המכון לאסטרטגיה ציונית ע"ר
THE INSTITUTE FOR ZIONIST STRATEGIES

The Status of Former Jewish Assets in Judea and Samaria

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Edited by: Noa Lazimi

February 2019

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Abstract

This paper explores the status of the former Jewish properties in Judea and Samaria that were seized by Jordan in 1948. Contrary to the Supreme Court's ruling in the Valero case (2011), this paper concludes that Israel legally can, and should, return the property to its former owners, based on the following justifications:

- **Recognizing confiscated Jewish assets as Jordanian state property would be a violation of the principle of *ex injuria jus non oritur,* unjust acts cannot create law**. The Jordanian seizure was illegal, was the result of Jordanian aggression and unrecognized annexation of the territory, and thus should be seen as invalid.
- **Jewish properties in Judea and Samaria are *sui generis,* ie. a unique historical and legal phenomenon**, and they are much straightforward legally than Arab properties in Israel.
- **Conditioning their return on parallel Arab claims would erase the distinction between aggressor and victim.**

- **Israel's experience in Jerusalem shows that such parallelism is unnecessary** and that the return of Jewish properties will not open the gates to a flood of Arab claims.
- **Israel has a unique historical obligation to restore the seized Jewish properties**.

To conclude, the Jordanian state bears responsibility for the damages resulting from its aggressive actions. While Israel cannot press Jordan to make full restitution for the damages it incurred, it can, and should, restitute property owners in Judea and Samaria who had their assets seized.

Introduction

At the time of the armistice agreement between the State of Israel and the Hashemite kingdom of Jordan in 1949, approximately forty square kilometers of land and several hundred buildings previously owned by Jews in Judea and Samaria lay in Jordanian hands.[1] Subsequently, the Jordanian government, applying Mandatory ordinances, seized the former Jewish assets, declaring them enemy property and vesting them in the Enemy Property Custodianship.

When Israel conquered Judea and Samaria following the 1967 Six Day War, many of the former owners expected to regain control of their property which had been seized from them by the Jordanian government. Despite this expectation however, the Israeli government has not released the property, instead continuing to hold the assets as Jordanian national property. The Israeli Supreme Court has argued that the Jordanian seizure of the

[1] Eyal Benbenishti and Eyal Zamir. **Private Claims to Property Rights in the Future Israeli-Palestinian Settlement**. The American Journal of International Law, vol. 89, no. 2, 1995, p. 298. JSTOR, JSTOR, www.jstor.org/stable/2204205.

assets as enemy properties essentially extinguishes the ties between the property and its original Jewish owners.

This paper will argue that the Jordanian seizure was illegal, was the result of Jordanian aggression and unrecognized annexation of the territory, and thus should be seen as invalid. Recognizing confiscated Jewish assets as Jordanian state property would be a violation of the principle of e*x injuria jus non oritur*, unjust acts cannot create law. After having established that Jordan's illegal actions cannot grant them legal rights, we will examine the claim that Jewish properties cannot be returned to their original owners barring comprehensive treatment of parallel Arab claims on Israel. We will argue that Jewish properties in Judea and Samaria are *sui generis,* ie. a unique historical and legal phenomenon, and that they are much straightforward legally than Arab properties in Israel. Conditioning their return on parallel Arab claims would erase the distinction between aggressor and victim. We will see from Israel's experience in Jerusalem that such parallelism is unnecessary and that the return of Jewish properties will not open the gates to a flood of Arab claims. Finally, we will

argue that Israel has a unique historical obligation to restore the seized Jewish properties.

1. The Current Legal Status of Former Jewish Owned Assets in Judea and Samaria

When the 1948 Israeli War of Independence came to an end, Jordan controlled Judea and Samaria. Considering Judea and Samaria to be part of the Hashemite kingdom, Jordan purported to annex the territory. This annexation was ostensibly done at the request of the local population, although the true degree of local support remains doubtful.[2] This annexation was done in violation of international law and as such was not recognized by the international community, except Great Britain and possibly Pakistan. The illegality of Jordan's moves regarding Judea and Samaria will be discussed in greater detail later on. At the time of annexation, the Jordanian government kept in force previous law in Judea and Samaria, including Mandatory legislation. In 1939, the Mandatory government instituted the Trading with the Enemy Ordinance, modelled on a similar British Act, prohibiting trade with Axis countries and making provisions to manage the assets of Axis nations and their citizens in England. The ordinance created a

[2] Benbenishti and Zamir, p. 301

Custodian of Enemy Property and vested in it management of enemy assets. By force of the Trading with the Enemy Ordinance, Jordan seized control of Jewish-owned assets in Judea and Samaria.

Upon the Israeli conquest of Judea and Samaria, the army issued the Order Regarding Government Property (Judea and Samaria) (No. 59), 1967 that stated that property belonging to an enemy country at the time of the Israel conquest would henceforth become government property. Due to the ambiguity of Order's application to property seized under the Trading with the Enemy Ordinance, the Order was amended in 1991 (Amendment No. 8) to include the aforementioned property under Jordanian Custodianship.

As previously mentioned, upon the Israeli conquest of Judea and Samaria many former property owners expected to regain control of their property, only to be rebuffed by the Israeli military commander. The Supreme Court examined the legal status of such property in HCJ 3103/06 Sholomo Valero v. The State of Israel. The Valero case concerns property that Moise Valero, a Jewish

man, bought in Hebron in 1935. The homes were vested in the Jordanian Custodian of Enemy Property following the Jordanian conquest in 1948. Valero's sons argued that upon the Israeli conquest of Judea and Samaria, their father's property should be released to them, and should the government fail to do so, the property should be considered to have been expropriated and the heirs entitled to government compensation.

The judgement, issued by Justice Procaccia, examines the status of the assets, first according to their having been vested in the Jordanian custodian of enemy property, and then according to them being under the administration of the Israel custodian of government property. The assets came under Jordanian custodianship under the Trade with the Enemy Ordinance, issued in Mandatory times and remaining in force under Jordanian rule. Justice Procaccia held that the purpose of this act was namely to sever the enemy's ties to the asset, and secondarily to manage the assets until a peace agreement is reached. The property's transfer to Jordanian custodianship eliminated any ties between the previous owners and the property pending the cancellation of such

a transfer as part of a peace agreement. The court then proceeded to discuss the assets upon the Israeli conquest in 1967. Since the assets were in the custodianship of the Jordanian government on the eve of the Israeli conquest, the court considered them with respect to the occupying power's obligations towards public property under Article 55 of the Hague Regulations:

> "The power in control of an area under belligerent occupation has the authority to hold and administer real estate assets belonging to the enemy state. It may enjoy the profits of these assets [usufruct], but it does not obtain ownership thereof. It is obligated to safeguard these assets and may not render the rights thereto meaningless or transfer ownership thereof to another. In exercising these powers, the commander must consider the interests of the protected persons, residents of the Area [i.e., the OPT], and ensure public order and safety. In deciding how to administer the government property in his possession, the military

> commander may not consider the interest of the country on behalf of which he operates…"[3]

In other words, the occupying power is tasked with administering property assets of the enemy but does not gain ownership of such assets. This administration must be done on behalf of the former sovereign and of the residents of the area, and not in the interests of the occupying power. As such, the military orders issued to the commander in Judea and Samaria regarding assets belonging or registered to the Jordanian government:

> "…relate to taking possession of and administering government property, as opposed to vesting it in the military commander. The Israeli custodian's responsibility pursuant to the orders and to international law is to hold government property and administer it within the confines of the purposes of belligerent occupation – maintaining security and

[3] **HCJ 3103/06 Sholomo Valero v. The State of Israel**, para. 45. [English translation provided by the Center for the Defence of the Individual] http://www.hamoked.org/files/2014/1156710_eng.pdf

> normal life and providing for the needs of the protected civilians in the Area".[4]

As such, the government sees its obligations under international law as holding the assets on behalf of the Jordanian government, as opposed to its transfer to its original owners.

[4] Ibid., para. 44

2. The Illegality of the Jordanian Invasion and Occupation

Upon the State of Israel's declaration of statehood on May 15th 1948, the nascent Jewish state was promptly invaded by its Arab neighbors. This invasion was a clear violation of the prohibition of the use of force except as subject to Article 2(4) of the United Nations Charter. The invasion was aimed at preventing the implementation of the United Nations General Assembly Partition Resolution. Given the illegality of this invasion, it could not have given rise to any valid legal title. *Ex injuria jus non oritur*.[5]

The initial justification given by the Arab states for their invasion was the protection of Palestinian Arabs and the restoration of order in the country, as explained in King Abdullah of Transjordan's telegram to the Security Council.[6] This argument was refuted by Mr. Tarashenko, the representative of the Ukraine to the Security Council, who correctly pointed out that:

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[5] Blum, Yehuda Z. **The Missing Reversioner: Reflections on the Status of Judea and Samaria**. Israel Law Review vol. 3, no. 2 (April 1968): pp. 279-301.
Schwebel, Stephen M. **What Weight to Conquest?** The American Journal of International Law, vol. 64, no. 2, 1970, pp. 344–347. JSTOR, JSTOR, www.jstor.org/stable/2198669.
[6] Blum, p. 284

> "According to the rules of the international community each Government has the right to restore order only in its own territory… none of the States whose troops have entered Palestine can claim that Palestine forms part of its territory. It is an altogether separate territory, without any relationship to the territories of the States which have sent their troops into Palestine".[7]

Neither did the Armistice Agreements signed between Israel and Transjordan, Egypt, Syria and Lebanon remedy the illegality of the Arab invading presence. Article 2(2) of the Israel-Jordan General Armistice Agreement states that "…no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations".

This provision means that each party's rights and claims were frozen as of the signing of the agreement, ruling out any subsequent unilateral actions that would alter party's rights.

[7] Ibid. [The two parts of the quote were said on two separate occasions].

Therefore, Jordan's annexation of Judea and Samaria in April 1950 was contrary to international law and invalid. Jordan's annexation was not recognized by the international community, apart from the United Kingdom (and possibly Pakistan).

As Blum explains, Jordan can at most be said to enjoy the rights of a belligerent occupant in Judea and Samaria.[8] There is a disagreement among international law experts whether a state that has illegally occupied territory in violation of UN Charter Article 2(4) can benefit from the rights provided to belligerent occupants. Therefore, Seyersted argues that "it can no longer be maintained that the laws of war apply in all respects equally to the aggressor and the defenders. Basically the aggressor could not derive from his illegal act any rights under the customary laws of war... "[9] Most critically for our purposes, "[although] both parties must observe the humanitarian rules of the law of occupation which are intended to protect individuals and cultural property… this does not necessarily mean that one has to recognize the validity of the

[8] Ibid, p. 292
[9] Seyersted, Finn. **United Nations forces in the law of peace and war**. AW Sijthoff, 1966. p. 224.

legislation enacted by the illegal occupant within the limits of Article 43 of the Hague Regulations".[10]

As a belligerent occupation, Jordan was legally bound to protect the property rights in the occupied territories. Article 46 of the Hague Convention stipulates that "family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." Oppenheim states on this article:

> "Immovable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right whatever to the property . . . if the occupant has appropriated and sold such private or public property as may not legitimately be appropriated by a military occupant, it may afterwards be claimed from the purchaser without payment of compensation".[11]

[10] Ibid, p. 245.
[11] C. J. Colombos. **International Law: a Treatise**. Vol. II. Disputes, War, and Neutrality, International Affairs, Volume 29, Issue 2, 1 April 1953, pp. 403, 619. https://doi.org/10.2307/2609005

Therefore, it is the illegality of the Jordanian invasion that should deny it the benefits accrued through such an invasion. As such, we can distinguish between the Jordan seizure of Jewish properties in occupied Judea and Samaria, and subsequent Israeli land expropriation post-1967. As international law expert Eugene Kontorovich explains, Article 46 does not ban expropriation *per se*, but rather uncompensated taking.[12] Kontorovich refers to Prof. Yutaka Arai's recent treatise on the law of occupation in which he writes that "many experts argue that expropriation … is not forbidden. Arai cites the leading post-war authority George Schwarzenberger as maintaining that ordinary eminent domain for development purposes is not governed at all by the law of occupation.[13] In the decades after 1967, the Israeli government expropriated private Palestinian land for the construction of Israeli communities and public infrastructure, based on security justifications and eminent domain. Jordan, however, cannot be said to enjoy the rights of a belligerent occupier when it gained that

[12] **Israel's Settlement Regulations Bill and International Law**. https://en.kohelet.org.il/publication/israels-settlement-regulations-bill-international-law

[13] Arai, Yutuka. **Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction With International Human Rights Law.** International Law in Japanese Perspective. Vol. 11. Brill Academic Publishers, 2009.

status through illegal aggression. As Zamir and Benbenishti explain, the seizure of enemy property during wartime is an accepted international law practice.[14] Through various Trade with the Enemy Acts, states seize the property of enemy states and civilians situated in their territory, preventing them from benefiting from said property and thereby weakening their economy might.[15] The seizure of enemy property necessitates the removal of the original owner's claims on the property without an automatic right to repossession at the end of hostilities. The guiding judgement on the seizure of enemy property is the British *Bank voor Handel en Scheepvaart*:

> "When such property vests in him [the custodian], it ceases thereupon beneficially to belong to its original owner; and though in pursuance of arrangements to be made at the conclusion of peace… in pursuance of treaties of peace to be negotiated by the Crown, the Crown could re-create a title in the original owners, it

[14] אייל זמיר ואייל בנבנישתי. **אדמות היהודים ביהודה, שומרון, חבל עזה ומזרח ירושלים.** מכון ירושלים לחקר ישראל, 1993, פרק ז(2): פקודת המסחר עם האויב בראי המשפט הבינלאומי.

[15] For full survey of Trading with the Enemy Acts, see Domke, Martin. **Trading with the Enemy in World War II**. Central Book Company, 1943.

> could, in my view, equally create such a title in anyone else, including itself. The 'statutory suspension' of title referred to by Lord Russell of Killowen seems to me in its context to point, not to the persistence throughout of a temporarily submerged title".[16]

In summary, Jordan took control of Judea and Samaria in an illegal act and in accordance with the principle of *ex injuria jus non oritur* cannot have gained legal rights either to the territory or seized assets. Jordan's seizure of Jewish-owned property was in violation of its Hague responsibilities as a belligerent occupant. Having established that Jordan's confiscation of Jewish property was without legal validity, we will now turn to the Jordan's liability towards victims of aggression (*jus ad bellum*) and its independent liability for breaches of *jus in bello*.

[16] **Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property** [1954] 1 All E.R. pp. 969, 991.

3. State Responsibility

According to the International Law Commisson's finalized Draft Articles on Responsibility of States for Internationally Wrong Acts (Article 1): "Every internationally wrongful act of a State entails the international responsibility of that State". This means that the use of force, contrary to the United Nations Charter and customary international law, brings about State responsibility.

According to the International Law Commission in Article 31(1), "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".

The *Chorzow Factory* case affirms the principle of restorative justice in international law.[17] In the aftermath of World War One, Germany agreed to transfer control of Upper Silesia to Poland due to a bipartite agreement. Germany's transfer was conditioned on Poland not forfeiting any German property. However, Poland forfeited two German companies situated in the area in violation of said agreement. The PCIJ ruled that Poland's seizure of the German factories constituted a violation of provisions of Polish-German Agreement and as a result, Poland was obligated to make reparations for its violations of international law. The court ruled:

> "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation

[17] **Factory At Chorzów, Germany v Poland, Judgment, Claim for Indemnity, Merits**, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), 13th September 1928, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ]

> must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[18]

According to Dinstein, restitution in kind is possible when the property seized by the aggressor State is traceable.[19] He points to Article 238 of the Versailles Treaty of Peace with Germany as well as Article 75 of the Paris Treaty of Peace with Italy as examples. However, since war causes death and large-scale damage, reparations is usually the most effective mode of compensation. Victim states are to be compensated for losses and injuries suffered as a result of unlawful use of force.

In addition to the aggressor State's obligation to compensate victims of aggression (violation of *jus ad bellum*), the Belligerent Party is independently liable to pay compensation for breaches of *jus in bello*. Article 3 of the Hague Convention, 1907 states that "a belligerent party which violates the provisions of the [Regulations]

[18] Ibid. para. 124.
[19] Dinstein, Yoram. **War, Aggression and Self-Defence**. Fifth Edition, Cambridge University Press, 2011, p. 111.

shall, if the case demands, be liable to pay compensation". Koppe notes that the relationship between *jus ad bellum* and *jus in bello* liability is unclear.[20]

The most famous case of war reparation is the 1919 Treaty of Versailles in the wake of World War I. Much criticized for its supposed excessiveness, in Article 231 of the Treaty, Germany accepted responsibility for Allied losses and damages because of the war brought about by German aggression. As Germany's economic ability could not meet full reparations, Article 232 limited compensation to damage done to Allied civilian population and property. While much maligned, the Treaty of Versailles is not the only case of war reparations. In the aftermath of the First Gulf War, the Security Council in Resolution 674 (1990) informed Iraq that "under international law, it is liable to any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal

[20] Koppe, Erik. **Compensation for War Damages Under Jus Ad Bellum** (October 1, 2007). A. de Guttry, H.H.G. Post and G. Venturini (eds.), The 1998-2000 War between Eritrea and Ethiopia; An International Legal Perspective, TMC Asser Press, The Hague, 2009. Available at SSRN: https://ssrn.com/abstract=2485267

occupation of Kuwait by Iraq".[21] In subsequent Resolution 687, the Security Council restated Iraq's liability under international law and decided that Iraqi oil revenues would go to a compensation fund.[22] On a much more limited level, the Eritrea Ethiopia Claims Commission concluded that Eritrea had violated Article 2(4) of the UN Charter by using armed force to attack and occupy Ethiopian territory, although it did not hold Eritrea liable for all damages caused in a war started by its *jus ad bellum* violations.[23] Compensation for damages due to breach of *jus ad bellum* was to be determined instead on "proximate cause".

Israel was twice the victim of Jordanian aggression, during the 1948 and 1967 wars. Prior to the 1947 United Nations Partition vote, Ben Gurion, the leader of the Jewish *yishuv*, made serious attempts to seek King Abdullah of Transjordan's neutrality, secretly sending Golda Meir to convince him not to attack the future Jewish state.[24] Despite Ben Gurion's efforts, the Jordanian League took part in hostilities against the Jewish *yishuv*

[21] **Security Council Resolution 674** (1990), 45 *RDSC* 25, 26 (1990).
[22] **Security Council Resolution 692** (1991), 46 *RDSC* 18 (1991).
[23] **Eritrea Ethiopian Claims Commission**, Partial Award, *Jus ad Bellum*, supra note 62, at 434.
[24] Gilbert, Martin. **Israel: A History**. 60th Year Edition, Key Porter Books, 2008, p.149.

immediately after the Partition vote, shelling Jewish neighborhoods of Jerusalem.[25] On April 29th, 1948, Jordanian troops crossed into Mandatory territory to attack (unsuccessfully) the Gesher settlement.[26] The State of Israel declared its independence on May 14th and the very next day, Jordanian troops crossed the Jordan river into Palestine/ *Eretz Yisrael*. The Jordanians occupied the Latrun fort on May 17th, cutting off the road to Jerusalem and fighting several highly intense battles with Israeli troops between May 25th and July 18th.[27] Most significant was the battle for Jerusalem. For days, the Arab Legion bombarded the Jewish Quarter of the Old City, systematically destroying its historical buildings.[28] On May 26th , the Arab Legion took the Hurva square and dynamited its magnificent synagogues; the Jordanians demolished twenty-seven synagogues in the Old City.[29] The Old City of Jerusalem, along with its historic and holy sites, would remain off limits to Jews for the next 19 years. As stated previously, the Jordanian invasion was the result of an illegal use

[25] Ibid. p. 168
[26] Ibid. p. 176
[27] Ibid. pp. 197, 205, 206
[28] Ibid. p. 198
[29] Montefiore, Simon Sebag. **Jerusalem: the Biography**. Vintage Books, 2011, p.501.

of force aimed at preventing the implementation of the UN Partition Plan and the establishment of a Jewish state. It is in the course of this Jordanian aggression that Jewish property owners had their assets seized in the Jordanian occupied territories.

The 1967 Six Day War was preceded by months of antisemitic and belligerent rhetoric emanating from the Arab world. On May 23rd, 1967, Egypt closed the straits of Tiran to Israel ships, considered by Israel as a *casus belli*. Israel communicated to Jordan its commitment to respect the 1949 Armistice line if Jordan stayed out of the conflict. Instead, enticed by Nasser's promises of booty, Jordan ordered its troops over the Armistice line. On June 5th , the Jordanians once again launched a 6,000 shell barrage against Jewish Jerusalem, hitting the Knesset, the prime minister's house, as well as the Hadassah Hospital and the Church of Dormition.[30] Intentionally aiming to hurt Israeli civilians, the Jordan air force bombed the residential neighborhoods of Netanya, Kfar Sirkin and Kfar Saba.[31] Within two days of Jordan's assault, Israel was in full control of Jerusalem, Judea and Samaria. Israel

[30] Montefiore, p. 516.
[31] Dershowitz, Allan. **The Case for Israel**. John Wiley & Sons, 2003, p.92.

repossesses control of previously Jewish-owned property and could choose to return it to its original owners if it so desires, without any interference from the Jordanian government.

Zamir and Benbenishti argue that, as states rarely if ever agree to international arbitration to establish which state bears legal responsibility for aggression, restitution usually depends on the balance of power between the victor and defeated powers after the war. After both the First and Second World Wars, the Central/ Axis Powers had been utterly defeated and surrendered unconditionally to the Allies. As such, the Allies were able to establish Central/ Axis responsibility for the wars and pay reparations. However, when a war's outcome is less clear cut, which neither side suffering total defeat, the right to reparation will not be legally recognized. Rather, the question of reparations will be dealt with in peace negotiations. Zamir and Benbenishti believe that the Israeli-Arab conflict belongs to the latter type of conflicts.[32]

[32] Zamir and Benbenishti, p. 192.

Zamir and Benbenishti's analysis of the aftermath of the Six Day War in the context of Jewish property that had been previously seized by Jordan is unclear. At the end of the 1967 conflict, Israel emerged as the clear winner, in full control of Judea and Samaria. While Israel does not necessarily have the ability to press Jordan to make full compensation for war damages, Israel is able to restitute property owners in Judea and Samaria who had their assets seized.

4. Parallel Arab Property Claims

Zamir and Benbenishti argue that Jewish assets in Judea and Samaria should be seen as parallel to Palestinian Arab assets in Israel. As such, there is no justification to return Jewish assets to their former owners while denying similar restitution to Palestinian Arab land owners. Without rendering judgment as to the precise historical facts that caused Palestinian Arabs to abandon their

property in 1947-1948, the issues of seized Jewish and Arab assets arose due to the same historical circumstances of the Israeli-Arab 1948 War.[33] While this argument is more policy-based as opposed to legal, it bears examination. Zamir and Benbenishti themselves admit that while international humanitarian law does not allow the occupying power to transfer ownership of government property, the status of Jewish assets in Judea and Samaria is not the typical case that these laws were designed to cover.[34] They were unable to find any international precedent in which property was taken according to Trade with the Enemy Ordinances or international law of belligerent occupation and then fell into the control of said "enemy" who continued to administer the property according to the laws of occupation. Hence, one could claim that international law was not meant to cover such situation and that a lacuna exists, as indeed the Appeals Committee in the Shechter Case believed.[35] Therefore, we will look at the question of whether the resolution of

[33] Ibid, p. 101.
[34] Ibid. p. 166.
[35] 87 יורשי המנוח יעקב שכטר נ' הממונה של הרכוש הממשלתי והנטוש באזור יהודה ושומרון, ערר 57

the Jewish property issues is *sui generis* or if it depends on a parallel resolution of Palestinian Arab property claims.

On a basic level, the issue of Jewish property is relatively simpler and more straightforward than that of Arab property. The assets discussed amount to between thirty and forty square kilometers of land as well as several hundred buildings.[36] All of the former owners are Israeli citizens and as such, the government should have little trouble verifying ownership claims and if warranted, returning the property. Meanwhile, the 1948 War resulted in 600,000-750,000 Arab refugees, abandoning over 300 villages. According to official Israeli data, approximately 3,250 square kilometers of land have been placed under the management of the Custodian of Absentee Property.[37] Whereas Jewish refugees who fled the Arab invasion force's advance were promptly resettled within the Green Line and thus continued their lives, Arab *realpolitik* refused Palestinian Arab refugee resettlement. Instead, the Palestinian Arabs languished in refugee camps for the past 70

[36] Zamir and Benbenishti. **Private Claims to Property Rights in the Future Israeli-Palestinian Settlement**, p. 298.
[37] Ibid.

years, and since Palestinian Arab refugee status uniquely is passed down to descendants, there are today several million Palestinian Arab refugees with potential demands for return and repossession. Palestinian claims are intimately tied to the so-called Right of Return, one of the most contentious and intractable issues of the conflict. No Israeli government, whether left or right, could countenance such a demand. Many, if not most, of the former Palestinian Arab villages no longer exist and many structures were used to house Jewish refugees, either Holocaust survivors or Jews expelled from Arab countries. The repatriation of millions of Palestinian Arabs would cause massive disruption and chaos in Israel, upending public order and seriously threatening societal cohesion. By contrast, the return of a small amount of Jewish property owners in Judea and Samaria could hardly be considered a threat to public order, especially considering that Israelis are able to purchase land and build homes over the Green Line. Given that there are today over 300,000 Jewish residents of Judea and Samaria, several hundred, if even, Jews reclaiming their former property would certainly not damage the status quo.

When Israel reunited Jerusalem after the 1967 War, it applied its civil law to the entire municipal area. It specified in the Legal and Administrative Matters (Regulation) Law [Consolidated Version] that East Jerusalem residents would not be considered enemies for the purpose of Israeli law, and neither would they be considered absentees regarding their property in East Jerusalem. The Legal and Administrative Matters Law mandated the return of Israeli property left behind in 1948 provided the owners could provide the necessary legal proof. Several decades later, the reclamation process has not been completed, with many owners making do with monetary compensation as numerous plots of land were expropriated for public purposes and the construction of new Jewish neighborhoods. As for Arab property left behind in West Jerusalem in 1948, the former owners were offered monetary compensation.[38] Thus, we can see from the Israeli government's experience in Jerusalem that property reclamation remains relatively limited and non-threatening to the status quo. It seems illogical to leave a simple problem (Jewish property) unsolved just

[38] Ibid., 310

because an infinitely more complicated problem (Arab property) remains. Israel's experience in Jerusalem also refutes the claim that Jewish property reclamation in Judea and Samaria would make a potential Israeli-Palestinian agreement more difficult and prevent the partition of the land. We see in Jerusalem that decades of Jewish property reclamation have not stopped discussion of a potential division of the city between Israel and the Palestinians. Similarly, the Israeli Left and other advocates of territorial division need not worry that the reclamation of Jewish property would necessarily preclude a future Palestinian state. At the same time, reclamation of Jewish property did not open the flood gates to Arab reclamation claims against Israel.

Furthermore, making the repossession of Jewish property dependent on a parallel resolution of Palestinian Arab property claims erases the distinction between aggressor and victim. As previously described at great length, Israel was the victim of Jordanian aggression in both 1948 and 1967. Jordan gained possession of Jewish properties through a violation of international law. Its nineteen-year occupation in Jerusalem, Judea and Samaria

was characterized by widespread human rights violations and wanton destruction of Jewish religious and cultural sites. In 1967, a Knesset inter-ministerial committee revealed that the Jordanian government destroyed 56 synagogues in the Old City of Jerusalem and desecrated the two millennia old Jewish cemetery on the Mount of Olives. Jewish tombstones were systematically used as building material and even latrines. Despite Jordanian assurances in the 1949 Armistice Agreement, Jews were denied access to their religious and historical sites in Jordanian-occupied Jerusalem, Judea and Samaria.[39] At the same time, while recognizing the different historical perspectives on the exodus of Palestinian Arabs, it cannot be denied that their refugee status resulted from an aggressive war chosen by their side. The continued legal recognition of the seized Jewish property as Jordanian national property therefore represents a grave injustice and a moral travesty. It also sends the message to the international community that states can violate international law with impunity and will not be held to account for their aggression.

[39] **Cabinet Report Says Jordan Destroyed 56 Old City Synagogues, Desecrated Cemetery** https://www.jta.org/1967/11/02/archive/cabinet-report-says-jordan-destroyed-56-old-city-synagogues-desecrated-cemetery

It is difficult to accept that Israel has an equivalent obligation to its own citizens who had their property seized by Jordan in 1948, as to Palestinian refugees, many of whom are residents of enemy countries. Furthermore, Israel has a unique duty towards Jewish property. Just as the State of Israel seems itself responsible for the reclamation of Jewish property seized during the Holocaust in Europe and property confiscated from Jews in Arab countries, Israel is responsible as well for Jewish property in the Land of Israel. Every single Israeli government since 1967, both on the right and on the left, has promoted the settlement of at least part of the territory conquered in the 1967 War. After the Six Day War, the Israeli government allowed the resettlement of Kfar Etzion, a Jewish community south of Jerusalem that had fallen in the 1948 War, despite the misgivings of certain Israeli legal advisors.[40] The reuniting of the seized Jewish property in Judea and Samaria with its original owners must be seen as a Zionist imperative of the highest order: *"And your children shall return to their border…"*

[40]**Secret memo shows Israel knew Six Day War was illegal**
https://web.archive.org/web/20080611213726/http://www.independent.co.uk/news/world/middle-east/secret-memo-shows-israel-knew-six-day-war-was-illegal-450410.html

Summary

This paper explored the status of the former Jewish properties in Judea and Samaria that were seized by Jordan in 1948. The Israeli Supreme Court in *Valero* ruled that the transfer of the property to Jordanian custodianship eliminated any ties between the previous Jewish owners and the property. Contrary to the Supreme Court's ruling in 2011, this paper concluded that Israel legally can, and should, return the property to its former owners, without regards to a comprehensive peace agreement settling all claims between Israel, the Palestinians and the Arab states. This conclusion relies on the following justifications:

- **Recognizing confiscated Jewish assets as Jordanian state property would be a violation of the principle of *ex injuria jus non oritur,* unjust acts cannot create law**. The Jordanian seizure was illegal, was the result of Jordanian aggression and unrecognized annexation of the territory, and thus should be seen as invalid. Jordan cannot enjoy rights to property gained through its illegal invasion in 1948.

- **Jewish properties in Judea and Samaria are *sui generis,* ie. a unique historical and legal phenomenon, and they are much more straightforward legally than Arab properties in Israel.** The repatriation of thousands of Palestinian Arabs would cause massive disruption and chaos in Israel, upending public order and seriously threatening societal cohesion. By contrast, the return of a small amount of Jewish property owners in Judea and Samaria could hardly be considered a threat to public order, especially considering that Israelis are able to purchase land and build homes over the Green Line.
- **Conditioning their return on parallel Arab claims would erase the distinction between aggressor and victim.** Both the Jewish and Arab refugee crisis stem from Arab aggression in Israel in 1948.
- **Israel's experience in Jerusalem shows that such parallelism is unnecessary** and that the return of Jewish properties will not open the gates to a flood of Arab claims.
- **Israel has a unique historical obligation to restore the seized Jewish properties.** Every single Israeli government

since 1967, both on the right and on the left, has promoted the settlement of at least part of the territory conquered in the 1967 War.

To conclude, the Jordanian state bears responsibility for the damages resulting from its aggressive actions. While Israel cannot press Jordan to make full restitution for the damages it incurred, Israel is able to restitute property owners in Judea and Samaria who had their assets seized.

Bibliography

Arai, Yutuka. “Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction With International Human Rights Law (International Law in Japanese Perspective” ; v. 11). Brill Academic Publishers, 2009.

Benbenishti, Eyal, and Eyal Zamir. “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement.” The American Journal of International Law, vol. 89, no. 2, 1995, p. 295., doi: 10.2307/2204205.

Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property [1954] 1 All E.R. 969, 991

Blum, Yehuda Z. "The Missing Reversioner: Reflections on the Status of Judea and Samaria," Israel Law Review vol. 3, no. 2 (April 1968): p. 279-301

Cabinet Report Says Jordan Destroyed 56 Old City Synagogues, Desecrated Cemetery

https://www.jta.org/1967/11/02/archive/cabinet-report-says-jordan-destroyed-56-old-city-synagogues-desecrated-cemetery

C. J. Colombos; International Law: a Treatise. Vol. II. Disputes, War, and Neutrality, International Affairs, Volume 29, Issue 2, 1 April 1953, https://doi.org/10.2307/2609005

Dershowitz, Allan, "The Case for Israel", John Wiley & Sons, 2003

Dinstein, Yoram. "War, Aggression and Self-Defence" Fifth Edition, Cambridge University Press, 2011, p. 111

Eritrea Ethiopian Claims Commission, Partial Award, *Jus ad Bellum*, supra note 62, at 434

Factory At Chorzów, Germany v Poland, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), 13th September 1928, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ]

Gilbert, Martin, "Israel: A History", 60th Year Edition, Key Porter Books, 2008

HCJ 3103/06 Shlomo Valero v. The State of Israel

Schwebel, Stephen M. "What Weight to Conquest?" The American Journal of International Law, vol. 64, no. 2, 1970, pp. 344–347. JSTOR, JSTOR, www.jstor.org/stable/2198669.

Secret memo shows Israel knew Six Day War was illegal

https://web.archive.org/web/20080611213726/http://www.independent.co.uk/news/world/middle-east/secret-memo-shows-israel-knew-six-day-war-was-illegal-450410.html

Security Council Resolution 674 (1990), 45 *RDSC* 25, 26 (1990)

Security Council Resolution 692 (1991), 46 *RDSC* 18 (1991).

Seyersted, Finn. "United Nations Forces: in the Law of Peace and War." A.W. Sijthoff, 1966.

Montefiore, Simon Sebag, "Jerusalem: the Biography", Vintage Books, 2011

Koppe, Erik, Compensation for War Damages Under Jus Ad Bellum (October 1, 2007).

A. de Guttry, H.H.G. Post and G. Venturini (eds.), The 1998-2000 War between Eritrea and Ethiopia; An International Legal

Perspective, TMC Asser Press, The Hague, 2009.. Available at SSRN: https://ssrn.com/abstract=2485267

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זמיר, איל ובנבנישתי, איל: "אדמות היהודים' ביהודה, שומרון, חבל עזה ומזרח ירושלים", מכון ירושלים לחקר ישראל, 1993, פרק ז(2): פקודת המסחר עם האויב בראי המשפט הבינלאומי