Legal Aspects of Settlement Evacuation

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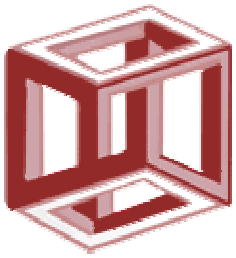

PROGRAM ON NEGOTIATION
HARVARD LAW SCHOOL

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PREFACE

ROBERT H. MNOOKIN

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PREFACE

In early 2003, the Harvard Negotiation Research Project ("HNRP") initiated a project to explore issues related to the conflict within Israel*, among Israeli Jews*, concerning the future of the Israeli settlements in the West Bank and Gaza. While at the time there was little immediate prospect that any settlers would be forced to relocate, either because of a bilateral agreement with Palestinians or by reason of a "unilateral" initiative by the Israeli government, I believed there was a high probability that the day would come when an Israeli government would seek to require thousands of its citizens to abandon their homes and move. That this possibility existed was hardly news. But what I found surprising and troubling was the near total absence of relevant policy research and constructive dialogue within Israel about the legal, political, economic, ideological and religious challenges that would be posed by relocation. Questions about the future of the settlements are the "third rail" of Israeli politics: the political danger it poses prevented for decision-makers from even discussing relocation, much less from outlining the specifics of a plan.

My colleagues and I believed that Harvard's Program on Negotiation (of which HNRP is a part) might play a constructive role in helping fill this gap and promoting serious discussion of what were sure to be a complex and highly contentious issues. Early in the project's life, I thought it critical to better understand the legal issues that would be relevant to any discussion of settler relocation. I understood, of course, that if relocation were ever imminent, an Israeli government would no doubt ask the Knesset to enact new "special purpose" legislation. This is what had happened over twenty years ago when Israeli settlements in the Sinai were

evacuated as a consequence of Israel's peace treaty with Egypt. In the aftermath of the Camp David Accords, as a result of protracted bargaining very detailed legislation was enacted to provide compensation legal for the Sinai settlers. If settlements in Gaza or the West Bank were to be evacuated, predictably there would once again be negotiations – negotiations that would be influenced (but not controlled) both by the shadow of the existing legal framework and by the Sinai precedent. For this reason, I identified two previously unaddressed legal questions that needed to be carefully explored: (1) By what authority might an Israeli government physically remove settlers from their homes? (2) Under existing Israeli law, what claims for compensation would those forced to relocate have?

To address these questions, our Program required the collaboration of persons expert in Israeli, Jordanian and international law. In the summer of 2003, I approached Gilead Sher, a talented Israeli lawyer with substantial experience at the highest levels of the Israeli government. Sher had served as Chief of Staff to Prime Minister Ehud Barak, and had been a chief Israeli negotiator with the Palestinians. He had a profound understanding of the political context – both within Israel and internationally – of the legal questions I had posed. Sher assembled a team of able younger colleagues -- Amir Kadari, Ephraim Schmeidler, and Jonathan Gillis – to work with him on this project. Together they have written a paper that reflects not only insightful legal analysis but also an acute political and historical understanding of the context.

Little did we know when this work was begun how soon it might become relevant. The paper was completed in November, 2003, and it reflects the legal state of affairs as of that time. Shortly, thereafter, Prime Minister Sharon suggested that as part of a unilateral disengagement initiative he would be prepared to

evacuate all the settlements in Gaza and a small number in the West Bank as well. In January of 2004, Israel's newly appointed National Security Advisor – Major General Giora Eiland – was asked by the Prime Minister to develop detailed plans for this initiative, and as part of this process the Ministry of Justice was asked to develop – under the leadership of Aaron Abramovich -- legislative proposals providing for compensation for those settlers that might be required to relocate.

At this moment – in the aftermath of the Likud referendum rejecting Prime Minister Sharon's initiative – it is not possible to predict whether Sharon will evacuate settlements or relocate settlers. But no one could doubt the timeliness or importance of the issues addressed in this paper, which I am pleased to distribute as part of the Program on Negotiation's Working Paper Series. In doing so, it is our hope that this work will stimulate discussion and further analysis from a wide circle of interested policy makes and scholars.

Robert H. Mnookin
Cambridge MA
May 12, 2004

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INTRODUCTION

1. One of the most significant changes to have taken place in Israel over the past decade - both in the political sphere but also in public opinion - has been the readiness to accept the idea of a Palestinian state existing alongside the State of Israel. Along with this has also come a general acceptance that any future arrangement with the Palestinians – be it a final permanent status arrangement or a long-term interim one - will inevitably involve the evacuation of Israeli settlements from those areas that will form part of the Palestinian state.

   Much of the public and expert discourse on the topic - in Israel and abroad - has focused on its political and security aspects, with little discussion of any note relating to the weighty issues which will affect Israel on an internal level.[1] In contrast with such political discussions, the present study deals with the legal ramifications - from the standpoint of Israeli domestic law - of the evacuation of settlements and settlers from the territories occupied by Israel in 1967.

   Addressing such legal ramifications is crucial to the general internal discussion of the wider issues. Indeed it is difficult - and probably inadvisable - to isolate the legal discussion from the wider, national and social discussion. Law has two social functions which at times appear to contradict one another: on the one hand, the law in force at any one time reflects the values of the society it is intended to serve; on the other hand, the law plays a significant part in the development of that society. This apparent contradiction stems from the process which a society appears to undergo when in a state of flux: while the law represents the current values of a society at any one time, it is also busy playing an active role in engineering change to that society, forging new boundaries and transforming norms. This dual role is of particular relevance at a time of national transformation. The present study concerns just such a time. One cannot overestimate the significance and importance for Israeli society of a mass evacuation of settlements – neither on a political nor a social, internal level.

2. It might have been possible, in theory, to produce a straightforward solution to the question of the legal norms applying to such an evacuation. We could have done this simply by focusing on a theoretical future legal solution - the legal arrangements that *would need to be* in place for the evacuation to go ahead (this is of course assuming that the political consensus, required for an agreement with the Palestinians, would also allow for the change in the applicable legal norms that would enable such an agreement to be implemented). But this would have been a less than satisfactory approach. First, because entering into such an agreement is the responsibility of the Executive – the Government of the day – and not of the Legislature – the Knesset. Of course the Government would require the support of the Knesset, but having such general support does not necessarily guarantee that the legal situation will change in line with the position taken by the

[1] Even this has begun to change of late. Most recently the Israel Institute for Democracy put out a position paper on the internal social questions, which would arise in the event of any evacuation of settlements. It also initiated a closed colloquium on the topic in which the writers of this report were invited to participate.

Government authorized to sign the agreement. Second, because, as we have already noted, current legal norms have a formative influence on the direction of any future change.

We were therefore asked by Professor Robert Mnookin – and we are indeed grateful that he has involved us in this fascinating research project – to prepare a paper on the current internal legal position in Israel, to the extent it would apply to any future arrangements that would involve an evacuation of settlements and settlers from territories not controlled by Israel prior to June 1967. As will be seen in the course of this paper, the legal situation is composed of a great number of different layers and is influenced by a host of different factors: international law and the internal laws of a number of different countries, property law, the law of war and human rights law, law whose effect is territorial and law with extra-territorial, personal effect. Nor is the situation on the ground which informs this paper any less complex: even the biggest opponent of Government and the policy of settlement cannot ignore the wide-ranging and enduring phenomenon of settlement in the Territories, nor their profound social impact: in certain cases the settlements have been around for over 30 years, the founders have established homes with children and grandchildren; their dead are buried in graveyards on site. As a result, the legal discussion has also to be wide ranging; to include in its scope both the human rights aspects involved, as well as the personal and property rights and group rights aspects.

3. In the light of the above, and to aid the reader in approaching this study, we chart its principal elements below.

   The starting point for the study is the staging of a large-scale evacuation of settlements as part of a comprehensive political resolution. This starting point would accommodate a range of possible scenarios, from an international permanent-status agreement signed between two or more entities, to a long-term interim arrangement between Israel and the Palestinians, or even a unilateral disengagement initiated by Israel. What all such scenarios would have in common would be the following:

   - There would be a complete evacuation of whole settlements, rather than a partial evacuation of certain individuals from those settlements;

   - The evacuation would include a significant number of settlers;

   - The evacuation would take place as a result of a major political move on the part of the Government of Israel and not as a stand-alone security measure;

   - The evacuation would result from a Government decision, rather than the local considerations of the Military Commander on the ground.

   - The evacuation being mooted here is the physical evacuation of the residents of the settlements. But it is also possible that there would be an actual severance of property rights between the settlers and/or the State of Israel and the land and the structures on site.

As noted, the above parameters could take place within a range of possible scenarios; the scenario most likely to occur is not easy to predict at this point. The above, however, are the parameters that have guided the present study in confronting the central underlying question: how does one deal with an evacuation on a massive scale - one which results from a political, strategic decision, as opposed to sporadic evacuations from security motives or decisions to evacuate on a personal individual level.

4. A further important premise for this study is that it deals with those settlers who are there 'legally', i.e. in accordance with internal Israeli law. Without embarking upon a discussion of the legal basis for such settlement under international law, it is clear that Israeli law *does* recognize the legality of settlement when carried out in accordance with the legal authorization of the Military Commander, but does *not* recognize the legality of what have been termed 'illegal outposts'. The courts have also ruled with respect to these illegal outposts that domestic law does not recognize the rights of the settlers in such outposts, even if, before their physical evacuation, they do have the right to a hearing before the Military Commander. Our discussion, therefore, will focus on those settlers who are there on the basis of a permit from the Military Commander and whose presence is recognized by the Israeli Government.

5. One of the difficulties we have faced in the course of this study has been the issue of terminology. This is a legal study. Our aim is to use terms that are both clear and legally accurate. But we have also sought to avoid using terms that are too loaded politically, so as not to introduce extraneous elements into the debate. One cannot avoid the political ramifications of such a debate: any discussion on settlement evacuation – even if purely legal – carries political significance in and of itself. Nonetheless we have sought to keep the analysis legal and, where possible, neutral. One of the striking examples of this was in the use of the term "occupied" to refer to those territories captured by Israel in 1967. Until very recently the Israeli Government refused to use the term "occupied" in relation to these territories, even though it itself had applied to them the norms of international law which pertain to occupied territory. Add to this the legal fact that the State of Israel applied its own law, jurisdiction and legal sovereignty to certain parts of those territories, which thereafter could not be regarded as occupied territory under domestic Israeli law. It is essential that a study that is to look at Israeli law (it should be noted that this is, after all, the point of the present study, rather than international law or internal Palestinian law) pays close regard to the sensitivity of such a term, if only because of its practical and legal implications for the study itself. We have therefore chosen to use the term 'Territories'. Within the term 'Territories' we have distinguished between 'Annexed Territories', to which Israeli law applies in full, and 'Non-Annexed Territories' where, even under Israeli law, the law that applies is that applying to territory under military occupation.

   We faced a similar dilemma with respect to the correct term to use for an Israeli withdrawal from such territories. In certain areas the end to military occupation would simply require a withdrawal of the IDF from those areas. In the Annexed Territories, that would not be sufficient, however; the legal act required would have to be a limiting of the territorial application of the laws of the State of Israel

so as to exclude such areas, and the cessation of Israeli sovereignty over them. We therefore chose to use a unified term to include both eventualities and to refer to the actual act of military withdrawal as a "termination of effective control" of the Territories, a term that, for the purposes of this study, served best to cover the implications inherent in an act of withdrawal. As a result, we also then had to explore separately the question of the termination of sovereignty over the Annexed Territories.

We would ask our readers, therefore, to keep in mind that the usual need for care in the choice of terminology which is required in any legal analysis, is considerably heightened in the present case.

6. The bulk of this study relates to an analysis of the current legal situation. The discussion is divided into two main parts: one relating to the Annexed Territories as opposed to the Non-Annexed Territories, the other relating to private land as opposed to State land. Lands of both types (private and State) are to be found in both Annexed and Non-Annexed Territories. Within these two main parts are other categories and distinctions that we describe in detail in the course of the study. The legal significance and importance of both types of land and Territory is the same, although the complexity of the legal questions relating to each may differ. There is no equal division between private and State land, neither in terms of the extent of the land itself, nor in terms of the numbers of settlements and settlers; the majority of settlers live on State land – whether in Annexed Territory, within the municipal boundaries of Jerusalem, or in Non-Annexed Territory. Nor is the political and social sensitivity of both types of land the same, but a discussion of this is beyond the scope of the present study.

7. With respect to our legal analysis also, we have divided the discussion into two main parts: 1) the question of the physical evacuation of settlers; and 2) that of the severance of the legal connection between the settlers, and the land and the structures built on it. This distinction requires some explanation. We take it as a basic premise that there will have to be a physical evacuation of settlers from their homes. In most of the potential scenarios - those which entail an agreement between the two sides as well as those which entail an act of unilateral withdrawal by Israel - it will not be possible to leave the settlers in their homes. The combination of the security threat to such people and the political claims of the Palestinians will mean that they will have to be evacuated by the State of Israel before it terminates any effective control of the Territories. Now, such an action would have, of course, weighty legal implications and consequences: it would appear to violate basic human rights, it would be likely to be regarded as a reneging by the State on its promises, there would be breach of contract issues with respect to lease agreements between the State and the settlers, and it would also involve an infringement of basic property rights. However, the physical evacuation of settlements does not have to mean the severance of the property rights of the settlers – in particular the rights of those living on private land whose title to such land was lawfully acquired. The issue of the severance of individual property rights therefore is a separate legal issue requiring separate treatment, and we have related to it accordingly, in relation to all those types of lands mentioned above.

8. In discussing the question of physical evacuation and the severance of property rights, we have also looked at current norms providing for compensation for the expropriation of land and the structures attached to such land. The survey in this part is necessarily brief since we believe that, in any event, a new set of provisions will be needed to deal with the weighty issue of compensation. There are three main reasons for this: first, because the existing provisions only apply to a part of the Territories and the land and property to be evacuated - the other parts have at present no such appropriate compensation measures; second, because the focus of the existing normative measures is on compensation for expropriation, and one of the conclusions of this study is that the laws of land expropriation are not the best or most appropriate mechanism for dealing with the question of the evacuation of settlers; third, and probably most important: the laws of land expropriation deal with compensation for expropriated land, they do not, in the main, take account of the multitude of other factors that would arise in the case of the evacuation of settlements and settlers: the question of the upheaval in people's ways of life, the desire to preserve whole communities, the reliance interest of an entire society on Government promises, and a great many more such factors discussed in the final chapter of this study.

   There is no doubt that a comprehensive legal measure will be needed to deal with the compensation of settlers to be evacuated from the Territories, and in all probability it will have to be set out in primary legislation. We have accordingly described its main features in our final chapter, rather than in the sections dealing with current law. However, and true to the position we spelled out above regarding the dual role of the law (as both reflecting the values of a society and also as having a formative effect on the future state of such a society) we have endeavored to include in such chapter the current principles of Israeli law which are likely to affect any future legislation. We have thus described, in a nutshell, the various possible mechanisms for dealing with the subject of compensation: which social interests we would wish to protect and therefore compensate; what the recognized legal methods are for dealing with the issue of compensation – looking, for example, at the approach of torts law as opposed to contract law. We have also dealt in this chapter with the question of distributive justice and the likely clash between any future compensation law and other fundamental principles, such as equality.

   The final chapter is by no means complete, but we have tried in it to raise points for what we believe to be a crucial discussion on the part of an interdisciplinary team on this topic. Such discussion would look at the fundamental questions that arise here and attempt to set out a framework for practical measures. Ultimately, the work of such a team would necessarily lead to practical objectives in the legal form of a draft law.

9. We sincerely hope that this study will be of use to those wishing to get to grips with this difficult subject. As we have noted above, however, it is only the beginning.

CHAPTER I

THE EVOLUTION OF APPLICABLE LAW IN THE TERRITORIES. THE FORMATION OF LAYERS OF SUBSTANTIVE LAW

1. The Territories

This study relates to the legal ramifications of the evacuation and possible removal of settlements built in territories occupied by Israel as a result of the 1967 war. The territories which form the subject of this study are those referred to in Israeli law as Judea, Samaria and the Gaza Strip, but include as well those parts of East Jerusalem which, while also captured in the course of the 1967 war, were formally annexed by Israel through a series of measures in 1967 and 1980 which we describe below. As we shall see, the different legal status of the annexed territories entails a separate legal treatment over the question of evacuation and we do indeed deal with this separately.

Various terms have been and are used to describe all or parts of these areas: the 'West Bank' (to refer to the territory on the western bank of the Jordan river); the 'occupied territories'; the 'areas', and, as noted above, Judea and Samaria. Some of these terms are both politically and legally contentious, as we shall see. Throughout the present study we have chosen to use the term the 'Territories' to refer to all these areas, distinguishing between them where necessary. In a field where the choice of terms can be a source of contention, the term 'Territories' has the advantage of being both value and politically neutral (as far as any term can possibly be) and also most suited to the categories of land referred to in both international and domestic law, as we explain in the course of the study.

2. Developments in the Law in the Territories up to the 1967 War – a Brief Legal and Political History

2.1. Following the First World War and the collapse of the Turkish Empire, the Council of the League of Nations in 1922 conferred a mandate on the British Government to administer the territory between the Jordan River and the Mediterranean which had previously been under Turkish (Ottoman) rule – an area which included the Territories - with a view to the establishment there of a Jewish state as envisaged in the Balfour Declaration of 1917 (hereinafter: the 'Mandate'). A further mandate had been conferred on the British Government with respect to the land of Transjordan (to the east of the Jordan river) and, following a treaty with the Emir Abdullah in 1923, the independent state of Transjordan was established, renamed the Hashemite Kingdom of Jordan in 1949.

Under the terms of the Mandate[2], section 46 of the Palestine Order in Council set out the civil law which would be in force in Mandatory territory. This included the Ottoman law that had been in force prior to

[2] The Mandate for Palestine July 24, 1922. Article 1: '*The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate*.'

November 1, 1914, certain later Ottoman laws, as well as other legislation in force at the time of the Order in Council, to the extent that such law was not modified by later legislation[3]. In the twenty-six years of its existence, the Mandatory regime made few changes to the Ottoman land regime applicable to the Territories.

On November 29, 1947 the United Nations General Assembly adopted resolution 181 the 'Plan of Partition with Economic Union' (the "Partition Plan") which envisioned the creation of two independent states - one Arab, the other Jewish - in what was then Mandatory territory. The boundaries of the proposed states were as described in the map attached therein. The Jewish leadership at the time accepted the Partition Plan. The Arab leadership rejected it and commenced hostilities against Jewish targets in Palestine.

Several hours before the British Government's Mandate for Palestine was to expire, on May 14, 1948, the Interim People's Council representing the Jewish community in Palestine declared the establishment of the State of Israel as an independent state in the 'land of Israel'. The newly established State was immediately invaded by the armies of the neighboring Arab states and the 'war of independence' began, continuing intermittently until early 1949 with the conclusion, under UN auspices, of four armistice agreements between the State of Israel and its neighbors Egypt, Jordan, Lebanon and Syria. It should be noted that, after the rejection by the Arab leadership of the Partition Plan and the subsequent hostilities in the 1948-1949 war, the new independent Arab state proposed in the Partition Plan did not materialize. The lands, which would have made up such a state, were subsequently divided – both as a result of the war and in the ensuing armistice agreements - between the new State of Israel, Jordan and Egypt.

The 1948-49 war of independence resulted in the State of Israel increasing its territory by 50% compared to what had been envisioned under the Partition Plan. It did not include, however, the lands which were to make up the Territories.

In the armistice agreement with Egypt, the borders agreed upon coincided with the borders of what had been Mandatory Palestine, with the exception of the Gaza Strip, which was retained by Egypt. The agreement signed with

[3] Section 46 of the Palestine Order in Council (1922): "*The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.*"

Jordan, however, defined armistice lines which neither coincided with the borders of Mandatory Palestine nor with the borders set out in the Partition Plan. Jordanian forces now occupied the land on the west bank of the Jordan River corresponding roughly to the area referred to under Israeli law as Judea and Samaria (the 'West Bank'). The line of the armistice agreement divided this area from the State of Israel and also ran between east and west Jerusalem.

On May 19, 1948 the Commander in Chief of the Jordanian Arab Legion proclaimed that all legislation in force in Palestine at the time of the termination of the British Mandate would remain in force in all those areas where the Jordanian Army was present or in charge of public order and security - unless such legislation contravened the Defense of Transjordan Law of 1935 and the regulations issued by virtue of such law.

2.2. On April 24 1950 Jordan's parliament voted to unify both parts of the Hashemite Kingdom of Jordan (i.e. both Transjordan *and* the West Bank), though this was not a move that was internationally recognized. On September 16 1950, Jordan enacted a law relating to the laws and regulations which would be valid in both parts of the Hashemite Kingdom. Section 2 of this law stipulated: "*Whereas the two parts of the Hashemite Kingdom of Jordan have been unified, the laws and regulations which currently prevail in each part shall remain in force until the enactment of later laws which encompass both parts".*

A similar provision was included in the Jordanian Constitution of 1952. As a result, only legislation enacted after 1950 was equally applicable to both parts, and, unless specifically modified, both Ottoman and Mandatory laws, rules and regulations continued to remain in force. Jordanian land laws enacted after 1950, essentially copied, rewrote or edited Ottoman and Mandatory laws[4]. Such actions, however, did not bring about any material change to the substantive land law in the region.

2.3. For its part, Egypt never purported to annex the Gaza Strip and refrained from applying Egyptian law to such territories. As a result, the law in force prior to the capture of the Gaza Strip by the Israel Defense Forces (the "IDF") during the 1967 war, was a combination of Ottoman and Mandatory law as well as orders issued by the Egyptian Military Commander of the Region.

[4] Among the laws based on Ottoman legislation were the Holding and Use (Tasruf) of Real Estate Assets no. 49 of 1953; The Pledge of Land as Security Collateral Law no. 46 of 1953; The Law for Distribution of Common Real Estate Assets no. 48 of 1953. Among the laws based on Mandatory legislation were the Land Law (acquisition for public needs) no. 2 of 1953, and the Landlord and Tenant Law no. 62 of 1953.

3. The 1967 War and its Aftermath

In June 1967, in a war lasting less than a week with its surrounding neighbors - Syria, Jordan and Egypt - Israel captured the West Bank - including east Jerusalem - from Jordan, the Sinai Peninsula and the Gaza Strip from Egypt and the Golan Heights from Syria. Subsequently, Israel returned control of the Sinai Peninsula to Egypt as part of the 1979 peace agreement between the two countries. Since 1967, the West Bank, Gaza Strip and Golan Heights have all remained under Israeli control.[5]

Immediately following the 1967 war, the Military Commander of the West Bank region issued a proclamation stating that the law existing in 'the region' on June 7 1967 would remain in force, to the extent that it did not contradict such proclamation or any other proclamation or order given by him, and subject to such changes as derived from the establishment of the IDF's military rule in the region[6]. This proclamation further stated that all legislative, governmental and administrative powers would be vested in the Military Commander[7]. A similar proclamation was issued by the Military Commander of Gaza and Northern Sinai. With two exceptions, which we present separately below, Israel refrained from extending the application of its domestic law to the Territories.

4. Layers of Applicable Substantive Law - The General Framework

As a consequence of the above historical developments, the legal regime in the Territories is now made up of the following layers:

a) In both the West Bank and the Gaza Strip - specific norms deriving from Mandatory and Ottoman law in force prior to the 1967 war, to the extent that such norms were not modified by military orders;

b) In the West Bank - specific norms of Jordanian law, subject to their modification by military orders;

c) Public international law relating to i) belligerent occupation, which serves as the source for the authority of the Military Commander; and ii) Human Rights; and

d) Military orders issued by the Military Commander.

Two points should be made about c) and d) at this stage.

First, as we shall see below, Israeli military orders, and the actions of the IDF in the Territories in reliance upon such military orders, have come to be subject to the review of Israel's Supreme Court sitting as High Court of Justice (the "Court") for reasons we shall elaborate upon below. The opening of the Court to petitions

[5] As we note below, a measure of control of parts of the Gaza Strip and the West Bank was ceded by Israel to the Palestinian Authority under the Interim Agreement, however overall effective control of these areas was not.

[6] Section 2, Proclamation Regarding Law and Government Order (West bank Region) (no. 2) 7.6.67 1 Proclamations Orders and Appointments of the Judea and Samaria Command 3.

[7] Ibid. Section 3.

relating to the actions of the Military Commander in the Territories, itself introduces another layer of law - the basic principles of Israeli administrative law and the application of legal norms deriving from Israel's constitutional law. This fact has complex and far-reaching implications, since the norms of Israeli constitutional law are bound to inform the Court's approach in reviewing administrative action in the Territories, even when Knesset legislation is not directly applicable there. The Court will also review such orders and actions in the light of the rules of Public International law.

Second, the application of Public International law relating both to belligerent occupation and human rights does not mean that *all* the norms of such law can be enforced by the Court as a domestic court. Adopting the approach of the English legal system regarding the enforcement of Public International law in the domestic court, the Court has held that the norms of customary international law would be regarded as an integral part of domestic law and would be enforced unless they contradicted specific domestic legislation. On the other hand, norms of conventional law (i.e. international treaties) would not be enforced by the domestic courts unless incorporated into domestic law by specific legislation. The classification of a certain norm or a set of norms deriving from public international law as customary or conventional is thus very important. Where such a norm is held to be conventional and was not incorporated into Israeli domestic law by way of legislation, it may not be relied upon in Israel's domestic courts, even if it is binding upon Israel in the international sphere. Having said that it should be noted that, even if a certain norm is not enforceable *per se*, it might still serve the Court as a source of interpretation for other norms.

5. The Additional Layer – The Court

5.1. The principles which underlie the Court's decisions – Israeli Administrative and Constitutional Law

Israeli administrative law is in effect 'common law' which has evolved over the years by way of judicial review of the actions of the executive. Until recently, the Court served as the judicial organ with exclusive jurisdiction for reviewing the actions of the administrative branch[8]. Judicial review of administrative action examines both the existence of the formal authority for such action as well as the manner in which administrative discretion was exercised. The Court reviews the legality of such an action, not its advisability. It has also laid down the principles according to which the exercise of administrative discretion is to be reviewed, holding that administrative discretion must be exercised: (i) fairly, and in compliance with due process; (ii) independently, for the substantive purpose envisaged by the norm which is the source of the legal authority behind the action, avoiding extraneous considerations; (iii) in a reasonable manner, properly balancing the needs to be addressed by the administrative action and the principles which form the foundations of the Israeli legal system and which

[8] Section 15(d)(2) of the Basic Law: Judiciary. In 1991 the Knesset enacted the Court for Administrative Matters Law – 1991, thereby establishing a Court for Administrative Matters and transferring certain powers held by the Court to said court. Judgments made by the Court of Administrative Matter may be appealed before the Court.

derive from the fact of Israel being a democracy. The Court's review of administrative action has been extended beyond the review of actions based on existing law, to include the review of subordinate legislation.

Israel has no formal Constitution. At the outset of the State it was decided to enact a Constitution through a series of Basic Laws which would have Constitutional status vis-à-vis other legislation and which together would make up the Constitution. Many, though not all, of such Basic Laws have been enacted. Some have played a significant role in recent times in the protection of property rights, *inter alia*, as we shall see in the course of this study. The picture is not complete, however, and in certain areas – such as freedom of speech - Israel remains without a formal bill of rights. In the absence of such, the Court's review of administrative actions and decisions has been the main channel through which fundamental liberties have been introduced into the Israeli legal system. Israel's administrative law has thus played an important role in the development and protection of constitutional rights. It is through the Court's application of the principles of administrative law, that many of the principles of Israel's constitutional law have come into existence, making it sometimes difficult to draw a clear distinction between the application of administrative law and constitutional law[9].

The scope of judicial powers under Israeli constitutional law was significantly extended after the enactment of two Basic Laws – Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty (the latter shall hereinafter be referred to as the "Basic Law" and both shall be hereinafter referred to as the: "Basic Laws") – sometimes referred to as the "Constitutional Revolution". The Court has held that both laws, empower courts to strike down primary legislation which infringes certain rights and liberties, when such infringement does not meet the criteria stipulated in these Basic Laws.

5.2. The Court's jurisdiction in the Territories

Shortly after the establishment of Israeli military rule over the Territories, petitions of local residents began to be filed with the Court. The Court was thus confronted with the difficult question regarding the extent of its jurisdiction over the actions of the military authorities in the Territories.[10] The Courts rulings on the existence and limits of such jurisdiction, as well as the substantive law applicable in the Territories, were made in a highly

[9] Scholars have noted however, that because the Court is aware of the special circumstance within which the Israeli administration has operated in the Territories, it has exercised some restraint, as compared with the willingness it has shown to intervene in administrative actions taken within the boundaries of Israel. In the Territories it has been more willing to use threshold claims in the form of *locus standi, act-of-state,* and *justiciability* doctrines, as a way of blocking petitions made by inhabitants of the Territories which challenge the actions of the Government in the Territories without regard as to whether such challenges were raised by local inhabitants, settlers, human rights organizations or other public petitioners. See D. Kretzmer **The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories** (SUNY Press, Albany, NY 2002)

[10] For a review and critical analysis of the evolution of Israeli jurisprudence regarding the Territories see **Kretzmer** *Supra* note 9.

charged political atmosphere - the Court being mindful of the unique position it held in the country's constitutional framework and anxious not to encroach on ground which properly belonged to the country's political leadership.

The Israeli Government, meanwhile, was declaring, on the international plane, that the Territories could not be deemed 'occupied' since they did not 'belong' to another state (the State of Israel not having recognized the decision of the Jordanian parliament we referred to earlier, to unify both parts of the Hashemite Kingdom) and thus international treaties which normally applied to occupied territory did not apply in this case. Nevertheless, it said, the State of Israel would voluntarily adhere to the principles of public international law with respect to the Territories, and in particular international humanitarian law[11]. The Government refrained, however, from attempting to extend the application of Israel's domestic law to the Territories.

While hearing initial petitions made by local residents, the Court indicated it was willing to rule on the merits of the petitions, *on the assumption* that, under Israeli domestic law, the Court had jurisdiction on a personal level over functionaries of the executive branch[12]. The Court's jurisdiction over the actions of the military authorities in the Territories was never challenged by the Office of the State Attorney. This was due to a policy decision by the then Attorney General, Meir Shamgar, (later to become Chief Justice of the Supreme Court). Shamgar directed all attorneys in the Office of the State Attorney to refrain from challenging the Court's jurisdiction.

Reviewing the actions of the IDF in the Territories thereafter became common practice and the assumption which had served as the basis for the Court's initial decisions lost its tentative nature and became an authoritative view of the Court[13].

5.3. The Court's application of substantive law

Having established its jurisdiction over IDF actions in the Territories, the Court was then required to decide according to which substantive law such actions were to be reviewed. The Court decided as follows:

a) That the actions of the IDF in the Territories were subject to the principles of Israeli administrative law[14].

b) That while the Military Commander's orders in the Territories had the status of primary legislation (normally excluded from judicial review under administrative law), such orders were nevertheless also subject to the review of the Court under the rules of Israeli administrative law[15].

[11] M. Shamgar *" The observance of International law in the Administered Territories"* 1 Israel Yearbook of Human Rights (1971)
[12] HC 302/72 Khelou v. Government of Israel 27(1) PD 169, 176.
[13] HC 393/82 Jamaiat Ascan v. IDF Commander in Judea and Samaria 37(4) PD 785, 809.
[14] HC 619/78 Al-Talia'a v. Minister of Defense 33(3) PD 505. 512.
[15] HC 69/81 Abu Itta v. IDF Commander in Judea and Samaria 37(2) PD 197, 230-231.

c) That international law relating to belligerent occupation was, in principle, applicable in the Territories, and, further, that public international law relating to belligerent occupation was the primary source from which the authority of the Military Commander in the Territories derived[16].

On the question of the Basic Laws, the Court has heard petitions in which it was argued that specific actions taken by the Military Commander were inconsistent with the Basic Law. However the Court was not asked to decide upon the application of this law to the Territories and in the absence of any objection by the Government to its application, the Court ruled on the merits in those cases[17].

6. Exceptions within the General Framework of Substantive Law

As we saw earlier, the bulk of substantive law in the Territories is not Israeli law but is made up instead of various layers of law – Mandatory, Ottoman, Jordanian and military orders. There are a number of exceptions to this that we should relate to here. These are:

a) the application of Israeli domestic law to certain parts of the Territories – the Annexed Territories;

b) the application of norms deriving from Israeli domestic law to Jewish municipalities, local and regional councils in areas in which Israeli law does not apply; and

c) the application on a personal basis of certain norms deriving from Israeli domestic law to Israeli residents living in the Territories.

In the following sections we shall deal with the above exceptions.

6.1. Israeli law in the Annexed Territories

In an amendment to the Law and Government Ordinance shortly after the capture of East Jerusalem, the Knesset decreed that the law, jurisdiction, and administration of the State of Israel would apply to any part of the land of Israel defined as such by the Government. On June 28 1967 the Government published an Order in the Official Gazette applying Israeli law, jurisdiction and administration to East Jerusalem[18].

The Court has adopted a number of different positions on the significance of the above act. In some instances it was held that the application of Israeli law to East Jerusalem did not amount to annexation[19]. In other cases, the

[16] HC 393/82 Jamaiat Ascan v. IDF Commander in Judea and Samaria 37(4) PD 785, 793.
[17] HC 2722/92 Al-Amarin v. IDF Commander in the Gaza Strip 46(3) PD 693. It should be noted that the Military Commander did not have to invoke such claim since Section 10 to the Basic Law: Human Dignity and Liberty stipulates that laws in effect prior to the enactment of said Basic Law shall remain in effect.
[18] Section 1 of the Law and Government Order (No. 1) 1967.
[19] HC 283/69 Ruidi v. Military Tribunal, Hebron District 24(2) PD, 419, 423.

Government act was held to be annexation to all intents and purposes[20]. Following the enactment of Basic Law: Jerusalem the Capital of Israel, in 1980 (the: "Jerusalem Law"), the Court held that the combination of the Government's act and the Jerusalem Law have determined Israeli sovereignty over unified Jerusalem[21].

In 1981 the Knesset enacted the Golan Heights Law, which was worded in a manner similar to that of the Order of June 28, 1967, thereby applying Israeli law, government, and administration to the Golan Heights.

Notwithstanding the absence of recognition of such acts by the international community,[22] as far as the Israeli legal system is concerned, the only applicable law in East Jerusalem and the Golan Heights is Israeli law. The term "Annexed Territories" shall henceforth be used to relate to those territories occupied during the 1967 war where Israeli law applies.

6.2. The application of Israeli norms deriving from Israeli domestic law to municipalities, and local and regional councils

The status of municipalities and local and regional councils in the Territories has been affected first of all by a number of laws enacted by the Knesset, which have been applied to the Territories[23]. In addition, military orders have subjected municipalities, as well as local and regional councils, to the 'supervision' of Israeli civil law and have further applied Israeli norms to the territories of such municipalities, and local and regional councils[24].

Although in substance the applicable norms of Israeli law apply to the territories of the particular local authority, and although in fact Israeli law applies within the jurisdiction of such local authorities, there is a marked distinction between the application of specific laws as a result of an act of the Knesset and the application of additional laws by military orders.

The Court has held that military orders - although materially changing the existing law in the Territories - do not mean that Israeli law applies in the territory[25]. Furthermore, a bill proposing to apply Israeli law in its entirety to the territories of the Jewish municipalities, as well as the local and regional councils in the Territories, was rejected by the Knesset.

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[20] HC 223/67 Ben-Dov v. Minister of Religious Affairs 22(1) PD 440, 442.
[21] HC 4185/90 Loyalists of the Temple Mount v. The Legal Advisor of the Government 47(5) PD, 221, 271.
[22] See for example UN General Assembly's Resolutions 2253 (ES-V) (1967); 2254 (ES-V (1967); 33/113 (1978). UN Security Council Resolutions 252 (1967); 476 (1980); 478 (1980).
[23] See for example development Towns and Areas Law –1988; Regional Councils Law (Date of General Elections) (Amendment) - 1997.
[24] Order Regarding the Management of Local Councils (no. 892) 1981, 48 Proclamations Orders and Appointments of the Judea and Samaria Command 864 ; Order Regarding the Management of Regional Councils (no. 783) 1979 45 Proclamations Orders and Appointments of the Judea and Samaria Command 88;
[25] HC 4400/92 The Local Council Kiryat Arba Hebron v. Itzhak Rabin Prime Minister et al. 48(5) PD 597, 615.

6.3. The personal application of Israeli law to Israeli nationals residing in the Territories

A large number of Israeli laws have been applied to Israeli nationals residing in the Territories. The main channel through which Israeli law has come to apply on a personal basis to Israeli nationals in the Territories is the Law for the Extension of the Validity of the Emergency Regulations (Judea Samaria and the Gaza Strip – Jurisdiction in Felonies and Legal Assistance) 1967. Although the purport of this law was to extend the scope and duration of subordinate legislation, its effect has been to give the regulations the status of primary legislation. Section 2 of such law grants the Israeli courts jurisdiction over any act or omission that, if committed in Israel, would be considered a felony. Section 6B stipulates that for the purpose of a number of lawsincluded in the schedule of the law, the term "Israeli Resident" or similar terms relating to residency or domicile, shall be deemed to include any person who resides in the Territories who is an Israeli citizen or is entitled to Israeli citizenship under Israeli law. The Minister of Justice was empowered to amend the schedule by an order issued by him and approved by the Knesset's Constitution, Law and Justice Committee.

The second channel for the application of Israeli law to Israeli citizens was by way of a specific statement to that effect in a particular law[26]. In addition, under regulations issued in 1969, both the civil courts and the labor courts were granted jurisdiction over any matter relating to litigation between Israeli citizens residing in the Territories. Israeli courts have decided that in the event of such litigation, the applicable substantive law will be Israeli law.

The existence of such channels as described above, in addition to the application of Israeli substantive law though the orders of the Military Commander, has created a situation whereby Israeli residents living in the Territories enjoy all the civil and political rights of Israeli citizens living within the boundaries of the State of Israel. Most norms deriving from Israeli law have been introduced through military orders and therefore are subject to changes by the Military Commander. Furthermore, the Court has held that, while a great number of norms are applicable to Israeli nationals residing in the Territories, this is an exception to the general rule according to which the Territories are subject to military rule under the public international law of belligerent occupation. It may not therefore be concluded from the application of such norms that Israeli law in its entirety was implicitly applied in the Territories[27].

[26] See for example Section 16A of the Land Taxation Law (Appreciation, Sale and Purchase) - 1963
[27] HC 2612/94 Sha'ar v. The IDF Military Commander in Judea and Samaria 48(5) PD 675, 681.

7. Application of Israel – Palestinian Agreements

A final layer to be taken into consideration in this survey of the legal norms applying to the Territories derives from the various agreements reached with the PLO in the years following the Oslo Accords and the Declaration of Principles in 1993, and the laws enacted for their implementation. A few words of caution are in order at this point, however. The agreements executed between the State of Israel and the PLO envisaged far-reaching changes in the lives of Palestinians and Israeli nationals living in the Territories, including the dividing up of effective control over parts of the Territories and a large-scale redeployment of Israeli military forces. While some changes *have* taken place, the agreements have so far had no effect on the *legal status* of Israelis residing in the settlements or on the settlements themselves. Nor was it their intention to have such an effect. The issue of the settlers and the settlements was to have been addressed in the Agreement covering the permanent status of the Territories (the "Permanent Status Agreement") whose progress was stalled at the Camp David summit in July 2000 and the violence that followed. Nevertheless, these signed agreements should not be ignored in the present study, since, as well as having created actual facts on the ground to date, they are also more than likely to provide the frame of reference for an eventual transfer of effective control of territory. It is for this reason that we review them briefly here.

7.1. The Main Agreements

Following the Madrid Conference in October 1991 and over a period spanning almost a decade, the State of Israel and the Palestine Liberation Organization negotiated and executed a series of agreements designed to bring about a resolution of all the issues underlying their conflict. The two principal agreements were:

a) The Declaration of Principles on Interim Self Government Arrangements, September 13, 1993 (the 'Declaration of Principles'); and

b) The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, September, 1995 (the 'Interim Agreement').

The latter was preceded by the Agreement on the Gaza Strip and the Jericho Area, May 1994 (the 'Cairo Agreement') and was followed by three other agreements whose purpose was to secure the implementation of the larger Interim Agreement; thus: the Protocol Concerning the Redeployment in Hebron, January 1997; the Wye River Memorandum, October 1998, and the Sharm el-Sheikh Memorandum, September 1999. In the ensuing sections we shall review (a) and (b), as the main instruments concerning us here.

7.1.1. The Declaration of Principles on Interim Self Government Arrangements, September 1993

The Declaration of Principles ("DOP") was in essence a declaration of intent by both parties "....to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement..."[28] It sets out the goals and objectives of the negotiations and a framework for an interim period during which an elected Palestinian Council would be convened and authority over certain fields transferred to the Council from the Israeli military and civil administration in the Territories[29].

Among the other provisions of the DOP which are of special interest here are Article XIV, providing for Israel's withdrawal from much of the Gaza Strip and the Jericho area, and Article IX, dealing with Laws and Military Orders and which empowers the Council to legislate within the authorities transferred to it. The most significant provision in the DOP is Article VII, requiring the parties to negotiate an agreement on the interim period, to specify, amongst other things, the transfer of powers and responsibilities from the Israeli military government to the Council.

7.1.2. The Israeli – Palestinian Interim Agreement on the West Bank and the Gaza Strip, September 1995 (the "Interim Agreement")

The Interim Agreement was the central agreement of all those entered into in the years preceding Camp David in July 2000. It was designed to extend further the scope of Palestinian self-government through the Palestinian Council. As indicated in the DOP, the Interim Agreement, as its name implies, was intended to cover the interim period leading up to the Permanent Status Agreement. As such, alongside a range of measures relating to security and the redeployment of Israeli forces, it provided for the formation of the Palestinian governing institutions and procedures for elections to the Palestinian Council as well as detailed provisions relating to the areas of jurisdiction of the Council. Of particular note here is Chapter 3 – 'Legal Affairs'. Article XVII1 provides as follows:

1. In accordance with the DOP, the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, **except for**:

[28] Preamble to the Declaration of Principles on Interim Self-Government Arrangements, September 13, 1993

[29] The areas of authority transferred under the DOP were: education and culture, health, social welfare, direct taxation and tourism (Article VI.2). The implementation of this was left for a subsequent agreement – the Agreement on Preparatory Transfer of Powers and Responsibilities, August 1994, and a further protocol of August 1995 which added additional areas of responsibility: labor, trade and industry, gas and gasoline, insurance, postal services, statistics, agriculture and local government. It should be noted that in all these areas the purpose of transfer of responsibility was so that the Palestinian Council would henceforth exercise control over the affairs of the local population. This did not include Israeli nationals.

a. issues that will be negotiated in the permanent status negotiations: Jerusalem, **settlements**, specified military locations, Palestinian refugees, borders, foreign relations **and Israelis**; and

b. powers and responsibilities not transferred to the Council.

And section 4 of Article XVII provides –

a. Israel, **through its military government**, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council **and Israelis**.

b. To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. **This provision shall not derogate from Israel's applicable legislation over Israelis *in personam***

(Emphasis added. Italicized words in the original)

Other than those areas that were explicitly excluded, the Interim Agreement foresaw the ultimate handing over, throughout the interim period, of control and responsibility for the bulk of the Territories. Section 8 of Article XVII provides: "The Council's jurisdiction will extend gradually to cover West Bank and Gaza Strip territory…".

In addition to Chapter 3 referred to above, legal matters in the Interim Agreement are dealt with in Annex IV – "Protocol Concerning Legal Matters." Article III of this Protocol deals with civil jurisdiction. It grants jurisdiction to Palestinian courts and judicial authorities in "all civil matters subject to this Agreement" (i.e. excluding Israelis and settlements etc.). However, section 2 sets out those cases where Palestinian courts and judicial authorities do have jurisdiction in civil actions even where an Israeli is a party. Section 4 notes that "Israelis, including registered companies of Israelis, conducting commercial activity in the Territory are subject to the prevailing civil law in the Territory relating to that activity." And section 3.b. of Article IV envisages the possibility of a Palestinian execution office issuing "orders (e.g. attachments, receivership, eviction) against Israeli property within the Territory".

At time of writing, the possibility of such a provision actually being applied seems particularly remote, in a climate where the various agreements are only haltingly adhered to. Nonetheless it represents part of the Interim Agreement and this, like all the other agreements signed, is still binding on both parties. Under

Israeli law, these agreements required specific legislation to ensure their application under Israeli domestic law, and such laws and regulations were passed by the Knesset and remain on the statute books. Examples are the Implementation of the Agreement on the Gaza Strip and Jericho Area Law 1994, and the Implementation of the Interim Agreement on the West Bank and the Gaza Strip Law 1996. Thus many of the frameworks established by the Interim Agreement and subsequent agreements are still in place, including those envisaging the process towards an agreement on the transfer of control of those areas presently excluded from the Interim Agreement - notably, for the present study, the settlements. Whatever the ultimate approach to any permanent agreement, it is likely that the frameworks already established will play a significant part.

CHAPTER II

THE APPLICABLE LAND REGIME

1. The Background

As the evacuation of the settlements will have significant implications for the settlers' rights to the land, it is important to describe the material legal regime applicable to such land. Obviously if there are differences between certain types of land as regards the proprietary right vested in the possessor, those differences will have a bearing on the actions needed to be taken for the purposes of the evacuation of such land.

The establishment of settlements began soon after the end of the 1967 war. In the period up to the Yom Kippur war in 1973, the move to settle 'beyond the green line' (i.e. beyond the pre-1967 border) had the support of large sections of the population, including the ruling Labor party which had adopted the idea of limited settlement in parts of the West Bank, in accordance with what was known at the time as the 'Allon Plan'[30]. In the wake of the Yom Kippur war, and the general disenchantment with the political leadership that followed, settlement in Judea and Samaria was motivated more by ideology - the 'Gush Emunim' movement regarding it as, amongst other things, a means of raising national morale after the 1973 catastrophe. This approach led it into frequent confrontations with the then Labor Government over the establishment of certain settlements. The effects of 1973 were partly instrumental in bringing about the change in Government in the 1977 general election which saw the rise to power of the Gahal Party led by Menachem Begin, committed to the idea of Jewish settlement. Thereafter, settlements were established as part of Government policy and with its active support and encouragement.[31] Such encouragement, which included economic incentives for people choosing to reside in settlements, led to an increase in the number of settlers and settlements. It also obscured the settler movement's initial ideological component. A large number of people came to reside in the settlements for purely economic reasons, relying upon Governmental encouragement and incentives.

The land on which the settlements were established may be divided into the following categories: (i) Private land either owned by Jews prior to the 1967 War or purchased by Jews in private transactions after the 1967 War; (ii) Private land of local residents which was requisitioned by the Military Commander for security needs and handed over to the settlers; (iii) Land which was declared by the

[30] The plan named after its devisor, the former general Yigal Allon, envisaged a viable border for the State whereby Israel would relinquish the main Arab-populated areas of the West Bank to Jordanian political jurisdiction, but would retain strategic areas, including the Jerusalem-Dead Sea corridor and a narrow strip of land in the Jordan valley.

[31] Even though the momentum of settlement was considerably slowed after the rise to power of the Labor party in the 1992 elections and its subsequent decision to halt the founding of new settlements, settlement activity still continued.

Military Commander to be "State land". We shall deal with each of these categories separately.

2. Private Land

2.1. Private land owned by Jews prior to the 1948 War

Various Mandatory laws and orders relating to trading with the enemy, which are still in force in the Territories,[32] were used by the Jordanian authorities. In September 1948 the Jordanian authorities issued a proclamation according to which Israelis and other persons loyal to Israel were deemed to be enemies unless proven otherwise, and thus subject to the laws, rules orders and proclamations relating to trading with the enemy[33]. The use of such law enabled the Jordanian authorities to issue vesting orders granting the Jewish property in the Territories to a custodian appointed by the military commander in the region (hereinafter: the "Custodian"). The prevailing attitude with regard to the property rights implications of such orders is that all property rights become vested in the Custodian, which at its discretion may decide to return such property to their original owner. The property rights of the owner are therefore severed, and the owner may not claim the return of such land[34].

With the capture of the Territories by the IDF during the 1967 war, all the powers of appointment were vested in the Military Commander. A number of military orders were issued which bestowed all property rights in such Jewish property on the Custodian, now appointed by the Military Commander. Attempts made by Israeli citizens to have their rights to such property restored have failed,[35] and such property has remained in the possession and management of the Custodian as Government property. This position has also relied on the norms of international law, whereby all the property and assets of the country defeated in war are to be under the control of the occupying power which shall have the right of administration and usufruct regarding such assets[36].

Private property owned by Jews prior to the 1948 war which is located in the Annexed Territories was treated differently; As Israeli law was applied to the Annexed Territories, an amendment was made to the Israeli law dealing with abandoned property[37]. Under this amendment all rights to such property are to be restored to the original owners upon their request unless expropriated for public use. A major portion of the land so captured was indeed expropriated and served either for the building of public institutions

[32] Trading with the Enemy Ordinance 1939; Trading with the Enemy (Custodian) Order 1939
[33] Proclamation 55 issued under the Trading with the Enemy Ordinance 1939.
[34] Bank voor Handel Scheepvaart v. Administrator of Hungarian Property [1954] 1 All E.R 969, 991
[35] HC 1285/93 Estate of Joseph Schechter v. The Military Commander of Judea and Samaria Takdin Elyon 96(4) 15.
[36] Article 55 of the Regulations Concerning the Laws and Customs of War on Land. The Hague 18 October 1907.
[37] Absentees' Property Law, 1950.

or the establishment of Jewish neighborhoods[38]. However, a portion of such land was restored to their original owners or their inheritors.

2.2. Private land purchased by Jews after the 1967 war

Where Jewish individuals and groups have acquired land after the 1967 war they are registered as the owners of said lands. In this regard there is a substantial difference between land acquired in the Annexed Territories and land acquired in the rest of the Territories as shall be further elaborated below.

3. Public Land

Public land may be divided into two categories: (i) land, which was requisitioned by the Military Commander for security needs, and (ii) land that was declared as "State land". It is on the latter kind of land that most settlements were established.[39]

3.1. Requisitioned land

The establishment of settlements on land requisitioned for security purposes began in the early seventies. The first few attempts to challenge such actions failed[40]. While reviewing the IDF's actions in accordance with Israeli administrative law, the Court was persuaded that the establishment of the settlement was intended to serve the security needs of the military and that therefore such action satisfied the criteria for the reasonableness of an action under administrative law.

The argument of the petitioners - who were usually local landowners whose property had been thus requisitioned - was that the establishment of settlements - by nature an action with a permanent outcome - contravened Article 52 of the Regulations Concerning the Law and Customs of War on Land (the "Hague Regulations") which sanctions the *temporary requisitioning* of land for the needs 'of the army of occupation'. The Court stated that it was not required to decide on such argument since the counsel representing the Military Commander had declared in court that the final status of the settlements in question would be determined in the peace talks between the State of Israel and its Arab neighbors and that therefore its establishment was temporary. As a result, the Court held, such actions were in compliance with Article 52 of The Hague Regulations and thus not in violation of public international law.

A change of policy came about in 1980, as a result of a judgment delivered by the Court, which declared the establishment of a certain settlement to be unlawful. The Court reached this conclusion on the basis of the particular

[38] E. Benvenist and E. Zamir **Private Property and the Israeli-Palestinian Settlement** (In Hebrew) The Jerusalem Institute for Israel Studies Research (1998) p. 28.
[39] According to Plia Albeck who served as head of the civil department in the State's Attorney's Offices 90% of the Settlement is built on State Land.
[40] HC 302/72 Khelou v. Government of Israel 27(1) PD 169; HC 606/78 Ayub v. The Minister of Defense 33(2) PD 113.

facts of the case. These led it to the conclusion that the *dominant* motive behind the requisition of the land was not to provide a response to security concerns, and that the Military Commander had therefore used the authority granted to him in a manner which was inconsistent with the purpose of said authority, thereby exceeding his powers. Although the Court did not declare the establishment of settlements over land requisitioned for security purposes to be *in principle* unlawful, the Court's ruling brought about an end to the practice of establishing settlements on requisitioned land.

3.2. State land

Under Article 55 of the Hague Regulations, the occupying state is to be regarded only as administrator and usufructuary of property 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'.

On July 7, 1967, the Military Commander issued an order relating to government property, which ruled that assets belonging to the Jordanian Government or any agency or corporation managed by the Jordanian Government, would henceforth be in the sole possession of the Military Commander[41]. The Military Commander appointed an agent to serve as the Custodian of Government Property. The Custodian was in charge of both property which had been declared Government property under the said order, and also abandoned property whose owners had left the region.

Under Ottoman land law, which was in force at the time in the Territories, land which was not registered under the name of any person or entity in the land registry offices belongs to the government, unless the holder of the land is able to prove that he has held and cultivated the land for a period of 10 years or more[42], in which case he shall be entitled to demand registration of possession rights to the land (*Tas'ruf*). Where a certain parcel of land is neither registered nor held under such terms, it may be declared as State land. The Military Commander further ordered that, where someone wishes to challenge such declaration he must argue before an appeals committee established by the Military Commander[43].

Attempts to challenge such declarations were generally based on the following arguments: (i) that the declaration of any particular parcel of land as State land was a mistake in the particular case and that therefore the declaration should be reversed on its merits;

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[41] Order Regarding Government Property (no. 59), 1967, 367 Proclamations Orders and Appointments of the Judea and Samaria Command 772

[42] Section 78 of the Ottoman Land Law of 1274 to the Hegira (1858). Section 78 also requires that the initial possession of the land be lawful. The Court has not enforced such requirement unless the occupiers have admitted that they began cultivating the land without legal authority. See E. Zamir, **State Land in Judea and Samaria**, Legal Review, Jerusalem, 1985 p. 19

[43] Order Regarding Appellate Committees (no. 172) 1967, 367 Proclamations Orders and Appointments of the Judea and Samaria Command, 350. The policy of declaring such land as State Land was criticized largely for failing to consider the difficulty that the claimants have faced in proving ownership of the land due to an underdeveloped registration system. See **Kretzmer** pp. 90-94.

(ii) that the interpretation of the appeals committee of the relevant Ottoman Law, with regard to proof of ownership over non registered land was too narrow and ignored the custom adopted in the area; (iii) that the establishment of the appeals committee was inconsistent with Article 43 of the Hague Regulations which requires the occupant to respect the laws in force in the occupied country, 'unless absolutely prevented', and (iv) the policy of establishing settlements on such land was unlawful.

The Court denied all such petitions. In doing so, the Court relied on the administrative law principle that its task was not to comment on the advisability, or otherwise, of any administrative decision, but to review its legality. The Court therefore declined to intervene on the appeals committee's factual findings. The Court further declared that the establishment of the appeal committees was not inconsistent with Article 43 of the Hague Regulations, as procedural changes do not affect substantive law. Arguments regarding the lawfulness of establishing settlements over such land were denied, as the Court held that once it was determined that this was State Land, petitioners had no standing with respect to this question[44].

3.3. As noted earlier, State land is subject to Article 55 of the Hague regulations, whereby the rights of the Military Commander are limited to that of administrator and usufructuary. In our view the same applies to requisitioned land, although in principle, once the 'needs of the army of occupation' have ceased, the land should revert to its original owners. In any event, it is clear that the rights of the occupying power - both as regards State Land and requisitioned land - is temporary.

As there is little difference therefore between requisitioned land and State land it may be concluded that the main distinction between the types of land is that between private land and public land. As we have noted, an additional distinction to be made is that between Annexed Territories and the rest of the Territories. As we shall see, the status of private land materially differs according to where it is situated.

[44] HC 285/81 Al-Nazar v. The Military Commander of Judea and Samaria 36(1) PD 701; HC 277/84 Al-Arayeb v. The Appellate Committee 40(2) PD 57.

CHAPTER III

REVIEW OF SETTLEMENT EVACUATION – APPLICABLE LAW AND REQUIRED LEGISLATIVE MEASURES

1. General

1.1. Basic assumptions and likely scenarios

The issue of the evacuation of settlements may become relevant in either of the following scenarios: (i) an international agreement between Israel and the authorized representatives of the Palestinian people; or (ii) a unilateral decision by Israel to withdraw its forces from the Territories, or from certain parts of the Territories which include settlements. As stated earlier, we believe that the scope of evacuation may have a bearing on the legal implications of the action. This holds true also in the case of a unilateral withdrawal. However, as the actions which would need to be taken in the event of an international agreement and those which would need to be taken in the event of a unilateral withdrawal largely overlap, we shall assume that the evacuation of the settlements results from an international agreement in which Israel has agreed to hand over the Territories to the Palestinian Authority. We shall refer to the legal implications of unilateral withdrawal only where it has different implications for our analysis.

1.2. Material distinctions

As noted above, there are two important distinctions, which need to be made at the outset. The first is between Annexed Territories and Non-Annexed Territories, since the legal regime applicable in each is different. The second is between private land and public land, since, as explained above and as we shall further show, the rights of the settlers with respect to such lands differ.

1.3. Analytical framework

While relating to the distinctions described above, our analysis will deal with the following issues: a) The termination of the State's effective control; b) Physical evacuation; and c) The severance of property rights.

The first issue, a), relates to the termination of political control by the State of Israel over the Territories or part of the Territories. We have chosen to use the term 'termination of effective control' since, as described earlier, the legal status of the land differs considerably, depending on whether it is in Annexed Territories or Non Annexed Territories. In the Annexed Territories, namely, Territories in which Israeli law is applied, the termination of effective control will require an act by the State to relinquish

sovereignty over such territory[45]. That is not the case in the case of Non-Annexed Territories where the mere act of the withdrawal of military forces is sufficient. The "termination of effective control" is therefore a neutral phrase to refer to both. The differences between the two will be reviewed in relation to each. The last issue, c), relates to the repercussions of physical evacuation for the property rights of the settlers.

Our analysis is structured along these lines for the following reasons:

Termination of effective control is, in essence, something that takes place on the international plane, and is the prerogative of the Government. It is also likely to be treated as such by the courts, since such action does not *per se* have any effect on settlers' rights. The discussion relating to such action by the Court would in principle be carried on within the framework of constitutional and administrative law - reviewing the Government's authority and the relevant constraints on such authority rather than the legitimacy of the Government's exercise of discretion. Furthermore, *in theory*, termination of effective control and the physical evacuation of settlements are two separate issues and one does not necessarily entail the other.[46] In practice, given the Government's responsibility for security and the other factors enumerated below, the one without the other would be unlikely.

Although jurists tend to include the right of access to one's property and the right to enjoy one's property, as both integral and material parts of property rights, the laws of belligerent occupation may, and often do, dictate otherwise. The distinction between physical evacuation and the severance of property rights may be necessary in a situation where a person is still to be considered the owner of a property even though his access to, and his ability to make use of, such property is denied. (It should be noted that the rights infringed upon in the event of physical evacuation are not limited to the prevention of access and the right to use one's property, but would also include the limitation on one's freedom of movement).

Despite their being analytically distinct, there is obviously a strong link between the issues of physical evacuation and the severance of property rights. This shall be elaborated upon below. It should also be noted that the structuring of our review along the lines described above is for analytical purposes only. In the final analysis all the issues described above will have to be dealt with in any future solution; or at least be consciously ignored. The analysis of the two issues also takes account of the fact that, although in

[45] As the focus of this study is Israeli domestic law we shall disregard the question whether by applying Israeli law, Israel has annexed that part of the Territories and whether such annexation is lawful under public international law. After some debate the Court held that applying Israeli law amounts to reacquiring sovereignty (see HC 4185/90 Loyalists of the Temple Mount v. The Legal Advisor of the Government 47(5) PD, 221.). As cession of sovereignty carries implications for Israeli domestic law (as shall be described) the distinction between Annexed Territories and other Territories is relevant.

[46] For example, France's withdrawal from Algeria did not entail the forcible evacuation of French nationals from Algeria.

theory termination of effective control may occur without physical evacuation, this is still an unlikely scenario. The reasons for this are as follows: (i) redeployment *per se* may have a material adverse effect on the basic human rights of the settlers currently secured by the IDF's presence in the area; (ii) such action is politically unfeasible as it would be deemed an abandonment of the Government's paramount duty to protect its citizens, and (iii) it is likely to encounter Palestinian objection. This, however, should not have a material effect on our analysis, since, as noted above, the two are still legally distinct.

2. Non-Annexed Territories - Termination of the State's Effective Control

2.1. General

There are no substantive norms in the Territories regulating the issue of termination of effective control. In the absence of such norms we shall first discuss the authority of the Military Commander to create such norms, and then discuss possible arguments challenging his authority. Having described the Military Commander's authority we shall discuss arguments challenging the Military Commander's exercise of discretion.

It should be noted that the need to create such norms and declare the termination of effective control is not axiomatic. In principle, the military could re-deploy without any formal act of termination of control. The consequences with respect to the applicability of the laws of belligerent occupation would be identical. The laws of belligerent occupation apply only in the event of effective control. No formal declaration is required in order to take such control. The same is true with respect to the termination of effective control which in principle, as we noted earlier, may be effected simply by the act of re-deployment. It is unlikely, however, that this will be the case, as it would create a legal vacuum – the ceding of effective control would thereby effectively bring about an end to the Military Commander's authority. It would also be inconsistent with actions previously taken by the Military Commander[47].

Another note should be made with regard to the role of the Military Commander. Formally, the Military Commander is the representative of the occupying power in the Territories and is vested with all legislative, appointment and executive powers. However, as described above, the Military Commander is subject to the Israeli Government and is bound to implement the policy dictated by the Government. This being so, although the Military Commander is the *de-jure* authority, his scope of authority as well as his scope of discretion are limited. Thus, although formally challenges may be leveled against the Military Commander such challenges are in practice likely to be directed against the Government (and in some cases maybe even the Knesset).

[47] Section 2, and Section 4(a), Proclamation Regarding the Implementation of the Interim Agreement (no. 7) 1995 164 Proclamations Orders and Appointments of the Judea and Samaria Command 1923.

Notwithstanding the above, since the Military Commander still holds the formal authority with respect to the Territories and since all Governmental actions in the Territories are formally taken by the Military Commander, this study will also address the Military Commander's possible action, both in instances in which the Military Commander operates independently and (as is likely to occur) in cases where the Military Commander implements the Government's directives or the Knesset's legislation.

2.2. The authority of the Military Commander

The authority to terminate effective control over the Territories, re-deploy military forces and transfer the Territories to the Palestinians, is vested formally with the Military Commander. Such authority derives from the fact that the Military Commander is vested with legislative powers with respect to the Territories and is entitled to incorporate any international agreement into the domestic law applicable in the Territories. The Military Commander in Judea and Samaria has done this with regard to the Israeli Palestinian Interim Agreement and has incorporated it into the domestic law of the Territories, while proclaiming that the IDF's forces are to re-deploy and that authority is to be transferred to the Palestinian Authority[48]. Such incorporation was held by the Court to be equivalent to Knesset legislation incorporating an international treaty into the domestic law of Israel[49].

2.3. Challenges to the Military Commander's authority

Arguments challenging the Military Commander's authority to enact such legislation are likely to be based on the claim that the law *in fact* applicable in the territories is Israeli law and that it is therefore for the Knesset to enact such law. Such a challenge was already made in different contexts, and was rejected by the Court[50]. As previous attempts to argue that Israeli law is in force in the Territories have been rejected in the past, we believe the same would happen again in the face of similar such challenges in the event of the termination of effective control.

Further, petitioners may claim that by terminating effective control the settlers are being exposed to hostilities from the local Palestinian population, including Palestinian security forces and militia, which would potentially deny to them their basic right to life and security[51]. However, as noted earlier, a scenario in which effective control is terminated while the settlers are not evacuated from those areas where effective control was terminated, is unlikely..

2.4. Challenges to the Military Commander's discretion

[48] Section 2, and Section 4(a), Proclamation Regarding the Implementation of the Interim Agreement (no. 7) 1995 164 Proclamations Orders and Appointments of the Judea and Samaria Command 1923.
[49] HC 2717/96 Waffa et. All. v. Commander of the IDF Forces in Judea and Samaria 50(2) PD 848, 853.
[50] HC 2612/94 Sha'ar v. The IDF Military Commander in Judea and Samaria 48(5) PD 675, 681.
[51] See for example articles 6 and 9 of the International Covenant of Civil and Political Rights 1966. For further discussion of the effect of this Covenant see the section below dealing with physical evacuation.

As noted above, the Court has already ruled that the actions of the Military Commander, including his legislative actions, are subject to the review of the Court, under the substantive norms of Israel's administrative law. However, it is unlikely that the Military Commander would act on his own initiative. Such action is likely to be preceded by a Government resolution ordering the Military Commander to re-deploy his forces and withdraw from the Territories or any part thereof and - to the extent that such action is taken in the context of an international treaty - to hand over his legislative and administrative powers to the entity which is to take control over such territories.

It may be argued that, in such an event, the order to be issued by the Military Commander would be null and void, as the Military Commander did not exercise his discretion independently, as may be required under Israel's administrative law. Such an allegation has previously been denied by the Court which has held that acting upon Government policy is not inconsistent with the principles of administrative law[52]. Furthermore, as the termination of effective control is firmly within the Government's prerogative, it is unlikely that the Court would intervene on such a matter.

Petitioners may further claim that their right to due process has been denied in the event that no hearing is conducted for such individual petitioners, prior to the termination of effective control. We shall elaborate below on the legal basis for hearing rights as part of due process and their applicability to the actions of the Military Commander. In the context of the actual act of terminating effective control (as distinct from the physical evacuation of settlers) it is likely that no hearing right will be granted, as such action is within the prerogative of the executive branch and therefore non-justiciable[53].

3. Non Annexed Territories - Physical Evacuation

3.1. Basic assumptions

For the purposes of dealing with the issue of physical evacuation, we assume here the scenario likely to create the severest conflict - namely, the mandatory evacuation of a large number of settlers who have turned down the opportunity to voluntarily relocate. Needless to say, not all settlers will turn down such an opportunity, and the actual number of those refusing to leave unless required by law is unknown. However, since it is likely that there will be many settlers who will oppose such action, we can safely assume that a substantial number of people will not voluntarily relocate.

3.2. Analysis framework

Our review of the physical evacuation of the settlers will follow the following lines:

[52] HC 302/72 Khelou v. Government of Israel 27(1) PD 169, 170; HC 606/78 Ayub v. The Minister of Defense 33(2) PD 113, 122.
[53] HC 3/58 Berman v. Minister of Interior 12 PD, 1493, 1509

3.2.1. An examination of the Military Commander's authority to evacuate the settlers according to the applicable law;

3.2.2. An examination of the Military Commander's authority to enact new rules ordering the evacuation. Such authority will be examined against the substantive norms of public international law and Israel's administrative and constitutional law.

3.2.3. An examination of the Military Commander's discretion in taking such actions.

3.3. The Military Commander's authority

The Military Commander's authority to evacuate the settlers may at present derive from one of the following sources: (i) Section 85 of the Order Regarding Security Provision[54] (the "Security Order") which empowers the Military Commander to issue restraining orders; (ii) Section 90 of the Security Order which empowers the Military Commander to seal areas; or (iii) Regulation 112 of the Mandatory Defense (Emergency) Regulations, 1945 (the "Defense Regulations") which empowers the Military Commander to expel individuals from the region.

i) Section 85 of the Security Order

We are of the view that the evacuation of the Settlers on the basis of Section 85 would not withstand judicial review. This is in light of the following:

(a) Section 85 is subject to the general provisions of Section 84 of the Security Order, which determines that the authority under this chapter may only be exercised where definite security concerns render the exercise of such authority necessary. Although it may be claimed that evacuation of the settlers may be required for their own safety, it appears that the correct interpretation of Section 85 is that it is intended to deal with situations in which the person against whom the order is issued poses a security threat.

(b) Support for our position may be derived from a decision of the Court with regard to Section 86, to the effect that ordering the relocation of a person *inside the region* may by done only in the event that the person himself poses a security threat [55]. There is little doubt that the Court would decide the same with respect to the use of Section 85.

ii) Section 90 of the Security Order

[54] Section 85, Order Regarding Security Provisions (no. 378) Proclamations Orders and Appointments of the Judea and Samaria Command 733

[55] HC 7015/02 Ajuri et. all v. Military Commander of the IDF Forces in Judea and Samaria published on September 9, 2002 on the Court's official website http://www.court.gov.il

A somewhat stronger source of authority may be found in Section 90 of the Security Order, as its scope is territorial rather than individual.

Historically, the Territories were declared a sealed area immediately after their capture during the 1967 war. Such declaration was never nullified. In principle, entry into the area is based on a general permit granted thereafter. Section 90(b) states that anyone entering a sealed area without a permit or remaining in such territory after the expiry of the permit violates Section 90.

Thus, although Section 90 does not specifically allow forcible evacuation of civilians (and was never used to evacuate civilians from territory in which such civilians resided), the Military Commander could, in theory, declare that all general permits have expired, thereby rendering residence in such areas illegal, and requiring evacuation.

It is unlikely, however, that Section 90 would be upheld as a sufficient source of authority for wide-scale mandatory evacuation. Section 90 deals with the prevention of both entry into, and exit from, a given area, and is perceived mainly as a mechanism for maintaining the *status quo*, preventing the entry of persons that would disturb military activity, or the exit of persons so as to enable the military to conduct searches and arrests. As a matter of practice, most orders issued by virtue of Section 90 have at the same time prohibited both entry and exit, to and from the area. Furthermore, as rights affected by an evacuation order are fundamental, it is likely that the Court would require a more explicit source of authority as the basis for such action.

iii) Regulation 112 of the Defense Regulations

Similar to Section 85 of the Security Order, Regulation 112 empowers the Military Commander to expel persons from a given area if it is required for the maintenance of security and public order. Our reservations regarding the applicability of Regulation 112 are similar to those regarding Section 85 of the Security Order.

It should be noted that Regulation 112(8) specifically grants hearing rights to the person whom the Military Commander decides to deport, which would seem inconsistent with a wide application of such regulation. Furthermore, in the only event in which relatively large numbers of people were forcibly evacuated from the Territories (the deportation of 415 Hamas and Islamic Jihad activists), the Court held that the deportation was permitted, as security concerns existed with respect to *each individual* so deported, and only due to the fact that security concerns did indeed exist[56]. It is unlikely, therefore, that the Military Commander could rely on Regulation 112 as a source of authority for the evacuation of the settlers.

[56] HC 5973/92 Association for Civil Rights in Israel v. Minister of Defense 47(1) PD 267, 282.

We are therefore of the view that, at present the Military Commander could not rely on existing applicable law in the Territories as a basis for the forcible evacuation of the settlers. Since future legislative measures are, in our view, required, we shall examine the argument challenging the Military Commander's authority to enact such law, both under public international law and under Israeli administrative and constitutional law.

3.4. Challenges to the Military Commander's authority – Public International Law

As noted earlier, the authority of the Military Commander derives from the applicable norms of public international law with respect to belligerent occupation.

Two norms deriving from public international law of belligerent occupation might be used to challenge the evacuation of the settlers under public international law: (i) Article 49 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (" the Geneva Convention") and (ii) Article 43 of the Hague Regulations.

Another set of norms which may be relevant in the context of the evacuation settlers are the provisions of the International Covenant on Civil and Political Rights 1966 (the "Covenant on Civil and Political Rights "), in particular Articles 12(1), 14(1) and 26. Article 14(1) will be discussed later with regard to the Military Commander's discretion.

Not all legal instruments described above are equally enforceable in Israeli domestic courts. The question of enforceability depends on whether a particular norm is deemed to reflect customary public international law or conventional law.

The Court has held that the provisions of the Hague Regulations reflect customary public international law and are therefore enforceable in Israel's domestic courts. With respect to the Geneva Convention, although it was held that its provisions do not reflect customary public international law, on several occasions the Court *has* applied its provisions, relying on the Attorney General's declaration that Israel would adhere to the *humanitarian* provisions of the Geneva Convention[57]. With respect to the Covenant on Civil and Political Rights , the situation is more complex. The Court has ruled that Article 9, relating to the rights of detainees to be promptly brought before a competent judicial organ, does reflects customary public international law,[58] but it has made no ruling with regard to the status of any other provision, and has not been called upon to do so.

i) Article 49 of the Geneva Convention

[57] HC 7015/02 Ajuri et. all v. Military Commander of the IDF Forces in Judea and Samaria, published on September 9, 2002 on the Court's official website http://www.court.gov.il

[58] HC 3239/02 Mar'ab v. Commander of the IDF's Forces in Judea and Samaria. Published on February 5, 2003 on the Court's official website http://www.court.gov.il

Article 49 which forms part of Chapter III of the Geneva Convention, states as follows:

> ***" Individual or mass forcible transfers as well as deportations of protected persons from the 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."*** (emphasis added)

Under Article 4 of the Convention, "protected persons" 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 an Occupying Power of which they are not nationals"*** … ***The provisions of Chapter II are, however wider in application, as defined in Article 13"*** (emphasis added)

As the settlers are Israeli nationals, and since Article 49 is not part of Chapter II, the provisions of Article 49 are inapplicable to the Settlers. Settlers could not then rely on the provisions of the Geneva Convention to support an argument against the Military Commander's exercise of discretion.

ii) Article 43 of the Hague Regulation ("Article 43")

Article 43 stipulates as follows:

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

Thus, it might be argued, an order in respect of evacuation issued by the Military Commander would be inconsistent with Article 43 since it comes to amend the 'laws in force'.

As noted above, the Court has repeatedly held that the Hague Regulations represent customary international law, and, further, that the Hague Regulations are the source from which the Military Commander derives his authority. There is thus no doubt that the Hague Regulations are applicable in the Territories[59].

Unlike the Geneva Convention which in our view does not apply to the settlers - their not being protected persons - the question of the application of the Article 43 is less clear, and it may be argued, as far as the Hague Regulations are concerned, that there is no distinction between settlers and local inhabitants.

We shall therefore discuss two issues pertaining to the applicability of the Hague Regulations: (i) their applicability to a transitional period in

[59] HC 393/82 Jamaiat Ascan v. IDF Commander in Judea and Samaria 37(4) PD 785, 793.

which preparatory actions are being undertaken prior to ending the status of belligerent occupation; (ii) assuming that they are still applicable even during such transitional period, their applicability to the protection of settlers' rights.

(i) **Application during a transitional period**

As noted above, the Military Commander in issuing an order for the evacuation of settlements may be alleged to be in breach of the requirements of Article 43 of the Hague Regulations to respect 'the laws in force'. The question that arises, therefore, is whether the Hague Regulations would continue to apply to a *transitional period* when actions are taken towards ending the status of belligerent occupation.

Article 42 of the Hague Regulations stipulates that territory is to be considered occupied '...when it is actually placed under the authority of the hostile army.' According to the letter of the Hague Regulations, therefore, its provisions continue to apply until such authority is waived. The issue of a transitional period is not mentioned in the Hague Regulations and any post-war consequences dealt with are inapplicable to occupation[60].

The exemption of the Military Commander during such transitional period, from the restrictions imposed by the Hague Regulations by alleging their inapplicability, would not be feasible. Plainly, the provisions of Article 42 would still be applicable, and other obligations imposed by the Hague Regulations would continue to apply - such as the duty to treat prisoners of war humanely, or the obligation not to gather information on the army of the other belligerent. Furthermore, the determination that the Hague Regulations are altogether inapplicable during such period would create a normative vacuum. This does not mean, however, that the effect of such transitional period may not be introduced into the Hague Regulations by way of interpretation. This possibility shall be discussed further below.

(ii) **The Hague Regulations as protecting settlers' rights**

Except in relation to specific provisions,[61] The Hague Regulations make no reference to the local inhabitants of the area subject to occupation and do not specifically distinguish between local residents and the civilian nationals of the Occupying Power. Such lack of a distinction may be interpreted as a negative provision. Furthermore, the Court has held that for the purpose of Article 43,

[60] See for example, Article 20 dealing with repatriation of war prisoners. However note also the duty to restore transmission and transportation equipment seized once peace is made (Article 53).
[61] Articles 44 and 45, The Hague Regulations.

the Military Commander is required to consider the needs of the settlers as part of his duty to maintain civil life[62]. One might conclude therefore, that the Hague Regulations should take into account the settlers' interests, thereby including them as part of the population.

On the other hand, the Court has based its reasoning for allowing amendments to local law - in apparent contravention of the restrictions imposed on such action by Article 43 - on the argument that the Hague Regulations are to be interpreted in a manner which conforms with the presence of a *long-term* belligerent occupation, a situation which the drafters of the regulations were unfamiliar with. It may be argued that, had the drafters of the Hague Regulations been aware of the possibility of nationals of the Occupying Power residing in the territory, a distinction would have been made between them and the local inhabitants. In other words, the failure to distinguish between the settlers and the local inhabitants was not an intended omission but rather a lacuna.

The later provisions of the Geneva Convention may serve as a source through which such lacuna might be filled. As a distinction is made between the nationals of the Occupying Power and the local population for the purpose of applying the Geneva Convention, the same distinction might be made with regard to the Hague Regulations. Article 43 is principally intended to provide a balance between the duty to ensure public order and civil life and the duty to maintain the *status quo ante* to the fullest extent possible. This may support an argument according to which, the enactment of a new law designed to restore the *status quo ante,* during a transitional period in which additional steps are taken to terminate the status of belligerent occupation, would not be in contravention of the Hague Regulations. Furthermore, since Article 43 is intended to limit the Military Commander's authority to introduce permanent changes to the *status quo ante*, the Military Commander may enact a *provisional* order, which would automatically expire once evacuations were completed.

We are of the view that the Court would be likely to uphold such an order, particularly where such an order is provisional. However, as the Court has never decided upon this question and since both interpretations are plausible, we shall not decide between the two. The outcome of such alternatives will be described in the conclusions to this chapter.

(iii) Article 12(1) of the Covenant on Civil and Political Rights

Article 12(1) of the Covenant on Civil and Political Rights (hereinafter "Article 12(1)") protects a person's right to freedom of

[62] HC 256/72 Electricity Company for Jerusalem District v. Minster of Defense 27(1) PD 124, 138.

movement and right to choose his residence. Petitioners may therefore argue that a forced evacuation infringes upon such rights in a manner inconsistent with the provisions of Article 12(1).

It is unlikely that the provisions of Article 12(1) would be held to deny the Military Commander's authority to evacuate the settlers. First, because, as noted earlier, it is questionable whether Article 12(1) would be enforceable in the domestic courts since, it may be asserted, it does not reflect customary public international law. Second, because it would appear that the interpretation of Article 12(1) itself would prevent such a decision. Article 12(1) is specifically operative "within the territory of the State". Consequently an evacuation, which is made in the context of terminating effective control over occupied territory, is likely to fall outside the scope of the protection granted under Article 12(1).

(iv) Article 26 of the Covenant on Civil and Political Rights

Article 26 of the Covenant on Civil and Political Rights provides equal protection before the law and further determines that the law shall prohibit any discrimination on any ground, which includes discrimination based on religion or national origin. Settlers might therefore claim that a decision to evacuate them is based solely on their religious or national identity and is therefore in violation of Article 26.

The Court has acknowledged the provision of the Covenant on Civil and Political Rights as adding additional weight to the right to equal treatment[63]. In doing so, however, the Court did not refer to Article 26 as an independent normative source but rather as an interpretative aid in determining the scope of the right to equal treatment. The Court has further determined that a law may explicitly derogate from such right[64].

As with Article 12(1), the enforceability of Article 26 as an independent normative source is also doubtful since it may be held to be conventional, rather than customary, public international law. Furthermore, it is likely that the infringement of the right to equality would be measured against the need to protect the settlers in the event of a termination of effective control. The action would therefore probably be held to be lawful, notwithstanding the infringement of such right. It seems that the Government would be able to persuade the Court that it has weighed, in good faith, the possible infringement of the settlers' right to equality against the welfare of the general public as well as the personal security of the settlers themselves as a result of such action.

[63] HC 6698/95 Ka'adan v. Administrator of the Lands of Israel et. al. 54(1) PD 258, 275.
[64] HC 6698/95 Ka'adan v. Administrator of the Lands of Israel et. al. 54(1) PD 258, 276.

3.5. Challenges to the Military Commander's authority - Israeli Administrative Law

The main norms, which may serve to challenge the Military Commander's authority to enact an evacuation order, are to be found in the Basic Law. Petitions challenging the Military Commander's orders will argue that such actions infringe upon the rights granted by the Basic Law and that such infringement is inconsistent with the provision in the Basic Law requiring that any infringement satisfy the Basic Law's criteria, i.e. that it be introduced through a law which is compatible with the values of the State of Israel, that it be enacted for a proper purpose and that it not be disproportionate.

3.5.1. The applicability of the Basic Laws in the Territories

In the course of judicial review, there are two possible ways by which the Basic Laws may be applied: (i) by direct application, namely to rule that the Basic Laws in their entirety are applicable in the Territories and that therefore any action - including legislative action which is inconsistent with the provisions of either of the Basic Laws - will be held null and void unless meeting the criteria described in the sections restricting possible infringement; (ii) by indirect application, namely, to rule that the *substantive norms* deriving from the Basic Laws are applicable in the Territories and that administrative decisions which do not properly consider the infringement of the rights granted by either of the Basic Laws will be held to be unreasonable and therefore *ultra vires*.

The Court has never decided whether the Basic Laws are applicable in the Territories. The attorneys representing the Military Commanders have never had to challenge their applicability, mainly because the actual validity of most orders couldn't be questioned on the basis of the Basic Law – Human Dignity and Liberty, since most orders were enacted prior to the enactment of the Basic Law and were therefore immune under Section 11 of the law. In the only case in which the petitioners did challenge the validity of a new military order enacted after the Basic Law - Human Dignity and Liberty, the Military Commander's counsel refrained from claiming that the Basic Law did not apply, claiming instead that such order was consistent with Section 8 of that Law[65] (allowing for infringements that satisfied its criteria for such infringements).

Since, as a matter of practice, the Court has heard and decided upon petitions arguing infringement of the Basic Laws, there is little doubt that the Court would reject the argument that the Basic Laws are inapplicable in the Territories in either mode of application. The difference in the form in which the Basic Laws are applied in the Territory does have practical significance, however. In the event that the Basic Laws are held to be directly applicable, petitioners may argue that a military order may not be considered as "law" for the purpose of the sections restricting infringement

[65]HC 3239/02 Mar'ab v. Commander of the IDF's Forces in Judea and Samaria. Published on February 5, 2003 on the Court's official website http://www.court.gov.il

of the Basic Law, and that consequently the order is null and void. If however, it were held that the Basic Laws are only indirectly applicable, petitioners would only be able to resort to challenging the reasonability of the Military Commander's discretion without being able to challenge his authority to enact such military order.

In our view the Court is unlikely to decide that the Basic Laws in their entirety are directly applicable in the Territories. As noted above, the Court has already held that any deviation from the principle of territorial application of laws should be specific. The Court is therefore likely to opt for the indirect application model. It is likely that the Court will decide that, although the rights granted under the Basic Laws are to be respected and not infringed upon, other than for a purpose which is consistent with the values of the State of Israel etc., not all procedural constraints regarding the protection of such rights are to be maintained. However, since we cannot entirely exclude the possibility that the Basic Laws will be held directly applicable in the Territories, we will examine the status of military orders in the Territories

3.5.2. Status of military orders as primary legislation

The status of legislative acts of the Military Commander is unclear. In principle, the Military Commander is the sovereign in areas held under the laws of belligerent occupation. On the other hand, unlike primary legislation enacted by the Knesset, the legislative acts of the Military Commander are subject to judicial review, both in the light of the norms of public international law, as well as the norms of Israel's administrative law. Thus, although in theory the Military Commander's order have the status of primary legislation, it may be argued that they are in essence subordinate legislation.

This approach was further bolstered by the Court in the Hamas deportation case described above, in which the Court declared that: "Security legislation may not bring about changes in the well-established norms of administrative law, which our law regards as principles of natural justice"[66]. On the basis of this ruling, military orders are in essence subordinate legislation, and thus would not qualify as "law" for the purpose of those sections in the Basic Law which allow for infringement of the Basic Law rights only on the basis of law.

Furthermore, the Court has held that matters of major significance are to be decided upon by the Knesset, it being the sole constitutional organ in which the authority to determine "primary arrangements" is vested[67]. The Court's decision was based on its determination that the basic principles of democracy - including the principle of representation - require that such arrangements be determined by legislation. It may therefore be argued that a settlement evacuation with such far-reaching implications for the future of Israeli society, should be decided upon only by Knesset legislation, in

[66] HC 5973/92 Association for Civil Rights in Israel v. Minister of Defense 47(1) PD 267, 290.
[67] HC 3267/97 Rubinstein v. Minister of Defense 52(5) PD 481,508.

which the will of the people is expressed. Conversely, it may be argued, that the decision to evacuate the settlements - however important - is in essence, a one-time decision which, after it is implemented, will have no direct implications for the Israeli legal system; it is therefore of the nature of a secondary arrangement which would not require Knesset legislation.

3.5.3. Conclusions with regard to the Military Commander's authority to evacuate settlers under Israeli Administrative Law

The Military Commander's authority to enact laws ordering the settlements and settlers to be evacuated is likely to be upheld. However, as one may not entirely exclude the possibility of the Military Commander's authority being contested, legislation by the Knesset may be required to overcome this. The Court has held that the Knesset is sovereign to enact laws of extra-territorial effect, and to apply laws on a personal basis to the settlers. Any legislation so enacted will be measured against the Basic Laws.

As noted above, it is unlikely that the Court would intervene in the event of a challenge to the Military Commander's actual authority to enact laws ordering the settlers to be evacuated. The more likely scenario is the Court subjecting the exercise of the Military Commander's discretion to review, while upholding his authority. We shall therefore examine the arguments relating to the Military Commander's exercise of discretion.

3.6. Arguments relating to the Military Commander's exercise of discretion

Challenges to the Military Commander's exercise of discretion may arise in two basic contexts: 1) Procedural fairness and compliance with due process; and 2) Non compliance with the substantive norms governing the exercise of discretion, namely:

i) His discretion was not exercised independently and in good faith;

ii) The evacuation order violates administrative undertakings made by the authorized representatives of the Israeli Governments.

iii) The evacuation order is unreasonable as it fails to properly consider the infringement of the settlers' basic rights.

We shall deal with each of these separately.

1) The right to Due Process

The substance of the right that we have termed here 'due process' is the right of each citizen, whose interests are adversely affected by an administrative decision, to be heard by such administrative authority and to be given the opportunity to persuade such authority to retract its decision (hereinafter: "Due Process").

Such right does not need to be recognized by a statute and is deemed to be part of Israel's administrative/constitutional law[68]. Furthermore it was held by the Court that Due Process is applicable within the Territories and that security considerations do not deny such right[69]. Although the scope of the right and the circumstances under which it would arise is not defined, it is obvious that an administrative action which leads to the removal of people from their homes should, in principle, give rise to such a right in that it adversely affects a direct and substantial interest of such people.

Due Process, however, may not be granted with respect to an administrative action in the following cases: 1) the action is by virtue of a law which explicitly or implicitly determines that Due Process will not be granted[70]; 2) Legislative actions (which includes both primary and subordinate legislation). The rationale for this is that it would normally be unfeasible to grant individuals Due Process with respect to administrative actions of such wide application.[71] It should be noted, however, that with respect to military orders, the denial of Due Process by virtue of a military order - even though the latter is considered primary legislation - would not be upheld by the Court[72], unless the "wide application rationale" were established; 3) Actions which, by nature are within the prerogative of the executive branch, such as actions which are foreign-affairs related [73]; and 4) actions which by nature require immediate measures[74]. It was further held that, in the event that the hearing itself would be redundant, and would be unlikely to have any effect on the administrative decision, the executive branch might be exempt from its duty to conduct a hearing. This decision, however, was criticized by scholars and was later reversed by the Court[75].

It should be noted, however, that failure to grant Due Process would not automatically render the administrative decision null and void and nullification of the administrative decision would be subject to the Court's discretion which would *inter alia* consider the severity of the flaw and the efficacy of the nullification of the decision[76].

From the above description we may conclude that the enactment of a specific military order relating to the evacuation would not *per se* deny the settlers Due Process. It is likely, however, that Due Process would not be granted where the military order is mandated under the terms of an international agreement, since the wide application rationale would be likely to apply. A distinction therefore needs to be made between the two

[68] See for example HC 3/58 Berman v. Minister of Interior 12 PD, 1493, 1508;
[69] HC 358/88 Association for Civil Rights in Israel v. Officer Commanding Central Command 43(2) PD 529
[70] Y. Zamir **The Administrative Authority**, Jerusalem 1996, 809
[71] HC 3/58 Berman v. Minister of Interior 12 PD, 1493, 1509 also Y. Zamir, Ibid, 809.
[72] HC 5973/92 Association for Civil Rights in Israel v. Minister of Defense 47(1) PD 267, 290.
[73] HC 3/58 Berman v. Minister of Interior 12 PD, 1493, 1509, See discussion regarding termination of effective control.
[74] HC 358/88 Association for Civil Rights in Israel v. Officer Commanding Central Command 43(2) PD 529, 541.
[75] HC 5194/03 Grossman v. Minister of Defense, published on June 16, 2003 on the official Court's website http://www.court.gov.il
[76] HC 551/82 Kashua v. Director General of the Ministry of Education and Culture 37(3) PD 571.

aspects of the executive decision: while the decision to terminate effective control will not entitle the settlers to Due Process - it being within the prerogative of the executive branch, the decision to evacuate the settlers, will in principle entitle the settlers to Due Process unless it affects a large number of settlers which would render such hearing impracticable.

The right to due process is also protected under Article 14(1) of the Covenant on Civil and Political Rights, although the term "due process" used there largely relates to a person's rights under a criminal process rather than an administrative one. Nevertheless, Article 14(1) may be interpreted so as to apply the right to Due Process to an administrative procedure. Furthermore, in its sensitivity to procedural fairness as a key component of the democratic principles on which Israel is established, the Court might well hold that such rights reflect customary public international law. However, we are of the view that such a determination would not affect the Court's decision in the event that it chose to deny Due Process on grounds of wide application. The term "due process" is not defined in Article 14(1) of the Covenant on Civil and Political Rights and it is likely that the Court, in determining the scope and contents of such term, would adopt the criteria for defining the scope of such rights which pertain under Israeli administrative law.

2) Independence of discretion

The Court has already held that the Military Commander, although independent in theory and the legislative authority in the Territories, is subject to the directions of the Government and is required to give effect to its decisions. It is likely, therefore, that an argument challenging the fact of the Military Commander's discretion not being exercised independently would not be accepted by the Court, in a case where the Military Commander acted on a Government decision.

3) Reasonability

For an action to be held to be reasonable it has to both: 1) give due weight to all relevant considerations and 2) mitigate the adverse effect it may have on basic rights while resorting to the least extreme measure.

It should be noted that, although in theory the Court subjects the reasonableness of an action to its review, it does not examine the advisability of the action. The Court also assumes that an administrative action is legal, and it is for the petitioner to persuade the Court otherwise. The Court's willingness to intervene in any particular matter may vary, depending on the circumstances of each particular case.

In our view, the circumstances here would provide strong arguments for the Court's non-intervention. First, the evacuation is tied in with the termination of the State's effective control, which is an "Act of State". Secondly, in the event that an international agreement were to precede such act, while in theory the existence of an international agreement should not be a factor to override all other considerations, we believe that the present

case would carry such far-reaching implications for Israel's national security and global position, that the Court would be highly unlikely to substitute its own discretion for that of the Government, especially given that any decision would be likely to be thoroughly and publicly discussed by the Government prior to its taking effect. The same conclusion would hold in the event of unilateral re-deployment of the IDF forces provided such action is not limited to narrow security measures.

Proportionality, however, requires that no evacuation be made unless due consideration is given to the effect, on the settlers' rights, of their removal from their homes. We propose to deal with such considerations in discussing compensation mechanisms. Although in theory these are separate issues, it is likely that the Court would not allow evacuation of the settlements to go ahead unless adequate arrangements were made with respect to the compensation the settlers were to receive, since otherwise such action would be deemed to be disproportionate.

3.7. Non-Annexed Territories and physical evacuation - conclusions

Current law in the Territories does not allow for the evacuation of the settlers and therefore additional legislative measures would be required. The nature of such legislative measures would be subject to a decision regarding the applicability and interpretation of the Hague Regulations and the Basic Laws.

It seems that the authority, in principle, of the Military Commander to enact an order would be upheld. Furthermore, in the event that such military order were enacted in the context of an international agreement or in the context of a Government's decision for unilateral wide-scale strategic action, and satisfactory compensation mechanisms were established, such an order would also likely to be upheld on its merits. However, given that the opposite scenario may not be altogether discounted - i.e. where a military order were held to be invalid as either contravening the Hague Regulations or not qualifying as "law" for the purpose of those sections in the Basic Laws which allow for infringements 'by law' of the protected rights - Knesset legislation may still be required.

4. Non Annexed Territories - Expropriation and Severance of Property Rights

4.1. General

As noted earlier, in the Non-Annexed territories a distinction is to be made between settlements built on State land, and settlements built on private land. The description is not entirely accurate, since, within a given settlement certain areas may be built on State land while others on private land. However, our discussion shall follow this distinction since the substantive norms applicable to each type of land are materially different.

4.2. Proprietary rights to State land

According to public international law, State land does not become the property of the occupying power; the latter, upon capture of a given territory is regarded only as administrator and usufructuary with respect to the lands of the former sovereign (or former power)[77]. The Military Commander could not therefore have transferred ownership of such land to the settlers since *nemo dat quod non habet.*

The use of State land for the purposes of building in the territories has been effected through a chain of agreements and decisions, beginning with the authorization to plan and hold the land granted by the Custodian to the Ministry of Construction and Housing (usually one of its subsidiaries). Following this, licenses are granted either to a society which serves as the framework for the settlements or to the settlers themselves[78]. The right granted is in the form of a license, which according to law may be terminated at any time, unless specifically limited under the terms of such license.

Agreements entered into between the Ministry of Housing and such settlers associations as well as Agreements between such societies and individual settlers may vary: some include a termination for convenience clause; others are for short terms which are automatically extended unless either of the parties decides otherwise, while others may provide for a long-term lease. As the settlers are not the owners of the land but rather lessees or licensees, the issue here is not the termination of ownership rights but termination of contractual rights. According to Israeli administrative law, the executive branch has the power to release itself from agreements in the event that their fulfillment is inconsistent with the public interest.

The Military Commander, therefore, (represented for this purpose by the Custodian), together with the Ministry of Construction and Housing would be entitled to revoke the permits which have been granted by them. Such revocation however would be subject to the applicable norms of administrative law. Our analysis with regard to the criteria which such act of revocation would be required to satisfy, is similar to the analysis presented earlier with regard to physical evacuation by virtue of a military order. As mentioned above, in our view, in the context of a general or a wide scale redeployment, such action (the revocation of such rights) would be likely to be upheld by the Court, provided that adequate compensation were paid.

4.3. Proprietary rights to private land

As noted earlier, private land includes both land which was owned by Jews prior to the 1948 war, the majority of which, as described above, has since become State land, and land acquired after the 1967 war, which is the main focus of this section, where the owners enjoy all proprietary rights. We will review first the main norms which may serve as a basis for the expropriation of private land under applicable law and discuss their

[77] Article. 55, the Hague Regulations.
[78] State Comptroller's Annual Report 51B p. 400.

application. Thereafter we will discuss the additional legislative measures that may be required.

4.3.1. The authority to expropriate – Jordanian Law

Although the Court enforces the Hague Regulations in the Territories, and adheres to the principle that expropriation is prohibited under its provisions, the Court has held that the Hague Regulations do not prohibit expropriation of land if such expropriation is made under local law (namely the law in force prior to the capture of the Territories) and also serves the needs of the local population[79].

It should be borne in mind that the 'local law' in this case is similar in content to Israeli law with respect to expropriation of land for a 'public purpose' – both laws deriving from British Mandate legislation. The latter will be reviewed in greater detail below, in the context of Annexed Territories. In theory, therefore, the Military Commander would be empowered to expropriate private lands in the Territory, alleging that such expropriation was for a 'public purpose' and served the needs of the local population, as such available lands would facilitate the development of the Palestinian State. It is unlikely, however, that the Court would accept such an argument. The decision regarding designation of a specific parcel of land for expropriation needs to be reasonable. The prevailing view with respect to land expropriation is that the decision as to which parcel of land might be expropriated, is to be derived from the characteristics of such parcel (e.g. whether such parcel is within an area designated for building a public institution), not from the characteristics of its owners.

It would seem highly unlikely that the Court would uphold a decision in which the sole criterion for the designation of a particular parcel for expropriation was the national or religious identity of its owner. Furthermore since the principle of *stare decisis* is applicable under Israeli law[80], the Court would have to consider the effect such decision might have over the Israeli legal system, given the similarity of the expropriation laws of Jordan to those in Israel - in particular with respect to the definition of "public purpose". Even if it *were* held that the doctrine of *stare decisis* was inapplicable in the present case, the implications of such an interpretation of the term 'public purpose' might be problematic.

A decision upholding the owner's national/religious identity as a valid criterion for designating a certain plot of land to be expropriated, would imply that any minorities' property might be subject to expropriation simply by virtue of their ethnic identity, if their residence in any given area was not approved by the majority. It is our view that relying on Jordanian Law for the purpose of the expropriation of all private lands of Jews in the region would not withstand judicial review, being both unreasonable and discriminatory. It would appear, therefore, that current applicable law in the Territories does not allow for expropriation of private land and that

[79] HC 393/82 Jamaiat Ascan v. IDF Commander in Judea and Samaria 37(4) PD 785, 808.
[80] Section 20, Basic Law: the Judiciary

consequently additional legislative measures may be required. In line with our previous discussion with regard to physical evacuation, we will review both the enactment of military orders mandating expropriation and Knesset legislation.

4.3.2. Expropriation by military orders

Military orders mandating expropriation may be inconsistent with Article 43 and Article 46 of the Hague Regulations. Article 46 sets out a general obligation to respect private property, and further stipulates that confiscation of private property is prohibited. The Court has not distinguished between confiscation and expropriation and assumed, albeit implicitly, that in general the provisions of Article 46 apply equally to both[81].

As the Court has repeatedly held that the Hague Regulations represent customary international law, and further, that the Hague Regulation are the source from which the Military Commander derives his authority, there is no doubt that the Hague Regulations are applicable in the Territories[82]. We have already discussed the applicability of the Hague Regulations to the settlers' rights, in the context of Article 43, while expressing the view that a provisional military order mandating physical evacuation is likely to be upheld. The situation is somewhat different with respect to Article 46. As noted earlier, one of the arguments supporting the validation of a military order issued under Article 43, was that, in the context of a transition period in which measures are taken to restore the *status quo ante*, such measures would not be held to be in contravention of the Hague Regulations. This argument presupposes that such measures are indeed required as part of measures to be taken during a transitional period in order to bring about the end of the status of belligerent occupation. It would be somewhat difficult to argue that an expropriation of land already evacuated - which would have no effect on the demography of the region - is actually required in order to bring about an end to the status of belligerent occupation, particularly when the proportion of such land in the totality of lands on which settlements are built is marginal. In view of the marginal contribution of such action to the termination of belligerent occupation, the Court might well hold such action to be unreasonable.

We believe, therefore, that in view of the difference between the circumstances of physical evacuation which may be held to be necessary to bring about an end to the status of belligerent occupation, and those pertaining to the expropriation of private land - which would not - Article 46 would serve to prevent the expropriation of private land.

4.3.3. Expropriation By Knesset legislation

We described earlier the personal application of Israeli law to the settlers residing in the Territories. Such application is by virtue of their nationality

[81] HC 393/82 Jamaiat Ascan v. IDF Commander in Judea and Samaria 37(4) PD 785, 808.
[82] HC 393/82 Jamaiat Ascan v. IDF Commander in Judea and Samaria 37(4) PD 785, 793.

and has been held by the Israeli courts to be lawful. However it is unlikely that the same will be true in respect of Knesset legislation ordering private land to be expropriated by the Military Commander. Unlike the personal application of Israeli law, legislation relating to ownership rights in the Territories would, in essence, be an application of Israeli law on a territorial basis. As such, Israeli rights in the Territories could not exceed the rights granted to the Military Commander under public international law, and would therefore be subject to the same restrictions.

Furthermore, even if it *were* held that the Knesset was empowered to legislate laws which are by nature territorial (rather than personal) in Territories where its jurisdiction does not apply, an additional obstacle might arise: such Knesset Legislation would be likely to be examined against the Sections in the Basic Laws which allow for the infringement of Basic Law rights only by a law which is in keeping with the values of the State of Israel, whose purpose is appropriate and which is not disproportionate. As described above, where land has already been evacuated, its expropriation merely for the purposes of amending the ownership registration records in the Territories, would be unlikely to be seen as essential for the conclusion of any evacuation process. Given this, it is doubtful whether such measures would pass the test for infringements of property rights set out in the Basic Laws.

4.4. Conclusions regarding the authority to sever settlers' proprietary rights

With regard to State land, on which the majority of settlements are situated, since the settlers' rights are largely those of licensees the severance of proprietary rights would be relatively simple. As the rights of the settlers are contractual, such contracts will be subject to termination by the Government if such termination is mandated by public needs, even when no termination for convenience clause has been included in such contracts.

A decision to terminate such agreements would be reviewed under the rules of Israeli administrative law, and would be likely to be upheld, subject to compensation.

As for private land, the possibility of expropriating such land would mainly rely on the interpretation of the Hague Regulations and in particular Articles 43 and 46. However, in line with our earlier discussion, we are of the view that the restrictions imposed under Article 46 would be interpreted as prohibiting such actions. In such an event, the Knesset's legislation would be unlikely to be upheld by the Court, both because it would be imposing Israeli sovereignty, by default, over areas where Israeli law does not apply, and also because of it being disproportionate.

We believe the failure to expropriate private land in the territories would not have a material adverse affect on the implementation of an international agreement between Israel and the Palestinians (in the event such an

agreement is reached). Firstly, because the amount of land registered under Jewish ownership in the local land records is marginal, and secondly, because it would not prevent physical evacuation. Furthermore, although proprietary rights with regard to such land might be maintained, arrangements would still need to be made with respect to compensation for loss of access, and loss of use of such property. Such issues, as well as the question of compensation in the event of the termination of obligatory rights relating to state land, will be discussed in the final chapter.

5. Annexed Territories - Termination of Effective Control

Termination of effective control in the Annexed Territories will be examined along the following lines: Initially we will review the norms that govern the issue of termination of effective control. Thereafter, we will discuss the measures, which may be required under such norms. Finally we will discuss the possibility of amending such norms, where the Government deems the measures to be taken unfeasible.

5.1. Norms governing termination of the State's effective control

There are two statutes which present a significant obstacle to the termination of effective control: 1) The Order and Government (Termination of Application of Law, Jurisdiction and Administration) Law – 1999 (the "Termination Law"); and 2) The Jerusalem Law.

5.2. The Termination Law – required measures

The Termination Law states as follows:

"1. Definitions:

For the purposes of this Law-

"Government Decision" – A decision of the Government, by way of approval of a treaty or an agreement, or otherwise, including future commitment and contingent commitment;

"Territory" – A territory in which the law, government and administration of Israel apply;

2. Knesset's Approval

A Government Decision according to which the law, government and administration of the State of Israel shall not apply to a Territory requires the approval of the Knesset by a resolution supported by a majority of its members.

3. Referendum

A Government Decision approved by the Knesset according to Section 2 requires approval by national

referendum obtained by the majority of valid votes of the participants.

4. Effect

Section 3 shall enter into force on the date on which a basic law regulating the conducting of a referendum enters into force."

As evident from the letter of the Termination Law a Government decision regarding the ceding of sovereignty requires the Knesset's approval obtained by a "majority of its members" – namely, the affirmative vote of 61 members. To date, the Knesset has not enacted a basic law dealing with the referendum. Assuming that a majority of the Knesset members approve the Government's resolution, however, and the Knesset does not enact a basic law regulating a referendum, would the Government's decision still be valid? Under Section 4, it is not the entry into force of the law in its entirety that is suspended until the enactment of a basic law, but merely that of Section 3 relating to a referendum.

Although it may be argued that the intention of the law is to ensure that the validity of such a Government decision is approved in a referendum, it would be a mistake to ascribe to the law the hidden intention to limit the validity of the Government's decision approved by the Knesset. Section 4 should be read as enabling the Knesset to approve such decision in the event that a basic law regarding the referendum is not enacted. It should be noted that, unlike the Termination Law which deals with the basic principle, the basic law dealing with a referendum would have to cover a large number of regulatory issues such as the extent of permissible political campaigning, the allocation of media resources, campaign funding and other issues (although such actions could at present be supported by reference to the general election laws). In light of the above, and until the enactment of a basic law regulating referenda, a referendum should not be considered a condition precedent to the validity of a Knesset approved decision to cede sovereignty.

5.3. The Jerusalem Law

The Jerusalem Law states as follows:

1.Jerusalem – Capital of Israel

Jerusalem, complete and united, is the capital of Israel

2. Seat of the President, the Knesset, the Government and the Court

Jerusalem is the seat of the President of the State, the Knesset, the Government and the Court.

3. Protection of Holy Places

The Holy Places shall be protected from desecration and any other violation and anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their sentiments with respect to such places.

4. Development of Jerusalem

The Government shall provide for the development and prosperity of Jerusalem and the well-being of its inhabitants by allocating to it special funds, including a special grant to the Municipality of Jerusalem (Capital City Grant) with the approval of the Finance Committee of the Knesset.

Jerusalem shall be given special priority in the activities of the authorities of the State so as to further its development in economic and other matters.

The Government shall set up a special body or special bodies for the implementation of this section.

It may be argued that termination of effective control would contravene Section 1 of the Jerusalem Law. In our view, however, the Jerusalem Law should not be interpreted as prohibiting termination of effective control in Jerusalem; the statement in Section 1 being merely declaratory. It is to be assumed that, had the legislature indeed intended to prohibit termination of effective control it would have done so explicitly. The normative provisions are provided by Sections 2, 3 and 4 which determine that the official seats of the president, the government and the court are in Jerusalem, that holy places are to be protected, and that a special fund will be issued for the development of the city. Thus the distinction between the declaratory and operative sections is clear. In our view, therefore, the interpretation of the Jerusalem Law does not dictate that termination of effective control is inconsistent with its provisions. If such were the case, then amendment of Section 1 would require specific legislation, possibly even amendment by means of another Basic Law.

5.4. Amendment of the Termination Law and the Jerusalem Law

The amendment of both the Termination Law and the Jerusalem Law raises the issue of the Knesset's rights to limit its own future legislative power. In the context of our discussion two questions arise:

5.4.1. Assuming that the Government - knowing that it would have support of the majority of the Knesset members attending the vote but not the support of the majority of the Knesset members - were to suggest that the law be amended so that the affirmative vote of a majority of all members not be required. What majority would be required to amend the law?

5.4.2. Similarly, assuming it were held that the Jerusalem Law prohibits termination of effective control over East Jerusalem, how is the Jerusalem Law to be amended?

The issue of the Knesset's right to limit its own legislative powers has arisen in the past in the context of laws which include provisions limiting the Knesset's power of amendment of said law. Both with respect to the Termination Law and the Jerusalem Law, the issue is somewhat different, as neither includes any such provision with respect to their own amendment.

As the basic premise regarding Knesset sovereignty is that the Knesset is sovereign to enact any law, any deviation from such premise needs to be explicit[83]. Therefore, with respect to the Termination Law, an interpretation according to which the majority requirement set forth in Section 2 of the Termination Law makes the Termination Law in its entirety immune from any amendment unless obtained by such majority, is unlikely to be accepted.

The Jerusalem Law does not prescribe any particular Knesset majority for its amendment, and therefore may be amended by any majority. The Court has expressed the view that basic laws may only be amended by basic laws[84], but the actual effect of such opinion is still doubtful since it was made in obiter dictum and was not shared by all members of the bench. Furthermore, the opinion related to an amendment of a right guaranteed by the basic law, and therefore seems inapplicable to the subject matter of our opinion. It is unlikely to be held that the issue of sovereignty, which appears to be entirely within the scope of the State's prerogative, could be the subject of an individual right.

In conclusion, termination of effective control over the Annexed Territories requires *at present* that the Government's resolution to effect such termination be approved by a majority of the Knesset members. At present, the legal requirement for the approval of the decision by a referendum is not in force. Furthermore, in the event that the Knesset majority in favor of the Government's decision does not meet the minimum majority requirement prescribed by the Termination Law, such majority should still be sufficient to amend the Termination Law and, if required, the Jerusalem law as well. In addition, as such actions are likely to obtain the Knesset's approval, we will not review such actions under the norms of Israeli administrative law.

6. Annexed Territories - The Authority to Expropriate Land

6.1. Frames of reference and scope of analysis

As noted earlier, the annexed territories are subject to Israeli Law by virtue of the amendment, in 1967 (no.11), to the Orders of Governance and Law

[83] See CA 6821/93 United Mizrachi Bank v. Migdal Collective Village 49(4) PD 221, 321. Such is the case with respect to Basic Law: Freedom of Occupation which determines in Section 7 that any amendment thereto shall be made by a basic law enacted by the majority of all the Knesset's members.
[84] CA 6821/93 United Mizrachi Bank v. Migdal Collective Village 49(4) PD 221, 296.

Ordinance 1948, in the form of section 11B which states: "The law, jurisdiction and administration of the State shall apply to all territories of the land of Israel which the Government shall decree are such by Order."

Under subsequent Government Orders issued under this section, Israeli law was applied to East Jerusalem and the Golan Heights. Many of the legal ramifications of this, with respect to land ownership, the effect on corporations and partnerships and certain professionals such as lawyers and judges, are dealt with in the Order of Law and Administration Law [combined version] 1970 which applies to any territory coming under an Order made in accordance with section 11B above. For the purposes of this part of the present study, our focus will be on the annexed territory in East Jerusalem.

Since the applicable law is now exclusively Israeli law, the distinction made earlier between private and state lands does not apply. The ownership of such land as was not privately owned prior to 1967 transferred automatically to the ownership of the General Custodian under the law of 1970 referred to above and thence to the State. Provided the various constitutional and legal criteria are met, the State's right of expropriation under Israeli law would extend equally to privately owned land as well as to lesser property rights attaching to State-owned land. The problems noted earlier stemming from the application of The Hague Regulations would not arise here. One of the - perhaps surprising but inevitable - corollaries of this is that under present law, the legal process of expropriation in the Annexed Territories is likely to be more straightforward than in the Non Annexed Territories.

We do not propose to follow, to the same degree, the distinction we made earlier between physical evacuation from land and the severance of property rights over such land. Whether by force of existing legal arrangements or by virtue of some new piece of legislation, the right of the State to expropriate land and thereby sever existing property rights should, in theory[85], be less problematic than in the case of the Non-Annexed Territories – provided the purpose for which the action is taken satisfies various statutory criteria, not least those set out in the Basic Law. Once it has been decided to cede effective control at the political level, it would seem logical that the State set about evacuating its citizens from such territory and, as a preliminary to such evacuation, expropriating their property. The crucial question in this regard is whether existing laws would suffice for such expropriation or, as seems to us more likely, new legislative measures would need to be drawn up for this purpose. And, notwithstanding the comparative ease with which the Government might effect the expropriation of property rights in Annexed Territory, the question would still remain, whether the complete severance of such property rights is, or should be, entailed by such expropriation.

The scope of our analysis in this part will be to look at existing laws providing for the State's right of expropriation, in addition to the policy

[85] See, however, the discussion below arising from the recent Court decision in Karasik.

considerations behind the enactment of further legislation when it was felt that existing provisions were inadequate. This discussion will survey the likely challenges to the use of such laws in the present case. Central to this will be an analysis of the effect of the provisions of The Basic Law. We introduce the section with a brief description of the Basic Law and refer to it throughout. We also look at the changing norms of administrative law on the implementation of existing expropriation laws, including the guidelines issued by the Attorney General's regarding the process of expropriation (the: "Attorney General Guidelines"). An understanding of the extent of the Court's recent activism will also be essential for determining whether (as seems probable) a separate law will be required in the present case to provide the Government with the necessary authority to expropriate.

7. Annexed Territories - The Existing Legal Framework

7.1. The Basic Law

Any discussion of the applicable law in the present case needs to be conducted in the light of the Basic Law, and particularly in the light of the case law that has resulted from the application of its provisions to the question of expropriation.

The Basic Law, enacted in 1992, effected a major change in the status of property rights in Israel, raising these to the level of constitutionally protected rights[86]. Section 3 of the Basic Law stipulates: "No infringement may be made of an individual's property rights." The section is not a 'stand alone' provision but is to be read in conjunction with section 8 of the Basic Law that reads as follows:

> ***"No infringement may be made against rights granted under this Basic Law except where based on a law which reflects the values of the State of Israel, is designed for a fitting purpose, and where the infringement is not disproportionate; or in accordance with such a law, by virtue of a specific provision empowering such infringement."***

The implications of the Basic Law for the status of property rights are twofold: 1) courts are empowered to annul any *new* law, enacted after the Basic Law, where such law is found to infringe property rights in contravention of the provisions of the Basic Law; 2) the Court has also ruled that courts should interpret any 'old' legislation (i.e. legislation enacted prior to the enactment of the Basic Law) in the light of the status granted to property rights under the Basic Law, in such a way as to limit the effect of any infringement embodied in the old law[87].

The Lands (Acquisition for Public Purposes) Ordinance 1943 (the "Lands Ordinance"), for example, which we analyze below, would fall into the second category. In this regard the Court has noted, "….it is fitting that the

[86] CA 6821/93 United Mizrachi Bank Ltd v. Migdal Collective Village 49(4) PD 221.
[87] CA 1188/92 The Jerusalem Local Planning and Building Committee v. Bareli,49(1) PD 463, 483.

Government's authority to expropriate land be interpreted now on the basis of a proper balance between public needs and individual property rights in a way that reflects the values of the State of Israel and that bolsters the hitherto flimsy protection of property rights."[88]

The Basic Law is consequently central to the discussion of the issue of expropriation and will inform our analysis of the applicable Israeli law on the subject.

7.2. Attorney General Guidelines

A further frame of reference in administrative law to take into account when reviewing the Government's potential use of existing legislation dealing with expropriation, are the Attorney General Guidelines numbers 60.116 and 60.124. The first of these was issued by the Attorney General in 1970 and provides a detailed guideline to the procedures to be followed in the event of the Government wishing to expropriate land under the Lands Ordinance. While setting out the property rights problems occasioned by the Lands Ordinance, its approach reflects the state of the case law at the time and does not push the interpretation of the law beyond what the Court has allowed. Thus, for example, on the question of the 'public purpose' behind the Finance Minister's decision to expropriate, the guidelines accept the fact that the Finance Minister has absolute discretion in the matter, with the scope of judicial review limited to the manner of the Finance Minister's decision rather than its substance.

The later guidelines are from 1986. They followed the Court's recommendation for a change to the situation whereby the Lands Ordinance does not grant hearing rights with respect to a decision under Section 3, or notices under Sections 5 and 7[89]. Accordingly the 1986 guidelines provide for hearing procedures in respect of Section 5 and 7 notices, though falling short of what the Court had recommended, which was for hearings prior to such notices[90].

7.3. The Legislative Framework

The Lands Ordinance

7.3.1. Background

The Lands Ordinance remains the primary source for the authority to expropriate land under Israeli law. It is a legal instrument dating from the time of the British Mandate which, like many such legal instruments of that time, reflects the spirit of what was in essence a colonial regime whose principal purpose was to serve the interests of the British Crown rather than to promote democratic values and a respect for basic human rights. It confers sweeping powers on the authorities with respect to land

[88] HC 2390/96 Yehudit Karasik v. The Israel Lands Authority, 55(2) PD 625.
[89] HC 307/82 Lubianker v. Finance Minister, 37(2) PD 141.
[90] For a full discussion of the Attorney General Guidelines and their effect, see A. Kamer **The Law of Land Expropriation** [*sixth edition*] Tel Aviv 2001 (Hebrew) p. 132

expropriation - powers not always in keeping with other principles of Israeli law which have come into being in the period since. As a result, and as we shall see below, although the Land Ordinance itself has not been amended since the Mandate period (it was amended only once, in 1946), the courts in Israel, though initially slow to check the use of Government powers under this law[91], have recently tended to give it a narrow interpretation, most particularly in the wake of the Basic Law which provides constitutional protection for basic property rights.

It is noteworthy that, while UK law dealing with land expropriation has changed considerably since 1943, in Israel this particular law has not changed at all, though others, as we shall see, have been enacted and work alongside it. Indeed, unlike most Ordinances from the Mandate period still in existence, the Lands Ordinance has not even been modified into a new, Hebrew version in accordance with section 16 of the Orders of Governance and Law Ordinance 1948, and consequently (and unusually) the definitive version of this law is actually the English original as opposed to its somewhat halting Hebrew translation. The apparent 'neglect' by the Israeli legislator is indicative of the fact that, for all its flaws, the existing version of the Land Ordinance has suited the purposes of Governments over the past sixty years in seeking to expropriate land for various public projects, and the proper balance with individual property rights has not been maintained. In the wake of the Basic Law, this is no longer a tenable approach. The call for legislative change has in fact recently come directly from the Court.[92]

7.3.2. The provisions of the Lands Ordinance - the assault on property rights

The Land Ordinance gives the Finance Minister (who replaces the High Commissioner from the original text) broad powers with respect to the expropriation of private land upon payment of compensation to the owners. Under the law, any such expropriation must be 'for a public purpose'. Thus section 3 of the Land Ordinance states that the Finance Minister (or, under section 22, any body or person authorized to do so by the Finance Minister) may expropriate land (or rights in land), where he deems it to be "…necessary or expedient for any public purpose so to do".

Under section 2, 'public purpose' is defined as "…any purpose certified by the Finance Minister to be a public purpose" i.e. essentially, whatever the Finance Minister says it is. In line with this, Section 5(2) stipulates that the publication in the Official Gazette of the Minister's intention to expropriate land (under section 5(1)) "…shall be deemed to be *conclusive* evidence that the Finance Minister has certified the purpose for which the land is to be acquired to be a public purpose". It should be noted that the notice of

[91] See Motion 33/53 Meir Salomon v. Attorney General, 7(2) PD 1023. The Court stated: "The issue of the expropriation of land for public purposes is subject to the unlimited discretion of the Finance Minister…" and "…there is no doubt that under section 3 the discretion of the Finance Minister is absolute."
[92] ibid.

intention to acquire land, published in accordance with Section 5, is constitutive: the acquisition occurring with the publication of the notice.

In addition to the notice under section 5, section 7 requires the Finance Minister to publish a further notice directing anyone in possession of the land which is to be acquired, to yield up possession on or before the expiration of the period specified in the notice (to be not less than two months from the date of the notice). This may be challenged on application to the court (in accordance with section 8 of the Land Ordinance) by the owners or occupiers of the land. Under section 8, the court, in response to such an application, shall issue an order commanding possession to be delivered if it is satisfied that the Minister is entitled to possession under section 7. The proceedings under section 8 are technical only: the court is to satisfy itself that section 5 and section 7 notices have been published, that the time period in the section 7 notice has passed and that the owners or occupiers refuse to yield possession. Sections 9-18 deal with the issues of compensation and disputes with respect to original title, the right of the Government to expropriate as well as disputes over the terms of compensation.

An important element of the exercise of the authority to expropriate land under the Lands Ordinance (as well as other legislation relating to expropriation) is the requirement on the Government to pay compensation to the owner/occupier. Sections 12 to 18 of the law set out the rules for the assessment of compensation, the court procedures for its award, and the legal implications of compensation. Compensation arrangements are one of the essential elements of this and other laws which relate to expropriation, and will of course form an integral part of any move to expropriate land in the present case. Chapter IV of this paper tackles in depth the question of the payment of compensation in relation to both annexed and non-annexed territories as part of a more general discussion of the probable additional legislation that will be required for this purpose.

As may be seen from the above, the Lands Ordinance provides for a fairly draconian assault on private property rights. It does not require the Finance Minister to institute any public inquiry as to the particular 'public purpose' involved and/or to show whether such land is indeed essential for that purpose, nor to give the land/rights-owners the opportunity of a hearing, nor even to indicate in the notice what the particular public purpose is[93]. This situation has changed following recent decisions by the Court and, of course, following the enactment of the Basic Law.

7.3.3. 'Public Purpose'

As we have seen, an important element in the acquisition process under the Lands Ordinance is the declaration by the Finance Minister that expropriation is required 'for a public purpose' (Section 3) [94]. The issue of

[93] See HC 67/79 Shmuelson v. State of Israel, 34(1) PD 281.

[94] Note that the current definition under Section 2 is the 1946 amendment from the original 1943 version of the Ordinance which had stated '. any purpose <u>of a public character</u>…' The underlined

challenging the declared 'public purpose' is a complex one. According to the letter of the law, as noted above, the authority of the Finance Minister to dictate what the public purpose is, is absolute. Again, according to the letter of the law, the Finance Minister would not be required to disclose the purpose in his notice under Section 5. The procedure under the Lands Ordinance for challenging an act of expropriation under sections 8-10, is limited to technicalities and does not extend to a challenge on the substance of the stated purpose. The procedure is, however, lengthy, and the right to appeal - both with regard to the decision itself as well as with regard to the amounts payable as compensation - may delay the completion of the expropriation.

Although the act of the Finance Minister is subject to judicial review, the Court would, in the past, have been loathe to allow a challenge to the decision to expropriate to open up as well the possibility for disputing the substance of the public purpose decided upon by the Finance Minister. The stipulation that a particular purpose is a 'public purpose' is one with legislative impact and in such a case the Court would be reluctant to replace the Government's discretion with its own[95]. The grounds for review by the Court would be limited to the parameters of administrative law in general, i.e. to determine whether there had been a major fault in the Finance Minister's exercise of discretion which undermined the whole decision, such as the absence of good faith, arbitrariness or extraneous considerations.[96] Today, in the light of the Basic Law, it is clear that the Court would apply these same parameters to look at the *substance* of the Finance Minister's decision, to determine whether the purpose was, in fact, a 'public' purpose.[97]

While it might be assumed that the 'public purpose' in the present case would not be in dispute (peace-making, compliance with an international agreement, and so on), in fact the question is by no means straightforward and would be bound to be disputed as part of a challenge to a decision to expropriate where the Lands Ordinance continues to be the source for the Government's right to expropriate. Thus, it might be argued, the ceding of territory to the Palestinians cannot be considered 'a public purpose' in the sense intended by the Lands Ordinance: no public benefit of the 'public works' kind (roads, public facilities and so forth) will derive directly from the *territory* being expropriated; rather, the land being expropriated is merely instrumental in achieving what the Government considers to be for the public good. Once expropriated the land will be given away and the public will have no further benefit from it.

Support for such an argument may be found in Chapter 8 of the Planning and Building Law 1965 dealing with expropriations, where the grounds for such expropriations are construction projects which serve 'public needs'.

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words were removed in the later version, thus removing, in theory, the right of citizens to challenge the 'public character' of the purpose for which the land was being expropriated.

[95] See, inter alia, HC 124/55 Dwick v. Finance Minister et al., 10 PD 753.

[96] HC 307/82 Lubianker v. Finance Minister, 37(2) PD 141.

[97] HC 2390/96 Yehudit Karasik v. The Israel Lands Authority, 55(2) PD 625.

'Public needs' are defined in Section 188 of that law as 'roads, parks, sports and leisure areas…..hospitals, health clinics….' and so on. The underlying assumption of such law is that expropriation, as the ultimate assault on private property rights, may only be justified where the land being expropriated will provide direct and tangible benefit to the public or community.

7.3.4. The Continuous Connection Ruling

A related issue is the extent to which the expropriation for a particular stated purpose has the capacity to sever property rights 'for good' or only for so long as the particular purpose is still valid. In the recent case of HC 2390/96 Yehudit Karasik v. The Israel Lands Authority, referred to above, the Court broke new ground on this question, ruling that an act of expropriation for a public purpose is effective only for so long as the particular purpose for which the land was expropriated remains valid. If the purpose lapses, so too does the title of the State acquired through the act of expropriation, and the property right is to be restored to its original owner. In a previous judgment, the Court had stated that the right of the State in the land after expropriation was a "conditional right" only, the condition being the extent to which the land was needed to fulfill a public need[98]. The implications of this new ruling are immense. Referred to as 'The Continuous Connection Ruling' by Justice Heshin in the Karasik judgment, it means, in effect, that the property rights of one whose property is to be expropriated, are never fully severed, but only conditionally so: for so long as the purpose remains extant. It also means that, on the part of the State, the title acquired through expropriation is potentially only temporary.

In view of the above, any expropriation of property in the present case, relying on the Lands Ordinance, would face a double challenge: 1) the 'public' purpose would be challenged and the Court would be expected to enter the difficult issues outlined above arising from the fact that the public purpose for which the land is being expropriated is not directly connected with the land being expropriated; 2) it would be contended, relying on the Karasik ruling, that the Government had no real right to give away land it had expropriated, since its own title to such land was merely conditional, and the original property rights had not been severed.

It is also anticipated that an argument that might be raised in the present case against expropriation is that, if recent historical experience is anything to go by, it is unlikely that any 'permanent' peace arrangement would last for any appreciable amount of time. Given this, both the conditional nature of expropriation under the Lands Ordinance as well as the likely temporary efficacy of the 'public purpose' in this case serve to undermine any grounds for expropriating land in the first place. We are of the view, however, that were the Court to uphold the 'public purpose' which in this case does not attach to the future use of the land, the question of its temporary efficacy

[98] HC 2739/95 Mahul v. Finance Minister, 50(1) PD 309, 321-322.

would be less likely to undermine the validity of an expropriation, precisely because the purpose as well as its temporary nature do not attach to a particular piece of land.

The Court itself in Karasik was fully aware that its new ruling had significant implications for State expropriations based on the Lands Ordinance – issues which could not be fully dealt with by the Court. It therefore appealed directly to the Legislature to enact comprehensive legislation on the question of expropriations, replacing the Lands Ordinance, and addressing the mass of issues in property law arising, inter alia, from the increased protection for property rights stemming from the Basic Law. In our view, were the Legislature to answer the call of the Court, it would be opportune in such a law to deal also with the potential issues arising in the present case where any part of the Annexed Territories is ceded.

7.3.5. Expropriation on behalf of 'another' under the Lands Ordinance

It might be argued that the Lands Ordinance contains a solution to the issue of the Government expropriating land in order to transfer such land to the Palestinian Authority. Section 22(1) provides as follows –

> "(1) *Any person may apply to the Finance Minister to acquire any land on behalf and for the use of such person, and –*
>
> …*if in the opinion of the Finance Minister the acquisition of the land on behalf and for the use of such person is likely to prove useful to the public, the Finance Minister may proceed to acquire such land under the provisions of this Ordinance as if it were land to be acquired for a public purpose.*
> ….
> *(3) Before acquiring any land on behalf and for the use of any person, the Finance Minister shall require such person to enter into an agreement with him providing to his satisfaction for the following matters, namely –*
>
> *(a) the payment to him of the cost of the acquisition; and*
> *(b) the transfer, on such payment, of the land to such person; and*
> *(c) the terms on which the land shall be held by such person;*
> …..
> [emphasis added]

It should be noted that, as stated in Section 22(1), it is the Finance Minister who bears the legal obligations towards the person from whom the land is to be expropriated, including the obligation to pay compensation. Furthermore, the person from whom the land is expropriated would have no claim against the recipient of the acquired land based on the agreement entered into under Section 22(3). Such agreement merely serves to indemnify the State for the costs involved in expropriating the land.

Section 22(1) still contains a condition for acquisition, though notably the language is somewhat looser language than in Section 3. It might be argued that the phrase, "*likely to prove useful to the public"* establishes a lesser standard than 'for a public purpose' stated in Section 3 and could allow for a claim that expropriation which was part of Israel's final peace settlement with its neighbors would be certainly 'useful to the public'. Nevertheless, in the light of our comments above, the Court would be likely to give even this lesser standard the strictest interpretation in the event of the envisaged breach of property rights.

7.4. Other specific norms dealing with expropriation

7.4.1. Chapter 8 of The Planning and Building Law - 1965

We noted earlier Section 188 of the Planning and Building Law 1965, which appears in chapter 8 of this law. The section entitles the local planning and building committee to expropriate land, which has been set-aside in the local plan or detailed plan 'for public needs'. We noted also the specificity of the definition of 'public needs' in section 188(b). In addition to the list of public works and projects noted above, it includes the phrase: "*…and any other public purpose which has been approved by the Minister of the Interior for the purposes of this Section."* This however should not be interpreted as allowing the Minister of the Interior to take into account literally any purpose. The Minister's discretion would be limited to the purposes set out in the *local plan*, which in essence reflects urban or rural planning and building considerations. As a result it would be virtually impossible for the Minister of the Interior to use his authority to expropriate land under this Section in the present case: a) it would require a new local plan, amending all exiting plans in the Annexed Territories (a notoriously lengthy procedure, involving all the planning and building authorities to the highest level), and b) it would probably also be deemed to be *ultra vires*, as it would be held that the purposes of such plan have no relation to planning and building considerations.

7.4.2. The National Highway for Israel Law - 1994

Probably the most telling example of legislation having a bearing on the present case is the National Highway for Israel Law 1994 (the "Cross Israel Highway Law"). The law was enacted so as to enable the clearing of the route for the construction of the Cross Israel Highway. Two facts from this are therefore immediately relevant: 1) the drafters of this law acted on the understanding that the Lands Ordinance would not allow the process of expropriation to be effected with the ease (and speed) necessary for the success of the project[99]; and 2) the law is subject to possible annulment in the light of the Basic Law.

The following excerpt from the explanatory note to the draft law is worthy of note:

[99] This is stated explicitly in the explanatory note to the draft law.

> **"……*Under current laws dealing with expropriation, the procedures for expropriating land for the purposes of constructing an inter-city road would take an excessive amount of time, principally because in certain cases the court conducts lengthy proceedings over the amount of compensation which thereby delay the process of entering and taking possession of the land.***
>
> ***The proposed law is intended to bolster the status of the company [Cross Israel Highway company] for the purposes of the expropriations that will be required for the [construction of] the road and to clarify that entering and taking possession of the land cannot be delayed merely because of a dispute over the amount of compensation to be paid; this is without prejudice to the right to dispute the amount of compensation. It is also proposed in the law to institute a procedure involving the company over the issue of compensation, and to set up special compensation committees empowered to determine the amounts of compensation to be paid for acquiring the rights in the land, in accordance with the Lands Ordinance….*"**

In the law that was passed, the actual procedure for acquisition of land was made subject to the provisions of the Lands Ordinance (Section 3 of the law). Thus, inter alia, the law makes no reference to the purpose of the proposed acquisition, which is left to the procedure under the Lands Ordinance. Section 5 of the law states: "*The rights which the company will acquire in the lands of the highway will be acquired for the State and registered in its name*." The procedure for assessing compensation is separated from the process of acquisition of title and possession, as the note indicates. The principle of non-delay referred to above is set out in Section 4(2) which states: "*a dispute over the amount of compensation owed…shall not be grounds for delaying the entry to, and taking possession of the land"*.

The Cross Israel Highway Law is of course inapplicable in the present case – its substantive provisions relate specifically to expropriation for the purposes of constructing the Cross Israel Highway. It does, however, provide us with an important precedent and an indication of the kind of direction the Government would need to follow. The procedures of the Lands Ordinance on their own were recognized as being inefficient and therefore inappropriate. If, as seems likely, new legislation will be deemed necessary in the present case for the purpose of expropriation of land in Annexed Territories, the provisions of the Cross Israel Highway Law could serve as a useful model.

A rider needs to be added to the above, however. The Cross Israel Highway Law bases itself extensively on the provisions of the Lands Ordinance. Notwithstanding the fact that the Cross Israel Highway Law was enacted after the Basic Law, it is conceivable that, in the wake of the Karasik ruling, a number of its provisions – not least the blanket adoption of the Lands Ordinance as the procedure for expropriation – might not meet the approval of the Court were a Basic Law challenge to be filed against it today.

8. Annexed Territories – Conclusions and Proposed Solutions

8.1. As noted above, and for the reasons presented here, it is our view that land expropriation in the case of the Annexed Territories will require new legislation. In such legislation, it is essential that the drafters take account of the need to provide, as Justice Heshin intimated, as comprehensive a treatment as possible of the issues arising from the required expropriation in the post Basic Law era.

8.2. We have noted the elements required by the Basic Law if a law is to infringe Basic Law property rights:

8.2.1. the law reflects the values of the State of Israel;

8.2.2. it is designed for a fitting purpose;

8.2.3. the infringement of the Basic Law rights is not disproportionate; or

8.2.4. in accordance with such a law, by virtue of a specific provision empowering such infringement.

In the light of the above and the issues we have raised, it is clear that such a law would need to address, inter alia, the following:

i) The purpose for which the land is to be expropriated – to be transferred to the Palestinians as part of a permanent status arrangement or unilaterally ceded in the context of a wide-scale re-deployment. Where this is explicitly stated in the law it would fully meet the Basic Law's requirement. We do not believe the Court would allow a challenge based on the fact that the purpose is not related to the public use of the land to be expropriated. In our view, where such purpose is related to the fulfillment of the State's international obligations, or the implementing of a Government strategic decision with wide-ranging application in the international sphere, it is also unlikely that the Court would be willing to enter the question of the substance of the purpose behind the legislation - this being far too politically charged.

ii) It should be explicitly stated in the law that all title in the expropriated land would vest irrevocably with the State. Notwithstanding the fact that this might be perceived as a direct challenge to the Continuous Connection ruling, the Court would again be unlikely to intervene, for the reasons stated in (i) above.

CHAPTER IV

COMPENSATION AND REHABILITATION

1. The Need for a Comprehensive Arrangement

The evacuation of settlers will be a watershed event in Israeli history. In addition to the legal implications of such evacuation there will inevitably be lasting and wide-ranging material, social, political and economic effects on Israeli society. A large-scale evacuation of settlers and the consequences in terms of the dislocation of a large section of the population which would result, would not only impose an enormous burden on the Israeli economy, but would also have major political ramifications. It would be bound to give rise to a protracted and painful internal political dispute, one that could possibly pose a threat to the very social fabric of Israeli society.

A significant number of settlers would very probably regard a decision to give away parts of the biblical homeland as tantamount to an act of betrayal, as both morally and ideologically bankrupt. An even larger number of settlers who have chosen to reside in settlements relying on the Government's declarations and its active encouragement, are likely to feel abandoned and betrayed. Such attitudes will receive substantial support in the Israeli public. Other sections of the Israeli public, who have long objected to the idea of the settlements, are likely to add fuel to the flames, holding the settlers themselves responsible for the burden imposed upon Israeli society as a result of their ideologically motivated and ill-conceived actions. All such conflicting attitudes, emotions and opinions would be likely to flourish in the atmosphere of uncertainty which will follow a decision to evacuate settlers. Nor would the uncertainty be limited to the economic sphere. The evacuation is bound to lead to a substantial change to the settlers' way of life, since a large number of settlements have distinctive communal characteristics, self-regulating organs, education systems and other voluntary institutions which will cease to operate as a result of the evacuation.

The design of an adequate compensation arrangement is therefore essential, not only to enable the Court to reject the argument that legislative measures to be taken by the Israeli Knesset and the Military Commander are disproportionate, but also to deal with all the tensions, issues and conflicts referred to above.

Dealing with the consequences of settler evacuation is not unprecedented in Israeli history. At the beginning of the 1980's, Israel was faced with the task of dealing with the evacuation of settlers pursuant to the peace treaty signed between Israel and Egypt. It did so by way of enacting the Sinai Evacuees' Compensation Law (1982) (hereinafter: the "Sinai Law"), which we discuss below. Thus, although the design of the compensation arrangement is not subject to any constitutional norm which would *a-priori* dictate its contents, such legislation would not be enacted in a legislative vacuum. Both the specific precedent of the Sinai Law and other principles deriving from other legal sources are likely to serve as a source of inspiration for the contents of such an arrangement.

To that extent, the term "compensation" is somewhat misleading as it assumes that the arrangements which have to be established shall have to deal solely with the monetary value of the rights infringed upon, and payment of such rights to the extent possible within budgetary constraints. As noted above and as we shall see below, this assumption addresses only part of the effects that the evacuation may have over the settlers' way of life and their interests, and over Israeli society in general.

2. Framework of our Analysis

Unlike the previous chapter which mostly dealt with a description and analysis of the existing legal framework, this chapter is by its very nature largely a prospective one, though we do relate to existing legal mechanisms where such exist. As we shall see below, however, the mechanisms that do exist are not the best or most appropriate ones for dealing with the question of the evacuation of settlements and settlers. They do not, in the main, take account of the multitude of factors that would arise in the case of the evacuation of settlements and settlers: the question of the upheaval in people's ways of life, the desire to preserve whole communities, the reliance interest of an entire society on Government promises. It would also be difficult to infer such rights from the current mechanisms, to the extent we indicate will be necessary. Existing norms and principles might still serve, however, as a model to assist in the design of any proposed arrangement, but we will need to add to these additional principles, not necessarily deduced from existing law.

As to the likely challenges to such a mechanism, first of all, primary legislation is generally immune from challenges under the principles of administrative law (as opposed to constitutional law). It should also be borne in mind that a law granting rights to compensation as a special norm will take precedence over a general norm. The extent of judicial review over such action would be limited to claims relying upon the Basic Laws. In our view, it is likely that legislative measures establishing a comprehensive arrangement to deal with settlers' claims would be held to meet the criteria of the sections in the Basic Laws allowing for their infringement, provided that such laws were not blatantly disproportionate.

Our analysis therefore proceeds as follows: we describe the legal principles that should affect the design of the compensation arrangement. In doing so we refer to the principles of constitutional and administrative law, contract law, and tort law. We set out, in brief, the current mechanisms that exist for compensation in the event of land expropriation. We then describe additional principles and values that, although not specifically recognized by law, need to be taken into account in designing the compensation arrangement. Such principles may include social rights, religious rights, rights of worship and the right to choose one's communal way of life. We then set out the potential conflicts that are likely to occur: (i) conflicts of interests between settlers arising between the settlers themselves, and (ii) conflicts which may arise between the settlers' interests and the interests of the Israeli public. Finally, we describe specific laws dealing with removal of populations. The first of these is the Sinai Law, which presents a general framework for dealing with the outcomes of evacuation. We describe the manner in which the Sinai Law deals with all such concepts and principles.

3. Principles Deriving from Existing Law

This part sets out the principles that may be derived from current Israeli law. It relates to three primary sources: Israeli administrative law, contract law and tort law.

3.1. Administrative Law

3.1.1. Equality

The first principle in administrative law to be looked at here is equality, a well-founded principle in Israeli administrative law, which has been held to be constitutional in nature. It can serve as grounds for striking down Knesset legislation. It is not, however, an absolute right, in the sense that different treatment of different persons will be held to be lawful where a relevant difference exists between such persons. Additionally, the right to equality may need to be balanced against other rights and liberties of similar value. Furthermore, the Court's readiness to intervene in Knesset legislation where arguments relating to an infringement of equality rights are raised, is limited, and only a severe violation of such rights would lead to a revocation of a piece of legislation. Such readiness to intervene will be even further limited when the legislation in question relates to complex subject matter. Such an approach is consistent with the Court's extreme caution where Knesset legislation is concerned.

It is obvious, however, that the principle of equality should serve as the basis for any future legislation here, and any deviation from this principle will need to be justifiable, either through relying upon the notion of relevant difference, or from balancing the principle of equality against other, conflicting, values and principles of equal importance.

3.1.2. Reliance and an administrative undertaking

As noted earlier, a great number of settlers relied upon the Government's declared policy and incentives in deciding to relocate to the settlement towns and villages. Although in our view, such reliance would not serve as legal grounds for challenging Knesset legislation, or orders issued by the Military Commander as the case may be, it is unlikely that the Government could altogether disregard its previous declarations and the *de facto* reliance of settlers upon such declarations when drawing up the new arrangement.

When approaching the issue of compensation, both the principle of equality as well as that of reliance interest may serve, in our view, to undermine the basic distinctions made earlier with respect to the question of evacuation. The difference between Annexed and Non-Annexed Territories would be irrelevant since, unlike the procedure in which such rights may be infringed upon, it is unlikely that the *scope* of rights infringed upon will be held to be different. The same applies to the distinction between state land and private land. Although there is a difference between the two types of land with regard to the termination of the rights of the settlers to said land, it is

unlikely that the rights would be differently evaluated for the purposes of compensation.

3.2. Distributive justice

As noted above, the compensation arrangement will impose a heavy burden on the Israeli economy. The allocation of resources for that purpose may be subject to the principle of distributive justice, acknowledged by the Court as a significant factor to be taken into consideration when distributing the country's resources. This issue will be particularly relevant when allocating land reserves for the purpose of building new settlements where the evacuated settlers might live.

3.3. Contract Law

In principle, contract law provides that compensation for breach of contract serves as a substitute for specific performance, thereby protecting the offended party's expectation interest. In some instances, particularly in the context of termination of contracts, damages may be awarded in order to restore the offended person to the position he occupied prior to the execution of the contract. Contract law also allows for restrictions on these rights where such restrictions can be justified. Such restrictions are applicable in the event of termination of a contract by an authority if such termination is mandated due to public needs. The Court has determined that in such event the offended party will be entitled to compensation for actual damages caused as a result of such breach, without taking into account loss of profit or similar damages which come to protect the offended party's expectation interest. Contract law may therefore serve as a model here, both as regards the general principle described above and its exceptions. Such exceptions may be applicable to the settlers' claims for damages due to termination of contract.

3.4. The Law of Torts

The basic principle of torts law is that actual damages are intended to provide a remedy for the adverse effect of the tort, and are to be paid by the tortfeasor. Certain laws, however, create different mechanisms with respect to the allocation of the burden, and further limit the maximum amount payable as damages[100].

From the above it appears that Israeli law acknowledges certain principles which may affect the form of the compensation arrangement: (i) liability to pay damages may arise when there is no culpability on the part of the tortfeasor; (ii) allocation of the burden to pay damages is governed by policy considerations and specific laws may deviate from the principle of placing the burden on the tortfeasor; (iii) where the burden is placed without regard to the question of causation or culpability, the amount of damages

[100] See for example Road Accident Victims Compensation Law (1975), which determines that compensation in the event of bodily injury caused in road accidents shall be payable while disregarding the issue of culpability, thereby allocating the risk to car owners and further stipulating a maximum amount payable for damages.

which may be awarded is subject to limitations, prescribed to ensure that the public on whose shoulders such burden is imposed do not have to carry an unbearable burden.

3.5. Specific norms governing compensation in the event of land expropriation

As we have noted, a number of norms currently exist on the statute books for compensating rights owners in the event of expropriation of property rights. There are a number of drawbacks with using such norms which we have highlighted above. Our aim will be to see what elements of such laws might form a part of the comprehensive mechanism for compensation which we are advocating in this study.

The principle laws in this regard are: 1) the Lands Ordinance; 2) The Highways and Railways Ordinance (Security and Development) 1943; 3) The Planning and Building Law 1965; 4) The Amendment of the Law on Acquisition for Public Purposes Law 1964 (a largely procedural statute relating to aspects of the Lands Ordinance); and 5) The National Highway for Israel Law 1994. We shall look at some of these briefly here.

3.5.1. The Lands Ordinance

We looked at the main provisions of this law earlier in relation to the evacuation of settlers and settlements in the Annexed Territories[101]. With respect to compensating rights owners for the expropriation of their property rights, the Lands Ordinance remains the central provision to which all the aforementioned laws refer. The compensation provisions are set out in sections 3, 9, 12, 13, 16, 18 and 20. Some of these are procedural which is not our central concern in this study, for the reasons stated. Section 3, which sets out the power of the Finance Minister to expropriate, also sets out the fundamental principle that it be in return for the payment of "...such compensation or consideration as may be agreed upon or determined under the provisions of this Ordinance". Section 12 sets out the rules for assessment of compensation by the court, in the event of a dispute over the amount of compensation to be paid, and some of these should be looked at:

> ***12. Rules for Assessment of Compensation***
>
> *In estimating the compensation to be awarded for any land or right or interest therein, the court shall act in accordance with the following rules:-*
>
> *a) no allowance shall be made on account of the acquisition being compulsory;*
>
> *b) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, if sold in the open market by a willing seller, might be expected to realize;*

[101] Supra, chapter III, section 7.3.

Provided that the court in estimating such compensation shall assess the same according to what it shall find to have been the value of such land, right or interest on the said basis at the time when the Finance Minister published in the Gazette the notice of intention to acquire the same and without regard to any improvement or works made or constructed thereafter or to be made or constructed thereafter on the said land….

c) the special suitability or adaptability of the land for any purpose shall not be taken into account if it is a purpose to which it could be applied only in pursuance of powers derived from legislation or for which there is no market apart from the special needs of a particular purchaser or the requirements of the Finance Minister;

d) where the land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such nature that there is no general demand or market for land for that purpose, the compensation may, if the court is satisfied that re-instatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of such equivalent reinstatement;

e) ….

f) …

g) …

h) *the court shall also have regard to the damage, if any, to be sustained by the owner by reason of the severance of the land acquired for public purposes from other land belonging to such owner or other injurious effect on such other land by the exercise of the powers conferred by this Ordinance.*

As may be seen, the above rules focus entirely on the *value of the property right* for the purposes of compensation. Other factors, which we review in the course of the present chapter, are not taken into account. Rule a) is the main excluder of such other factors. Rule a) is in effect subsumed in rule b) which sets out the principal criterion for assessment of compensation - being the value of the land that, 'if sold in the open market by a willing seller, might be expected to realize.' It is noteworthy that the background to a) was a previous English statute, since repealed, which had conferred an additional percentage on the rights owner in lieu of the fact that the land was being expropriated[102]. Such consideration could be the rule in the present case, as a basis for providing compensation that would cover many of the social effects of the settlers' evacuation. Rule a) would therefore not be included in any proposed mechanism.

Only in subsection d) where, because of the land's purpose, its market value is low, does the Lands Ordinance countenance the cost of reinstatement as a possible yardstick for compensation. The Supreme Court has ruled that 12(d) does not apply in the case of owners of commercial businesses[103]. The section has been rarely used. By contrast, in our present case, the cost

[102] See **Kamer**, *supra* note 90, p. 355.
[103] CA 740/75 Davidovich v. Atarim Behof Tel Aviv-Yaffo 31(3) PD 10.

of reinstatement – re-housing settlers and possibly also whole settlements – could well emerge as the norm for the purposes of compensation.

It should be noted that a similar provision to section 12, including d), appears in the Highways and Railways Ordinance (Security and Development) 1943 which parallels the Lands Ordinance with respect to compensation.

3.5.2. The National Highway for Israel Law 1994

The National Highway for Israel Law 1994, as we noted in Chapter III, is a very good example of recent specific legislation in the field of expropriation for public purposes. As we noted also it relies for much of the procedure for land acquisition on the principles set out in the Lands Ordinance. Its provisions with respect to compensation are similar in this regard.

The initial body for determining compensation under this law is the Government's Chief Assessor and compensation is determined in accordance with the principles of this law, and the Lands Ordinance[104] i.e. the focus is again principally on the market value of the land to be expropriated. Where the rights owner and Government cannot agree on the amount to be paid the matter is referred to a compensation commission composed of three members: a judge (chairman) and two other members, at least one of whom must be a member of the public with legal training or knowledge in real estate[105]. The commission has the same authority held by the court under the Lands Ordinance and its decisions are subject to appeal to the District Court. The model of such a commission is one which was adopted in the case of the National Highway for Israel Law 1994 for the purposes of efficiency, speed and also fairness. The criteria for compensation are likely to be different in the present case, and the need for the role of the Government Assessor is questionable, however the model of a commission as playing a central role in determining the amount of compensation rather than resorting directly to the courts is one that could well be adopted here.

4. Other Principles

4.1. Social rights

The idea, substance and meaning of social rights are widely debated in Israeli academic legal and political circles. In general, the term 'social rights' refers to the State's duty to provide adequate conditions to enable each citizen to exercise their political rights. Such rights include the right to livelihood, residence, and education. The idea of distinct social rights is not recognized as such, although specific laws grant rights to basic means of existence, medical treatment, education and other necessities.

[104] National Highway for Israel Law 1994, section 6.
[105] Ibid section 7(a).

Additional rights, which are usually mentioned when talking about social rights, relate to the right of a community to maintain its particular characteristics. Both are likely to become relevant in the context of the settlers' evacuation. The settlers' removal from their homes may entail the destruction of certain means of subsistence, thereby affecting the settlers' livelihood. Furthermore, some settlements have distinctive communal characteristics that the settlers may wish to maintain in order to mitigate the effects of dislocation.

5. Conflicting Principles

The decision on the extent of the State's liability for the outcome of the settlers' evacuation is one to which principles of distributive justice will apply. One may assume that the capacity of the Israeli public to bear the economic burden resulting from the settlers' evacuation will be limited. The principles of distributive justice will then help to decide on the appropriate allocation regime, balancing the settlers' claims for compensation to remedy the affects of their dislocation against the impact of such dislocation on the Israeli public.

We do not aim here to cover the entire range of the conflicts between competing principles that are likely to arise. We will, however, provide some examples, in order to indicate the complexity of such an act.

5.1. The general right to equality versus specific rights

5.1.1. The right to equality versus land rights

As noted above, settlers' land rights may vary and be affected by two principles: (i) The type of land ownership, namely the distinction between private land and state land; (ii) The applicable law – namely the distinction between the Annexed territories and the Non-Annexed Territories. It might be argued that a better title to the land was acquired in the case of private land than in the case of state land, and similarly in the case of Annexed Territories, as compared with Non-Annexed Territories. It may be argued that such difference should be expressed in the amount of compensation payable. In order to determine whether different treatment is indeed justified, a decision as to the relevance of such difference needs to be made. This will have to take into account a number of issues; for example, payment according to size, as opposed to payment according to asset valuation and appreciation.

5.1.2. The right to equality versus the preferential allocation of land resources

One solution, which might be proposed to preserve the settlers' way of life, is the establishment of new settlements inside Israel where the communal, social and educational characteristics of the original settlement are maintained. Such solution may conflict with the principle of equality in two respects: (i) the scope of freedom of a distinct group to maintain certain communal characteristics in a particular place, while prohibiting the residence there of people whose way of life is inconsistent with such

characteristics, is limited under Israeli law as infringing upon the principle of equality (ii) the allocation of land for such purpose will require preferential treatment of settlers' societies, *inter alia* in the form of exemption from the requirements of Tender Law, thereby providing grounds for challenging such actions.

5.1.3. The right to receive comprehensive damages versus social rights

As noted above, both contract law and tort law may prescribe damages whose purpose is to cover the actual damage caused due to the tort or breach of contract. Such mechanisms relate to the status of the actual person as a point of reference. In addition, both contract law and tort law mainly relate to relations between individuals and mostly disregard the prior socio-economic status of the adversaries, other than for the purpose of restitution through damages. The severity of the effect of evacuation, however, may vary depending on the settlers' prior status, nature of occupation and way of life. It should be noted that the cost of living in the Territories is relatively subsidized, and therefore cheaper on the whole than in Israel itself.

Some settlers will be seeking a remedy (contractual or otherwise) for the damages incurred, and will stress the economic effects of their evacuation (such as lost assets, lost property, lost opportunities, profit and goodwill). Others who perhaps fared worse will stress the adverse effect on their way of life, the loss of certain means of subsistence, their inability to find alternative sources of income, and loss of additional benefits deriving from their status as settlers.

Possible conflicts may therefore arise in the context of progressive compensation. Two conflicting approaches will have to be taken into consideration: (i) full payment against actual measurable damages while disregarding other effects and (ii) progressive payments, primarily taking into account basic necessities while dealing with other effects only to the extent that it is monetarily feasible.

5.2. Specific contractual rights versus the principle of distributive justice

As noted above, the total amount of public expense required to deal with the consequences of any evacuation will need to take into account the principles of distributive justice. In this regard it is likely that settlers' losses will not be fully covered, as compensation ceiling will be determined.

At the same time, however, since both individual settlers and businesses in the Territories maintain routine business relations with persons, businesses and institutions inside Israel, it is likely that any evacuation will have a marked effect on the continuance of such relations and may bring about contractual claims against the settlers and their businesses. A mechanism dealing with the collapse of such businesses and the effect of this on third parties will need to be worked out.

6. Legislative Precedent - The Sinai Evacuees' Compensation Law – 1982 (the "Sinai Law")

The Sinai Law is a highly elaborate legislative arrangement that was intended to deal with the consequences of the evacuation of settlers pursuant to the peace treaty between Israel and Egypt. We do not intend, within the scope of this opinion, to describe the details of the arrangements prescribed under the Sinai Law, nor do we intend to cover all its principles. We shall limit ourselves to describing certain key provisions in the Sinai Law, which deal with issues raised in this chapter.

6.1. The Sinai Law and questions of distributive justice

Three main provisions reflect the legislature's decisions and priorities with regard to distributive justice. These could be categorized under (i) Comprehensiveness of the Sinai Law; (ii) Restrictions on public expenditure; and (iii) Provisions dealing with settlers' contractual obligations.

6.1.1. Comprehensiveness

Section 2 of the Sinai Law determines as follows:

> ***"No compensation shall be paid and there shall be no right to or ground or claim for compensation from the State in respect of the evacuation or in respect of damage or loss arising therefrom, save by virtue of this law"***

Accordingly, a settler could not raise any claim to compensation while relying on any other norm, general or specific. On the other hand the law only applies to compensation by the State. Thus any third party claims were to be regulated outside the scope of the Sinai Law.

6.1.2. Restrictions on public expenditure

Several steps are taken in order to restrict public expenditure. Such restrictions include:

i) a ceiling on compensation for settlers residing in agricultural settlements[106];

ii) restrictions on grounds for compensation[107];

iii) determination of fixed compensation for certain compensation components without regard to their actual value[108].

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[106] The Sinai Law, Section 16.
[107] The Sinai Law, Section, 11, 12, 13 39. 54.
[108] The Sinai Law, Schedules B, C, F. It should be noted that this does not necessarily mean that the fixed amounts are less than the actual value and may be considered as a measure taken to enhance

iv) restriction of compensation under more than one chapter.

6.1.3. Settlers' contractual obligations

Section 60(B) of the Sinai law stipulates that an obligation whose performance is frustrated due to the evacuation shall be deemed to be a frustrated contact as defined in Section 18 of the Contact Law (Remedies for Breach of Contract), (1970) (the: "Remedies Law")[109]. Section 18 of the Remedies Law exempts a party to a frustrated contract from fulfilling their obligation, and further declares that such breach shall not serve as grounds for specific performance or compensation. The court however is entitled, if it deems this to be justified, to order restitution of goods and values received, and order the party in breach to indemnify the offended party for reasonable costs and expenses borne during the performance of the contract.

It may be concluded that the law balances the right of the offended party's expectation interest against the settler's particular circumstances. The settler may be required, at the court's discretion, to indemnify the offended party for reasonable costs.

6.2. The conflict between the right to receive full damages and social rights in the Sinai Law

The conflict between the two principles was described above. Obviously, settlers with a greater amount of assets would uphold the principle of compensation, while settlers who fared worse would uphold the principle of compensation without regard to the actual assets held prior to the evacuation and taking into account personal circumstances. In general, the Sinai Law does not take into account the socio-economic status of each particular settler as grounds for preferential treatment in the allocation of the funds set for compensation. However, the law does grant settlers a special consolidation grant[110]. Such grant takes into account the length of time such settlers resided in the area and the size of their family. Such grant disregards the assets held by such settlers, their income, and the actual damages resulting from their relocation. Although other provisions of the law deal with such components, it should be noted that granting certain rights irrespective of actual damages inevitably has a progressive effect, assuming the total public expenditure is limited.

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efficacy. However, even if that is the case it may be considered as a measure required in order to place a limit on public expenditure.

[109] Although in theory such provision was not required as the issue of frustrated contract is dealt with by the Remedies Law, in fact the provision of Section 60(B) is material. The courts have defined the circumstances, which define a contract as frustrated contract very narrowly, going so far as to determine that a war cannot be deemed as frustrating circumstances since in Israeli reality war is predictable. Section 60(B) orders the court to disregard the issue of foreseeability, which was the main obstacle to dealing with the consequences of such termination.

[110] The Sinai Law, Section 11 and 39.

6.3. Social rights and community rights in the Sinai Law

Although the Sinai Law encourages agricultural settlers to carry on such activities by way of special incentives to farmers who continue to engage in farming[111], and further, by means of establishing new settlements inside Israel, it seems that such incentives were granted in order to promote further agricultural activity rather than out of acknowledgment of the settlers' rights to maintain special communal characteristics. It should be noted that, at the time the Sinai Law was enacted, the concept of community rights was far less developed as a legal concept. The same is true with regard to an individual's right not to be discriminated against in the allocation of land resources in the event that his way of life is inconsistent with that of the majority. It is therefore, not surprising to find out that such conflicts are not thoroughly dealt with by the Sinai Law.

7. Compensation Arrangement - Conclusions

7.1. We have described the principles which are likely to govern and shape the future compensation arrangement, and potential conflicts between such principles. As stated above, such description is neither detailed nor exhaustive, but does highlight the complexity of the issue that the Government will have to tackle.

7.2. The same may be said with regard to our review of the Sinai Law and the description of the methods used to deal with such conflicts. The Sinai Law appears to deal with some of the conflicts while disregarding others. The final shape of the Sinai Law could be attributed to the circumstances, and the political climate in which the Sinai Law was enacted. The relevance of the Sinai Law to our discussion depends on the circumstances, under which the settlers will be evacuated, the scope of such evacuation and the resources available to the State. However, even if such circumstances are materially different than those under which the Sinai Law was enacted, most of the competing principles dealt with in the Sinai Law will have to be dealt with when drawing up any compensation arrangement.

7.3. The design of the compensation arrangement will require multi-disciplinary research and analysis, in which all conflicting principles are identified and evaluated. Only after such principles and competing interests are thoroughly examined, can the basic alternatives and solutions be brought before the decision makers. Such research, analysis and evaluation will require extensive legal, social and economic inputs, and an ongoing exchange of views between all parties to such mission. Furthermore, as the compensation arrangement will depend on the final outcome of any peace agreement and be largely dictated by such agreement, it would be advisable to have at least the basic premises of such arrangement brought to the knowledge of the decision makers prior to the carrying out of any wide-scale re-deployment.

[111] The Sinai Law, Schedule C.