservist nature of the Israeli Army, and the reluctance of the court to substitute its judgment for that of the military, even if the latter's views corresponded to those of a civilian government that favored Jewish settlement on the West Bank.

Turning to the claim of international law violations, Justice Witkon affirmed the template that was, with some later modifications (particularly, during the presidency of Aharon Barak), used by the Israeli Supreme Court in later cases: Article 49(6) of the Geneva Convention does not reflect customary international law (although the court did not dispute the possible customary status of certain other provisions of the Geneva Convention) and as "a conventional provision[,] . . . the petitioners . . . [could not] rely on it"²³⁵ before the court; but the Hague Regulations, having become customary international law, could be used by the petitioners. Turning to Article 52 of the Hague Regulations, which specifically sustains requisition for "the needs of the army of occupation,"²³⁶ Witkon considered the divergent interpretations of the

233. See *supra* note 220 (explaining distinction between expropriation and requisition).

234. The court, for example, relied upon the affidavit of Major-General Avraham Orly:

[*Beth-El*] camp is situated in a place of great importance from a security point of view. This is evidenced by the fact that it was previously a Jordanian camp.

The settlement itself is on an elevation commanding the vitally important junction of the longitudinal Jerusalem-Nablus route and the transverse route from the Coastal Plain to Jericho and the Jordan Valley.

1 MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 227, at 385 (quoting H CJ 606/78 Ayyub v. Minister of Def. (*Beth-El*) [1979] IsrSC 33(2) 113).

235. *Id.* at 388 (Landau, D.P., concurring).

236. Hague Regulations, *supra* note 157, art. 52.

standard, whether quite narrow as alleged by the petitioners, or more expansive as alleged by the Israeli government. The court accepted the government's interpretation of Article 52 for much the same reason it decided military necessity would be an acceptable ground for the settlements (i.e., protection from terrorist attacks and the like).²³⁷

It should be noted that one argument advanced by counsel for the petitioners has been used by subsequent critics of Israeli settlements: "[H]ow a permanent settlement can be established on land requisitioned only for temporary use."²³⁸ To this Witkon responded, "This occupation can itself come to an end some day as a result of international negotiations leading to a new arrangement which will take effect under international law and determine the fate of . . . settlements existing in the Administered Territories."²³⁹ This argument would have attained much greater importance over the years were it not for *Elon Moreh*.

In that case, the military government had requisitioned 700 dunams of land for a civilian settlement within the borders of the *Rujeib* village, located close to Nablus and approximately 2 kilometers from the Jerusalem-Nablus Road. Although the land requisitioned for the settlement was uncultivated, 17 Arabs who owned 125 dunams of the land successfully challenged the action before the Israeli Supreme Court.²⁴⁰ *Elon Moreh* can be analyzed on several different levels, including the facts of the case (especially those that distinguish it from *Beth-El*), the tenor of the justices' opinions, the reasoning employed, and, most importantly, its enormous effect on the building of future settlements. The case produced three different opinions, the majority written by Deputy President Justice Landau (in which two other justices concurred) and separate concurring opinions by Justices Witkon and Bekhor.

The opinions painted a rather negative picture of the settlers and their actions. Landau's opinion was highly critical of the speed that the

237. Ironically, Israel's withdrawal from Gaza has strengthened the argument that settlements serve as a security buffer. Recently, Palestinian rockets fired from the premises of former Israeli settlements have reached the outskirts of Ashkelon, a major Israeli city. See sources cited *supra* note 218.

238. 1 MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 227, at 392 (quoting *Ayyub*, [1979] IsrSC 33(2) 113).

239. *Id.* Justice Ben-Porat opined "the word 'permanent' must be taken in a relative sense," stressing the continuing state of emergency that Israel had found itself for its first thirty years. *Id.* at 396 (Ben-Porat, J., concurring).

240. Technically, the landowners petitioned the court for an *order nisi* against the Government of Israel, the Minister of Defense, the Military Commander of the West Bank, and the Military Sub-Commander of the Nablus Sub-District to show cause why the requisition orders should not be declared void and why the equipment and structures on the land should not be removed. An interim order was issued, which, as a result of the court's judgment, became absolute.

requisition and initial construction occurred and the impropriety of the military governor having given notice to the village *mukhtar* rather than the actual landowners—steps that created “the impression . . . that the occupation of the land was organized as a military operation by employing an element of surprise and in order to forestall the ‘danger’ of intervention by th[e] [c]ourt on an application by the landowners before work began in the area.”²⁴¹ Witkon stated he “d[id] not wish to refer to incidents . . . in which members of *Gush Emunim* (among them the settlers before us) were shown to be people who do not accept the authority of the Army and do not even hesitate to give violent expression to their opposition,”²⁴² but, of course, he did precisely the opposite by mentioning such. In short, the die was cast, although no justice explicitly based his opinion upon these negative depictions of the settlers.

The government and military first tried to argue that the requisition could be justified under a 1948 ordinance by the Provisional Council of State “regard[ing] the State of Israel as possessing sovereignty over all of the land of Israel (Palestine).”²⁴³ The justices rejected that position:

In dealing with the legal basis of Israeli rule in Judea and Samaria [(the West Bank)], our concern is with legal norms which exist in fact and not only in theory, and the basic norm upon which the structure of Israeli rule in Judea and Samaria was erected is still today . . . the norm of military government and not the application of Israeli law that entails Israeli sovereignty.²⁴⁴

In other words, Israel’s rights on the West Bank would be judged in terms of its status as an occupier.

In accordance with the earlier *Beth-El* decision, each justice accepted the applicability of the Hague Regulations, as part of customary international law, to the actions of the Israel’s Military Authority (regardless of the legality of Jordan’s occupation of the West Bank). The court employed the standard of military necessity under Article 52 of the Hague Regulations to adjudge the Military Authority’s actions. Distinguishing *Elon Moreh* from *Beth-El*, the court concluded the *Elon Moreh* requisition primarily reflected a political response to the settlers’ desires rather than calculated military necessity. Indeed, important facts pointed to both the lack of military necessity and to the political nature of the decision.

241. *Id.* at 407 (quoting H CJ 390/79 *Dwaikat v. Israel (Elon Moreh)* [1980] IsrSC 34(1) 1).

242. *Id.* at 435 (Witkon, J., concurring) (emphasis added). See generally GORENBERG, *supra* note 228.

243. 1 MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 227, at 417 (quoting *Dwaikat*, [1980] IsrSC 34(1) 1).

244. *Id.*

While the Chief of General Staff claimed the settlement was militarily required, an affidavit and other evidence indicated the Minister of Defense had initially disagreed.²⁴⁵ Further, the court noted that “military necessity” was based upon a generalized notion of “the importance of regional defence”²⁴⁶ in wartime, rather than the comparable justification of protection against terrorist activity offered in *Beth-El*.²⁴⁷ Moreover, several high-ranking reserve officers opined in affidavits that *Elon Moreh* would be a settlement without military value and, if anything, would consume military resources in protecting the settlers and settlements in a time of war.²⁴⁸

The settlers did not help their own case. Unlike the settlers from *Beth-El*, the settlers were permitted to file affidavits of their own, and, in one such affidavit, a settler “explained that the members . . . had settled at *Elon Moreh* because of the Divine commandment to inherit the land given to our forefathers.”²⁴⁹ Both the content of the various affidavits as well as the history of *Elon Moreh* convinced the court that politics came first and the conclusion of military necessity followed as, at best, a secondary motivation for the settlement.²⁵⁰

To Justice Landau, implicitly,²⁵¹ and to Justice Witkon, explicitly,²⁵² the government bore the burden of proof on the issue of military necessity. Without so declaring, this position seemed to have been a procedural shift from its earlier decision in *Beth-El*. Justice Landau stressed “that the military needs referred to in [Article 52 of the Hague Regulations] cannot include, on any reasonable interpretation, national-security needs in the broad sense,”²⁵³ that is, the broad political

245. The Minister of Defence later went along with the decision, as the Ministerial Defence Committee, which the Prime Minister chaired, came to a positive decision on the settlement.

246. *Id.* at 408.

247. *Id.* at 392-93 (quoting HCJ 606/78 Ayyub v. Minister of Def. (*Beth-El*) [1979] IsrSC 33(2) 113 (careful location of settlements impedes terrorist activity)).

248. *Id.* at 409-10.

249. 1 MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 227, at 414 (quoting HCJ 390/79 Dwaikat v. Israel (*Elon Moreh*) [1980] IsrSC 34(1) 1) (emphasis added).

250. *Id.* at 406-14.

251. Justice Landau, after stating the facts, then asked, “Have the [*Israeli authorities*] shown sufficient legal warrant for seizing the petitioners’ lands?” *Id.* at 420 (emphasis added).

252. As Justice Witkon expressed:

[W]e must ask ourselves who bears the burden of proof? Must the petitioners convince us that the land was not requisitioned for the needs of the Army and security or should we perhaps require the respondents, the security authorities, to convince us that the requisition was needed for this purpose? I think that the burden rests upon the respondents.

Id. at 433 (Witkon, J., concurring).

253. *Id.* at 422.

perspective of the Government and settlers. And, while military necessity could conceivably include the regional defense justification used by the Chief of General Staff in his affidavit to the court, the primacy of politics over military judgment in making this decision undermined that justification. Hence, not only the government's broadly stated "national security" rationale, but also the narrower "regional defence" grounds proffered by the Chief of General Staff could not justify the requisition of private property in *Elon Moreh*. In Justice Landau's words:

In our legal system, the right of private property is an important legal value protected by both civil and criminal law, and as regards the right of an owner of land to legal protection of his property, it is immaterial whether the land is cultivated or barren.

The principle of protecting private property applies also in the law of war. . . .²⁵⁴

To Julius Stone, the decision was remarkable in that "[p]robing of this severity by civilian judges of the motives of this level of military and political decision-makers of their own government is . . . rather unique even in democratic policies."²⁵⁵ Its precedent in the general law of "belligerent occupation" "now offers the novel rider that 'military needs,' even if attested in good faith by the highest military authorities, will not qualify as such if it appears that historically the subjective motive of the officials initiating the requisitioning procedure was not predominantly military."²⁵⁶

Even more important than the court's showing of independence, its rhetoric and the particular result regarding the initial location of the *Elon Moreh* settlement was the long-term consequence of the decision.²⁵⁷ Thereafter, all Israeli settlements legally²⁵⁸ authorized by the Israeli

254. 1 MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 227, at 419.

255. Julius Stone, *Aspects of the Beit-El and Elon Moreh Cases*, 15 ISR. L. REV. 476, 490 (1980). Stone further questioned whether it was appropriate to allow the testimony of individuals to surmount testimony of military officers as to whether military necessity existed. *Id.* at 492.

256. *Id.* at 490.

257. Benvenisti & Zamir, *supra* note 40.

258. At times Israelis have established settlements without the authority of the Military Government, usually in the form of mobile homes on empty hilltops. In response to these unauthorized settlements, the Prime Minister appointed a commission, chaired by Talya Sason, to determine the extent of and make recommendations concerning illegal outposts. As a consequence of the Sason Report, such settlements were supposed to be immediately dismantled. *See* Sason, *supra* note 8. It appears, however, the great bulk of the settlements were still in existence as of December 2005. *See* Dan Izenberg & Tovah Lazaroff, *No Action Taken on W. Bank Outposts*, Dec. 7, 2005, JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1132475697589&>

Military Administration have been constructed on lands that Israel characterizes as state-owned or “public” land.²⁵⁹ This term would appear to include uncultivated rural land not registered in the name of anyone²⁶⁰ and land owned by absentee owners,²⁶¹ both categories that existed under pre-existing legal regimes, including Jordanian and Ottoman law. Inversely, the term excludes land registered in the name of someone other than an absentee owner (regardless of whether the land is presently cultivated), land to which a title deed exists (even if the deed is unregistered),²⁶² and land held by prescriptive use.²⁶³ The latter requires continuous use of the land for a period of ten years.

As might be expected, Israel’s categorization and characterization of certain lands as “state” or “public” have provoked considerable

pagename=JPost%2FJPArticle%2FShowFull. According to the Sason Report, a settlement must satisfy four conditions to be considered legal under Israeli law:

First, the decision to establish a settlement must be made by the authoritative political echelon. . . . [Second,] Israeli settlements shall be established only on State land. . . . [Third,] a settlement shall be established only according to a lawful designed building scheme. . . . [Fourth,] the bounds of jurisdiction of such a settlement was determined in an order by the Commander of the area.

Sason, *supra* note 8. Because of these conditions for legality, the Sason Report defines an illegal settlement as having one of the following characteristics: (1) established without governmental decision; (2) established without legal planning status; (3) not attached to existing settlements; or (4) established after the mid-1990s. *Id.*

259. The term, as used by Israel since *Elon Moreh*, includes lands owned by absentee owners and uncultivated rural land not registered to anyone. See Benvenisti & Zamir, *supra* note 40, at 307-314, 315 n.106. The absentee owner category includes land on the West Bank under registered ownership to Jews prior to 1948 and held by Jordanian authorities prior to 1967. In any event, the land most in dispute involves uncultivated rural land not under registered ownership. Even if this characterization continues Jordanian characterization and law on the subject, it is not to say Palestinians accept the notion that unregistered land qualifies as “state land.” See RAJA SHEHADEH, OCCUPIER’S LAW: ISRAEL AND THE WEST BANK 26-33 (rev. ed. 1988). In addition, there have been recent reports of fraudulent land sales from Arabs to Jewish settlers and land dealers who transfer the land over to the Civil Administration. The custodian then converts the lands to “state lands” and leases them back to settler associations for development. See Akiva Eldar, *There’s a System for Turning Palestinian Property into Israel’s State Land*, HAARETZ, Dec. 27, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=662729>.

260. KRETZMER, *supra* note 212, at 90. Although Ottoman law required registration for ownership, B’Tselem claims most land on the West Bank was never registered “to preserve the collective ownership system (*musha’a*)[,] . . . evade tax liability, and . . . avoid being drafted into the Turkish army.” Lein, *supra* note 35, at 54. During the British Mandate period and subsequent Jordanian rule, the pace of registration picked up, and “[b]y the time Israel occupied the West Bank, regulation proceedings had been completed for approximately one-third of the area.” *Id.*

261. The “public” designation of land owned by absentee owners was a continuation of the Jordanian designation. Some of this land was owned by Jews or the Jewish Agency prior to 1948. See Benvenisti & Zamir, *supra* note 40, at 310-14.

262. Both of these types of land ownership would presumably come under the designation of *mulk* land. Lein, *supra* note 35, at 51.

263. KRETZMER, *supra* note 212, at 90.

controversy.²⁶⁴ Several of the most detailed critiques have been undertaken by B'Tselem, the Israeli human rights group, which concedes that ninety percent of the settlements have been established on what is nominally "state" land,²⁶⁵ but takes issue with that designation on both substantive and procedural grounds.

B'Tselem's principal substantive objections relate to the percentage of West Bank land designated as "state" land and to the categorization of such land. According to B'Tselem, approximately forty percent of the West Bank²⁶⁶ has been declared to be "state" or "public" lands, a vast expansion of the sixteen percent of West Bank land considered state or public land while under Jordanian control. Other settlement opponents have used percentages in the range of sixty percent,²⁶⁷ although even B'Tselem's figure may be on the high side considering its inclusion of certain Jerusalem neighborhoods in its calculations. However, B'Tselem's concedes that the vast majority of this land is in the Jordan Valley, which, with the primary exception of Jericho, was barely populated by Palestinian Arabs prior to 1967 (which explains why such land was both unregistered and uncultivated).²⁶⁸ Moreover, regardless of the gross percentage of land designated as state or public land, according to B'Tselem's own statistics, only approximately 5 percent of the West Bank is within settlement "municipal boundaries" and a much, much smaller percentage of land, 1.7 percent, is developed.²⁶⁹ In other words, B'Tselem's emphasis on the large percentage of land considered "state" or "public" on the West Bank relates more to the potential takeover of West Bank land by Jewish settlements than to the present reality of the actual land occupied. As B'Tselem itself concedes, there is a huge divergence between built-up areas and municipal boundaries.²⁷⁰

264. See, e.g., Raja Shehadeh, *Jewish Settlements in the Occupied West Bank*, in QUESTION OF PALESTINE, *supra* note 175, at 6, 7-11; Stacey Howlett, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 VAND. J. TRANSNAT'L L. 117, 143-46 (2001); Lein, *supra* note 35, at 51-59; Kretzmer, *supra* note 212, at 90-94.

265. Lein, *supra* note 35, at 51.

266. *Id.* at 8.

267. See, e.g., Deborah Horan, *The Promised Land Grab—Israel's West Bank*, WASH. MONTHLY, May 1993.

268. B'Tselem acknowledges "[t]here are no permanent Palestinian communities in the Judean Desert and Dead Sea areas." Lein, *supra* note 35, at 93. Further, "a significant proportion of land in this area was already registered as state land under the Jordanian administration, . . . [and] most of the land reserves held by Israel in the West Bank and registered in the name of the Custodian for Government and Abandoned Property is situated in this strip." *Id.* at 94.

269. *Id.* at 116.

270. See, e.g., *id.* at 101 (discussing several settlements south of Trans-Samaria highway). One group of settlements is described as having municipal boundaries of fourteen times the built-up area and another group as having municipal boundaries equal to seven times the built-up area. *Id.*

Of greater substantive merit is B'Tselem's claim that, while in percentage terms the amount of public lands involved may not be large, West Bank areas designated as public lands along the central mountain range between the Jordan River and the Mediterranean Sea and areas immediately east or west, where many settlements exist, lie close to populated Palestinian centers and choke off their expansion and the use of the land for agricultural purposes. But analysis of particular settlements, including Ariel, one of the West Bank's largest, focuses more upon the stultifying effect of Ariel's presence if expansion continues to its full municipal boundaries rather than the comparatively small presently built-up area.²⁷¹ In other words, the notion of expansive municipal boundaries only has great relevance if continued Israeli sovereignty rather than Palestinian sovereignty is assumed.

B'Tselem also takes issue with Israel's categorization of land as "state" or "public" lands. To lands that were considered "state" lands by the Jordanians, according to B'Tselem, the Israeli military administration added land owned by the Jordanian government—as property belonging to an enemy state—and three categories of untitled land:²⁷²

Miri land that was not farmed for at least three consecutive years, and thus became *makhhlul*; *Miri* land that had been farmed for less than ten years (the period of limitation), so that the farmer had not yet secured ownership; [and] land defined as *mawat* due to its distance from the nearest village.²⁷³

Clearly it would be unfair to declare *Miri* lands that have been continuously farmed, but not yet for the full ten years, as "state" land.

271. B'Tselem states only twenty-two percent of the municipal area has been built-up or is in the process of construction. Lein, *supra* note 35, at 119.

272. That is, land the ownership to which is claimed on the basis of prescriptive use.

273. *Id.* at 53. B'Tselem defines *Miri* lands as:

[T]hose situated close to places of settlement and suitable for agricultural use. A person may secure ownership of such land by holding and working the land for ten consecutive years. If a landowner of this type fails completely to farm the land for three consecutive years for reasons other than those recognized by the law (e.g., the landowner is drafted into the army, or the land lays fallow for agricultural reasons), the land is then known as *makhhlul*. In such a circumstance, the sovereign may take possession of the land or transfer the rights therein to another person. The rationale behind this provision in the Land Law was to create an incentive ensuring that as much land as possible was farmed, yielding agricultural produce which could then be taxed.

Id. at 52 (footnote omitted). On the other hand, *Mawat* land is classified as:

[L]and that is half an hour walking distance from a place of settlement, or land where 'the loudest noise made by a person in the closest place of settlement will not be heard.' According to the legal definition, this land should be empty and not used by any person. In this case, the sovereign is responsible for ensuring that no unlawful activities take place in such areas.

Id. (footnote omitted).

Yet it is unclear from B'Tselem's presentation how much of the "state" land consists of *Miri* lands and which, if any, Jewish settlements were actually established on that land.²⁷⁴

B'Tselem's procedural objections to the notion of "state" or "public" land on which all settlements have been established since 1979 are deserving of serious attention.²⁷⁵ B'Tselem claims that, because most land was not registered under the Ottoman Empire for reasons such as tax avoidance, it was held according to prescriptive use. Yet, according to B'Tselem, parties who might have been affected by the designation of land as "public" were frequently not directly notified of such designation. While village *mukhtars*, appointed by the military government, were notified, they in turn failed to notify the affected land "owners," who first discovered the designation when settlement building had begun.²⁷⁶ Theoretically, an appeals process existed, but the land claimants often learned of the designation of their property as "state" land too late to appeal the designation. Moreover, regardless of when the affected Palestinians heard about the designation, their only source of contesting the designation was a Board of Appeals established by the military administration, which granted relief in only a small percentage of cases. The burden of proof lay on the petitioners and was difficult to overcome given that Israeli authorities took periodic aerial photographs searching as to whether the land was in fact being used for farming.²⁷⁷ With respect to West Bank property that was registered, but owned by someone mistakenly classified as an absentee owner, B'Tselem asserts a similar failure in the notice process. It cites one instance in which the appeals committee refused to undo the transaction that allowed for a settlement to be built on the ground that the faulty conclusion that the land had been abandoned was made in "good faith."²⁷⁸ In addition, B'Tselem claims, the presence of the military court of appeals actually

274. David Kretzmer, who is critical of Israeli governmental policy concerning settlements (as part of a larger criticism of Israeli actions on the West Bank), likewise argues since only about a third of the land on the West Bank was registered prior to 1967, unregistered lands are not necessarily state lands. However, he also cites a government attorney, who estimated that approximately forty percent of the West Bank land could be characterized as "state land." Thus, while Palestinians may hold deeds for some of the unregistered land that is classified as private by Israel, that category or designation would seem clearly to include substantial areas where ownership has been accepted or proved on the basis of "prescriptive use." At least some of Kretzmer's criticism, then, focuses on the means by which Palestinians must prove "prescriptive use" and the appeals committee before whom such proof has to be made. See KRETZMER, *supra* note 212, at 90-91.

275. Kretzmer echoes these procedural objections. See *id.* at 91-94.

276. Lein, *supra* note 35, at 55.

277. *Id.* at 56.

278. *Id.* at 59.

precluded, in most instances, Palestinian appeals to the Israeli Supreme Court because, in theory, another procedural recourse existed.

These are, of course, allegations. B'Tselem seems to say that the military administration, by using aerial photographs, had an unfair advantage over those contesting land ownership, but it is unclear why use of technology should prejudice the purported landowner. B'Tselem also concedes that many prospective claimants had discontinued use of unregistered land because of high wages in the Israeli labor market, which made working in that market more favorable than continuing to farm.²⁷⁹ This argument, in any event, relates more to the political and economic relationship between a prospective Palestinian state and Israel rather than the genuineness of an ownership claim based upon prescriptive use. It is difficult to jump to the conclusion that a settlement falls on private land, claimed on the basis of alleged use which was discontinued by choice on the part of the purported owner.²⁸⁰

Nonetheless, B'Tselem's core accusation that many land claimants were denied notice or failed to contest the designation of land because of the biased, or perceived biased, nature of the tribunal remains a serious allegation. Even if recourse was never sought from the Board of Appeals, landowners should still have the opportunity to prove their claims. If such a claim is established, two resolutions are possible, consistent with the theme of this Article. Where substantial construction on land has not yet occurred (that is, the land is in effect "reserved" for a particular settlement), the condition that no private Arab land has been taken for the settlement will not have been established, and the particular land should revert to its Palestinian owner, with damages for the period in which the Palestinian owner was unable to use the land. If there is substantial settlement construction on that land with conflicting claims of settlers who relied upon the characterization of the land as "state" land, rightful Palestinian claimants should be granted restitutionary relief that would include a monetary amount representing lease payments equal to what they would have received had the land been requisitioned rather than mistakenly designated as "state" land, with appropriate interest thereon from the date those lease payments would have been made, as well as damages equal to the present value of the property (rather than the value as of the date of the false designation).

Settlements falling into two other categories would, as well, not

279. *Id.* at 56-57.

280. Significantly, as Von Glahn points out, "[T]he Hague Regulations do not define state property or supply a test of state ownership," and the "[g]eneral practice among modern occupants indicates that if doubt exists concerning the nature of the ownership of property, it is held to be publicly owned until and unless private ownership is established." VON GLAHN, *supra* note 211, at 179.

meet the condition that a settlement must not have been established on Palestinian owned land. Certain outposts, mostly hilltop caravans, have been set up without the approval of the Israeli government; some of these were later abandoned and then reoccupied. These settlements are considered illegal under Israeli law. Several years ago, the Israeli government appointed Talya Sason, an attorney, to investigate this phenomenon. Her investigation revealed at least 105 of these illegal outposts. Of these, to the extent that Sason was able to establish the legal status of the land on which the outposts sit, twenty-six are located on state land, seven are located on survey land, and fifteen located on Palestinian private property. Thirty-nine are located on “mixed” lands, that is, land that is part state, part survey, and partly owned by Palestinians.²⁸¹ These outposts, almost all of which were established in the 1990s, are supposed to be dismantled, although only several have been thus far.²⁸² A majority of these outposts fail the condition that a settlement must not be established on Palestinian private property and hence should not continue in a future Palestinian state.²⁸³

Another group of settlements that may illegally reside on Palestinian land are those which were constructed on fraudulently acquired land.²⁸⁴ One recent allegation by B’Tselem,²⁸⁵ for instance,

281. See Sason, *supra* note 8. “Survey land” refers to land that has gone through a survey land procedure for the settlement. In some cases, these procedures were accomplished without regard to whether the settlements were otherwise legally established. *Id.* at 14.

282. See, e.g., Aluf Benn, Amos Harel & Yuval Yoaz, *AG Mazuz to Security Forces: Enforce Rule of Law on Settlers*, HAARETZ, Jan. 19, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=671976> (describing Olmert’s call for defense establishment to formulate plan to evacuate twenty illegal outposts and negative reaction of settler leaders); Myre, *supra* note 24 (“Under Mr. Sharon, the Israeli government removed a few outposts, but most remained.”); Nadav Shragai, Yuval Yoaz & Akiva Eldar, *Government Official: Illegal Outpost to Go No Matter What*, HAARETZ, Jan. 12, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=669054> (describing difficulties in dismantling Neveh Daniel North and *Amona* outposts).

283. Prior to the last Israeli election, Amir Peretz, chair of the Labor Party, announced that a condition for joining a coalition government would be the dismantling of all illegal settlements. See Lilach Weissman, *Labor Will Only Join Gov’t That Pledges to Quit All 105 Illegal West Bank Outposts*, HAARETZ, Mar. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=691823>. On the other hand, there has been some suggestion a *Kadima* led government might ex post authorize certain settlements (i.e., “legalize” them under Israeli law) provided “that they were built on state land and not private Arab property, . . . fall within . . . [an existing legal settlement’s] master plan[,] and are in areas which Israel intends to keep” in any final settlement or unilateral border decisions. Herb Keinon & Yaakov Katz, *Exclusive: Gov’t May OK Illegal Outposts*, JERUSALEM POST, Mar. 21, 2006, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1139395644062>.

284. Lein, *supra* note 35, at 63. Allegedly, one reason for the lack of visibility is that, because a sale of land to Israeli Jews is considered an act of treason punishable by death, the Israeli military authority issued an order extending the period for an irrevocable

relates to new construction in the *Modi'in Illit* settlement on land within the territory of the Palestinian village of *Bil'in*. Supposedly, a Palestinian father sold land to his son who in turn sold it to the Society of the Foundation. The latter then transferred the land in trust to the Israeli administration, which, after converting the land to "state" land, leased the land back to the settlers' building concern.²⁸⁶ Both the Palestinian father and son have died,²⁸⁷ and it is claimed that their signatures as well as those of others involved were forged in this chain of events. If proved, the leased settlement would violate the condition that it cannot exist on Arab land. The facts of the case remain murky, including whether the land at issue belonged to the individual Palestinian-sellers or the village within the borders of which the land was situated. The Israeli Supreme Court has issued a temporary injunction in the case, and the prosecution is considering a criminal investigation.²⁸⁸

With the exception of these settlements, however, the vast majority of settlements were not established on land deeded or registered to resident Palestinian Arabs or to which they can lay claim by cultivated use over a period of time. Critics rightly note that Arab individually owned land has been used for public improvements such as roads.²⁸⁹ As

power of attorney from the five years provided by Jordanian law to fifteen years, an extension that sought to hide the identity of Palestinian sellers. *Id.*

285. See Akiva Eldar, *Documents Reveal Illegal West Bank Building Project*, HAARETZ, Jan. 3, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=665425>. The article, which alleges the Modi'in Illit settlement "is being built on land belonging to the Palestinian village of Bil'in," *id.*, is based in large part upon the research and allegations of B'Tselem. Eldar, like B'Tselem, is a vociferous opponent of Israeli settlements and whether the allegations turn out to be accurate remains to be proved. Unclear in Eldar's piece is whether this was land allegedly owned by private individuals within the village or by the village itself.

286. *Id.*

287. The son was apparently shot in Ramallah in 2005. Since the Palestinian Authority considers it a capital offense to sell land to Jews, an alternative explanation might be that the sale was in fact legitimate, but other Palestinian residents of the village are simply now alleging otherwise.

288. See Akiva Eldar, *State Mulls Criminal Probe into Illegal Settlement Construction*, HAARETZ, Jan. 8, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=667303>.

289. See, e.g., HCJ 393/82 Askan v. Commander of IDF Forces, [1983] IsrSC 37(4) 785, translated in Benvenisti, *supra* note 231, at 396-409. The petitioners, who constituted a cooperative society, purchased land for the purpose of a housing project. When they applied for a housing permit, the permit was denied and part of the land was requisitioned to construct two highways, linking two different towns in the West Bank to Israel. Justice Barak spoke of the Hague Regulations' twin theme: the interests of the military occupant (in this case, Israel) and the interests of the civilian population (in this case, the Palestinians). Since a military commander must secure the continued existence of civilian order and life under Section 43 of the Hague Regulations, and since, especially in a long occupation not envisioned in the Hague Regulations, circumstances do not stand still, the Israeli Supreme Court held the Commander was able to take account of changed

long as Israel is the ultimate power in the West Bank, especially over a forty-year period, it cannot simply neglect infrastructure improvements that other governments routinely effect, even if private property must be taken with compensation or requisitioned with periodic use payments for such purpose. Every nation in the world, including the United States,²⁹⁰ takes land for such purposes. Until a final peace settlement is achieved, road construction and other public infrastructure improvements are theoretically both inevitable and warranted. The heart of the criticism, however, is that most of the road work has primarily benefited the Israeli military and settlers rather than the Arab residents and therefore cannot be justified on the need to ensure the civil life and order of the local populace in accord with Article 43 of the Hague Regulations.²⁹¹ On the other hand, the extent of terrorist attacks on the Israeli military and Jewish residents while traveling would tend to legitimize takings necessary for infrastructure work on a theory of “military necessity.”²⁹²

circumstances in pursuing public investments, as long as a prime reason was the good of the civilian population. In Justice Barak’s words, “Fundamental investments which might lead to permanent change that persists after termination of the military government are permitted if they are reasonably required for the needs of the local population.” *Id.* at 494.

290. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), where in a 5-4 decision the Supreme Court validated New London’s expropriation of homeowners’ property, not even to construct a highway or public facility, but to facilitate construction on the land by a private developer. The majority consisted of the Court’s most liberal Justices including Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. One prominent Supreme Court observer, Professor Erwin Chemerinsky of Duke Law School, disputed the notion that this decision was a “dramatic change in the law”: “in reality the Court applied exactly the principle that was articulated decades ago: a taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public.” *Erwin Chemerinsky: The Supreme Court’s Decision in Kelo Is Not So Radical as Many Have Made It Out to Be* (Prac. L. Inst./All-Star Briefing), Dec. 8, 2005, available at <http://media.whatcounts.com/pli/allstar/ASB3.45.htm>.

291. Kretzmer argues the party making the decision, the military government or a panel appointed by such, can hardly have the interests of the local populace solely in mind. In fact, he postulates “[t]he notion of ‘public benefit’ [the theory under which such improvements have been sustained by the Israeli Supreme Court] is intimately connected to political objectives and interests.” KRETZMER, *supra* note 212, at 70. He particularly takes aim at the court’s decision to disband district planning bodies that provided input into the central planning process under Jordanian law. District councils may have made sense under the law of Jordan, which, in many ways, disregarded the economic development of the West Bank in favor of Jordan’s East Bank (Transjordan), but retarded central planning in an administrative structure trying to modernize society. Nonetheless, Kretzmer rightly points out that there should be local input in the process, although not necessarily a veto, and the main consideration under the Hague Regulations should be the welfare of the population in the occupied territory rather than the political needs of Israel where the two conflict. In an occupation that has lasted this long, however, it must be considered whether the local populace should not also include the West Bank’s Jewish residents, unless there are other grounds that make their presence on the West Bank illegal.

292. See Benvenisti, *supra* note 231, at 396 (quoting *Askan*, [1983] IsrSC 37(4) 785).

Moreover, while there is dispute as to whether these roads presently benefit the Israeli military and citizens more than West Bank Palestinians, in any peace settlement the roads would serve all residents and substantially contribute to the economic well-being of a new Palestinian state.

b. Land owned by Arab communities or villages

B'Tselem has also made a wider claim, to wit, that Israel has expropriated land belonging to Arab villages, without compensation, in order to construct Jewish settlements. For example, B'Tselem vigorously argues that *Ma'aleh Admumim*, the largest Israeli settlement on the West Bank and one several kilometers to the east of Jerusalem, is situated on territory taken from *Abu Dis*, *al-'Izriyyeh*, *al-'Issawiyyeh*, *a-Tur*, and *'Anata*, Palestinian Arab villages on the outskirts of Jerusalem.²⁹³ But its "brief" to that effect then equivocates: "The farmland of these villages extended from the border of Jerusalem on the west to *a'-Khan al-Ahmad*, at the approach to the Dead Sea, on the east. Ownership determined land usage, i.e., each family worked the land that it owned."²⁹⁴ Thus, it is unclear whether B'Tselem claims the land is owned by private individuals within the identified villages or constitutes village land owned collectively by its residents. If it is the former, B'Tselem's argument collapses into the argument, already discussed, that Israeli settlements have been placed on land privately owned by Palestinians. If, instead, B'Tselem's claim is that it is village land, the source of this claim needs to be examined.

Since the five villages identified do not have any registered title to this expanse of land, B'Tselem tries to argue on the basis of prescriptive use. But, while some claim is made that the villagers themselves had used the land for grazing, the use demonstrated was by *Jahalin* Bedouin, who in recent years intermittently camped and grazed their livestock on land to the east of Jerusalem going down to the Dead Sea. But B'Tselem strains to find a connection between *Jahalin* Bedouin and the Palestinian villagers whose claim to the land B'Tselem champions: "They grazed on village land in accordance with lease agreements (at times symbolic) with the landowners—including landowners from the villages of *Abu Dis*

293. See Yuval Ginbar, *On the Way to Annexation: Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement*, INFO. SHEET (B'Tselem, Jerusalem, Isr.), July 1999, at 3, available at http://www.btselem.org/Download/199907_On_The_Way_To_Annexation_Eng.doc; see also GORENBERG, *supra* note 228, at 297-98, 305-06, 309, 319, 328 (history leading to establishment of *Ma'ale Adumim*).

294. Ginbar, *supra* note 293, at 4 (footnote omitted).

and *al'Izariyyeh*.”²⁹⁵

In other words, only Palestinian Arab villages may be constructed and expanded on the land because Bedouin have occasionally grazed their flocks thereon pursuant to the implied consent of Palestinian villagers whose right to the land (that is, the right to consent to someone else using it) is based upon the same Bedouin use. Aside from its circularity, B'Tselem's argument equates whatever rights Bedouin may or may not have with the rights of sedentary Arab villages on the outskirts of Jerusalem. Are the rights identical? Why?²⁹⁶ Interestingly, Bedouin do not necessarily identify themselves as Palestinian Arabs, and, although they are surely not Israeli Jews, many Bedouin are Israeli citizens, serve (unlike most Palestinian Arabs who are Israeli citizens) in the Israeli army, and have been disproportionately killed by Palestinian attacks on Israeli border patrols.

Moreover, when the expansive reach of B'Tselem's claim on behalf of the villages (all land substantially down to the Dead Sea to the east of Jerusalem) is considered, presumably the question of which of the five villages has the right to this expansive stretch of land becomes pertinent. Is the right of each village identical? Would not the claim of one village conflict with the claims of others? B'Tselem's "brief" neither asks nor attempts to answer these questions. The result is that, sometimes explicitly and otherwise implicitly, its claim that the land belongs to these villages collapses into the contention—dealt with in the next subsection—that only Arabs, not Jews, have the right to own and use this land.

c. Land owned by a larger Arab polity of “people”

The meaning of the argument (by some), or the assumption (by others), that Israeli Jewish settlements have been established on “Arab” land in a broader sense is quite obscure. Let us put aside for the moment whether Israel's only status on the West Bank is that of an “occupying power” and any international legal implications of that characterization.²⁹⁷ If the resultant conclusion from that argument or assumption is that Jews cannot legally establish settlements west of the Jordan River and east of the Green Line, is the essence of this claim

295. *Id.* at 22.

296. Interestingly, the problem of designating and dividing land on the basis of Bedouin use is not unique to the West Bank situation; Jordan has struggled with the same issue east of the Jordan River. See M.F. Tarawneh, *Public Land Between the State and the Tribes: A Dilemma of Rural Development: A Case from Southern Jordan*, OPTIONS MÉDITERRANÉENNES: SÉRIE A (Int'l Ctr. for Advanced Mediterranean Agronomic Stud., Paris, Fr.), 1999, available at <http://ressources.ciheam.org/om/pdf/a38/99600176.pdf>.

297. See *supra* notes 176-87 and accompanying text.

based upon the negative notion that Jews have no rights, or the positive notion that the land legally belongs to “Palestinian” Arabs?²⁹⁸

As related previously, that Jews have only limited privileges in the Near East is a recurrent historical theme. This perspective denies substantially all aspects of the Jewish narrative, including a millennia-old nexus with the land. More recently, within the twentieth century, after promising the land in the Palestinian mandate for a Jewish homeland,²⁹⁹ the British decided to partition off approximately seventy percent of Mandatory Palestine to provide a kingdom for the Hashemites.³⁰⁰ Transjordan, once created, barred Jews from owning land or even living within its borders, a prohibition it extended to the West Bank when it captured it in 1948.³⁰¹

If the basis of the argument is that, in a positive sense, the West Bank “belongs” to Palestinian Arabs, what is the basis for this claim—legal title, longevity of habitation, the concept of peoplehood, or something else? And, in any event, how would such a claim justify a conclusion that Israeli Jewish settlements are illegal? Prior to the first Zionist *aliyah* in the late nineteenth century, most of the privately owned

298. Eugene Rostow described this diffuse feeling as follows, “The legal assumption . . . is that the territories in dispute are in some sense “Arab” territories held by Israel only as military occupant.” Rostow, *supra* note 182, at 152.

299. The promise was made in what is commonly known as the Balfour Declaration, issued on November 2, 1917:

His 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 object, 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 right and political status enjoyed by Jews in any other country.

3 THE ARAB-ISRAELI CONFLICT: THE DIFFICULT SEARCH FOR PEACE (1975-1988) 31-32 (John N. Moore ed., 1992). The Balfour Declaration was binding on Britain, and when Britain was assigned the Mandate for Palestine after the collapse of the Ottoman Empire, the Balfour Declaration became binding on the League of Nations as an international agreement between Britain and the League. See Dinstein, *supra* note 187, at 137-54. Dinstein states:

It follows that virtually the whole international community, as it existed in the era between the two World Wars, was legally committed to the Mandate for Palestine, which included the obligation for the establishment in Palestine of a national home for the Jewish people. Admittedly, the Balfour Declaration and the Mandate for Palestine did not ignore the rights of non-Jews in Palestine. Nevertheless, whereas Jews were granted the right to establish a national home, non-Jews were conceded only civil and religious rights. In other words, the expectation was that non-Jews would live as a protected minority within the Jewish national home.

Id. at 140.

300. PEEL REPORT, *supra* note 93, at 37, 60-61.

301. Benvenisti & Zamir, *supra* note 40, at 315; see Weisman, *supra* note 89, at 47-48 (describing Jordanian restrictions on selling land to Jews).

land west of the Jordan was either “state-owned” land or land privately held by absentee Turkish landlords. Thereafter, the Jewish Agency made most of the purchases of privately-owned land, allowing Jewish settlements to exist. Virtually all of this land was not even farmed by Arabs in the area. As for state ownership, any title claims descended from the Ottoman Empire (that is, Turkish state ownership) to British trusteeship and thereafter to Jordan, whose annexation of the West Bank was not internationally recognized. Moreover, it has been estimated that over thirty square kilometers of land on the West Bank were owned by Israeli Jews prior to any requisitions for settlements.³⁰² In short, whatever Palestinian claim exists with respect to West Bank land is not based upon any concept of a recorded legal title.

Certainly, much of the popular belief in the Palestinian claim to the West Bank rests upon a notion of longevity—that is, the Arabs were there *first*. But what does “first” mean? One possible meaning of “firstness” is “most ancient.” As mentioned previously, Arabs have recently tried to buttress the “firstness” of their claim by asserting that they descended from the ancient Canaanites,³⁰³ but there is no anthropological or other evidence that supports this claim.³⁰⁴ The solely political nature of the claim is transparent.³⁰⁵ If, then, “first” means the most ancient tie to the land, the three-millennia history of the Jews in that area³⁰⁶—a history increasingly supported by mounting archaeological

302. Benvenisti & Zamir, *supra* note 40. Benvenisti and Zamir further report: Some of the Jewish-owned lands in these areas were not inhabited, but most were. Some of the inhabitants had been forced to leave their property during the turbulence of the 1920s and 1930s, and most of them (several thousand, mainly from the Jewish quarter of Jerusalem and the Gush Etzion settlements south of Jerusalem) were displaced in the 1948 war. Yet, unlike the Palestinian refugees, these Jewish refugees were rehabilitated and resettled with the help of the Israeli authorities, which prevented the creation of a permanent problem.

Id. at 298 n.15.

303. See, e.g., ABU-SITTA, *supra* note 42; Itamar Marcus & Barbara Crook, Palestinian Media Watch, “Be Gone. Die Anywhere You Like, but Don’t Die Here.” PA Hate TV Reaches New Levels (Dec. 29, 2005), http://www.pmw.org.il/Bulletins_Dec2005.htm (describing program about Jaffa that “opens with a revision of history, by casting the ancient Canaanites as Arabs [and] [b]y doing this, the more than 3,000 years of Jewish history in the area are pre-dated by a fabricated Arab history”).

304. As Efraim Karsh reported:

[I]n an attempt to prove the historic continuity of an “Arab nation,” the Palestinian intellectual and political leader Yusuf Haikal traced Arab imperial greatness to the ancient Fertile Crescent peoples such as the Hittites, Canaanites, Amourites, *et. al.*, ignoring the minor problem that these diverse peoples never constituted a single people, let alone an Arab one.

KARSH, *supra* note 43, at 7.

305. See Morris, *Details and Lies*, *supra* note 42, at 9 (reviewing *Atlas of Palestine: 1948*).

306. See sources cited *supra* notes 91-93 and accompanying text.

evidence³⁰⁷—would give Jews the superior claim.

Popular support for the Palestinian argument depends far less upon an ancient notion that the Palestinians were the first inhabitants of the land several millennia ago, however. Instead, it relies on the idea that, in more recent times, Palestinian Arabs were the majority inhabitants of the land prior to the advent of modern Zionism. Edward Said and Noam Chomsky,³⁰⁸ among others, popularized this view, according to which the Zionists were colonizers over an indigenous Palestinian population. But even that argument raises more questions than it supplies answers. What land is included in the claim of majoritarianism or exclusivity? For example, Jews apparently constituted a plurality of the residents of Jerusalem, whose other inhabitants included Palestinian Arabs, Greeks, Europeans, Turks and others, at least at the turn of nineteenth century.³⁰⁹ Prior to Arab riots and massacres in the early twentieth century, Jews inhabited Hebron along with Arabs for centuries.³¹⁰ While the exact numbers are uncertain, it appears many Arabs who assert a “Palestinian” identity were attracted to the land west of the Jordan *because of* Jewish settlement and economic development that provided jobs.³¹¹ The quality of some of the research on this subject has been subjected to enormous criticism—for example, on the theory that the twentieth century increase in the Arab population in Palestine may have resulted from better health care rather than the economic growth generated by Jewish settlement³¹²—but the two tendered explanations are not mutually

307. See, e.g., Itim, *Remains of Second Temple Era Jewish Village Discovered*, HAARETZ, Jan. 1, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=664845>.

308. See generally SAID, *supra* note 10, at 266-77. Said so adamantly supported the Palestinian cause that he rejected a two-state solution in favor of a bi-national state, which is generally recognized to be code for destruction of Israel. See DERSHOWITZ, *Introduction to THE CASE FOR ISRAEL*, *supra* note 45, at 5.

309. See MARTIN GILBERT, *Introduction to JERUSALEM IN THE TWENTIETH CENTURY*, at ix (1998) (describing Jews as majority of Jerusalem’s residents around 1900); see also DERSHOWITZ, *Is Israel a Colonial Imperialist State?*, in *THE CASE FOR ISRAEL*, *supra* note 45, at 13, 17 (describing Jews as majority since first population census in 1700s).

310. *Id.*

311. The extensive literature has been summarized by Dershowitz. See DERSHOWITZ, *supra* note 104, at 27-28 & nn.13-32. The uniqueness of the UN definition of a Palestinian refugee is also instructive. A Palestinian refugee is any person who lived in Palestine “between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict.” UN Relief and Works Administration, *Who Is a Palestinian Refugee?*, <http://www.un.org/unrwa/refugees/whois.html> (last visited Aug. 15, 2006).

312. See PETERS, *supra* note 107, at 260-61. Peters, an English researcher, started looking at the Israeli-Arab dispute several decades ago from a Palestinian perspective, but after almost ten years of research concluded many “Palestinians” came from elsewhere due to the improving economic conditions that accompanied Jewish settlement. See *id.* at 259-63. While some of the criticism directed towards Peters’ work

exclusive. The fact that the Arab population in and around Jewish settlements increased several times the increase recorded in other areas of Palestine, as well as other evidence, lends support to the economic growth thesis.³¹³ In short, both Jews and Arabs lived for centuries in a sparsely populated, desolate and largely neglected land; Arabs surely constituted the majority of the population prior to the twentieth century, but Jews constituted a majority or plurality in Jerusalem and certain other places. Yet, Jews were excluded from most of the area included within the Palestinian Mandate once the British created Transjordan in order to provide the Hashemites a throne.³¹⁴

To some extent, the Arab claim of exclusive right to the West Bank rests on the notion of Palestinian "peoplehood." Indeed, an argument made in favor of the State of Israel has been applied to the Palestinians: Israel is justified on the grounds that people (Jews) having a common culture and religion (Judaism, whatever its variety) with a distinct language (Hebrew) deserve, like other peoples, a distinct, autonomous geographical area. But the analogy breaks down on many fronts. First and foremost, if the argument is used to counter the right of Jews to settle on the West Bank, one must initially note that there *are* Arab communities in Israel.³¹⁵ Equally significantly, the Palestinian Arabs do not have a tradition, religion, language, or anything else that is materially distinct from other countries in the Middle East, with the exception of Israel and possibly Lebanon.³¹⁶ Through much of the twentieth century, most Arabs, including those in Palestine, saw Palestinian Arabs less as a separate people and more as part of a greater polity of Arabs within greater Syria.³¹⁷ There is even evidence that the Palestinian peoplehood

was politically motivated, the strongest critique was not. See Porath, *supra* note 107, at 37 (ascribing growth of Arab population not to immigration, but better health provision).

313. See DERSHOWITZ, *supra* note 104, at 27-28; Ronald Sanders & Daniel Pipes, *Mrs. Peters's Palestine: An Exchange*, N.Y. REV. OF BOOKS, Mar. 27, 1986, at 50, 50-51.

314. Originally, the Balfour Resolution, recognized by the League of Nations, called for a Jewish National home in all of Palestine, but the League of Nations' "assent to a British proposal to suspend application of Jewish national rights under the Palestine Mandate to the area of Trans-Jordan," GERSON, *supra* note 168, at 44, narrowed the Resolution's mandate by at least two-thirds. See *id.*; see also PEEL REPORT, *supra* note 93, at 37-38.

315. As stated elsewhere, they comprise approximately twenty percent of Israel's population. See Zeev Klein, *Israel's Population Almost 7m on Eve of 2006*, GLOBES, Dec. 29, 2005, available at <http://archive.globes.co.il/english/>.

316. The prominent Palestinian academic, Walid Khalidi, has even stated "[t]he Arab nation both is, and should be, one." Walid Khalidi, *Thinking the Unthinkable: A Sovereign Palestinian State*, 56 FOREIGN AFF. 695, 695 (1978).

317. PEEL REPORT, *supra* note 93; see Curtis, *supra* note 116, at 471-72 ("The myth that Jews in Palestine unjustly displaced 'the Palestinian people' may be widely espoused, but official documents before 1947 generally spoke of 'Arabs in Palestine,' not of a 'Palestinian people.' Though some Arab journalists and politicians spoke of a

was created as a construct to oppose the creation of a modern Jewish state rather than a firmly held reality.³¹⁸

However, all of these arguments are beside the point: whether or not Palestinians considered themselves a distinct people prior to Israel's establishment, they do so now, and the question of whether there should be an independent Palestinian state has been answered in the affirmative. The point here is not that there should not be a Palestinian state, but that state need not be inhabited exclusively by Palestinian Arabs. To the extent this claim depends upon a notion that the land belongs to an Arab polity, it did not in the past (the Ottoman Empire was not an Arab polity), and, most importantly, it would not destroy the "peoplehood" of Palestinian Arabs by having Jewish communities in their midst.

Indeed, in the broadest sense, the notion that the West Bank "belongs" only to Palestinian Arabs because it is "Arab" land speaks not only to the issue of Jewish settlements, but to the question of Jewish settlement within the pre-1967 borders of Israel, that is, the legitimacy of Israel itself.³¹⁹

3. The "Transfer" Issue: The Charge that Israel, as an Occupying Power, Has Transferred Its Citizens into the West Bank in Violation of Article 49 of the Fourth Geneva Convention³²⁰

As time passed, settlement opponents have increasingly relied less

Palestinian national movement in the 1920s, the people in the area did not consider themselves a separate Palestinian people per se. Rather, they historically identified themselves with the larger Moslem or Arab world (*Qawmiya*) or with the Syrian nation. Only with the creation of Israel and the Arab exodus from the occupied territory did a Palestinian national consciousness develop.") (footnotes omitted).

318. While Arabs were undisputedly in the Palestinian Mandate, their "Palestinian" identity has been fiercely contested. For an example, some espouse the view that "Palestinian" identity is simply "a purely negative reaction to Zionism after the Balfour Declaration." See Marie Syrkin, *Palestinian Nationalism: Its Development and Goal*, in *THE PALESTINIANS: PEOPLE, HISTORY, POLITICS* 199, 199-208 (Michael Curtis et al. eds., 1975). On the other side of the political spectrum, some support an extreme view of "Palestinian" identity based upon continuity from the ancient Philistines. See FRANK C. SAKRAN, *PALESTINE, STILL A DILEMMA* 104-05 (1976). A group of "new historians" in Israel, who generally are regarded as more favorable to the Palestinian rather than the Israeli viewpoint, have taken a more nuanced view of "Palestinian" identity as arising simultaneously with the Zionist movement. See, e.g., BARUCH KIMMERLING & JOEL S. MIGDAL, *THE PALESTINIAN PEOPLE: A HISTORY* (2003).

319. In an article primarily addressed to the legality of Jewish settlements, but also whether a second Palestinian state should be established (the first being Jordan itself, which was carved out from the majority of the Palestinian Mandate), Eugene Rostow recognized this fundamental reality: "[The proponents of Palestinian self-determination] cannot bring themselves to believe that the object of the campaign for a third Palestinian state is not a peaceful solution of the Palestine problem, but the destruction of Israel." Rostow, *supra* note 182, at 171.

320. See Fourth Geneva Convention, *supra* note 158.

on the Hague Regulations, with its underlying dominant theme of protecting an ousted sovereign, and more on the Fourth Geneva Convention, with its transparently humanitarian ideals and provisions. The opponents specifically charge that the settlements violate Article 49(6),³²¹ which states: “The occupying power shall not deport or transfer parts of its own civilian population into territories it occupies.”³²² Frequently, Article 49(6) is recited as if its “plain meaning” were transparent and its application to the establishment of Israeli settlements beyond dispute.³²³ However, as is the case with respect to the Hague Regulations, both the meaning of this provision and its applicability to Israeli settlements are subjects of substantial dispute. Many general texts on international humanitarian law give Article 49(6) scant if no attention,³²⁴ and, if anything, its origins and meaning are more obscure than the provisions of the Hague Regulations discussed previously.

a. The Rostow perspective, redux

An initial problem with the claim that Israeli settlements violate Article 49(6) is that this argument, once again, may presuppose a conclusion that the West Bank constitutes “occupied” rather than “disputed” territory. Eugene Rostow consistently took the position that the predicate for the application of Article 49, as a provision in Section III (“Occupied Territories”) of Part III (“Status and Treatment of Protected Persons”) of the Fourth Geneva Convention, was the act of one signatory of the Convention occupying “the territory of a High Contracting Party.”³²⁵ To Rostow, who noted that Jordan’s own

321. *See id.* art. 49.

322. Fourth Geneva Convention, *supra* note 158, art. 49.

323. *See, e.g.*, Letter from Sarah L. Whitson, Executive Director, Middle E. N. Afr. Div., Human Rights Watch, to President George W. Bush, (Dec. 26, 2005), *available at* http://hrw.org/english/docs/2005/12/27/isrlpa12346_txt.htm; THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 246 & n.33 (Dieter Fleck ed., 1995) (“[Article 49(6)] prohibits . . . the settlement of nationals of the occupying power in the occupied territory. . . . The settlement of civilians in the territories occupied by Israel therefore contravenes [Article 49(6)].”).

324. *See* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 199 & n.70 (2d ed., Ashgate Publ’g 1999) (1990) (scant reference to Article 49(6)); RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 38-39 (2002) (no mention of Article 49(6) and misses scenario in which it might apply); VON GLAHN, *supra* note 211, at 72-74 (no mention of Article 49(6) in discussion of Article 49); *infra* note 399 (discussing McCoubrey’s reference to Article 49(6)). Even Draper, while calling Article 49(6) “very important,” merely devotes one clause of a sentence to its discussion. *See* DRAPER, THE RED CROSS CONVENTIONS, *supra* note 169, at 41 (“Conversely, this Article prohibits the detaining of protected persons in danger areas, and furthermore, which is very important, prevents the Occupant from moving parts of its own population into the occupied territory.”).

325. Fourth Geneva Convention, *supra* note 158, art. 2; *see* Rostow, *supra* note 114,

occupation of the West Bank was not internationally recognized, “[t]he West Bank is not the territory of a signatory power, but an unallocated part of the British Mandate.”³²⁶ Rostow’s reference was to Article 2(2) of the Fourth Geneva Convention, which states “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”³²⁷

To the extent that Rostow’s conclusion was based upon his positive view of the legitimacy of Israel’s claim to the West Bank—that is, his view that the West Bank is “disputed” rather than simply “occupied” territory—Rostow might have a point. Otherwise, one would arrive at the totally paradoxical result that, for example, once Kuwait’s government reacquired control over its territory after the first Gulf War, it could not construct housing for Kuwaitis because both it and Iraq were signatories to the Geneva Convention. However, to the extent that Rostow’s conclusion was meant solely as an interpretation of the Fourth Geneva Convention in light of Jordan’s suspect sovereignty rights, a sensible reading of the application of the Convention described in Article 2 is to the contrary. The vast weight of authority concludes Article 2(2) expands rather than limits the application of the Convention described in Article 2(1)³²⁸: “the present Convention shall apply to all cases of

at 719. Rostow’s correspondence was in response to an article by Roberts, in which Roberts termed Rostow’s analysis—which he ascribed to Israel—a “technical error”:

To refer to the terms of the second paragraph of common Article 2 is of limited relevance, because it is in fact the first paragraph that applies when a belligerent occupation begins during a war. . . . [T]his paragraph says nothing about “the territory of a High Contracting Party,” referring simply to “all cases of declared war or of any other armed conflict” arising between two or more of the high contracting parties.

Roberts, *supra* note 208, at 64 (footnote omitted). In response, Rostow argued Roberts presented “the problem of terminating the Israeli occupation of the territories as if the only relevant legal question were the arbitrary denial of Palestinian national rights [whereas] . . . [t]he true issue is . . . ‘not the clash of right and wrong, but the clash of two rights.’” Rostow, *supra* note 114, at 720.

326. *Id.* at 719. Among others who express a similar view are David Ball, Robert Caplen, and Robbie Sabel, although their reasoning is not identical. See David John Ball, *Toss The Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)Assessment*, 79 N.Y.U. L. REV. 990, 1009-16 (2004); Robert A. Caplen, *Mending the “Fence”: How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 753-54 (2005); Robbie Sabel, Bitterlemons, *The Convention Does Not Formally Apply* (Sept. 20, 2004), <http://www.bitterlemons.org/previous/bl200904ed35.html>. Ball, for instance, rests his conclusion not only upon Jordan’s lack of legitimate claim to the West Bank, but also on the theory that the Palestinian Authority is a non-state actor that cannot avail itself of the Convention’s provisions. Ball, *supra*, at 1014-16.

327. Fourth Geneva Convention, *supra* note 158, art. 2.

328. For example, the International Court of Justice (ICJ), in its judgment on the

declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”³²⁹ In other words, the application of the Convention simply depends upon whether both Jordan and Israel are signatories, not whether the West Bank was legally the territory of Jordan. Further, Article 6 provides that certain articles of the Convention, including Article 49, bind occupying powers “for the duration of the occupation, to the extent that such power exercises the functions of government in such territory.”³³⁰

b. Defining the nature of state involvement

Aside from this basic prerequisite for the application of Article 49(6), both the nature of state involvement, which can trigger the paragraph’s prohibition, and, whatever the definition of that trigger, its application to the Israeli settlements are moot questions. With respect to the more abstract question—what character and degree of state involvement trigger Article 49(6)—one can envision a spectrum, with a variety of legal opinions as to how most points within that spectrum relate to Article 49(6). At one end of the spectrum are voluntary movements of the occupying power’s nationals to the occupied territory, without any inducements of any nature and with or without its permission. At the other end of the spectrum lies an occupant’s forcible transfer of its own population into occupied territory.

Closely related to, and arguably influencing, the degree and character of state involvement is the question of purpose both underlying Article 49(6) and the transfer effectuated by the occupying power. One might conceive of the purpose of Article 49 as to protect civilians who are transferred, the population of the territory to which the civilians are transferred, or both. Correlatively, the occupying power may aim to change the ethnic or racial composition of its own population (by cleansing its own territory of an undesirable ethnicity), to alter the

Israeli security fence, *see infra* note 426 and accompanying text, stated:

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable. This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power.

Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 175 (July 9).

329. Fourth Geneva Convention, *supra* note 158, art. 2.

330. *Id.* art. 6.

population in the occupied territory (by replacing all or parts of that population with the occupying power's own nationals), or to accomplish some other less transparent purpose.

Unfortunately, neither the language nor the history of Article 49(6) conclusively resolves the issue of the extent and character of state involvement necessary for a violation. Neither do they unambiguously identify the persons the prohibition intends to protect. Further, the only "authoritative" judicial interpretation interpreting Article 49(6), by the High Court of Justice, was given in the context of an advisory opinion concerning Israel's security fence,³³¹ leaving open the question of whether its interpretation will apply apolitically to disputes involving other nations in similar contexts.

c. The limits of "plain meaning"

Article 49, in its entirety,³³² deals with transfers of persons, largely civilians,³³³ from and to occupied territories, except for their transfer to a power not a party to the Fourth Geneva Convention, which is the subject of Article 45.³³⁴ Key to an understanding of arguments based solely upon paragraph 6's language is Article 49(1), which reads, "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."³³⁵ To settlement opponents, "transfer" in Article 49(6)—especially because the adjective "forcible," found preceding "transfers" in Article 49(1), is absent—connotes that any transfer of the occupying power's civilian population is prohibited.³³⁶

This literalist interpretation only succeeds, however, if other "literalisms" are disregarded. If the settlers have willingly moved to the West Bank, and arguably forced the government to acquiesce to their settlement,³³⁷ it is questionable to claim that Israel, as an "occupying

331. See *infra*, notes 426-32 and accompanying text.

332. See Fourth Geneva Convention, *supra* note 158, art. 49.

333. Article 49 relates to two groups of persons, "protected persons," in Article 49(1-5), and an occupying power's own civilian population in Article 49(6). See *infra* note 356 and accompanying text (defining "protected persons").

334. *Id.* art. 45.

335. *Id.* art. 49.

336. See Lein, *supra* note 35, at 38.

337. Even B'Tselem concedes the part of the settlement enterprise that resulted in the largest number of settlers and settlements close to Palestinian population areas, on the central mountain range of the West Bank, was forced by *Gush Emunim*, meaning, the Block of the Faithful. "The principal method adopted by the movement was to settle a given site without government permission—and sometimes contrary to its policy—in an effort to force the government later to recognize the settlement as an accomplished fact."

power,” transferred them. If it is alternatively argued the Israeli government has encouraged the settlers to settle in the West Bank, through tax subsidies and other benefits, thus constructively employing a “transfer,”³³⁸ the interpretation of Article 49(6) has transcended the language’s “plain meaning.” A literalist interpretation would also be self-contradictory in rejecting Rostow’s view that Article 49, like other provisions dealing with occupation in the Geneva Convention, only applies to “acts by one signatory ‘carried out on the territory of another,’”³³⁹ a predicate quite problematic given Jordan’s very questionable rights to the West Bank. Settlement opponents rightly emphasize that the Geneva Convention, unlike the Hague Regulations, was designed primarily as humanitarian law to protect people, not to protect dispossessed sovereign states, and therefore the applicability of the Geneva Convention’s occupation provisions should not depend upon such a technicality.³⁴⁰ That is fair enough, but the “plain meaning” of words or provisions can be a two-way street. Superficially noting the “plain meaning” of a term like “transfer” unmodified by “forceful” without accepting the plain meaning of “occupying power” or taking into account Rostow’s argument about the Convention’s applicability hardly suffices to derive meaning.

An enlightening textual approach might inquire why the term “forcible” was used in Article 49(1) but not Article 49(6). Settlement opponents, of course, answer that force is a prerequisite to a violation of Article 49(1), but not necessary for a violation of Article 49(6).³⁴¹ But other answers are equally plausible. Not infrequently, when similar language is used in several different paragraphs of the same provision, legislators drop modifying language because it is understood.³⁴²

Id. at 13.

338. *Id.* at 39. “State” involvement includes the Ministerial Committee for Settlement, composed of ministers from relevant government ministries and members of the World Zionist Organization (WZO), which decides on the establishment of a new settlement, and the Ministry of Construction and Housing and the Settlement Division of the WZO, which are involved in the actual physical and economic structure of the settlement. See Lein, *supra* note 35, at 20-22. State encouragement includes certain benefits and financial incentives, which are generally available to development towns in Israel as well, but exceed on a per capita basis the subsidies actually received by residents of settlement towns within the pre-1967 borders of Israel, primarily because of the role played by the Settlement Division of the WZO. *Id.* at 73-84.

339. Rostow, *supra* note 114, at 719.

340. Roberts, *supra* note 208.

341. See, e.g., David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT’L L. 88, 91 (2005) (“As [Article 49(1)] refers expressly to forcible transfers, it seems fair to conclude that the term ‘transfer’ in [Article 49(6)] means both forcible and nonforcible transfers.”).

342. This is essentially the point that Ruth Lapidoth makes specifically in relation to Article 49. See Ruth Lapidoth, *The Advisory Opinion and the Jewish Settlements*, 38 ISR.

Alternatively, while Article 49(1) is phrased in the passive voice, Article 49(6) is phrased in the active. Force may be inherent and therefore understood in government action, that is, the act of an “occupying power” deporting or transferring parts of its own population, whereas “transfers” without any identified transferor may occur at the instance of actors (including, conceivably, the transferees themselves) in addition to the occupying power and therefore not necessarily imply coercion exercised by one party upon another. To understand the phraseology used in Article 49(1), “individual or mass forcible transfers,” as well as one plausible meaning of Article 49(6), it appears necessary to transcend a dictionary definition of words to take account of context, background and purpose.

d. Context, background, and purpose

Although an earlier effort to draft and have states adopt an international convention for the protection of civilians preceded World War II,³⁴³ the Fourth Geneva Convention, a product of the Geneva Conference held in the summer of 1949, was drafted in the aftermath and took into account the experiences of World War II,³⁴⁴ especially the Nazi atrocities that occurred both before and during the war. Throughout, “[t]he discussions were dominated . . . by a common horror of the evils caused by the recent World War and a determination to lessen the sufferings of war victims.”³⁴⁵ The various nations’ delegates at the 1949 Geneva Diplomatic Conference considered a draft of the convention produced at a preliminary conference held in Stockholm the prior year, 1948.³⁴⁶ The Stockholm Draft was an amended version of the draft

L. REV. 292, 294-95 (2005) (“According to a well known principle of interpretation, a term which appears several times in a treaty, should usually be given the same meaning in each provision. This applies *a plus forte raison* to a term that appears several times in one and the same article. A look at the other paragraphs of Article 49 shows, that the terms deportation and transfer refer to non-voluntary movement of people.”).

343. See Fifteenth International Conference of the Red Cross, Tokyo, Japan, Oct. 20-29, 1934, *Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent*, in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS & OTHER DOCUMENTS 445 (Dietrich Schindler & Jiri Toman eds., 4th rev. ed., Brill Academic Publishers 2004) (1973) [hereinafter Tokyo Draft].

344. In the words of George Best, “This was a long-standing Red Cross project to which the experiences of 1939-45 gave urgency and direction.” BEST, *supra* note 171, at 115; see *id.* at 80-179 (describing ideas and drafts leading to Fourth Geneva Convention, including political stances of various governments as they, in some cases belatedly, realized dimensions of convention).

345. 4 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 8 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY IV].

346. See Seventeenth International Conference of the Red Cross, Stockholm, Sweed.,

presented to the Stockholm Conference,³⁴⁷ which in turn was based upon, but replaced, an earlier draft considered by the Conference of Government Experts held in Geneva in the spring of 1947.³⁴⁸ Final Article 49 was the renumbered and partially redrafted successor to Article 45 of the Stockholm Draft,³⁴⁹ which in turn amended Article 45 of the draft presented to the Stockholm Conference by the International Committee of the Red Cross (ICRC).³⁵⁰ Article 45 of that draft

Aug. 20-30, 1948, *Draft Convention for the Protection of Civilian Persons in Time of War*, in 1 FINAL RECORD, *supra* note 169, at 113 [hereinafter Stockholm Draft].

347. See Seventeenth International Conference of the Red Cross, Stockholm, Sweed., Aug. 20-30, 1948, *Draft Revised or New Conventions for the Protection of War Victims* [hereinafter Revised Draft].

348. See Conference of Government Experts, Geneva, Switz., April 14-26, 1947, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* [hereinafter Experts Draft]. The Conference of Experts was itself preceded by a Preliminary Conference of National Red Cross Societies held in the summer of 1946, which, although dominated by the most recent horrors of World War II, initially considered the question of whether the protection of civilians should be integrated into the convention protecting prisoners of war or required a separate convention. *See id.*

349. Article 45 read as follows:

Deportations or transfers against their will of protected persons out of occupied territory are prohibited, whether such deportations or transfers are individual or collective, and regardless of their motive.

The occupying Power shall not undertake total or partial evacuation of a given area, unless the security of the population or imperative military considerations demand. Such evacuations may not involve displacements outside the bounds of the occupied territory, except in cases of physical necessity.

The occupying power shall not carry out such transfers and evacuations unless it has ensured proper accommodation to receive the protected persons. Such removals shall be effected in satisfactory conditions of hygiene, healthfulness, security and nutrition. Members of the same family shall not be separated.

The Protecting power shall be informed of any proposed transfers and evacuations. It may supervise the preparations and the conditions in which such operations are carried out.

The occupying Power shall not deport or transfer parts of its own civil population into the territory it occupies.

Stockholm Draft, *supra* note 346, art. 45.

350. Article 45 provided:

Deportations or transfers of protected persons out of occupied territory, whether individual or collective, and whatever their motive, are prohibited.

The occupying Power shall carry out no evacuation, total or partial, of a given area, unless the security of the population or imperative military considerations require. Such evacuations may only take place within the occupied territory, except in cases of material impossibility.

The occupying Power shall undertake such transfers and evacuations only after ensuring to the protected persons proper accommodation to receive them. Such removals shall be effected in satisfactory conditions of hygiene, salubrity, security and nutrition. Members of the same family shall not be separated.

The Protecting Power shall be informed of any proposed transfers and

succeeded Article 27 of the draft considered at the Conference of Experts.³⁵¹ However, Article 27 lacked any analogue to the paragraph that became Article 49(6), which a subcommittee at the Stockholm Conference inserted.³⁵² The new paragraph became Article 45(5) of the Stockholm Draft considered at the 1949 Geneva Diplomatic Conference.

When the Stockholm Draft was presented to the Conference of Delegates in 1949, Article 45(1) read: "Deportations or transfers against

evacuations. It may supervise the preparations and the conditions in which they are carried out.

Revised Draft, *supra* note 347, art. 45. Each article of the Revised Draft was accompanied by remarks of the committee that revised the Experts Draft or ICRC staff. The Legal Commission of the ICRC consisted of Director Jean S. Pictet, ICRC Honorary President M. Max Huber, and M. Bossier. See ICRC, Report on General Activities: July 1, 1947 - December 31, 1948, at 12 (1949). The remarks following Article 45 stated:

This Article corresponds to Article 27 of the Draft of the Government Experts. It draws a very clear distinction between deportation of protected persons outside the borders of occupied territory (which is strictly forbidden), and the evacuation of particular areas, which is permitted in two cases, named by way of limitation: (1) if the security of the populations requires; (2) if imperative military considerations demand. It should be noted that the Protecting Power may exercise the right of supervision which is granted to it, without exception, even when, for example, populations are removed outside the boundaries of the occupied territory and transferred to the national territory of the Power in occupation. The Protecting Power may exercise its right of supervision in respect both of the transfers themselves and of the conditions in which they are carried out.

Revised Draft, *supra* note 347, art. 45.

351. Article 27 provided:

Individual or collective deportations or transfers, carried out under physical or moral constraint, to places outside occupied territories, and for whatever motives, are prohibited.

This prohibition applies to all persons in the said territories. It shall not constitute an obstacle to the general evacuation of an area by the occupying Power, if military operations make it necessary. Such evacuation shall not involve the transfer of the population beyond the occupied territory, unless it cannot possibly be effected within the limits thereof.

Collective transfers within an occupied territory shall only be enforced to meet the security requirements of the occupying Power.

The occupying Power shall carry out such transfers and removals with all due regard to the rules of hygiene, salubrity, security and nutrition, not only during the transfer, but also in the area in which the evacuees will be accommodated.

The conditions under which transfers and removals are carried out shall be verified by the Protecting power, or by the competent international body.

In no case shall the above removals and transfers constitute a disguised form of internment or assigned residence.

Id. art. 27. Article 27 was drafted to account for the horrors of World War II and replace Article 19(b) of the Tokyo Draft, which read, "Deportations outside the territory of the occupied State are forbidden, unless they are evacuations intended, on account of the extension of military operations, to ensure the security of the inhabitants." Tokyo Draft, *supra* note 343, art. 19(b).

352. See *infra* notes 393-97 and accompanying text.

their will of protected persons out of occupied territory are prohibited, whether such deportations or transfers are individual or collective, and regardless of their motive.”³⁵³ Delegates from various nations, most notably the Soviet Union,³⁵⁴ thought “against their will” in Article 45(1) was too weak on the theory that persons could be coerced to consent to expulsions.³⁵⁵ Whether the text read as in its original guise, “against their will,” or as redrafted to read, “individual or mass forcible transfers,” the sentence remained in the passive tense rather than the active voice, such as, “The occupying power may not deport or forcibly transfer. . . .” The drafters probably kept the language in passive voice because the Nazi atrocities to which Article 45(1) primarily referred were often carried out not by the Nazis themselves, but the nationals or partisans of the occupied country, for example, Poles or Lithuanians, who rounded up Jews, either for killing in mass pits or for transfer to concentration camps. Hence, the phraseology of Article 45(1) prohibited the kind of events that occurred in Poland, Lithuania, and other occupied countries, regardless of whether an occupying power, such as the Nazis, or its surrogates committed the atrocities.

Final Article 49(6) (Article 45(5) of Stockholm Draft) on which the alleged illegality of Israeli settlements is based, remained the same from the Stockholm Draft through the adoption of the Fourth Geneva Convention. In order to view Article 49’s attempt to fully cover the heinous practices that occurred before and during World War II and its plausible meaning, reference must be made to the definition of “protected persons,” the parties protected by the initial paragraphs of Article 49, in contrast to the occupying power’s own “civilians” referred to in Article 49(6). Article 4 provides that “[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”³⁵⁶ In other words, although the Geneva Convention was primarily designed to protect individuals rather than sovereigns, it did

353. Stockholm Draft, *supra* note 346, art. 45.

354. See 2A FINAL RECORD, *supra* note 169, at 664 (quoting P. Morosov of Soviet Union: “The Soviet Delegation further proposed deletion of the words ‘against their will’, because in occupied territory no one had the right to express an opinion. There was a risk of abuses arising out of the words ‘against their will’.”).

355. See *id.* at 759 (quoting Reporter Colonel Du Pasquier).

356. Fourth Geneva Convention, *supra* note 158, art. 4. Article 4 excludes “Nationals of a State which is not bound by the Convention,” “Nationals of a neutral State who find themselves in the territory of a belligerent State,” and “Nationals of a co-belligerent State” from the category of protected persons. *Id.* It also excludes persons, such as prisoners of war, who are protected under the other three Geneva Conventions. *Id.*

exhibit some deference to the concept of sovereignty.³⁵⁷ Most of its provisions did not apply to a belligerent power's own nationals or civilians,³⁵⁸ and therefore the draft prepared for the Stockholm Conference left at least two Nazi practices uncovered: (1) deporting Germany's own Jews and other undesirables to slave and extermination camps in Poland and other occupied countries; and (2) transplanting Germans (*Reichsdeutsche*) and people of German descent (*Volksdeutsche*) to occupied countries to displace all or parts of the native populations. The language of Article 49(6) covers these omissions, as the restrictive definition of "protected persons" protected by Article 49(1) does not include the occupying power's own "civilians."

Besides the question of whether "against their will"³⁵⁹ in Article 45(1) was strong enough, many of the comments by conference delegates and the drafting committee members related to whether protected persons could be temporarily transferred from the occupied territory to the territory of another power.³⁶⁰ With the exception of beneficial transfers,³⁶¹ substantially all references by delegates concerning "transfers" connoted an involuntary movement of people, regardless of whether the Convention employed the term "forcible transfers."³⁶² In the third committee at the Geneva Conference, charged with the final drafting of the Fourth Geneva Convention, Adolpho Maresca of Italy "said that in the last war the flower of Italian youth had been sent to Germany in cattle trucks."³⁶³ Significantly, he added, "Such forced transfers must at all events be prohibited in the future. The term 'deportation' in the last paragraph of the Article had better not be used,

357. Article 4 provides an exception for the provisions of Part II, "General Protection of Populations Against Certain Consequences of War," but they are not relevant to present issues. David Ball similarly stresses the extent to which, behind the humanitarian façade of the Convention, lay the concept of state sovereignty. *See* Ball, *supra* note 326, at 990-92.

358. *See supra* note 356 (listing other civilians excluded from class of "protected persons").

359. The language was inserted into Article 45 by a legal subcommittee at the Stockholm Conference and became part of Article 45 in the Stockholm Draft presented to the Geneva Diplomatic Conference the following year. Its proponent was Albert J. Clattenburg of the United States. *See* sources cited *infra* note 394.

360. *See, e.g.,* 1 FINAL RECORD, *supra* note 169, at 347 (comments by Anna Kara of Hungarian People's Republic).

361. *See infra* notes 372-75 and accompanying text.

362. *See* source cited *infra* note 375 and accompanying text. Article 45(1) could be interpreted, not as indicating a difference between the conduct condemned by redrafted Article 49(1) and (6), but as substantiating the conclusion that the line of division between prohibited and permitted conduct corresponded to the difference between forceful versus voluntary transfers.

363. *Id.* at 664.

as ‘deportation’ was something quite different.”³⁶⁴ Maresca was clearly making reference to the text of present Article 49(6), and making the same distinction between “deportations,” which some participants saw as legitimate during war time,³⁶⁵ and “transfers,” which they condemned as inherently forced and condemned. Representatives of the Soviet Union³⁶⁶ and the Netherlands³⁶⁷ similarly saw transfers as forced rather than voluntary, without any comment that its use in Article 45(5) differed.

Colonel Du Pasquier of Switzerland, the reporter for the committee considering the civilian convention, introduced the final draft of Article 45 to the third committee with these words: “[T]he text proposed by the Drafting Committee . . . set forth a principle on which all the members of that Committee had had no difficulty in agreeing, namely, the need to prohibit, once and for all, the abominable transfers of population which had taken place during the last war.”³⁶⁸ Addressing a Belgian fear that a majority vote to include “deportation” on the same footing as “transfers” in a draft of Article 41 (Article 45 in the final draft, which applies to transfers to a non-signatory power) would “seriously prejudice the sovereign rights of the States concerned,”³⁶⁹ Colonel Du Pasquier replied that “the provisions of the Convention might be evaded, ‘transfers’ taking place under the guise of ‘deportations.’”³⁷⁰ The reporter’s comment reinforced the usage, adopted throughout the discussions, that “transfers” were *even more culpable* than “deportations”; hence, inclusion of both terms in Article 49(6) can hardly connote the use of “transfer” as a voluntary act in contradistinction to “deport” as a forced act. Nowhere did this discussion reference Article 49(6)’s use of the word “transfer” as involving or including voluntary movement. Nor, in these sparse references, is there any indication that the conference delegates understood the purpose underlying the prohibition of an occupying power transferring its own civilians in Article 49(6) as

364. *Id.*

365. *See, e.g., id.* at 809 (quoting Maurice Mineur of Belgium).

366. *See id.* at 664 (quoting P. Morosov). From context, his motion to insert “by force” in Article 45(1) was to emphasize this usage, rather than depart from what speakers understood the to be in the text’s meaning: “The insertion of the words ‘by force’ would *ensure* a formal prohibition of the deplorable practices carried out by certain European countries, where men had been loaded into trucks like cattle, and sent to distant countries to do forced labour.” 2A FINAL RECORD, *supra* note 169, at 664 (emphasis added).

367. Mas Slamet of the Netherlands “agreed with the principles underlying Article 45. In Indonesia, during the last war, numbers of women and children had been transferred to unhealthy climates and forced to build roads, and had died as a result.” *Id.*

368. *Id.* at 759.

369. *Id.* at 809.

370. *Id.*

anything other than to protect those civilians who were “transferred.”

In fact, the one usage of “transfer” in Article 45 that could be construed to import a lack of compulsion reinforces the conclusion that “transfer” in Article 49(6) implied a lack of volition on the part of the transferred population. Because of the blanket prohibition on transfers and deportations in Article 45(1), it might be considered unlawful to transfer protected persons out of harm’s way during warfare for their own benefit. Thus, while Article 45(2) of the Stockholm Draft did bar an occupying power from “undertak[ing] total or partial evacuation of a given area,”³⁷¹ this prohibition was succeeded by the clause “unless the security of the population or imperative military considerations demand.”³⁷² Without any change of meaning, the final draft of Article 49(2) was rephrased to read: “[T]he Occupying power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.”³⁷³ With minor modifications, the third and fourth paragraphs then dealt with the necessity of ensuring that, where civilians had to be evacuated for their own benefit, proper accommodations would be provided, their health safeguarded, family members would not be separated, and the party in control of the territory to which the civilians were being evacuated would be so informed. In reference to these provisions, the Final Report of the Committee drafting the text for consideration by the plenary meeting of the delegates referred to the function of Article 45(2) in relation to Article 45(1):

Although there was general unanimity in condemning such deportations as took place during the recent war, the phrase at the beginning of Article 45 caused some trouble in view of the difficulty in reconciling exactly the ideas expressed with the various terms in French, English and Russian. In the end the Committee have decided on a wording which prohibits individual or mass forcible removals as well as deportations of protected persons from occupied territory to any other country, but which permits voluntary transfers.

The second paragraph deals with the problem of evacuations made necessary in the interest of the security of the civilian population, or for imperative military considerations. . . . This special case constitutes an exception to the first paragraph.³⁷⁴

In other words, the transfers that were “voluntary” were those that were permitted, i.e., evacuations for the benefit of the civilians. In that

371. 1 FINAL RECORD, *supra* note 169, at 120.

372. *Id.*

373. Fourth Geneva Convention, *supra* note 158, art. 49.

374. 2A FINAL RECORD, *supra* note 169, at 827.

context, the term “transfer” was used as a synonym for “evacuations.” In contrast, the transfers in Article 45(6) are of course prohibited, and there is no suggestion anywhere that these prohibited transfers were viewed as anything but involuntary. In this latter context, “transfer” and “deport” were used synonymously.³⁷⁵

Within the Fourth Geneva Convention, the two other primary uses of the term “transfer” relate to protected persons, who are “transferred to a Power . . . not a party to the Convention,”³⁷⁶ and to “internees,” whose transfer must “be effected humanely.”³⁷⁷ Both contexts clearly indicate that “transfer,” again unmodified by “forcible” or a synonym, connotes an act by the detaining power upon the protected persons or internees, as the case may be, irrespective of their consent. Finally, the Fourth Geneva Convention was considered at the same diplomatic conference that considered and adopted the three other conventions. In the Third Geneva Convention, relating to Prisoners of War, “transfer” is used consistently, without any adjectives, to connote an act of the detaining power upon prisoners of war, rather than a voluntary act by the prisoners.³⁷⁸

Without more, then, a textual reading that takes into account the term “occupying power,” the term “transfer” reinforced by “deport,” the use of similar terminology elsewhere in the Fourth Geneva Convention,

375. STONE, *supra* note 124, at 180. The distinction between mass voluntary and involuntary transfers is drawn by De Zayas. See De Zayas, *supra* note 39, at 208-09. Certain post-1949 developments in international humanitarian law—particularly, the 1977 Additional Protocols to the Geneva Conventions and the Charter of the International Criminal Court—were, in part, specifically and politically designed to bolster the contentions and position of the Palestine Liberation Organization against Israel. See Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT’L L. 169, 198-203 (2003). The first Additional Protocol added as a “grave breach” to the Conventions, the willful “transfer by the Occupying Power of parts of its own civilian population into the territory it occupies” and noticeably omitted “deport.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 85(4)(a), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391. Further, the Rome Conference established “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” as a crime within the competence of the International Criminal Court. See Rome Statute of the International Criminal Court art. 8(2)(b)(viii), July 17, 1998, 2187 U.N.T.S. 90. Rabkin has noted these linguistic changes were intended “to imply that the issue was not forcible transfer but any permission for Israeli citizens to take up residence in the territories won in 1967.” Rabkin, *supra*, at 198. Significantly and ironically, these linguistic alterations also support the notion that the language of Article 49(6) *does* imply the use of force. Israel has not signed or ratified either Protocol 1 or the Rome Statute.

376. Fourth Geneva Convention, *supra* note 158, at art. 45.

377. *Id.* art. 127.

378. See, e.g., Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention. . .”).

the use of similar terminology in the Third Geneva Convention, the comments of delegates to the Convention, and the overriding context surrounding the drafting of the Geneva Convention support an interpretation that voluntary movement of civilians is not prohibited by Article 49(6). To Julius Stone, writing in reference to this paragraph, “the word ‘transfer’ in itself implies that the movement is not voluntary on the part of the persons concerned, but a magisterial act of the state concerned.”³⁷⁹ Terming a contrary interpretation of Article 49(6) as “an irony bordering on the absurd,” he commented:

Ignoring the overall purpose of Article 49, which would *inter alia* protect the population of the State of Israel from being removed against their will into the occupied territory, it is now sought to be interpreted so as to impose on the Israel government a duty to prevent any Jewish individual from voluntarily taking up residence in that area.³⁸⁰

Eugene Rostow concurred that “the provision was drafted to deal with ‘individual or mass forcible transfers of population,’ like those in Czechoslovakia, Poland, and Hungary before and after the Second World War.”³⁸¹ In contrast, Rostow characterized Jewish settlers in the West Bank as “most emphatically volunteers”³⁸² and concluded that Jews had every right to settle on the West Bank “equivalent in every way to the right of the existing population to live there.”³⁸³

e. Commentary IV and its sources

There is “more,” however, and that additional input casts some doubt on the meaning and purpose of Article 49(6). Under the general editorship of Jean S. Pictet, Director Delegate of the ICRC, the

379. STONE, *supra* note 124, at 180.

380. *Id.*

381. Rostow, *supra* note 182, at 160.

382. Rostow, *supra* note 114, at 719. Gorenberg details the extent to which settlement groups coaxed or even coerced the Israeli government to permit settlement activities during the first ten years of Israel’s control over the West Bank. *See generally* GORENBERG, *supra* note 228. Although Gorenberg also relates how different Israeli government officials at one time or another supported these activities—frequently below the radar of the Israeli cabinet—it seems clear the dominant causal arrow ran from settlers to government (i.e., settlers’ “facts on the ground” or pressure leading to late governmental recognition) rather than from government to settlers (i.e., governmental pressure or incentives leading to settlement activity). *See generally id.* For example, in describing the establishment of a Golan Heights settlement, which set the pattern for settlements elsewhere, especially the West Bank, Gorenberg concludes: “This was one more variation on creating facts: from the bottom up, the activists pulling in sympathetic officers and officials, intent on dragging the government after them. They would set policy, and draw the map of the country themselves.” *Id.* at 71.

383. Rostow, *supra* note 114, at 720.

sponsoring organization of the Geneva Conference and the organization under whose auspices the Convention was drafted, several members and former members of the ICRC wrote a commentary on the Convention,³⁸⁴ published in its original French version approximately seven years after the conference.³⁸⁵ Like “official comments” of a statute subsequently written by non-legislators who participated in drafting the legislation, there is serious question of what weight to attach to commentary of an international treaty published well after the conference where the drafts were discussed, the final draft adopted, and the Convention signed by the delegates and ratified by various governments.³⁸⁶ Nonetheless, *Commentary IV* has been given authoritative weight,³⁸⁷ and therefore must be considered.

384. See COMMENTARY IV, *supra* note 345. The actual authors are identified as Oscar M. Uhler, Frederic Siordet, Roger Boppe, Henri Coursier, Claude Pilloud, Rene-Jean Wilhelm, and Jean-Pierre Schoenholzer. Of these parties, Pictet, Siordet, Pilloud, and Wilhelm attended the diplomatic conference as “experts.”

385. See COMMENTAIRE: IV LA CONVENTION DE GENÈVE RELATIVE À LA PROTECTION DES PERSONNES CIVILES EN TEMPS DE GUERRE (Jean S. Pictet ed., Comité International de la Croix-Rouge Genève 1956).

386. Israel signed the Convention on December 8, 1949, and the *Knesset* ratified the Convention on July 6, 1951.

387. See, e.g., Ben-Naftali et al., *supra* note 194, at 246 & n.68, 252 & n.95, 581 & n.180; Imseis, *supra* note 110, at 103. Interestingly, both authors whitewash the language in *Commentary IV*, Imseis by omission and Ben-Naftali, by rephrasing. *Commentary IV*'s expression of concern for the “separate existence [of the native population] as a race,” COMMENTARY IV, *supra* note 345, at 283, becomes, in Ben-Naftali, an “intent . . . to maintain a general demographic status quo in occupied territories.” Ben-Naftali et al., *supra* note 194, at 581. Not surprisingly, in light of the focus on Nazi behavior during World War II, the notion of racial separateness ran contrary to the delegates' views at the 1949 Diplomatic Conference. See *infra* notes 403-04 and accompanying text. Kretzmer also relies heavily on *Commentary IV* in criticizing the Israeli Supreme Court's interpretation of Article 49. See KRETZMER, *supra* note 212, at 49-50. Significantly, Kretzmer's preference for Pictet over Stone's view (which the court has relied upon) proceeds not only from Pictet's status as the editor-in-chief of *Commentary IV*, but also because *Commentary IV* “was written before 1967, was not related to any specific conflict and is therefore obviously an objective view of the Convention.” *Id.* However, Kretzmer does not mention that *Commentary IV* was written *well after* the delegates at the Geneva Diplomatic Conference discussed, approved and signed the Convention and, likewise, after its ratification by governments. Its forward explicitly states it “is the personal work of its authors,” *Forward* to COMMENTARY IV, *supra* note 345, at 1, and “emphasize[s] that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty.” *Id.* As Rabkin has pointed out, “[n]othing in the conventions indicates that the ICRC has any authoritative role as interpreter of the conventions, much less any authority to enforce compliance.” Rabkin, *supra* note 375, at 179; see also Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1041-46 (2004) (disputing, on basis of *Final Record*, view expressed in *Commentary IV* that all unlawful combatants are protected by Fourth Geneva Convention and characterizing ICRC's activities at Geneva Convention as “more akin to a special interest group than to a neutral, dispassionate observer”).

Referring to the theme of Article 49 as a whole, *Commentary IV* states: “It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions.”³⁸⁸ But the authors were less certain of the role of Article 49(6) and commented:

It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons *or* in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and *endangered their separate existence as a race.*³⁸⁹

Moreover, in addition to the above, the authors posited:

It would therefore appear to have been more logical—and this was pointed out at the Diplomatic Conference—to have made the clause in question into a separate provision distinct from Article 49, so that the concepts of “deportations” and “transfers” in that Article could have kept throughout the meaning given them in paragraph [one], i.e. the compulsory movement of protected persons from occupied territory.³⁹⁰

In other words, *Commentary IV* suggests two things that might give pause with respect to the prior conclusion that Article 49(6) was intended to protect the civilians of the occupying power’s own country (e.g., Germany) from their forcible transfer to the occupied territory (e.g., Auschwitz or other concentration camps in Poland). First, the purpose of Article 49(6) was the protection of two parties: (1) the occupied power’s civilians transported against their will into occupied territory; and (2) the native people of the occupied territory. Second, it suggests the terms “transfer” and “deport” were not used with the same connotation of involuntariness or compulsion that these terms connoted in Article 49(1).

To the extent its purpose was to protect the racial purity or economic situation of the native population, could it not be argued that Article 49(6) should be interpreted most liberally and broadly against any actions of an occupying power that sponsor or promote the movement of an occupant’s population into the occupied territory?³⁹¹ Indeed, Palestinians and settlement opponents argue quite vigorously that the settlement enterprise intended to change the demographic composition of the West Bank. Moreover, does not the suggestion of a different

388. COMMENTARY IV, *supra* note 345, at 278.

389. *Id.* at 283 (emphasis added); *see* Imseis, *supra* note 110, at 103 (citing without further inquiry into sources relied upon in text).

390. COMMENTARY IV, *supra* note 345, at 283 (footnote omitted).

391. *See* Kretzmer, *supra* note 341, at 91.

meaning or usage of “transfer” and “deport” in Article 49(6) support the notion that Israel’s actions—allegedly a combination of subsidies, tax, and infrastructure improvements for the use of settlements and confiscation of Arab lands³⁹²—have violated Article 49(6)’s prohibition? But, while the historical record does provide support for the first notion (that the beneficiaries of Article 49(6)’s prohibition included the native population of the occupied territory), it does not confirm the latter (that “transfer” as used in Article 49(6), unlike its usage in Article 49(1), did not connote compulsion).

As support for the idea that the prohibition had as one, if not primary, purpose to protect the native population of the occupied territory, *Commentary IV* cites several pages in a type-written report that tersely *summarized* discussions in a sub-committee of the Legal Commission at the Stockholm Conference (interestingly, this is the only citation to this source in *Commentary IV*).³⁹³ The reference seems to

392. For example, Roberts opined, “[E]ven if voluntary settlement of nationals on an individual basis were permissible under Article 49, the ambitious settlements program of the 1980s, which was planned, encouraged and financed at the governmental level, does not meet that description.” Roberts, *supra* note 208, at 85. He concludes, “The settlements program is quite simply contrary to international law,” *id.*, but cites no authority except UN General Assembly Resolutions. Elsewhere, Roberts admits that UN General Assembly resolutions can be the product of bias against Israel, including the infamous 1975 resolution equating Zionism (the notion that Jews have a right to statehood) with racism. *Id.* at 100.

393. See COMMENTARY IV, *supra* note 345, at 283 (citing ICRC, LEGAL COMMISSION SUMMARY OF THE DEBATES OF THE SUB-COMMISSIONS (1948) [hereinafter ICRC, SUMMARY OF SUB-COMMISSION DEBATES]). Because this summary is unavailable either in the United States or on the internet, the notes kept from the meeting are presented below with the scant recorded introduction of the proposal at a first meeting, its tabling until a second meeting, its contraction, and the ambiguous references of various participants. Discussion of Article 45 at first meeting:

M. Cohn (Danemark, Gvt.) propose d'ajouter un nouvel alinéa ainsi conçu: "La Puissance occupante ne pourra pas procéder à la déportation ou au transfert d'une partie de sa propre population ou de la population d'un autre territoire qu'elle occupe dans le territoire occupé par elle," ceci afin de protéger la population d'un Etat occupé contre une invasion de personnes.

M. Pilloud (CICR), croit qu'il s'agit là plutôt des devoirs de la Puissance occupante, ce qui n'est pas entièrement du ressort de la Croix-Rouge internationale. Nous devons chercher à protéger plutôt les ressortissants d'un pays.

M. Castnerg (Norvège, Gvt.) appuie la proposition de M. Cohn car il estime que ce nouvel alinéa protégerait les nationaux d'un pays occupé contre un envahissement de personnes venant d'autre territoires et qu'il faudrait nourrir, etc.

La Commission, sur proposition de MM. Holmgren (Suède, CR.) et Abut (Turquie, CR.), décide de différer sa décision sur cet article et d'attendre que la proposition de M. Cohn ait été distribuée.

M. Clattenburg (YSA, Gvt.) demande qu'au premier alinéa de l'article 45 on ajoute "contre leur gré" après "les déportations ou transferts." Cette proposition est adoptée. L'article 45 avec ou sans addition de la proposition

have been directed primarily to the remarks of Dr. Georg Cohn of Denmark, who is reported to have initially introduced the provision with reference to “protecting the inhabitants of an occupied State against an invasion of people.”³⁹⁴ Cohn’s initial provision would have prohibited an occupying power from deporting or transferring a “part of its own inhabitants or the inhabitants of another territory which it occupies into the occupied territory.”³⁹⁵ Claude Pilloud, Chief of the ICRC Legal Division, reacted seemingly with some skepticism and with ambiguous references to aspects of Cohn’s proposal directed “at the duties of the occupying power, which is not entirely within the competence of the International Red Cross.” Pilloud concluded, “We should therefore try to protect a country’s nationals.” It is unclear from the abbreviated summary whether Pilloud’s reference to “a country’s nationals” referred to the transferred population of the occupying power or the inhabitants of the occupied territory.³⁹⁶

The proposal to add the provision was first shelved to allow interested parties to consider it. Cohn reintroduced his text at the next subcommittee meeting, without reference to the intended beneficiaries of the prohibition.³⁹⁷ Other participants at the subcommittee committee, led

de M. Cohn sera mis aux voix lors de la prochaine séance.

ICRC, SUMMARY OF SUB-COMMISSION DEBATES, *supra*, at 61-62. Discussion of Article 45 at next meeting:

M. Cohn (Danemark, Gvt.) propose l'addition suivante à l'article 45: "La Puissance occupante ne pourra pas procéder à la déportation ou au transfert d'une partie de sa propre population ou de la population d'un autre territoire qu'elle occupe dans le territoire occupé par elle."

Après une discussion à laquelle ont pris part M. Clattenburg (USA, Gvt.) qui estime que cet alinéa a un sens beaucoup trop étendu, M. Wershof (Canada, Gvt.) et M. Pilloud (CICR), la sous-commission adopte cet alinéa modifié comme suit: "La Puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie de sa propre population civile dans le territoire occupé par elle."

M. Wershof (Canada, Gvt.) signale qu'il s'est abstenu de voter, non qu'il réprouve les sentiments exprimés dans cet alinéa, mais il estime que cette conférence n'est pas habilitée pour examiner dans cet alinéa des questions de ce genre et trouve que la Convention n'a pas pour but de montrer à des Nations comment elles doivent faire la guerre.

Id. at 77-78.

394. *Id.* at 61-62. It should be emphasized that, apart from the exact language included in the sentence Cohn proposed for inclusion, the quoted language is part of the summary of the discussions and does not pretend to represent Cohn’s exact language.

395. ICRC, SUMMARY OF SUB-COMMISSION DEBATES, *supra* note 393, at 61-62.

396. In French, Cohn used the phrase “*la population d’un Etat occupé*,” *id.*, while Pilloud used “*les ressortissants d’un pays*.” *Id.*

397. *Id.* at 77-78. Cohn’s original text would have prohibited the Occupying Power from deporting or transferring not only its own inhabitants, but also those of another occupied territory into its occupied territory. Arguably, although reference to inhabitants of another territory does not relate to whether the primary purpose of the provision was to

by Albert J. Clattenburg, Jr. of the United States, thought the provision was too broad. After discussion, the language “or the inhabitants of another territory which it occupies” was deleted, and the word “civil” was added prior to “inhabitants” in the French text.

Shortly after the 1949 Geneva Conference, Hersh Lauterpacht published a new edition of *Oppenheim's International Law* in which he opined that Article 49(6)'s “prohibition [was] intended to cover cases of the occupant bringing in its nationals for the purpose of displacing the population of the occupied territory.”³⁹⁸ Lauterpacht, the very distinguished English law professor and member of the ICJ, was a legal expert to the Stockholm Draft at a committee of experts in December of 1948, but that meeting apparently concerned certain “grave breach” provisions common to all four of the Geneva Conventions and occurred subsequently to the Stockholm Conference where the language of Article 45(5) was introduced and fixed.³⁹⁹ In the preface to his edition of Oppenheim's text, Lauterpacht thanks Pilloud of the ICRC “for information concerning the Geneva Conventions of 1949.”⁴⁰⁰ Pilloud, who, as mentioned above, was chief of the Legal Division of the ICRC and a participant at the legal subcommittee meeting at the Stockholm Conference, is also listed as one of the authors of *Commentary IV*, although not the principal one. It is a reasonable assumption that

protect transferred parties or the native population of occupied territories, it suggests that “transfer” refers to forced movements of people by the Occupying Power rather than voluntary movements. The phrase “or the inhabitants of another territory which it occupies” was deleted at the suggestion of Albert E. Clattenburg, Jr., a representative of the United States, who thought the paragraph “too extensive.” Clattenburg was the First Secretary of the U.S. Embassy in Lisbon and former Chief of Special War Problems Division of Department of State during World War II. In the latter capacity, he apparently resisted an attempt to save Jews from the Bergen-Belsen concentration camp by exchanging them for interned Germans in South America. See Max Paul Friedman, *The U.S. State Department and the Failure to Rescue: New Evidence on the Missed Opportunity at Bergen-Belsen*, 19 HOLOCAUST AND GENOCIDE STUD. 26, 40 (2005). Clattenburg also participated in a program of interning Japanese Peruvians during World War II. See Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. & DEV. L.J. 53, 69-70 & n.79 (1999). In addition, Cohn's proposal at the two meetings had no adjective prior to the word “inhabitants.” As adopted by the Committee, the French word for “civil” was inserted prior to inhabitants. ICRC, SUMMARY OF SUB-COMMISSION DEBATES, *supra* note 393, at 78.

398. 2 OPPENHEIM, *supra* note 169, at 452. This would seem to be the same meaning suggested by one modern text of international humanitarian law, written without any reference to Israel and the West Bank: “Once occupation is established, individual or mass forcible transfers or deportation are prohibited, apart from the evacuations dictated by imperative military necessity. . . . In no circumstances may *evacuated* areas be repopulated by nationals transferred from the home territories of the occupying power.” MCCOUBREY, *supra* note 324, at 199 (emphasis added) (footnote omitted).

399. BEST, *supra* note 171, at 93-94.

400. See 2 OPPENHEIM, *supra* note 169, at vii-viii.

Lauterpacht divined the meaning of the paragraph from Pilloud.

Commentary IV notes that “[a]fter passing through these various stages, the draft texts were taken as the only working documents for the Diplomatic Conference.”⁴⁰¹ From this text, it appears the delegates did not have the summaries of the committee discussions before them, and those delegates who spoke with respect to Article 45 did not include the members of the legal subcommittee that added Article 45(5). In any event, while it may be unclear who the Geneva delegates understood to be the intended beneficiaries of the prohibition in Article 45(5), all explicit references by delegates to “transfers”—whether of protected persons, internees, the occupying power’s civilian population, or others—seemed to focus either upon the need to protect the transferred population or, in transfers for the benefit of transferees, the necessity of notification to, and having regard for the needs of, the “protecting power.”

Certainly, the theme of racial or ethnic purity expressed in *Commentary IV* cannot be found in either the remarks of the legal subcommittee that inserted the provision into Article 45 or elsewhere in the Fourth Geneva Convention—quite the contrary. Article 13, the first provision of Part II (“General Protection of Populations against Certain Consequences of War”), which applies even if the parties affected are not “protected parties” under the Geneva Convention, states that the provisions of Part II “cover the whole of the population of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion.”⁴⁰² Part III (“Status and Treatment of Protected Persons”) provides that “all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.”⁴⁰³ Further, of course, modern trends in international human rights law, including negative views of immigration restrictions based upon color or ethnicity and positive views of granting political asylum,⁴⁰⁴ show no respect for a notion of preserving the racial composition or ethnic integrity of the country of immigration, although they do evince support for self-determination.

In less racial terms,⁴⁰⁵ whatever the intent of the settlement

401. COMMENTARY IV, *supra* note 345, at 6.

402. Fourth Geneva Convention, *supra* note 158, art. 13.

403. *Id.* art. 27.

404. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 14(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

405. See *supra* note 35 (discussing populations).

promoters, the negative one imputed to Israel by its opponents—to displace the Palestinian population with Israeli Jews—or a positive one—facilitating the rights of Jews to live on the West Bank without prejudice to the rights of Palestinians,⁴⁰⁶ it is difficult to argue that Jewish settlements have materially altered the ethnic balance of the West Bank.⁴⁰⁷ Excluding disputed neighborhoods in Jerusalem and settlements contiguous to the pre-1967 armistice lines, Jews at most constitute no more than eight percent of the West Bank's population, less than four percent of a future Palestinian state that would include Gaza, and an even smaller percentage of the population if at least some Palestinian refugees return to live in either the West Bank or Gaza.⁴⁰⁸ Moreover, while the 1967 War, like the 1948 War, produced some refugees, there is no evidence that there was any nexus between Arab refugees in 1967 and plans to construct and populate Jewish settlements. Thus, this situation differs substantially from efforts by the Soviet Union to alter the ethnic makeup of the Baltic States by initially deporting hundreds of thousands of people and encouraging Russian immigration,⁴⁰⁹ and China to alter the ethnic makeup of Tibet by forcibly

406. See Isr. Ministry of Foreign Affairs, *supra* note 184 (“[T]he movement of individuals to the territory is entirely voluntary, while the settlements themselves are not intended to displace Arab inhabitants, nor do they do so in practice.”). Further, Menachem Begin, while a believer in a Greater Israel including the West Bank, rejected the notion of denying equal rights to Palestinians and “believed that both Jews and Arabs would live in peace and harmony in the State of Israel.” Arye Naor, “Behold, Rachel, Behold”: *The Six Day War as a Biblical Experience and Its Impact on Israel's Political Mentality*, 24 J. ISR. HIST. 229, 243-44 (2005).

407. Further, the Palestinian economic situation improved appreciably from 1967 to 1995 (the approximate date that the Palestinian Authority assumed control over most of the West Bank). Life expectancy increased, infant mortality fell, and medium to strong economic growth occurred. See Zimmerman et al., *supra* note 35. On the other hand, it can also be argued Palestinian dependence on the Israeli economy had a negative effect that presently requires substantial recovery.

408. During the first decade of Israeli control over the West Bank, the number of settlers, approximately 2,000, and their percentage of the population, approximately 0.5 percent, were even smaller, but, at that point, there was no movement from Arabs to make peace. See GERSON, *supra* note 168, at 174. Certainly, during the first decade when the Labor party still dominated the Israeli government, “in the perspective of contemporary international law, Israel's land acquisition and settlement policy was not unlawful as it neither aimed for, nor neared, a stage involving displacement of the existing population as a prelude to future annexation.” *Id.* at 173.

409. See THOMAS A. ARMS, *ENCYCLOPEDIA OF THE COLD WAR* 43 (1994). While the deportations began under Stalin in 1945 prior to the Fourth Geneva Convention, the movement of Russians in to the Baltic States continued even under Khrushchev and Brezhnev “so that by 1980 of 1.5 million citizens in Estonia, only 900,000 were ethnic Estonians.” *Id.* The forced deportations of hundreds of thousands of natives continued throughout the Baltic States and through the Russification of Estonia, Latvia, and to a lesser extent Lithuania. See WALTER C. CLEMENS, JR., *BALTIC INDEPENDENCE AND RUSSIAN EMPIRE* 56-57 (1991); JOHN HIDDEN & PATRICK SALMON, *THE BALTIC NATIONS AND EUROPE: ESTONIA, LATVIA AND LITHUANIA IN THE TWENTIETH CENTURY* 131 (rev. ed.

scattering its native population and moving Chinese into Tibetan territory in their stead.⁴¹⁰

With respect to *Commentary IV's* support for an interpretation of “transfer” different from the rest of Article 49, footnote three refers solely to the Final Record of the Geneva Conference, which contains the remarks of delegates Morosov of the Soviet Union, Slamet of the Netherlands, and Maresca from Italy (discussed previously), none of whom suggested the removal of Article 49(6) to a separate article, and all of whom referred to “transfers” in the negative sense as involving force and compulsion.⁴¹¹ At the close of the sixteenth committee meeting considering the civilians’ convention, Mr. Georges Cahen-Salvador of France, chair of the committee, was reported to have summed up the discussion concerning the whole of Article 49 in the following way:

The Chairman, before declaring the discussion on Article 45 closed, noted that the Committee was unanimous in condemnation of the abominable practice of deportations. The sole purpose of every speaker had been to strengthen the interdictory provisions of the Article. He suggested that deportations should, in the same way as the taking of hostages, be solemnly prohibited in the Preamble.⁴¹²

The delegates, meeting as a committee before the draft was presented to the plenary session for approval, proceeded to discuss succeeding articles. No one argues that Israel forcibly moved settlers into the West Bank; however, as part of the Gaza disengagement, Israel did forcibly *remove* settlers from four settlements in the Northern West Bank and has since begun to evacuate, with force, illegal outposts having some permanent residents.

f. Other considerations: Avoiding absurdity and circularity and accounting for the element of time

Several other considerations—most notably, avoiding absurd

1994) (“By 1979 ethnic Latvians constituted only 38.3 percent of their own capital, Riga.”); ROMUALD J. MISIUNAS & REIN TAAGEPERA, *THE BALTIC STATES: YEARS OF DEPENDENCE, 1940-1990*, at 102, 112 (1993) (one-tenth of Latvian and Estonian farmers were deported, and “[t]he Latvians’ share of their country’s population was probably around [eighty-three] percent in 1945, but dropped to about [sixty] percent by 1953, due to immigration and deportations”).

410. See John S. Hall, *Chinese Population Transfer in Tibet*, 9 *CARDOZO J. INT’L & COMP. L.* 173 (2001). The reticence of the international community actively and vociferously to criticize China’s human rights record in this regard is explored by Philip Baker. See Philip Baker, *Human Rights, Europe and the People’s Republic of China*, 169 *P.R.C. Q.* 45 (2002).

411. See *supra* notes 359-67 and accompanying text.

412. 2A *FINAL RECORD*, *supra* note 169, at 664.

conclusions, avoiding circularity of meaning and taking account of the element of time—counsel against the conclusion that Israeli settlements violate Article 49(6), especially on the basis of preserving any alleged racial or ethnic purity of Palestinians. While Julius Stone considered Israeli settlements in compliance with both of the themes that, at least in his reading of *Commentary IV*, inhered in Article 49(6) (protecting the occupying power's civilians from transfer against their will and protecting nationals of the occupied territory from a mass influx that historically had often accompanied forcible transfer of nationals out of occupied territory), he said the following about Israel's obligation to keep Israeli volunteers from settling on the West Bank:

[W]e would have to say that the effect of Article 49(6) is to impose an obligation on the [S]tate of Israel to ensure (by force if necessary) that these areas, despite their millennial association with Jewish life, shall be forever *judenrein*. Irony would thus be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that . . . the West Bank . . . must be made *judenrein* and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants.

Common sense as well as correct historical and functional context exclude so tyrannical a reading of Article 49(6).⁴¹³

Stone's observation invites a hypothetical: suppose a group of Palestinian Arabs who are citizens of Israel requested permission to establish a community on the West Bank. Further, assume, without loss of their citizenship, Israel facilitated the community's establishment on land purchased from other Palestinian Arabs (not citizens of Israel) or on state land. Would establishment of this settlement violate Article 49(6)? If not, how can one distinguish the hypothetical from Jewish settlements?

Those who most vigorously allege that Jewish settlements violate Article 49(6) generally do not differentiate between settlements established prior or subsequent to actions by the Israeli government that, for a time, are said to have promoted settlement activity. To these opponents, the military government's permission to establish a settlement itself would be prohibited. The argument that only Jewish settlements established without any state involvement satisfy Article 49, therefore, leads to another absurdity: only Jewish settlements unauthorized by the military commander, and thus illegal under Israeli

413. STONE, *supra* note 124, at 180.

law,⁴¹⁴ are lawful under Article 49. Only occupants of these illegal outposts would truly qualify as “volunteers” not related to Israeli government action in any way.

Circularity of interpretation should also be avoided. Concluding Israeli settlements violate Article 49(6) overlooks the Jewish communities that formerly existed in areas occupied by today’s Israeli settlements, for example, in Hebron and the *Etzion* Bloc.⁴¹⁵ These Jewish communities were destroyed by Arab armies, militias, and rioters, and, as in the case of Hebron, the community’s population was slaughtered. Is it sensible to interpret Article 49 to bar the reconstitution of Jewish communities that were destroyed through aggression and slaughter? If so, the international law of occupation runs the risk of freezing one occupier’s conduct in place, no matter how unlawful. Further, under what theory can one distinguish between settlements and the reconstruction and repopulation of the Jewish quarter of Jerusalem’s old city, which was also destroyed by the Jordanians in its 1948 occupation of the West Bank?⁴¹⁶ To claim these acts of Arab aggression against Jewish communities preceded the Geneva Convention, whereas the establishment of Jewish settlements on the West Bank succeeds it, would be a “technicality” hardly consistent with the view that the applicability provision of Article 2 is a “technicality” not to be relied upon or the view that “occupying power” and “transfers” should be interpreted most broadly to accord with the Convention’s humanitarian purposes.

Suppose that, irrespective of any textual, contextual, historical, or purposive analysis and the *voluntary* movements of Jews, to civilian settlements on the West Bank, one still wishes to assert that the initial establishment of Israeli civilian settlements on the West Bank violated Article 49(6). Substantially, all legal systems take account of the element of time, which bears on both the relevance of legal doctrine as well as the equities of parties involved.⁴¹⁷ International law is no

414. See Sason, *supra* note 8.

415. See Lein, *supra* note 35, at 11 (“As early as September 1967, *Kfar Ezyon* became the first settlement to be established in the West Bank. It was established because of the pressure of a group of settlers, some of whom were relatives of the residents of the original community of *Kfar Ezyon*, which was abandoned and destroyed during the 1948 war.”) (emphasis added).

416. To its “credit” on grounds of consistency, B’Tselem does not do so, characterizing the Jewish quarter in the Old City as a “settlement.” *Id.* at 103. Most people would presumably recoil at this characterization, as the property in this area has been owned and populated by Jews for centuries (if not millennia), the synagogues were destroyed during Jordanian occupation, and Judaism’s holiest site, the Western Wall, lies at the edge of the area.

417. A domestic example might be the doctrine of adverse possession, where open use of another’s property after a certain number of years results in title passing to the

exception. For example, after substantial time has passed, should the remedy under international law for dispossession of property be a right to repossession or compensation? Generally, the international practice has been, at best, to grant compensation rather than a right to repossession based upon dated claims. And, even then, compensation has been based upon what Benvenisti and Zamir call “adequate compensation” rather than “fair value.”⁴¹⁸ No one disputes that the Hague Regulations were designed to regulate short-term occupations.⁴¹⁹ While it is argued that the Geneva Convention, because of its greater focus on the protection of people rather than sovereign states, does not necessarily presuppose that only short-term occupations are meant to be regulated by its provisions, no one contends its drafters or signatories contemplated a *lawful* belligerent occupation lasting close to forty years.⁴²⁰ As George Best comments:

The makers of the Civilian Conventions can never have envisaged a military occupation as unprecedentedly prolonged as this, or circumstances as intractable as those which tangle together the new State of Israel, the neighboring Arab States (most of them in some sense new too), and the dispossessed Palestinian people bearing the aspect of a State-in-waiting.⁴²¹

In its original guise, the Geneva Convention included a one-year provision after which only certain provisions would continue to be binding on signatory states.⁴²² Surely, there is a difference between a lawful occupation that lasts five to ten years (relatively “long” in terms of the Hague Regulations),⁴²³ and one that lasts forty years or more. At

occupier from the original owner.

418. See Benvenisti & Zamir, *supra* note 40, at 328-31.

419. See BENVENISTI, *supra* note 159, at 27.

420. See Roberts, *supra* note 208, at 71 (“[T]he Fourth [Geneva] Convention was designed to protect the civilian population under an essentially temporary occupation.”). However, Roberts states elsewhere, “The proposition that the basic rules codified in the law on occupations must continue to be observed for as long as the occupation lasts is a useful compass bearing to guide one through this difficult subject.” *Id.* at 54.

421. See BEST, *supra* note 171, at 316.

422. Fourth Geneva Convention, *supra* note 158, art. 6; see Roberts, *supra* note 208, at 55. Although Israel has not ratified Protocol 1, it has never relied on Article 6 to advance its position that the Geneva Convention is inapplicable to its control over the West Bank; Israel does insist it conforms to the Convention’s humanitarian provisions. See Roberts, *supra* note 208, at 55 (“Israeli authorities have never invoked it as a means of reducing their obligations.”) (footnote omitted). In any event, the one-year provision specifically does not apply to Article 49. See Fourth Geneva Convention, *supra* note 158, art. 6.

423. Roberts defines a “prolonged occupation” as one “that lasts more than [five] years and extends into a period when hostilities are sharply reduced—i.e., a period at least approximating peacetime.” Roberts, *supra* note 208, at 47. Roberts, who is critical of Israeli settlements, wrote in 1990 at a period when Israel’s control over the West Bank

some point it becomes absurd to argue that an occupying power cannot permit its own citizens to settle on disputed land,⁴²⁴ which is not privately owned, especially in areas once occupied by Jews, simply because they belong to the dominant ethnic group of the occupying power. The contrary conclusion could well be reached if, consistent with Security Council Resolution 242 and 338, Arab states had negotiated and arrived at peace treaties with Israel, or if Palestinians had accepted a negotiated settlement of all claims with Israel in 2000, that is, if the occupation had persisted not because of Israel's legitimate security concerns, but because of Israel's refusal to settle claims with the Palestinians. It can even be argued that, at some point, uprooting the settlers becomes a wrong comparable to those at which Article 49 is directed. In short, even if one adopts an interpretation of the Geneva Convention that would dictate the initial illegality of Israeli settlements, both time and culpability for failing to resolve the conflict should be accorded some weight in adjudging their present legality.

g. Judicial interpretation

The *only* instance of the ICJ applying or interpreting Article 49(6) was its advisory opinion in 2004, which responded to a request from an emergency session of the UN General Assembly to evaluate the legality of Israel's security fence.⁴²⁵ Israel appeared only to contest the court's jurisdiction. For the most part, the fence follows the route of the Green Line, but is in many instances constructed to its east, that is, in the West Bank. Writing for the ICJ, its President, Shi Jiuyong of China, reiterated the commonly accepted position that the Fourth Geneva Convention does apply to Israel's control over the West Bank. In his opinion, he also opined that Israeli settlements violate Article 49(6), which he interpreted as "prohibit[ing] not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory."⁴²⁶ As support, the opinion cited three resolutions adopted by the Security

was approaching twenty-five years—a far cry from the forty years that is now imminent. Moreover, while the consideration of time might be analyzed differently if the failure to end the hostilities and the resultant occupation primarily lay at Israel's feet, but the weight of authority is to the contrary. See *supra* notes 187-206 and accompanying text.

424. In this regard, one of the strongest grounds given by an opponent of Israeli settlements—that settlements were established on indisputably sovereign territories—does not apply to the West Bank. See Roberts, *supra* note 208, at 64-65.

425. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). The opinion was sought by the Tenth Emergency Special Session of the UN General Assembly.

426. *Id.* at 183.

Council in 1979 and 1980,⁴²⁷ but the court did not otherwise buttress its interpretation with any reference to the drafting history of Article 49(6), the understandings at the Geneva Diplomatic Conference, the Nazi behaviors to which Article 49 was directed, or contrary views.

From the court's perspective, its opinion regarding Article 49(6) was hardly *dictum*, however. In addition to protecting the lives of soldiers and Israeli civilians living within the Green Line, protecting Israeli settlers on the West Bank would also explain the positioning of the fence, at least at the time of the court's opinion.⁴²⁸ Implicit in the court's opinion, therefore, was the notion that such a purpose could not serve as justification for constructing a fence on occupied territory. On the other hand, since the court held that any part of the fence lying within the West Bank was unlawful, and not simply parts designed to protect settlers, its view of the scope of Article 49(6) was actually irrelevant to its broad decision with respect to the fence.⁴²⁹ The vote of the court was fourteen to one. While six justices who joined the majority wrote separate opinions, none expressed a difference of opinion with respect to Article 49(6). Justice Thomas Buergenthal wrote the lone dissent and thought the court should have declined to exercise jurisdiction in light of the fact that it "did not have . . . the requisite factual bases for its sweeping findings."⁴³⁰ Nonetheless, he agreed that Article 49 "applies to the Israeli settlements in the West Bank and that their existence violates . . . [Article 49(6)]."⁴³¹ He concluded "that the segments of the wall being built by Israel to protect the settlements are ipso facto in violation of international humanitarian law."⁴³²

In *Elon Moreh*, the 1979 Israeli Supreme Court decision that greatly impacted where subsequent Israeli settlements could be established, Justice Witkon, unlike his other colleagues, was prepared to apply the

427. *Id.* at 184 (citing S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979); S.C. Res. 452, U.N. Doc. S/RES/452 (July 20, 1979); S.C. Res. 465, U.N. Doc. S/RES/465 (Mar. 1, 1980)). Resolution 465 describes "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories [as] a flagrant violation of the Fourth Geneva Convention." S.C. Res. 465, *supra*, ¶ 5.

428. The court stated: "it is apparent from an examination of the map mentioned in paragraph [eighty] above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem)." *Consequences of Wall in Palestinian Territory*, 2004 I.C.J. at 183. However, the positioning of the security fence has shifted a number of times since, sometimes at the instance of questioning by the Israeli Supreme Court. See *infra* notes 436-38 and accompanying text.

429. See Lapidoth, *supra* note 342, at 293 ("[D]iscussion of the legality of the settlements was not necessary, and thus is only an *obiter dictum*." (footnote omitted)).

430. *Consequences of Wall in Palestinian Territory*, 2004 I.C.J. at 240 (Buergenthal, J., dissenting).

431. *Id.* at 244.

432. *Id.*

Fourth Geneva Convention to Israel's control over the West Bank. However, he noted in his concurring opinion, "[T]he question whether voluntary settlement falls under the prohibition of 'transferring sections of the population' within the meaning of Article 49(b) of the Geneva Convention is not an easy one and . . . no answer has yet been found in international jurisprudence."⁴³³ The view expressed by Justice Witkon concerning the applicability of the Fourth Geneva Convention to Israel's control over the West Bank presaged a subtle shift on the part of the Israeli Supreme Court. In later cases, the court measured Israeli actions against the standards of the Convention's humanitarian provisions, in part because the government of Israel, despite its official stance regarding the Convention's non-applicability, claimed its actions conformed to the Convention.⁴³⁴ Despite disagreeing with the ICJ as to

433. 1 MILITARY GOVERNMENT IN THE TERRITORIES, *supra* note 227, at 438 (quoting H CJ 390/79 Dwaikat v. Israel (*Elon Moreh*) [1980] IsrSC 34(1) 1 (Witkon, J., concurring)). Justice Witkon thought the Geneva Convention applied to Israel's hold on the West Bank, unlike the view expressed by Justice Landau that the Geneva Convention "belongs to conventional international law which does not legally bind an Israeli court." *Id.* at 419.

434. Most recently, this "construct" was articulated in *Mara'abe v. Prime Minister of Israel*:

The Judea and Samaria areas are held by the State of Israel in belligerent occupation. The long arm of the state in the *area* is the military commander. He is not the sovereign in the territory held in belligerent occupation. His power is granted him by public international law regarding belligerent occupation. The legal meaning of this view is twofold: [F]irst, Israeli law does not apply in these areas. They have not been "annexed" to Israel. Second, the legal regime which applies in these areas is determined by public international law regarding belligerent occupation. In the center of this public international law stand the [Hague] Regulations. . . . These regulations are a reflection of customary international law. The law of belligerent occupation is also laid out in [the Fourth] Geneva Convention. . . . The State of Israel has declared that it practices the humanitarian parts of this convention. In light of that declaration on the part of the government of Israel, we see no need to reexamine the government's position. We are aware that the Advisory Opinion of the [ICJ] determined that [t]he Fourth Geneva Convention applies in the Judea and Samaria area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned, seeing as the government of Israel accepts that the humanitarian aspects of [t]he Fourth Geneva Convention apply in the area, we are not of the opinion that we must take a stand on that issue in the petition before us. In addition to those two sources of international law, there is a third source of law which applies to the State of Israel's belligerent occupation. That third source is the basic principles of Israeli administrative law, which is law regarding the use of a public official's governing power. These principles include, inter alia, rules of substantive and procedural fairness, the duty to act reasonably, and rules of proportionality.

H CJ 7957/04 *Mara'abe v. Prime Minister of Israel*, at *8-9, (Sept. 15, 2005), http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf (emphasis and internal citations omitted).

whether an occupying power could legally construct a security fence in occupied territory in order to protect its own citizens from terrorism, even if those citizens were settlers,⁴³⁵ the court has required the government to change the shape and scope of the fence to take greater account of the interests of Palestinians.⁴³⁶ In these and other more recent

435. *Id.* The *Mara'abe* case dealt with a petition by residents of several Palestinian villages that were separated from the remainder of the West Bank by the placement of Israel's security fence to protect *Alfei Menashe*, an Israeli settlement in the West Bank four kilometers beyond the Green Line. The court's opinion, by President Justice Aharon Barak, was written in the aftermath of the ICJ's advisory opinion about the security fence, *see supra* notes 425-32 and accompanying text, and was as much a response to the ICJ opinion as it was an adjudication of the rights of the villages affected. The Israel Supreme Court did order the military, "within a reasonable period, to reconsider the various alternatives for the separation fence route at *Alfei Menashe*, while examining security alternatives which injure the fabric of life of the residents of the villages of the enclave to a lesser extent." *Mara'abe*, at 63 (emphasis added).

436. *See* HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2005] IsrSC 58(5) 807. *Beit Sourik* occurred prior to the ICJ opinion, while *Mara'abe* was decided subsequently. Writing for the court in *Beit Sourik*, President Barak laid out the test of proportionality that, according to the court, inheres in both international humanitarian law and Israeli municipal law:

According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it.

Id. at 24. Barak then laid out the subtests, all of which must be satisfied, if proportionality is to be satisfied:

The first subtest is that the objective must be related to the means. . . . According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the 'least injurious means' test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means.

Id. In *Beit Sourik*, the court was convinced the first two subtests of proportionality were satisfied, but disagreed that the requirements of the third subtest had been met in a majority of the instances to which the decision related. Thus, the court ordered the government and military to change the placement of the fence in the objectionable areas. Similarly, in *Mara'abe*, although the court disagreed with the ICJ—both as to whether the safety of Israel's own citizens could be taken into account with respect to the placement of the fence, *Mara'abe*, at 13, and whether international law forbade the construction of the fence in occupied territory—it did determine that particular segments of the fence failed the proportionality test, particularly the third subtest. *Id.* at 63. This trend has continued. In another recent case, the court also required the Israeli government to reconfigure the security fence on grounds of hardship to Palestinian residents or of separation of Palestinians from agricultural lands. *See, e.g., Yuval Yoaz, High Court: State Must Explain Why It Won't Move Separation Fence in Bil'in*, HAARETZ, Feb. 2, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=678112>. In another case, the court enjoined building the security fence around illegal outposts. *See Yuval Yoaz, High Court Forbids Building Fence Round Illegal Avnei Hefetz Outpost*, HAARETZ, Jan. 2, 2006, <http://www.haaretz.com/hasen/pages/>

opinions, the court has seemed less certain that its basis for adjudging Israeli actions on the West Bank according to the Fourth Geneva Convention depends solely upon the government's own claim of adherence to the Convention's humanitarian provisions.⁴³⁷ As David Kretzmer, a prominent critic of settlements, acknowledged, "In the last few years the [c]ourt has also handed down a number of courageous decisions, supportive of human rights."⁴³⁸ Yet, despite this record of attentiveness to Palestinian interests and decisions that have actually restricted governmental and military actions vis-à-vis the Palestinians,⁴³⁹

ShArt.jhtml?itemNo=664913. In general, the Israeli Supreme Court is regarded as one of the most impartial judiciaries in the world and seen as highly protective of Palestinian rights. See DERSHOWITZ, *Is Israel the Prime Human Rights Violator in the World?*, in THE CASE FOR ISRAEL, *supra* note 45, at 181, 183-87; Dorit Beinisch, *The Role of the Supreme Court of Israel in Times of Emergency*, GLOBES, Nov. 21, 2002, available at <http://archive.globes.co.il/english/>. Indeed, the Israeli Supreme Court, particularly under President Justice Aharon Barak, has been criticized precisely for its judgments allegedly adverse to Israeli settlers and security. See Caroline Glick, *Column One: Israel's Judicial Tyranny*, JERUSALEM POST, Nov. 17, 2005, <http://www.jpost.com/servlet/Satellite?cid=1132053877195&pagename=JPost%2FJPArticle%2FShowFull>.

437. For example, in *Mara'abe*, President Justice Barak's opinion termed the basic normative foundation of both the ICJ opinion on the security fence and its own to be "a common one." Specifically, in regard to the Fourth Geneva Convention, he articulated that commonality of normative foundation in the following subtle way:

The ICJ held that in an occupied territory, the occupier state must act according to [t]he Hague Regulations and [t]he Fourth Geneva Convention. That too was the assumption of the Court in [*Beit Sourik*], although the question of the force of [t]he Fourth Geneva Convention was not decided, in light of the State's declaration that it shall act in accordance with the humanitarian part of that convention. The ICJ determined that in addition to the humanitarian law, the conventions on human rights apply in the occupied territory. This question did not arise in [*Beit Sourik*]. For the purposes of our judgment in this case, we assume that these conventions indeed apply.

Mara'abe, at 36.

438. KRETZMER, *supra* note 212, at 14.

439. Kretzmer, writing approximately five years ago, noted:

In the last few years the Court has . . . handed down a number of courageous decisions, supportive of human rights. Foremost among these are decisions forbidding the security services from using any form of physical force in interrogation of terrorist suspects, denying the authorities the power to use the law on administrative detention to hold detainees as 'bargaining chips,' and deeming unlawful restrictions on Arabs purchasing houses in a communal settlement established on state land by the Jewish Agency.

Id. at 14-15 (footnotes omitted). A recent example is a case in which the Israeli Supreme Court, sitting as the High Court of Justice, rebuked the municipality of Jerusalem for having not created enough classrooms for the Arabs of East Jerusalem. The court ordered the Jerusalem municipality and Israel's Department of Education to draft a plan to do so within five months. See Ksenia Svetlova, *H CJ Rebukes Municipality, Education Ministry over Education in E. Jerusalem*, JERUSALEM POST, Nov. 25, 2005, <http://www.jpost.com/servlet/Satellite?cid=1132475619858&pagename=JPCst%2FJPArticle%2FShowFull>; see also Yuval Yoaz, *High Court Bans IDF's 'Early-Warning' Practice*, HAARETZ, Oct. 7, 2005, <http://www.haaretz.com/hasen/pages/>

the court has never held that Israeli settlements, per se, violate international law.⁴⁴⁰

In accord with the ICJ's opinion and the Security Council resolutions mentioned therein, the General Assembly has repeatedly passed resolutions stating that Israeli settlements violate Article 49(6).⁴⁴¹ The Security Council issued three such resolutions during 1979 and 1980.⁴⁴² However, finding references to the application of Article 49(6) to nations other than Israel is like looking for "needles in a haystack." A number of indictments and decisions by the International Criminal Tribunal for the Former Yugoslavia that have considered acts of genocide and forced deportations, primarily those committed by Serbs against Bosnian Muslims,⁴⁴³ and a decision on a motion for acquittal by the International Criminal Tribunal for Rwanda⁴⁴⁴ deal with, or are based upon, a violation of Article 49, along with other provisions from the four Geneva Conventions. However, all references with respect to the Article

ShArt.jhtml?itemNo=632657. Although acknowledging and applauding this activism, Kretzmer seems to partially agree with the view that the Supreme Court has legitimated the actions of Israel on the West Bank "[b]y clothing acts of military authorities in a cloak of legality." KRETZMER, *supra* note 212, at 2. On the other hand, he concedes that questioning and pressure by the court have caused the military and government to back down from decisions or acts under consideration. *See id.* at 190 ("[W]hen the overall picture is considered, the conclusion is far less clear [that the court's legitimating function has dominated], since the [c]ourt's shadow has played a significant role in restraining the authorities.").

440. David Kretzmer suggests that the doctrine of "justiciability" still plays a role. *See id.* at 21. He opines the court accepts the justiciability of individual claims brought by Palestinians on the basis of their property or other rights, but deems the general policy of settlements not justiciable. *See id.* at 22; *see, e.g.*, HCJ 4481/91 Bargil v. Israel [1992] IsrSC 47(4) 210. In other words, the Court's silence on this issue does not necessarily mean that it concurs with the government that the settlements do not violate international law. Further, in *Mara'abe*, the court avoided deciding whether the settlements violate international law because it determined, under the Hague Regulations, the Israeli military administration was responsible not only to provide safety and security for Palestinians on the West Bank but Israeli civilians as well. *See id.* at 13-14. In other words, the duty of protection did not depend upon the legality of the presence of the settlers.

441. *See supra* note 17.

442. *See* S.C. Res. 452, *supra* note 427; S.C. Res. 465, *supra* note 427; S.C. Res. 478, U.N. Doc. S/RES/478 (Aug. 20, 1980). The date of these resolutions, which were adopted during the Carter administration, is significant. While the U.S. State Department during the Carter and George H.W. Bush administrations considered the settlements illegal, it subsequently declined to reiterate that position. The Reagan, Clinton, and George W. Bush administrations have adopted the more frequent formulation that the settlements simply are an obstacle to peace.

443. *See, e.g.*, Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgment (Jan. 17, 2005); Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment (July 29, 2004); *see also* TONY JUDT, *POSTWAR, A HISTORY OF EUROPE SINCE 1945* 665-83 (2005) (describing horrific events on account of which these prosecutions were brought).

444. *See* Prosecutor v. Nyiramasuhuko, Joint Case No. ICTR-98-42-T, Decision on Defence Motions for Acquittal (Dec. 16, 2004).

49 of the Fourth Geneva Convention seem to pertain to Article 49(1) and (2) rather than Article 49(6). Finally, occasionally one finds a non-governmental reference to Article 49 applying to the conduct of a nation other than Israel. For example, in 1994, a non-governmental organization alleged that Article 49(6) was violated in the Chinese transfer of its population into Tibet in order to alter the ethnic composition of Tibet.⁴⁴⁵

Caution in facily concluding that Israeli settlements violate Article 49(6) comes from respect for, rather than disregard of, international humanitarian law. Although elementary, it merits repetition that what distinguishes a system of “law” from arbitrary systems of control is that similar situations are handled alike. No legal system is one-hundred percent pure, of course, but the incompletely achieved goal remains that legal principles are applied based upon the circumstances regardless of the political position or identity of the parties. The loose use of international law, disproportionately applied to Israel’s attempts to protect its citizens, undermines the notion that this is “law” entitled to authoritative weight in the first place.⁴⁴⁶ Where are the legal proceedings and UN General Assembly and Security Council resolutions condemning the forced displacement of Tibetans by Chinese, the movement of Russians into the Baltic States, or other post-1949 transfers in Africa, Asia and Central Europe for violations of Article 49(6)?

445. See U.N. Econ. & Soc. Council [ECOSOC], Int’l Ass’n of Educ. for World Peace, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*, U.N. Doc. E/CN.4/1994/NGO/29 (Feb. 10, 1994). The International Commission of Jurists wrote two reports dealing with Tibet in 1959 and 1960 reporting “genocide,” but neither was based upon Article 49(6) of the Fourth Geneva Convention. See INT’L COMM. JURISTS, THE QUESTION OF TIBET AND THE RULE OF LAW (1959), available at <http://www.tibet.com/Resolution/icj59.html> (excerpt); INT’L COMM. JURISTS, TIBET AND THE CHINESE PEOPLE’S REPUBLIC (1960), available at <http://www.tibet.com/Resolution/icj60.html> (excerpt). As Gerson noted, “The General Assembly limited its response to mild censure and the Security Council was never convened.” GERSON, *supra* note 168, at 19. After the Republic of China assumed the UN post formerly held by the Republic of China (Taiwan), no subsequent resolutions were ever passed.

446. This point is made most emphatically by Michla Pomerance:

Since advisory opinions are inherently nonbinding—and do not gain in legal force when endorsed by the General Assembly or even the Security Council—their authoritativeness depends, naturally, on the persuasiveness of their reasoning. To rise above the level of political discourse and be considered judicial utterances worthy of respect in state practice, they must be seen as thorough and balanced in the presentation of facts and law, fair to the contending interests involved, and internally consistent. Mere ipse dixits obviously cannot substitute for careful judicial explication of the process by which conclusions were reached.

Michla Pomerance, *The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT. L. 26, 36 (2005) (footnote omitted).

Where warranted, of course, Israel should not be immune from the charge that it has violated the Fourth Geneva Convention. However, others have cited the irony of applying the Geneva Convention, drafted and adopted in the aftermath of World War II with the Holocaust specifically in mind, *uniquely* to the state a significant percentage of whose population consists either of Holocaust survivors, offspring, or other relatives of Holocaust victims.⁴⁴⁷ To some, the implied equation of Israeli actions with those of the Nazis forms part of a strategy to demonize and deny legitimacy to Israel, not simply its settlements on the West Bank or particular Israeli policies.⁴⁴⁸ As one legal commentator noted:

In three recent emergency special sessions of the UN General Assembly, Israeli settlement was cited as a violation of the 1949 Fourth Geneva Convention. These international humanitarian instruments, forged in the ashes of the Holocaust to prevent future genocidal brutality and oppression, were never invoked in [fifty] years until the case of condominium construction in Jerusalem during 1998.⁴⁴⁹

Similarly, would it not be ironic if the only application of the Fourteenth Amendment equal protection clause was against African-Americans when the amendment, like the Thirteenth Amendment, was passed in the aftermath of, and directed towards, the end of slavery and its consequences in America?

4. Some Concluding Remarks about the Applicability and Weight to Be Assigned to the Condition of Legality under International Law

In sum, the question of whether, as a general matter, Israeli settlements violate either the various provisions of the Hague

447. See Curtis, *supra* note 116, at 486 ("It is ironic that this charge [that Israel has violated the Geneva Convention] should be made in reference to a convention the purpose of which was to prevent the recurrence of a Nazi-like occupation with its brutality, disregard of human rights, physical and mental coercion, taking of hostages, and imposition of foreign law.") (footnote omitted).

448. See Bradley Burston, *What Makes Islam So Easy to Hate?*, HAARETZ, Jan. 31, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676507> ("The code is clear, and it is communicated to a billion Muslims the world over—these Jews, these are the Nazis now."); Francis A. Boyle, *Israel's Crimes Against Palestinians: War Crimes, Crimes Against Humanity, Genocide*, MEDIA MONITORS NETWORK, Aug. 28, 2001, <http://www.mediamonitors.net/francis7.html>. Boyle served as Legal Adviser to the PLO from 1991 to 1993.

449. See Jeffrey Helmreich, *Diplomatic and Legal Aspects of the Settlement Issue*, JERUSALEM ISSUE BRIEF, Jan. 19, 2003, available at <http://www.jcpa.org/brief/brief2-16.htm>.

Regulations or Article 49(6) of the Geneva Convention is reasonably moot. One should be cautious not to overstate the position of either settlement proponents or opponents.

Many of those who allege a violation of international law acknowledge, indeed try to point out, a distinction between settlements established from the late 1960s until at least 1977, when the Labor led government basically followed the Allon plan, and those established in subsequent years under Likud led governments.⁴⁵⁰ Many if not most of the settlements established under the Allon plan were placed in the Jordan Valley, away from Palestinian population centers, and, wherever placed, were justified by military defense. These settlements, then, at least initially qualified under the “military necessity” standard of the Hague Regulations and hardly affected the Palestinian civilian population.⁴⁵¹ Under later Likud led governments, many if not most settlements were demanded if not forced upon the government by *Gush Emunim* and similar settlement groups. As to the great bulk of these settlements, there is little doubt that almost all settlers were enthusiastic volunteers, who, irrespective of any Israeli tax incentives or other help, would nonetheless have established settlements. As B’Tselem has stated, “The principal method adopted by the [*Gush Emunim*] movement was to settle a given site without government permission—and sometimes contrary to its policy—in an effort to force the government later to recognize the settlement as an accomplished fact.”⁴⁵² Hence, the argument that Israel, as an “occupying power,” had “transferred” the the settlers in violation of Article 49(6) becomes very weak. Similarly, since most Israeli settlements have been established on state rather than private land, the charge that all settlements have been established on “Arab” land should meet with substantial skepticism unless material errors either in the substance or procedure of designating land as “state” land are established.

On the other hand, one should also exercise caution about overstating Israel’s position. When the Hague Regulations and Fourth Geneva Convention are viewed together, there is a sense that Israeli arguments justifying West Bank settlements under one body of law weaken its arguments under the other body. The more one justifies settlements in the West Bank under a doctrine of “military necessity” as a reason to depart from the status quo ante prior to June 1967, the more that justification is incongruous with seemingly permanent civilian

450. Lein, *supra* note 35, at 11-15.

451. Even B’Tselem concedes that, at least when initially established as military bases, the settlements did not violate international law. *See id.* at 40.

452. *Id.* at 13.

settlements. Stated inversely, the more one emphasizes that settlers voluntarily moved to the West Bank rather than at the instance of the Israeli government or its military (to answer an alleged Article 49(6) violation), the more difficult it is to support the justification of “military necessity” under the Hague Regulations for alterations in the West Bank allegedly prejudicial to the native population. Similarly, even if the settlers are legally present because of military necessity, they would not have the right to remain in a Palestinian state any more than Israel’s soldiers present on the West Bank. While, elsewhere, this article presents possible answers to these difficulties—including, inter alia, the opinion of Blum, Rostow, and Stone that Israel’s status on the West Bank cannot be defined solely as an occupying power, the removal of seemingly “permanent” settlements from the Gaza Strip (demonstrating that even the notion of permanence is ephemeral), the fact that the international law of occupation was never formulated with reference to control over a territory for this length of time without final peace agreements, and the absurdity of interpreting international law so as to bar Jews from voluntarily living in an area—just like the frequently reiterated statement that Israeli settlements clearly violate international law, the question of legality is not a “slam dunk” on Israel’s part.

Nonetheless, international law should not be used solely as an instrument of politics. To the extent that it is so used, its legitimacy as a source of law materially suffers, as illustrated by the pointed critiques that followed the ICJ’s advisory opinion on the security fence.⁴⁵³ Given

453. See, e.g., Caplen, *supra* note 326; Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62 (2005); Pomerance, *supra* note 446; Gerald M. Steinberg, *The UN, the ICJ and the Separation Barrier: War by Other Means*, 38 ISR. L. REV. 331 (2005); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self Defence*, 99 AM. J. INT’L L. 52 (2005). Wedgwood even reports that “following the rendering of the [c]ourt’s judgment, foreign ministry legal advisers from varied countries privately conveyed dismay at the opinion.” Wedgwood, *supra*, at 57. The one-sided nature of the facts accepted as the basis for the ICJ’s decision, the cursory nature of its handling of legal materials, and its problematic position that military necessity does not include protection against terrorism emanating from occupied territory, contrast unfavorably with the measured way that the Israeli Supreme Court decided the same questions by applying its proportionality test in *Beit Sourik* and *Mara’abe*. See *supra* note 436. Even Kretzmer criticized the superficial analysis offered by the ICJ:

International mechanisms for ensuring compliance with norms of [international humanitarian law] have always been extremely weak. It is essential that they be strengthened. A major step in this direction has been taken with the establishment of the International Criminal Court. Nevertheless, while this step has been welcomed by many, some experts and a few states, foremost among which are the United States and Israel, remain skeptical. Their skepticism is mainly grounded in the fear that the ICC’s decisions will be dictated by politics rather than by law. In this atmosphere the credibility of international judicial organs involved in assessing compliance with

the paradoxes in applying the international law of occupation, especially Article 49(6) of the Fourth Geneva Convention, which has uniquely and increasingly been the thrust of the charge against the settlements, to Jewish settlements on the West Bank, which have existed for millennia prior to the twentieth century and were rightfully established by the Balfour Declaration and the Palestine Mandate, it is questionable at best to conclude that Jewish settlements *in general* violate international law. By stating the condition negatively -- that Israeli settlements are not demonstrably illegal -- the condition appears to be satisfied. This conclusion, of course, may not hold as to *particular* civilian settlements that, without military necessity, have been established on requisitioned land, civilian settlements established on private Palestinian land subsequent to *Elon Moreh*, or settlements established on land fraudulently purchased or fraudulently designated as state land. While international law cannot be the ultimate arbiter of whether settlements remain, it can influence the decision with respect to particular settlements.

The Oslo Accords,⁴⁵⁴ signed between Israel and the Palestine Liberation Organization in September 1993, specifically left the subject of Israeli settlements, like the subjects of Jerusalem and refugees, to the

[international humanitarian law] becomes more important than ever. This credibility rests largely on the professionalism of such organs and the soundness in law of their opinions. When looked at from this point of view, an opinion whose findings "are not legally well-founded" is hard to applaud.

Kretzmer, *supra* note 341, at 102 (footnote omitted). While several international law scholars applauded the ICJ opinion, particularly Richard Falk, *see* Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AM. J. INT'L L. 42 (2005), at least Falk's reaction could be anticipated in light of his unrelenting opposition to Israel and substantially all of its policies over the last decades. *See, e.g.*, ECOSOC, Hum. Rts. Comm., *Report on the Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, ¶¶ 35-44, UN Doc. E/CN.4/2001/121 (relating Falk's position that Israel could not exercise rights of occupation *bellico* on theory that conflict in West Bank was not international conflict); Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991) (defending intifada with one-sided view of Israeli policies on West Bank). In contrast, other scholars generally supportive of the ICJ opinion, especially its conclusion that the Fourth Geneva Convention applied to Israel's control over the West Bank, wrote more nuanced reviews of the decision. Geoffrey R. Watson, *The "Wall" Decision in Legal and Political Context*, 99 AM. J. INT'L L. 6 (2005) [hereinafter Watson, *The "Wall" Decision*]. Watson's view with respect to the applicability of the Fourth Geneva Convention accords with his earlier writing. *See* GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 136-42 (2000). However, he characterized the ICJ opinion as "primarily retrospective and relatively unconcerned with practical implementation." Watson, *The "Wall" Decision*, *supra*, at 25.

454. OSLO ACCORDS, *supra* note 13.

political process of negotiation.⁴⁵⁵ The 1995 Interim Agreement between Israel and the Palestinian Authority similarly designated settlements and borders as subjects to be negotiated in final status negotiations between the parties.⁴⁵⁶ It is the predominantly and transparently political, social, and security considerations—namely, that continuance of Jewish settlements is both practical and consistent with the creation of a viable Palestinian state—that will and should determine their fate in general.

B. The Condition that Israeli Jewish Settlements Do Not Prevent the Creation of an Independent Palestinian State Necessary for a Two-State Solution

Except for partisans who tend to use legal arguments to score political points, legitimate political issues dominate over legal issues when speaking about Jewish settlements. It is to these political issues that we now turn. The first, heard repeatedly, is that Israeli settlements prevent the establishment of a Palestinian state. The political argument would seem to have two dimensions, one geographical and the other directed towards peoplehood or citizenship.

The most frequent version of this political argument is geographical. In its strongest form, it claims that Israeli settlements prevent a contiguous Palestinian state.⁴⁵⁷ A more moderate form of the geographical argument claims that regardless of the state's contiguity, its borders would be extraordinarily convoluted. A correlative claim argues the settlements, in any event, occupy too much of the land that Palestinians would need for their state.

It is difficult to understand the strong form version because, even if Israel were to retain sovereignty over every existing Jewish settlement on the West Bank, it would be Israel not Palestine that would lack

455. *Id.* Article V provides that negotiations cover the remaining issues, including “Jerusalem, refugees, *settlements*, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.” *Id.* art. V(3). Annex II (“Protocol on Withdrawal of Israeli Forces from the Gaza Strip and Jericho Area”) provides a specific exception for “external security, *settlements*, Israelis, [and] foreign relations,” *id.* Annex II, ¶ 3(b), from “[s]tructure, powers and responsibilities of the Palestinian authority.” *Id.* The Agreed Minutes to the Oslo Accords provides that the jurisdiction of the Palestinian council to be created “will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations: Jerusalem, *settlements*, military locations, and Israelis.” OSLO ACCORDS, *supra* note 13, Agreed Minutes to the Declaration of Principles on Interim Self-Government Arrangements, pt. B, art. IV(1).

456. See Interim Agreement, *supra* note 202, art. XXXI, ¶ 5.

457. See Editorial, *Bush, Abbas Intentions*, BOSTON GLOBE, Oct. 21, 2005, at A16 (“Palestinians perceive continued thickening of settlements as proof that Israel has no intention of allowing a viable Palestinian state on land that is not divided into multiple separate enclaves.”).

contiguity. Further, as previously discussed, while the moderate version has some validity in the abstract, much of its force is undermined by the reality that the land west of the Jordan River must be allocated between two independent states. However, both of these geographical concerns ironically do not apply to the argument made in the article. Acceptance of Israeli Jewish settlements within a Palestinian state would only serve to increase the contiguity and geographical wholeness of that state.⁴⁵⁸

Connected to both the strong and moderate geographical arguments is the assumption, held by the popular press and much of the public, that Israeli settlements constitute a substantial percentage of the land mass of the West Bank. Ironically, Peace Now and B'Tselem, both of which oppose the settlements, estimate the settlements presently occupy 1.36 percent and 1.7 percent of the West Bank, respectively.⁴⁵⁹ To the extent that population clusters of Arabs and Jews should and will influence the borders between Israel and a state of Palestine, at least some of the settlements will be integrated into Israel, probably in exchange for land in the Negev that would broaden the width of Gaza. Moreover, if some settlements are integrated into Israel, the remaining settlements would constitute an even smaller percentage of land on the West Bank, arguably well below one percent. These percentages may rise appreciably to somewhere between three and six percent of the West Bank considering connecting roads and the like.⁴⁶⁰ However, once again, the percentages can only drop if the issue under consideration is not whether the settlements will stay, but under whose jurisdiction they will remain.

The heart of the matter concerns the presence of a population within Palestine that identifies as Israeli Jews. In contrast to the nearly 20 percent of Israel's population that is Palestinian Arab, the 50,000 to 100,000 Jewish settlers that will be most affected by continued Jewish settlements would constitute less than 3 percent of Palestine's population, based upon a present population of approximately 2.3 to 2.5 million Palestinian Arabs within the West Bank and Gaza,⁴⁶¹ and substantially less than 2 percent of such a state if one assumes some influx of Palestinian refugees. Whereas, in the words of Ephraim Karsh, "it is certainly true . . . that the influx of these [Palestinian] refugees into

458. See *supra* notes 123-32 and accompanying text.

459. See Helmreich, *supra* note 449.

460. This was reflected in Washington's proposal between July and December of 2000 that Israel withdraw from ninety-five percent of the West Bank. See Morris, *supra* note 65, at 44.

461. See Arnon Regular, *1.1m Palestinians Live in Local Councils Controlled by Hamas*, HAARETZ, Dec. 18, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=658955>. If the Palestinian Authority's own population figures were used, the Jewish percentage of the total West Bank population would be *de minimus*. See *supra* note 35.

the Jewish State would irrevocably transform its demographic composition,"⁴⁶² the existence of Jewish communities within a Palestine would not pose any demographic risk to Palestine's remaining an overwhelmingly Arab state.

As with Israel's Arab population, the presence of Israeli Jews in a Palestinian state would pose issues of citizenship (will they be citizens of that state or only residents?), loyalty (will the settlers, regardless of whether they gain Palestinian citizenship, remain citizens of Israel?), and legal autonomy in particular spheres. These are serious issues, but it is unclear why they pose more serious problems than those concerning the Arab population in Israel.⁴⁶³ Israel's Arabs, whether Muslim or Christian, exercise legal autonomy in personal affairs.⁴⁶⁴ A recent Israeli survey on patriotism in Israel and its bearing on national security found that "[m]ost of the Israeli Arabs are not proud of their citizenship ([fifty-six] percent), and are not ready to fight to defend the state ([seventy-three] percent)."⁴⁶⁵ Moreover, the survey found differences "between the

462. KARSH, *Right of Return*, *supra* note 43, at 166.

463. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 493-96 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) (providing brief review of legal status of various minority populations within Israel) [hereinafter INTERNATIONAL HUMAN RIGHTS IN CONTEXT]. Nor is the question of autonomy for religious and ethnic minorities unique to Israel or to a future state of Palestine if Jewish settlements remain. See *id.* at 491-93. With respect to loyalty, anecdotal evidence suggests that the problem of "dual loyalty" may be equally as applicable to Israeli Arabs as it would be for Palestinian Jews. See, e.g., Jack Khoury & Nir Hasson, *Two Israeli Arabs Dentist Indicted on Suspicion of Joining Hamas*, HAARETZ, Oct. 24, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=637317>. Haaretz reports that "Arab MKs over the years have become more resolved and effective expressing Palestinian identity and the national Palestinian struggle." Dan Rabinowitz, *The Peretz Challenge to Arab Politics*, HAARETZ, Dec. 1, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=652261>; see Zvi Bar'el, *Absentee Journalism*, HAARETZ, Dec. 11, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=656078> ("Hebrew Jewish society . . . is almost completely missing from the Arab press. . . . Even worse, the leaders of Arab society take no interest in the way Israeli society is covered—or not covered—in the Arab press."). An interesting illustration was the recent suggestion by United Arab List MK Ibrahim Sarsur "that he is willing to accept granting Israeli settlers in the West Bank citizenship of a future state of Palestine as part of a final status peace treaty." Jack Khory, *Arab MK: I Would Agree to Grant Settlers Palestinian Citizenship*, HAARETZ, May 12, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=715018>. With respect to the question of state loyalty, even more remarkable than the substance of the message was the fact that a member of the Israeli *Knesset* was articulating the policy of a future Palestinian state.

464. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 463.

465. Uzi Arad & Gal Alon, *Patriotism and Israel's National Security—Herzliya Patriotism Survey 2006* (Jan., 19 2006), <http://www.imra.org.il/story.php3?id=28218>. One commentator has addressed the nuances in this survey, including the fact that seventy-seven percent of Arabs view Israel as better than other countries. See Alexander Yacobson, *On Israeli-Arab Patriotism*, HAARETZ, Jan. 30, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676221>.

type and expression of patriotism among Jewish citizens . . . and . . . Arab citizens.”⁴⁶⁶ It reported that “[a]mong the latter, patriotic feeling is subdued. When patriotic sentiment is given expression, twice as many Arabs define themselves as Palestinian patriots than as Israeli patriots.”⁴⁶⁷ After the creation of an independent Palestinian state, would not at least some of Israel’s Arab citizens wish to become citizens of that state as well as citizens of Israel?⁴⁶⁸

Moreover, just as conceptions of sovereignty continue to evolve and change,⁴⁶⁹ it is clear that citizenship, a concept related to one’s degree of inclusiveness within a given sovereignty, bears different and evolving meanings. Summarizing a wealth of social scientific learning, Paul Schiff Berman demonstrates, “people can hold multiple, sometimes nonterritorial, community affiliations.”⁴⁷⁰ Traditional and allied notions of citizenship, sovereignty and the “nation-state” are eroding fast, with flexible and contingent forms of these notions replacing the more absolutist, formalistic notions associated with Europe after the Middle Ages. Significantly, under the Oslo Accords, Palestinians in East Jerusalem were allowed to vote in the Palestinian elections, although Israel claims all of Jerusalem as its capital under its jurisdiction.⁴⁷¹

Millions of Americans, to consider another example, hold dual citizenship, retaining their American citizenship even as they live in Ireland, Poland, Israel, Mexico, or elsewhere and also exercise citizenship or attributes of citizenship in these other places. Why would dual citizenship necessarily be more problematic in the context of two

466. Arad & Alon, *supra* note 465.

467. *Id.*

468. This is a very different question than the one Arad discusses. See Arad, *supra* note 70, at 16-18. In discussing and supporting land swaps, Arad admits only one-third of Israeli Palestinians support a land swap that would make them residents and, presumably, citizens of Palestine rather than Israel (parenthetically, he also argues that this percentage would rise for a variety of reasons). *Id.* at 17. But whether Palestinians who are citizens of Israel would like to give up their Israeli citizenship and become citizens of Palestine is a very different question from whether they would like to enjoy dual citizenship.

469. See generally STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (2001); *NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW* (Amos Shapira & Mala Tabory eds., 1999); *SOVEREIGNTY IN TRANSITION* (Neil Walker ed., 2004); Lapidot, *supra* note 193, at 318.

470. See Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005); see also Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 472-90 (2002). Although Berman directs his attention to jurisdictional questions, his analysis is applicable to juridical questions more broadly.

471. See Aluf Benn, *State Seeks Solution for E. J'lem Voters in PLC Elections*, HAARETZ, Dec. 28, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=663125> (discussing difficulties Israel faced in reconciling vote by Jerusalem’s Palestinian population with reality that Hamas was on ballot).

contiguous states? Further, what if the Jewish population, or large numbers of it, chose not to become citizens of Palestine? Again, by way of analogy, approximately 6.6 percent of legal residents in the United States are not citizens.⁴⁷² Provided they legally reside within the United States, these residents enjoy many of the same rights as American citizens, the most notable exception being the right to vote. Arguably, it is optimal to have all persons that permanently reside within a given territory experience all the rights and obligations of others, but this utopian ideal rarely characterizes the situation of any country, especially multi-ethnic nations that also attract immigrants.

Moreover, substantially all *peace* plans proposed that incorporate a two-state solution, with an Israel that can realistically be denominated and remain both a democratic and predominantly Jewish state, also posit that any Palestinian state would be *demilitarized*.⁴⁷³ Without an army, some of the complications that Israel experiences with its Arab population disappear.⁴⁷⁴ Issues of taxation, juridical status for purposes of legal proceedings, and voting are no more intractable in a peace agreement and accompanying treaties than the comparable issues with respect to Palestinians residing within Israel as citizens or entering Israel for employment on a daily basis.

C. The Condition that Continuance Is Practical: Whether Jews and Arabs Can Co-Exist Safely within a Predominantly Arab Palestine

The argument that Jewish settlements obstruct peace frequently devolves to questions related to the ability of Jews and Arabs to safely co-exist in a Palestinian state. Sometimes this view is expressed in terms of “pragmatism,”⁴⁷⁵ that is, although Jews should as a matter of principle be allowed to establish communities on the West Bank, pursuing the continuance option is not a pragmatic solution. The recent victory of Hamas in the Palestinian parliamentary elections has, if anything, heightened such concerns, although many pundits and academics have attributed the Palestinian vote more to the Palestinian Authority’s

472. CensusScope, U.S. Nativity and Citizenship: 1990-2000, http://www.censusscope.org/us/chart_nativity.html (year 2000 estimate based upon total population of 281.4 million and non-naturalized foreign population of 18.6 million).

473. The usual phrase used in the negotiations was “nonmilitarized state.” See ROSS, *supra* note 55, at 720.

474. Generally, Israeli Palestinian Arabs do not serve in the Israeli Army, while Israeli Druze and Bedouin do. Israel justifies this by the unseemliness of requiring Palestinians to fight Arab brethren. Whether or not this justification is convincing, the exclusion of Palestinian Arabs from military service has been criticized because a number of government benefits are based upon military service.

475. See DERSHOWITZ, *Is Settlement in the West Bank and Gaza a Major Barrier to Peace?*, in THE CASE FOR ISRAEL, *supra* note 45, at 176, 176.

incompetence and inefficiency than to Hamas' militant stance towards Israel and Jews.⁴⁷⁶

Both Arabs and Jews have legitimate security and safety concerns. Palestinians have witnessed the destructive, anarchic acts of some Jewish settlers, who, originally armed for their self-protection, have stolen additional munitions from the Israeli military and turned their wrath both against the Israeli military and Palestinians. In several cases, they have killed Palestinians and in other cases beaten them, torched residences, and stolen their olive crops.⁴⁷⁷

Jewish settlers also have good reason to fear for their safety.⁴⁷⁸

476. See, e.g., Fotini Christia & Sreemati Mitter, *Hamas at the Helm*, N.Y. TIMES, Jan. 27, 2006, at A23; Karby Liggett & Neil King, Jr., *Hamas Victory Roils Middle East Peace Process*, WALL ST. J., Jan. 27, 2006, at A1.

477. Amira Hass, Jonathan Liss & Nadav Shragai, *Shin Bet: IDF Did Nothing to Stop Settlers Uprooting Olive Trees*, HAARETZ, Jan. 10, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=668510> (several human rights organizations allege twenty-nine "harvest incidents" occurred between March 2005 and January 8, 2006, and 773 olive trees were uprooted during the last three years; Yesha Council of settlements alleges many incidents resulted from Palestinians pruning or intentionally damaging trees to receive compensation from Israeli military). The recurrence of these incidents, however, indicates the great bulk of damage was caused by settlers. See, e.g., Gideon Alon, *Shin Bet Gives IDF, Police 'Harvest Incident' Suspects*, HAARETZ, Jan. 11, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=668680> (describing allegation Jewish youths cut down olive trees in Hebron area and reporting seventeen "harvest incidents" in 2005, including physical attacks on Palestinian harvesters, theft of harvested olives, and trespassing); David Forman, *Settlers, Hands off the Olive Trees*, JERUSALEM POST, Dec. 27, 2005, <http://www.jpost.com/servlet/Satellite?apage=2&cid=1134309653390&pagename=JPost%2FJPArticle%2FShowFull>; Amos Harel, *IDF Says May Impose Closure on Jewish Areas in Hebron*, HAARETZ, Jan. 15, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=670191> (Israeli settlers, reacting violently to orders issued by Israeli military to evacuate shops in Hebron, rioted, including torching home belonging to Palestinians); Amos Harel, *Security Forces Demolish Amona Homes Amid Violent Clashes*, HAARETZ, Feb. 2, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676627> (describing beatings of Arabs and torching of cars, as well as violence by settlers against Israeli Army in anticipation of forced evacuation of illegal settlement on West Bank); Arnon Regular & Eli Ashkenazi, *Palestinians: Settlers Cut Down 200 Olive Trees near Nablus*, HAARETZ, Nov. 27, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=650475>; Ze'ev Schiff, *Anarchy on the Hilltops*, HAARETZ, Nov. 18, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=647209>. Even more recently, settlers in the illegal outpost of *Maon Farm* have reportedly attacked Palestinian children walking to school, necessitating a military escort. See Michal Greenberg, *IDF Jeeps, Soldiers Escort 15 Palestinian Children Home from School Past Illegal Maon Farm Outpost*, HAARETZ, May 14, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=715421>.

478. See Raphael Israeli, *The New Muslim Anti-Semitism: Exploring Novel Avenues of Hatred*, JEWISH POL. STUD. REV., Fall 2005, at 97, available at <http://www.jcpa.org/phas/phas-israeli-f05.htm>; Glenn Kessler, *Palestinian Leader is Urged to Confront Militant Groups*, WASH. POST, Oct. 21, 2005, at A14; Mortimer B. Zuckerman, *Abbas Must Act*, U.S. NEWS & WORLD REP., Oct. 31, 2005, www.usnews.com/usnews/opinion/articles/051031/31edit.htm.

Sectarian hatred is a common phenomenon in the Middle East.⁴⁷⁹ Even Christian Palestinian Arabs have increasingly faced discrimination and physical violence from Muslims.⁴⁸⁰ Jews face even greater hostility. Sermons and speeches, broadcast on the official Palestinian Authority radio station, continually desecrate Jews and Judaism, calling them the children of pigs and monkeys, and implore Arab Muslims to kill all Jews and drive them from Palestine (a term that includes all of even pre-1967 Israel).⁴⁸¹ Indeed, during Ramadan the past several years, serial dramas based upon the Czarist produced forgery, *Protocols of the Elders of Zion*, have been broadcast on Arab television, including on stations under the control of the Palestinian Authority and stations in Egypt (with whom Israel has a peace treaty) and Syria.⁴⁸² Very recently, Mahmoud

479. Witness the horrendous violence exhibited by Sunnis and Shi'ites in Iraq. See Sabrina Tavernise, *Sectarian Hatred Pulls Apart Iraq's Mixed Towns*, N.Y. TIMES, Nov. 20, 2005, § 1, at 1.

480. See generally WEINER, *supra* note 90. Weiner ascribes this to the emergence of Islam as a political force, pointing out the draft constitution of the Palestinian Authority declares Islam to be the official religion and includes Sharia Law. Specifically, Weiner details the social and economic discrimination against Christians, the boycott and extortion of Christian businesses, violation of real property rights, crime against Christian Arab women, Palestinian Authority incitement against Christians, and failure of the Palestinian security forces to protect Christians. He concludes, "The reversion to traditional Muslim religious attitudes necessarily includes the treatment of Christians as second-class citizens or dhimmi." *Id.* at 22 (emphasis omitted). In other words, Christians, as non-Muslims, face the same second class status that characterized minority communities in the Islamic Middle East for centuries, especially its Jewish communities.

481. See generally Itamar Marcus & Barbara Crook, *Kill a Jew—Go to Heaven: The Perception of the Jew in Palestinian Society*, JEWISH POL. STUD. REV., Fall 2005, at 119, available at <http://www.jcpa.org/phas/phas-marcus-crook-f05.htm>. The authors write:

The Palestinian religious, academic, and political elites teach an ideology of virulent hatred of Jews. The killing of Jews is presented both as a religious obligation and as necessary self-defense for all humankind.

Palestinian Authority elites have built a three-stage case against Jewish existence, much as a prosecutor might build a case demanding a death sentence. As their expert witness, they bring Allah Himself, Who is said to have sent a message through the Prophet Muhammad that killing Jews is a necessary step to bring Resurrection. Stage 1 is characterized by collective labeling of Jews as the enemies of Allah, possessing an inherently evil nature. Stage 2 teaches that because of their immutable traits, Jews represent an existential danger to all humanity. Stage 3 presents the necessary solution predetermined by Allah: the annihilation of Jews as legitimate self-defense and a service to God and man.

Id.; see Justus Reid Weiner & Michael Sussman, *Will the Next Generation of Palestinians Make Peace with Israel?*, JERUSALEM VIEWPOINTS, Dec. 1, 2005, available at <http://www.jcpa.org/jl/vp537.htm> ("The idea of the *shahid* (martyr) has become so ingrained in Palestinian culture that it is a major theme in formal education, family values, religious practices, television broadcasting, posters, pre-suicide eulogies, trading cards, family celebrations, movies, music, games, and summer camps.").

482. See Palestinian Media Watch, *Bulletins Prepared and Edited by Itamar Marcus*, <http://www.pmw.org.il/Protocols.htm> (last visited Aug. 18, 2006); see also Middle E. Media Research Inst., *Ramadan TV Special: The Protocols of the Elders of Zion* (Dec. 6, 2001), available at <http://www.memri.org/bin/articles.cgi?Area=sd&ID=SP30901>.

Ahmadinejad, the president of Iran, pronounced that "Israel must be wiped off the map."⁴⁸³ Iran sponsors both Hezbollah, which fights Israel from Southern Lebanon, and Islamic Jihad, which, operating both out of Gaza and the West Bank, engages in terrorism against Israeli civilians, both within the 1948 borders and on the West Bank; neither of these groups accept the legitimacy of Israel.⁴⁸⁴ Moreover, even after the Israeli withdrawal from Gaza, scores of terrorist incidents have been attempted, and a few have succeeded.⁴⁸⁵ In the immediate aftermath of the Palestinian elections, the Hamas leadership seemingly remains committed to its retention of guns and the legitimacy of specifically targeting civilians.⁴⁸⁶

Yet important voices of moderation do exist, accepting the legitimacy of Jews living within the midst of a greater Arab population.⁴⁸⁷ Undoubtedly, guarantees of safety, free travel, and the like would have to be extended to Jewish communities before they would feel safe and agree to stay in an Arab Palestine. The world has rushed to create a Palestinian state on the assumption that it would decrease the level of Islamist terror that Israel and Western countries, both the United States and in Europe, have experienced. Whether, in fact, the creation of

483. See Martin Indyk, *Iran's Bluster Isn't a Bluff*, L.A. TIMES, Nov. 1, 2005, <http://www.latimes.com/news/opinion/commentary/la-oe-indyk1nov01,0,2800045.story?coll=la-news-comment-opinions>. Indyk, Director of the Saban Center for Middle East Policy at the Brookings Institution, is a former U.S. ambassador to Israel and Assistant Secretary of State for Near East Affairs.

484. See *id.*

485. For example, on October 26, 2005, a Palestinian suicide bomber killed five Israelis in the town of *Hadera*. See Greg Myre & Dina Kraft, *Palestinian Suicide Bomber Kills 5 in an Israeli Town*, N.Y. TIMES, Oct. 27, 2005, at A3.

486. See Steven Erlanger, *After the Elections: The Leadership; Hamas Leader Sees No Change Toward Israelis*, N.Y. TIMES, Jan. 29, 2006, § 1, at 1; Nidal al-Mughrabi, *Hamas Says It Won't Arrest Militants Who Attack Israel*, REUTERS, Mar. 23, 2006, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=697914>; Editorial, *Meshal: Hamas Ready to Merge Armed Factions to Form PA Army*, HAARETZ, Jan. 28, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=675793>; Interview by Bernard Gwertzman with Matthew Levitt, Senior Fellow, Wash. Inst. for Near E. Policy (Mar. 20, 2006), <http://www.cfr.org/publication/10189/levitt.html>; see also Jonathan Adiri, *From Mahmoud Abbas to Mahmoud Hamas*, YNET NEWS, Feb. 19, 2006, <http://www.ynetnews.com/articles/0,7340,L-3218458,00.html>.

487. See, e.g., Walid Salem, *Address the 'Jewish Question' Without Resorting to Propaganda*, DAILY STAR, Nov. 8, 2005, available at www.dailystar.com.lb/article.asp?edition_id=10&categ_id=5&article_id=19863#. Salem is the director of the East Jerusalem office of Panorama, the Center for the Dissemination of Democracy and Community Development. Sari Nusseibah, President of Al Quds University in East Jerusalem, is another key voice of moderation. See, e.g., Alan Cowell, *End to Boycott of Israeli Universities is Urged*, N.Y. TIMES, May 20, 2005, at A8; David Horowitz, Op-Ed., *A Glimmer of Peace*, N.Y. TIMES, Mar. 10, 2004, at A27. Salem and Nusseibah differ from others, whose calls to integrate Jews into Arab society are part of a strategy to advocate one multi-ethnic state, with Arabs in the majority, rather than two states.

a Palestinian state would decrease Islamic terrorism against the West generally is beyond the realm of this paper, but the nexus between a Palestinian state and Palestinian acceptance of Israel or a decrease in terrorism directed towards Israel increasingly appears to be wishful thinking.⁴⁸⁸

Indeed, the mere creation of a Palestinian state, without more, would not be a panacea. There are preconditions to such a state, not as a matter of theory or wishful thinking, but as a matter of reality. These conditions include the dismantling of terrorist organizations,⁴⁸⁹ the monopoly of force by a Palestinian police force, demilitarization,⁴⁹⁰ and economic viability.⁴⁹¹ It is not simply a matter of acceding to Israel's interest or that of Jews who may be living in a Palestinian state. As even Adam Roberts, who is sympathetic to the Palestinian view of Israeli settlements, has observed:

[O]n the Palestinian side, the belief that self-determination is an internationally recognized right still sometimes involves a corollary reluctance . . . to accept that there might be any obligation on Palestinians to demonstrate (to Arab states as much as to Israel) that a future Palestinian state would be a stable and responsible member of international society, accepting frontiers, regimes and rules of coexistence.⁴⁹²

A recent suggestion by Amnon Rubinstein, the founder of *Shinui*, one of

488. See Ze'ev Schiff, *The Hope That Turned False*, HAARETZ, Dec. 9, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=655822> ("In recent months, Israel has shown an openness that it has not displayed in the past: the disengagement from Gaza and evacuation of the settlements, the opening of the Rafah passage between Gaza and Egypt, and the agreement allowing European Union monitors at the passage. . . . The response by the Palestinian gangs was to step up the Qassam rocket fire from northern Gaza. . . . And who's among the shooters? Not only Islamic Jihad members, but also those belonging to Al Aqsa Martyrs Brigades of Fatah, Abu Mazen's organization.").

489. See Press Statement, Middle East Quartet, Statement on Palestinian Legislative Council Elections (Dec. 28, 2005), http://www.un.org/news/dh/infocus/middle_east/quartet-28dec2005.htm ("[T]hose who want to be part of the political process should not engage in armed group or militia activities, for there is a fundamental contradiction between such activities and the building of a democratic state.").

490. See Uzi Arad, *No Free Rides: Tangible Israeli Gains Required if Palestinian State is Established*, Oct. 11, 2005, YNET NEWS, <http://www.ynetnews.com/articles/0,7340,L-3153931,00.html>; Mazal Mualem, *Kadima Platform Calls for Jewish Majority, Territorial Concessions*, HAARETZ, Nov. 29, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=651003>.

491. This undoubtedly explains why the World Bank and various donor countries are presently pumping almost a billion dollars into Gaza after Israel's disengagement. See Agence France Presse, *Aid for Gaza Aimed to Jump Start Economy*, DAILY STAR, Oct. 12, 2005, available at http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=3&article_id=19231; see also *infra* notes 501-08 and accompanying text.

492. Roberts, *supra* note 208, at 78-79.

Israel's most liberal parties, and dean of an Israeli law school, is, in the absence of a control of the violence, to establish a new mandate for the West Bank under the trusteeship of either the European Union or Jordan (with Egypt having the trusteeship for the mandate over Gaza), with Palestinian sovereignty held in abeyance.⁴⁹³

The military, political and economic conditions interrelate. Apart from the Arab-Jewish question, the lack of a monopoly of force in the governing authority threatens the very existence of governing authority and the population it governs.⁴⁹⁴ A failure to rid the territory that becomes the Palestinian state of various forces "contributes to the anarchy in Palestinian society, to gangland rule,"⁴⁹⁵ that is, it makes the creation of a civil state nearly impossible.⁴⁹⁶ As the London Telegraph recently editorialized:

Mahmoud Abbas's chronic inability to contain Palestinian violence . . . has serious implications both for democracy in the areas under Palestinian authority and for relations with Israel. A man . . . unable to keep his side of the bargain in the peace talks is failing those he governs. . . .⁴⁹⁷

Private investment necessary for economic revival will be difficult in the context of a general state of lawlessness.⁴⁹⁸ Of course, a corollary of

493. See Amnon Rubinstein, Op-Ed., *Mandate for Palestine*, JERUSALEM POST, Dec. 26, 2005, <http://www.jpost.com/servlet/Satellite?cid=1134309653376&pagename=Jpost%2FJPArticle%2FShowFull>.

494. See, e.g., Khaled Abu Toameh, *Two Suspected Collaborators Killed in Gaza Hospital*, JERUSALEM POST, Aug. 3, 2004, at 1; Ibrahim Barzak, *Fatah Gunmen Clash with Palestinian Police*, BOSTON GLOBE, Mar. 21, 2006, at A10.

495. Ze'ev Schiff, *The Hope That Turned False*, HAARETZ, Dec. 9, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=655822>.

496. See, e.g., Barry Rubin, *Palestinian Politics*, TURKISH DAILY NEWS, Nov. 25, 2005, www.turkishdailynews.com.tr/article.php?enewsid=29289 (describing "anarchy and the continuing cult of violence" that prevents political progress). Aaron Miller, an advisor to six presidents on the quest for Middle East peace, concurs:

Armed struggle as a tactic has been a disaster. . . . [T]he gun has also wreaked havoc on the Palestinian society and image. Suicide terrorism has not only alienated Israel and America but also pushed them closer together. And without Israel and America, a Palestinian state will be stillborn.

Aaron David Miller, *The Palestinians' Crisis of Leadership*, WASH. POST, Jan. 24, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/23/AR2006012301256.html>.

497. Editorial, *Democracy in Palestine*, *supra* note 123.

498. The lack of investment in Gaza since the withdrawal of Israeli settlers and soldiers has been ascribed to lawlessness, perceived corruption in the Palestinian Authority, and the lack of border outlets for exports. See Steven Erlanger, *With Sharon Ill, Palestinians Face Own Travails*, N.Y. TIMES, Jan. 8, 2006, § 1, at 1 ("The combination of the security chaos in Gaza and in large parts of the West Bank . . . is likely to drive off foreign investors. . . . Yet it is only investment and job creation that can offer enough jobs for the growing population of young men."); Harvey Morris,

centralization of force and police-keeping in a Palestinian central government is that Jews also must be barred from militia-like activity and, for that matter, bearing unauthorized arms. To some settlers, this might be anathema,⁴⁹⁹ but that would be a condition to remaining within a Palestinian state.

Additionally, a Palestinian state must be economically viable. Otherwise, there can be little doubt that rather than constituting an answer to the scourge of terrorism, the state would become another and important base for it. For the foreseeable future, there is little doubt that to be economically viable, large numbers of Palestinians, arguably in excess of 100,000,⁵⁰⁰ would have to come into Israel to work every day, as they did prior to the first and second intifadas.⁵⁰¹ The most recent World Bank report calculates unemployment in the West Bank at twenty-eight percent, with approximately fifty-seven percent of workers receiving wages below the poverty line.⁵⁰² An extraordinarily high

Palestinians Grow Frustrated Waiting for the Expected Economic Recovery, FINANCIAL TIMES, Nov. 29, 2005, <http://news.ft.com/cms/s/262b2110-607d-11da-a3a6-0000779e2340.html>.

499. Ze'ev Schiff has described certain settlers as "right wing anarchists," originally armed for their self-protection, who "have been involved in an entire slew of illegal and violent activities against the Palestinians in recent years, among them beatings and stealing their olive crops." See Schiff, *supra* note 477.

500. See *Long-Term Policy Options for the Palestinian Economy*, WEST BANK & GAZA UPDATE (World Bank Group, Washington, D.C.), Dec. 2002, at 1, available at http://www-wds.worldbank.org/external/default/WDSContentServer/TW3P/IB/2003/08/14/00160016_20030814165921/Rendered/PDF/263360PAPER0GZ0News0Update0.pdf.

501. The World Bank estimates the number at almost 150,000 in mid-2000 prior to the recent intifada. See WORLD BANK GROUP, *supra* note 135, at 6; Associated Press, *Israeli Aircraft Fire on Gaza Rocket Labs*, ABC NEWS, <http://abcnews.go.com/International/wireStory?id=1370965&CMP=OTC-RSSFeeds0312> ("The entry of Palestinian laborers into Israel has been severely restricted over the past five years in response to violence, dealing a crushing blow to the Palestinian economy."); Associated Press, *UN Report: Poverty Rising in Palestinian Areas, Despite Cease-Fire*, HAARETZ, Dec. 8, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=655553> ("[J]oblessness is three times higher than what it was before fighting broke out in late 2000 . . . [caused by] continued Israeli closures and other travel restrictions as drags on the economy. During spikes in violence, Israel restricts Palestinian movement to stop militants from launching attacks."); Akiva Eldar, *U.S. to Israel: Gaza Convoys Must Start This Week*, HAARETZ, Dec. 11, 2005, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=656089> ("[A] new report prepared by the World Bank . . . attributed most of the PA's economic problems to various movement restrictions imposed by Israel, including limitations on the number of Palestinians working in Israel. . ."). While Hamas leaders, at least prior to forming the new government, have stated they want an economy independent of Israel, see Orly Halpern & Associated Press, *Hamas Plans Independent Economy*, JERUSALEM POST, Feb. 9, 2006, <http://www.jpost.com/servlet/Satellite?apage=1&cid=1139395371192&pagename=JPost%2FJFJArticle%2FShowFull>, accomplishing that goal presently seems remote and more reflective of their anti-Israel political stance than objective economic reality.

502. Akiva Elder, *UN Report: Joblessness and Poverty on the Rise in Territories*, HAARETZ, Dec. 13, 2005, <http://www.haaretz.com/hasen/pages/>

unemployment rate raises serious questions about whether a state at peace with its neighbors can be created, especially one that lacks the oil resources of some other Arab nations. One analyst at the World Bank, researching policy options for the West Bank as well as Gaza, cited the fact that “Palestinians earn [ninety-one percent] more in Israel than in [the West Bank and Gaza],” and concluded that “it is paramount for [the West Bank and Gaza] to maintain access to Israel’s labor market, irrespective of the trade policy between Israel and [the West Bank and Gaza].”⁵⁰³ Recent economic studies of the Arab Middle East reveal very high unemployment rates throughout the Arab Middle East,⁵⁰⁴ making it unlikely that Palestinian excess labor could be absorbed by other Arab states, even assuming a willingness to do so.

Aside from employment within Israel, open or relatively open borders are necessary for the export of goods from those industries within a Palestinian state.⁵⁰⁵ As the World Bank reports, “All Palestinian trade flows to or through Israel: for the small trade-dependent Palestinian economy, therefore, the smooth operation of the bilateral passages between Gaza, the West Bank and Israel is essential.”⁵⁰⁶ It may be possible to separate Israel and the Palestinians politically, but an economic separation will take many, many years.⁵⁰⁷

ShArt.jhtml?itemNo=657006.

503. Maurice Schiff, *Trade Policy and Labor Services, Final Status Options for the West Bank and Gaza* 26 (World Bank Development Research Group, Policy Research Working Paper 2824, 2002), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/05/14/000094946_0205010411325/Rendered/PDF/multi0page.pdf. While another World Bank Report has argued in favor of greater economic separation “aimed at diversifying the Palestinian economy away from Israeli dependence in favor of greater integration with global markets,” *Long-Term Policy Options for the Palestinian Economy*, *supra* note 500, at 5, even this report acknowledges that “this scenario is associated with significant unemployment.” *Id.* at 6.

504. See Nirod Raphaeli, Unemployment in the Middle East—Causes and Consequences (Feb. 10, 2006), <http://memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA26506> (while International Labour Organisation reports unemployment rate of 13.2 percent for Middle East and North Africa—even higher than Sub-Saharan Africa, the poorest region in the world—Arab League Economic Unity Council estimates even higher rate among its members).

505. Analogously, when Israel, based upon its stated security concerns, closed the entrances to Gaza, James Wolfensohn scolded Israel for strangling Gaza’s economy. Wolfensohn, former president of the World Bank, presently serves as an emissary of the United States, Russia, UN, and EU to oversee the use of donor funds in the economic development of Gaza. See Greg Myre, *Envoy in Mideast Peace Effort Says Israel Is Keeping Too Tight a Lid on Palestinians in Gaza*, N.Y. TIMES, Oct. 25, 2005 at A8.

506. WORLD BANK GROUP, *supra* note 135, at 11.

507. This is essentially the point that David Brooks makes with respect to a general Israeli policy of “disengaging” from the Palestinians. Disengagement, according to Brooks, is “not an option because while Israelis may no longer be dependent on the Palestinians, the Palestinians remain dependent on them.” David Brooks, Op-Ed., *What Palestinians?*, N.Y. TIMES, Nov. 17, 2005, at A31.

In what way do these economic data and analyses bear on the question of whether it would be pragmatic to pursue the continuance option? *The only circumstances under which it would be safe for Israel to accept huge numbers of Palestinians for employment and exports from industries within Palestine, without fear of terror, are the same circumstances under which it should be safe for Jews to live in a Palestinian state.* The exact nature of the guarantees of safety and rights need not be spelled out here, but the presence of Israeli armed forces ready and willing to protect endangered Israeli Jews can be a spur to a truly open and civil Palestinian society. Further, if this kind of society is not what the Palestinians desire and, if permitted, design as their state, there is little reason to allow its independence. As two observers of Palestinian society have written, “A peace agreement can only successfully end a conflict if it enjoys underlying, wide-ranging support from its respective populations.”⁵⁰⁸

Moreover, the question of whether Jews are allowed to stay in their communities in land considered *Eretz Yisrael*, even if not *Medinat Yisrael*, should be answered by the communities. Under the right circumstances, just as Israeli Jews live in New York, Los Angeles, and Boston, these same Jews might well decide, for religious and other reasons, to remain. It should be their choice.

V. Conclusion

Two narratives indeed compete.⁵⁰⁹ According to one, the Palestinian Arabs were “there” first, the Jews came and, as imperialists or colonists, “took” the Arab land and displaced the native population.⁵¹⁰ But blind acceptance of this narrative, intentionally in the case of some commentators,⁵¹¹ completely obliterates even the affirmative elements of

508. Weiner & Sussman, *supra* note 481.

509. Compare, e.g., Charles Moore, Op-Ed., *How Did We Forget That Israel's Story Is the Story of the West?*, TELEGRAPH, Nov. 26, 2005, <http://www.opinion.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2005/11/26/do2602.xml&sSheet=/opinion/2005/11/26/ixopinion.html>, with Scott Wilson, *A Dig Into Jerusalem's Past Fuels Present-Day Debates*, WASH. POST, Dec. 2, 2005, at A1 (“Whether [King] David was a tribal chieftain or visionary monarch matters deeply to the Jewish historical narrative. . . . Palestinian leaders . . . dismiss the ancient story as politically useful fiction.”). An official organ of the Palestinian Authority terms a Jewish nexus to Jerusalem as a “fabricated heritage.” See Press Release, Palestinian Nat'l Auth. State Info. Serv., Israel Funds Construction Acts Beneath Al Aqsa Mosque at the Cost of 68 Million (Dec. 13, 2005), http://www.ipc.gov.ps/ipc_new/english/details.asp?name=12400.

510. See *supra* notes 91-97 & 104-111 and accompanying text (describing several different versions of narrative).

511. See, e.g., Justin Keating, *Justin Keating on Israel*, DUBLINER, Nov. 2005 (“Zionists have absolutely no right in what they call Israel. . . . [T]hey have built their

the Jewish narrative that relate the several millennia connection between the land that Jews refer to as *Eretz Yisrael* and the Romans renamed *Palaestina* in an effort to sever that connection. According to Ephraim Karsh, “So successful has this misrepresentation of the historical truth [(the narrative that portrays ‘Israel as an artificial neo-crusading entity created by Western imperialism’)] been that what began as propaganda has become conventional wisdom, with aggressors portrayed as hapless victims and victims as aggressors.”⁵¹²

The Palestinian narrative has now become dominant,⁵¹³ and it is

state not beside but on top of the Palestinian people, and . . . there can be peace as long as contemporary Israel retains its present form.”).

512. KARSH, *Preface* to RETHINKING THE MIDDLE EAST, *supra* note 42, at xii.

513. See, e.g., Strawson, *supra* note 110; John J. Mearsheimer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, (Harvard Univ. John F. Kennedy Sch. Gov’t, Working Paper No. RWP06-011, 2006), available at [http://ksnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP06-011/\\$File/rwp_06_011_walt.pdf](http://ksnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP06-011/$File/rwp_06_011_walt.pdf) (suggesting narrative’s acceptance in other academic disciplines). To buttress their case that an “Israel Lobby” controls United States’ foreign policy in the Middle East, Mearsheimer and Walt first belittle the “moral case” for Israel. *Id.* at 8-14. Reactions to the paper have come fast and furious, including an extended refutation by Benny Morris, see Benny Morris, *And Now For Some Facts: The Ignorance at the Heart of an Innuendo*, NEW REPUBLIC, May 8, 2006, at 23, on whose scholarship Mearsheimer and Walt repeatedly rely. See, e.g., Mearsheimer & Walt, *supra*, at 48 n.24, 50 nn.34-35. In Morris’ words, “Like many pro-Arab propagandists at work today, Mearsheimer and Walt often cite my own books. . . . Yet their work is a travesty of the history that I have studied and written for the past two decades. Their work is riddled with shoddiness and defiled by mendacity.” Morris, *supra*, at 23. The dominance extends beyond academia. Walter Reich has observed how the popular media have accepted the Palestinian narrative:

With regard to the “narrative” of the Israeli-Palestinian conflict following the establishment of Israel in 1948, until a few decades ago the American and European narrative was, in the main, one that was favorable toward Israel. This “narrative,” or story, was that of a justifiable, necessary and heroic return by Jews to their homeland.

. . . .

The public’s understanding of the conflict and its background has changed in recent decades, and in some ways radically. More and more, the Palestinian “narrative” has affected the way in which the Israeli-Palestinian conflict is presented in the media—in newspapers, television and film—and has, as a result, affected the way in which the public understands it.

Postings of Walter Reich to Rosner’s Guest, *supra* note 107. For example, *Paradise Now*, a film about Palestinian suicide bombers, won the 2005 Golden Globe award for Best Foreign Film. See *Suicide Bomb Film Scoops US Prize*, BBC NEWS, Jan. 17, 2006, http://news.bbc.co.uk/2/hi/middle_east/4620160.stm. While the film is not supportive of suicide bombing, it adopts the Palestinian narrative and, in the words of the filmmaker, “trie[s] . . . to explain why two seemingly simple garage mechanics would be willing to kill themselves and others.” *Palestinian Film on Suicide Bombers Wins Golden Globe*, REUTERS, Jan. 17, 2006, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=671378>; see Gerald M. Steinberg, *Funding NGOs Is No Solution*, JERUSALEM POST, Feb. 11, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395389604&pagename=JPost%2FJPArticle%2FShowFull> (describing how NGOs “repeat the Palestinian version of history that labels Israel as ‘colonialist’”).

probably that narrative's unquestioned and uncritical acceptance, rather than particular arguments or claims made and addressed above, that most accounts for the near universal acceptance of the proposition that, in any final peace deal between Israel and a Palestinian political authority (whether the Palestinian Authority, or not), all Jewish settlements would have to be abandoned. Indeed, if one adopts all aspects of the narrative, then acceptance of the Jewish State of Israel is simply a concession to a present geo-political reality rather than an acknowledgement that Jews, too, have rights. Conscious awareness and rejection of those parts of the Palestinian narrative that deny any nexus between Jews and the land would allow for a more critical examination of the assumption that the territory included in a Palestinian state must be completely free of Israeli Jewish settlements. The challenge is to move beyond political narratives to deal with the reality and desirability of these settlements. To what degree should the presence of Jewish settlements affect the final boundaries of Israel vis-à-vis a nascent Palestinian entity? Must the Palestinian state be free of Jews?

The presence and location of Jewish settlements surely should and will influence the ultimate boundary between Israel and a Palestinian state. If the *raison d'être* of Israel is that it is a Jewish albeit democratic state, its Jewish majority should not be threatened by an Arab minority that has a realistic chance of becoming a majority. Israel as a haven for Jews around the world will disappear. The approximately twenty percent of Israel's present population that is Arab does not threaten Israel's Jewish character. Similarly, if the *raison d'être* of a future Palestinian state is to provide a political sovereignty for Arabs who identify themselves as Palestinians, whether or not they reside in that state, Palestine's Arab identity should not be threatened by a Jewish minority that could become a majority. Two conclusions flow from this construct.

First, indeed, some Jewish settlements like *Ma'ale Adumim* that are contiguous or substantially contiguous to the 1967 borders of Israel will surely remain part of Israel in any final settlement,⁵¹⁴ with land swaps most likely in the area of the Negev that would broaden the waist of Gaza. This was basically Prime Minister Ehud Barak's offer at the 2000 summit at Camp David with Chairman Yasir Arafat and in the negotiations that followed. Further, even some of the most pro-Palestinian Israeli politicians, like former Foreign Minister Yossi Beilen,

514. While it seems clear that Jewish settlements in the Hebron area, if they are to remain, would become part of Palestine, and a settlement such as *Ma'ale Adumim*, on the outskirts of Jerusalem would be incorporated within Israel, the fate of many settlements seems not straightforward. See Matthew Gutman, *Beit Arieh Won't Be Abandoned—Sharon*, Nov. 9, 2005, JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1131367050883&pagename=JPost%2FJPArticle%2FShowFull>.

now a head of the *Meretz* party, acknowledge the need for border adjustments to integrate into Israel those settlements that border or substantially border the Green Line and house close to 80 percent of the approximately 250,000 settlers on the West Bank.

Second, the remainder of the settlements and the Jewish settlers there, including those in the Hebron area, need not be the obstacle to a peace settlement that is commonly portrayed. Even if 100,000 settlers remain (a rather high estimate, if major settlement blocs contiguous to the Green Line are incorporated into Israel in exchange for other Israeli land), that number would probably constitute no more than 2 percent of the population of a Palestinian state and probably less. Further, the land area of those settlements would constitute considerably less than two percent of the land under Palestinian sovereignty.

Let us return to the African-American analogy tendered at the beginning of this article. Most Americans, especially liberal Americans, would never think that the solution to conflict within a predominantly white-ethnic neighborhood, whether Irish, Italian, or other, would be to remove African-American families. Rather, substantial resources would be devoted to insuring that the neighbors respect the new inhabitants. Instead of reiterations of the assumption that the settlements are an obstacle to peace, thought and resources should be devoted to a serious discussion of the context and conditions under which Jews might continue to live on the West Bank. While both reason and justice support the creation and co-existence of two states west of the Jordan River, neither justice nor other reason is served by requiring that one of these states be free of Jews.

