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A photograph of an elderly man with white hair, seen from the back, wearing a dark blue suit jacket and a light blue shirt. He is pointing his right hand towards a large, multi-story stone building under construction. The building has many rectangular window openings and some orange lights on its roof. The background is a clear blue sky. The foreground is a dirt path.

# **The Absentee Property Law and its Implementation in East Jerusalem**

**A Legal Guide and Analysis**

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**May 2013**



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**Cover photo:** The Cliff Hotel, which was declared “absentee property”, and its owner Ali Ayad. (*Photo by: Mohammad Haddad, 2013*).



**This publication has been produced with the financial assistance of the Norwegian Ministry of Foreign Affairs.**

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The **Norwegian Refugee Council (NRC)** is an independent, international humanitarian non-governmental organisation that provides assistance, protection and durable solutions to refugees and internally displaced persons worldwide.

The author wishes to thank Adv. Talia Sasson, Adv. Daniel Seidmann and Adv. Raphael Shilhav for their insightful comments during the preparation of this study.

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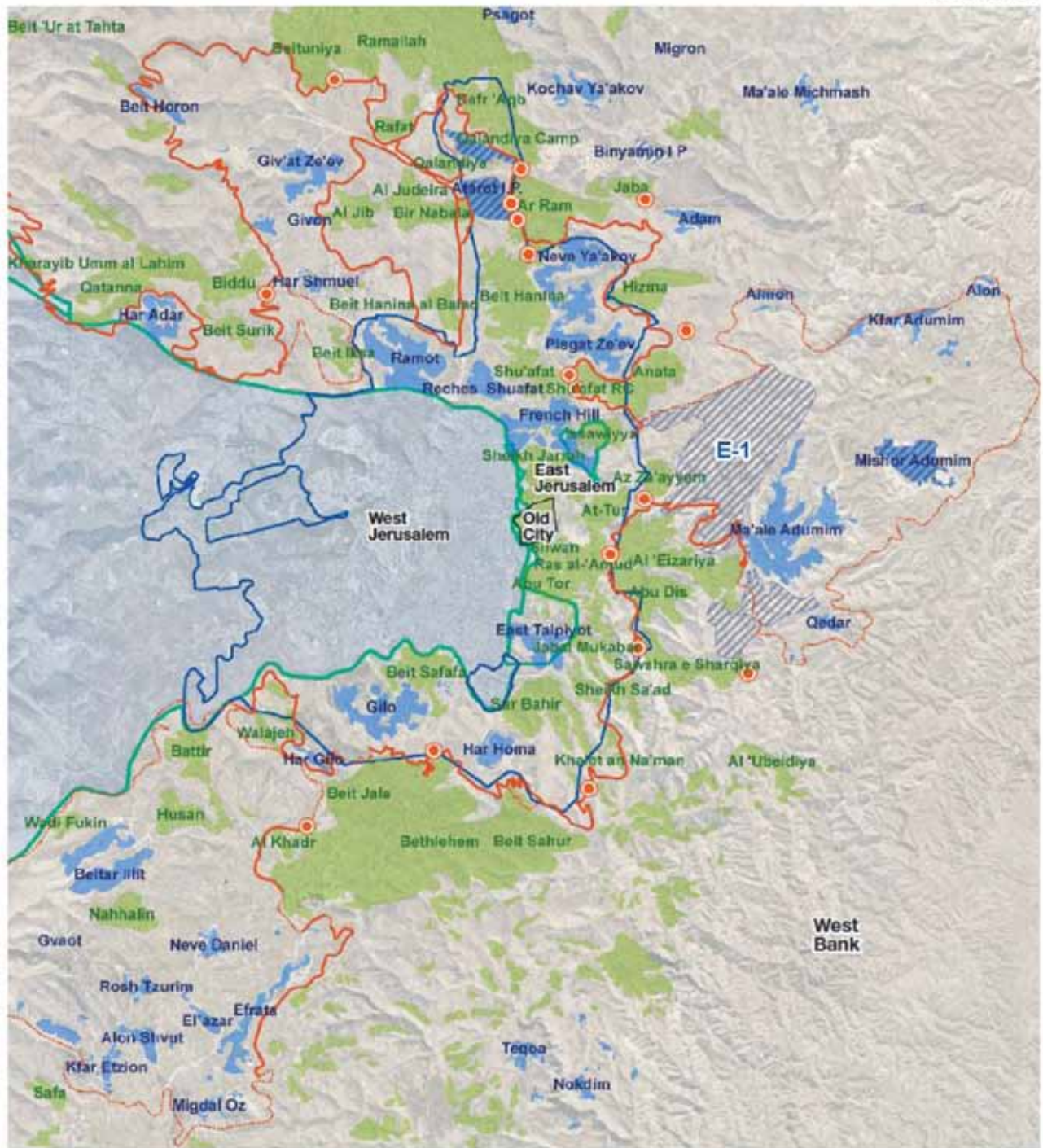
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
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# Jerusalem and its Environs

Scale 1:100,000 



-  Green Line
-  Old City
-  Municipal Boundary
-  Barrier- Completed
-  Route of the Barrier- Planned
-  Checkpoint/ Terminal
-  Palestinian Built-up Area
-  Israeli Built-up area Beyond the Green Line
-  Industrial Park
-  E-1 Master Plan

Map by: Terrestrial Jerusalem

## **1. Introduction**

The Absentee Property Law (APL) has been applied to East Jerusalem since its annexation to Israel in 1967. This law has significant ramifications for the issue of property ownership in East Jerusalem. In addition to infringing property rights for those whose property was vested in the Israeli authorities, it has many other negative implications. As this paper describes in detail, the application of the APL in East Jerusalem affects many transactions involving transfer of property rights in East Jerusalem, and imposes severe limitations on the residents of East Jerusalem seeking to obtain building permits and initiate planning processes. Moreover, the APL has been used over the years as a central means by which Palestinian-owned property in East Jerusalem is transferred to settler organisations.

The APL was enacted in the wake of the 1948 War to facilitate the transfer of property of Palestinian refugees to the Israeli authorities. The provisions of the APL were drafted in a sweeping manner, and set forth broad definitions regarding who is considered “absentee” and what is considered “absentee property”. The APL also granted many powers to the Custodian of Absentee Property, including wide discretion in the question of whether to release absentee property, while the rights of the absentees themselves were extremely limited. In order to understand the APL's extensive reach, we will begin by describing the background of the legislative process and the purposes underlying its enactment. We will then detail the APL's main provisions. Following this, we will examine the application of the APL to East Jerusalem and elaborate on the actual implementation method in the annexed territory. We will explore the changes in Israeli policies regarding implementation of the APL in East Jerusalem and focus on the role of the Israeli courts. We will show that, to date, the conservative approach adopted by the Israeli courts has assisted in facilitating the various APL enforcement mechanisms in East Jerusalem.

We will dedicate a separate chapter to the issue of applying the APL to Palestinians who reside in the West Bank and hold property in East Jerusalem. A chapter presenting the issue from the perspective of international law will conclude our analysis.



## 2. Background on the Absentee Property Law

The Absentee Property Law<sup>1</sup> is the main law in a series of statutes that regulate the treatment of property belonging to Palestinians who left, fled or were deported during the 1948 War.<sup>2</sup> The Palestinian refugees during this period left behind a great deal of land. Estimations of the extent of this land vary dramatically, but it is clear that Palestinians lost several millions of dunams<sup>3</sup> that were transferred to the State of Israel.<sup>4</sup>

As described in detail in this document, following the enactment of the APL, the ownership rights in the Palestinian property described above automatically vested in a special Israeli entity referred to as the Custodian of Absentee Property, who was granted very broad powers, while those defined as “absentees” by the APL lost ownership rights, as well as all other rights in the property. It was clear to the legislature that a law of this kind would have far-reaching consequences, both politically as well as in terms of ownership. Nevertheless, and although the provisions of the APL were sweeping in scope, as detailed below, no bill (draft law) for this Law was ever published and the Knesset (the Israeli Parliament) never provided any explanatory statement thereof.<sup>5</sup>

In the absence of draft law, the discussion in the Knesset’s plenum preceding the enactment of the APL can shed some light on the purposes of the APL. By way of example, MK *Joseph Lam* (MAPAI – Israel’s Workers Party) explained that “this Law intends to preserve the property of the absentees for purposes to be determined by the Knesset. I do not want to discuss here the question whether this is for the absentees’ benefit or not, but the basis of the law is undoubtedly to retain the absentees’ property...”<sup>6</sup> Moreover, MK *David-Tsvi Pinkas*, chairman of the Finance Committee,

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<sup>1</sup> The Absentee Property Law 5710-1950, Laws of the State of Israel No. 37, 20 March 1950, p. 86 (hereinafter: “the Absentee Property Law” or “the APL”).

<sup>2</sup> According to various estimates, from December 1947 through September 1949, between six hundred thousand and seven hundred and sixty thousand Palestinians left, fled or were deported from the area in which the State of Israel was established. The estimates of the number of Palestinian refugees and of those who remained in Israel vary. See: Alexandre (Sandy) Kedar, “On the Legal Geography of Ethnocratic Settler States: Notes towards Research Agenda”, *Law and Geography: Current Legal Issues*, Vol. 5, 401, p. 421.

For details on the abovementioned legislation, see: Jeremy Forman and Alexandre (Sandy) Kedar, “From Arab land to ‘Israel Lands’: the legal dispossession of the Palestinians displaced by Israel in the wake of 1948”, *Environment and Planning D: Society and Space*, 2004, Vol. 22, 809; Gail Boling, “Absentees’ Property Laws and Israel’s Confiscation of Palestinian Property: A Violation of U.N General Assembly Resolution 194 and International Law”, *The Palestine Yearbook of International Law*, Vol. 11 2000/2001, 73, pp. 83-112.

<sup>3</sup> A dunam is equal to 0.1 hectares.

<sup>4</sup> Israeli officials and researchers have estimated between 4.2 million and 6.5 million dunams; however, much higher estimates exist. See: Forman and Kedar, “From Arab land to ‘Israel Lands’”, *supra* note 2, p. 812.

<sup>5</sup> Typically, the process of Knesset legislation goes through a number of steps. One of the initial stages is the publication of the proposed bill – which includes an explanation of the purposes of the bill – before the bill is presented to the Knesset.

<sup>6</sup> *Divrey HaKnesset* vol. 4, booklets 11-20 (second term), p. 952.

who presented the APL to the Knesset's plenum, stated: "I would like to emphasize that there are no grounds to claim that the State intends to take the property as compensation in the future under this Law. This claim is incorrect. The Law establishes that the absentees' property is to be transferred to and retained by the Custodian of Absentee Property<sup>7</sup> for retention..."<sup>8</sup>

Despite these statements, it was obvious from the very beginning that retaining absentee property was not the main purpose behind the legislation. In the plenary discussion, MK *David-Tsvi Pinkas* added:

On the other hand, this Law has to ensure that proper use of this property is made to prevent it becoming dead property. Not only that, the Law must ensure that this property is used as leverage and a basis for the development of the economy and of the State, and for this reason, we should have enabled the transfer of the property from the Custodian to other, new, owners, who will replace him and take care of this property for the benefit of the entire country.<sup>9</sup>

In fact, reading of the APL suggests that the legislature's intent was to give the State the possibility of utilizing absentee property for its various needs. Article 19 of the APL, entitled "Limitation of powers of Custodian", establishes that the Custodian is not permitted to sell property or otherwise transfer its ownership, but "if a Development Authority is established under a law of the Knesset, it shall be lawful for the Custodian to sell the property".<sup>10</sup> Although the APL uses the wording "if a Development Authority is established," at the time the APL was discussed in the Knesset, a draft law concerning the Development Authority had already been proposed. Therefore, it should have been clear to the legislators that the provisions of the APL would almost immediately legalize the transfer of property to the Development Authority.<sup>11</sup>

And indeed, under Article 19 of the APL, most absentee property was subsequently vested in the Development Authority.<sup>12</sup> The Development Authority is a public body that was established under the Development Authority (Transfer of Property) Law 5710-1950 (Development Authority Law). Even at the draft law stage, it was established that the Development Authority would be granted powers that are "as broad and as comprehensive as possible".<sup>13</sup> Accordingly, the list of powers in Article 3 of the Development Authority Law is broad and enables almost any possible action. *Inter alia*, Article 3(3) of the Development Authority Law provides that the Development Authority

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<sup>7</sup> For elaboration on the Custodian and his powers – see below.

<sup>8</sup> *Divrey HaKnesset*, *supra* note 6, p. 984.

<sup>9</sup> *Ibid.*, pp. 869-870.

<sup>10</sup> The Absentee Property Law, *supra* note 1, Article 19(a).

<sup>11</sup> Moti Banyan, *Land Law: The Principles and Rules*, 2nd edition, Tel-Aviv, 2004, pp. 819-820 [Hebrew]. For further elaboration on the APL and the Development Authority (Transfer of Property) Law as a two-statute model see Forman and Kedar, "From Arab land to 'Israel Lands'", *supra* note 2, pp. 816-819.

<sup>12</sup> Banyan, *Land Law: The Principles and Rules*, *supra* note 11, pp. 819-820.

<sup>13</sup> Draft law: Transfer of Property to the Development Authority, 5710-1949, published in Draft Law 25, 8 December 1949.

may “develop, complete, ameliorate, merge, cultivate and reclaim property”.<sup>14</sup> Article 3(4)(a) of the Development Authority Law, in its initial wording, decreed that the Development Authority “shall not be authorized to sell, or otherwise transfer the right of ownership of, property passing into public ownership, except to the State, to the Jewish National Fund<sup>15</sup>, to an institution approved by the Government, for the purposes of this paragraph, as an institution for the settlement of landless Arabs, or to a local authority”.<sup>16</sup> This article was later amended and declared that the Development Authority “shall not be authorized to sell the Lands of Israel... that are not municipality lands and whose area exceeds 100,000 dunams, or otherwise transfer the right of ownership of, rent or lease them, except with the consent of the Israel Land Council”.<sup>17</sup>

The Development Authority Law initially imposed some limitations on the institutions to which rights could be transferred for property that was vested in the Development Authority.<sup>18</sup> However, the wording of the Development Authority Law following its amendment left sufficient leeway to facilitate the transfer of absentee property from the Development Authority to individuals and various groups. As set forth in this report, in East Jerusalem, for example, absentee property found its way to settler organizations via the Development Authority.<sup>19</sup> In this and many other cases, the Development Authority served as a “land laundering” agency which aimed to distance the government from direct involvement in the process of acquiring rights in absentee property and transferring them to Jewish individuals or political groups.<sup>20</sup>

In rulings from the first few years following enactment of the APL, the Israeli Supreme Court, in interpreting the provisions of the APL, chose to focus on the purpose of the APL to retain and manage absentee property.<sup>21</sup> However, in subsequent years, the Israeli Supreme Court also acknowledged other purposes underlying the legislation. In a ruling issued by the Israeli High Court of Justice from 1994, we find the following:

Case law has long acknowledged that preserving absentee property is a fundamental purpose of the Law... but I am unable to accept that this is the sole – or even the main

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<sup>14</sup> The Development Authority (Transfer of Property) Law, 5710-1950, Laws of the State of Israel, No. 57, 9 August 1950 p. 278, Article 3(3).

<sup>15</sup> Established in the early 20<sup>th</sup> century, the Jewish National Fund (JNF) served as the main arm of the Zionist movement in acquisition of land in Palestine prior to the establishment of the State of Israel. Thereafter, in addition to its function as the guardian of “Jewish national land”, the JNF have performed certain state functions, such as land reclamation and development (see: David Kretzmer, *The Legal Status of the Arabs in Israel*, Westview Press, 1990, p. 49).

<sup>16</sup> The Development Authority (Transfer of Property) Law, *supra* note 14, Article 3(4)(a).

<sup>17</sup> The Development Authority (Transfer of Property) Law, amendment No. 1, Laws of the State of Israel, No. 312, 29 July 1960, p. 58, Article 3(4).

<sup>18</sup> Concerning details regarding the transfer of absentee property to various parties through the Development Authority see also: Sabri Jiryis, “the Legal Structure for the Expropriation and Absorption of Arab Lands in Israel”, *Journal of Palestine Studies*, Vol. 2, No. 4, 82, pp. 88-89.

<sup>19</sup> See chapter 4.2.1 below.

<sup>20</sup> See more on this issue: Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture and Society*, 2007, p.110.

<sup>21</sup> See for example: H CJ 6/50 *Froind v. Supervisor of Absentee Property, Jerusalem*, (1950) 4 PD 333, p. 337; Civil Appeal 58/54 *Mahmud Habab v. Custodian of Absentee Property*, (1956) 10 PD 912, p. 918.

– purpose of the Law and that it has no (or hardly any) other purpose. In general, it is possible to say that the Law is designed to actualize the State's interests in this property at least as much as it is designed to preserve the property for its absentee owners and protecting their interests therein: the ability to utilize it for the benefit of the country, while preventing the exploitation of the property by someone who is absent according to the meaning of this term in the Law, and the ability to hold onto the property (or its monetary value) until the formulation of political arrangements between Israel and its neighbours that will determine the fate of this property on the basis of reciprocity between the countries.<sup>22</sup>

### **Absentee Property as Enemy Property**

The APL is not an original Israeli concept. The APL (and, in fact, the Absentee Property Regulations that preceded it) was modelled on the British Trading with the Enemy Act of 1939. A similar ordinance was enacted by the British government in Palestine.<sup>23</sup> This Ordinance includes special provisions dealing with the issue of property located in Palestine which belong to the enemy and its citizens. These provisions are based on the concept that the country's wealth, which may be used for its war effort, includes not only the property situated in its territory, but also its property and that of its citizens located abroad. Therefore, in order to prevent the enemy from using its property, the Ordinance vests the property in the Custodian.<sup>24</sup>

According to the Ordinance, the State may appoint a Custodian in order to preserve the enemy property that fell into its hands during an armed conflict “in contemplation of arrangement to be made at the conclusion of peace”.<sup>25</sup> Thus, it may seem that the purpose of appointment of a custodian for these properties was not to permanently seize them, but to hold them in escrow until the end of hostilities.<sup>26</sup> However, according to another interpretation, once the property is vested in the Custodian, the original owners no longer possess the legal right to the return of the property, and they hold nothing more than the expectation of return of their property when peace is concluded.<sup>27</sup>

In any case, observing the way in which Israel has dealt with absentee property supports the conclusion that the Israeli adoption of the enemy property model was more in form than in substance. Notwithstanding statements made by Israeli officials – according to whom the main purpose of the APL was consolidation and safeguarding of absentee property – it was evident from the start that the usage of the enemy property doctrine

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<sup>22</sup> HCJ 4713/93 *Golan v. Special committee under Article 29 of the Absentee Property Law 5710-1950*, (1994) 48(2) PD 638, p. 644.

<sup>23</sup> Trading with the Enemy Ordinance (Palestine), No. 36 of 1939.

<sup>24</sup> Eyal Benvenisti, Eyal Zamir, “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement”, *The American Journal of International Law*, Vol. 89, No. 2 (April, 1995), 295, p. 302.

<sup>25</sup> Trading with the Enemy Ordinance (Palestine), *Supra* note 23, Article 9(1).

<sup>26</sup> Michael Kagan, “Restitution as a remedy for refugee property claims in the Israeli-Palestinian Conflict”, *19 Fla. J. Int'l L.* 421, p. 451 (August, 2007).

<sup>27</sup> Benvenisti and Zamir, “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement”, *supra* note 24, p. 303.

aimed to covertly facilitate the permanent transfer of Palestinian absentee property to the hands of Jewish Israelis. There was no real intention to safeguard this property for the benefit of its original owners. The enactment of the Development Authority Law immediately following the enactment of the APL and the way the Development Authority functioned, as discussed earlier, illustrate this assumption.<sup>28</sup> Another example is the Israeli treatment of property belonging to internally displaced Palestinians, who departed for a short time during the 1948 War to locations in Palestine that were held at that time by forces fighting against Israel, and who returned to their home shortly afterwards and became residents and citizens of Israel. The enemy property rationale cannot acceptably explain the continuing application of the APL to these “absentees”.<sup>29</sup> When the enemy armies of the countries that fought against Israel lost control of the territories in which these internally displaced Palestinians were residing, and these places fell under Israeli control, the continued holding of property belonging to these Palestinians by the State of Israel cannot be justified.<sup>30</sup>

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<sup>28</sup> For more on this issue see: “From Arab land to ‘Israel Lands’”, *supra* note 2, pp. 816-819.

<sup>29</sup> See: Benvenisti and Zamir, “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement”, *supra* note 24, pp. 300-301.

<sup>30</sup> Kagan, “Restitution as a remedy for refugee property claims in the Israeli-Palestinian Conflict”, *supra* note 26, p. 454.

### 3. Provisions of the Absentee Property Law

#### 3.1 Definitions

##### 3.1.1 Who is an absentee?

Article 1(b)1 of the Law decrees that “absentee” means:

(1) a person who, at any time during the period between the 16th Kislev, 5708 (29 November 1947) and the day on which a declaration is published, under Article 9(d) of the Law and Administration Ordinance, 5708-1948(1), that the state of emergency declared by the Provisional Council of State on the 10th Iyar, 5708 (19 May 1948)(2) has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period -

(i) was a citizen or subject of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or the Yemen, or

(ii) was in one of these countries or in any part of Palestine<sup>31</sup> outside the area of Israel, or

(iii) was a Palestinian citizen and left his ordinary place of residence in Palestine

(a) for a place outside Palestine before the 27th Av, 5708 (1 September 1948);  
or

(b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment;

Article 1(9) of the APL decrees that “‘area of Israel’ means the area in which the law of the State of Israel applies”.

The APL defines three types of people as absentees:

- **Absentees by virtue of citizenship or as subject of country’s authority:** any person who is/was a citizen or subject of the countries specified in the Article<sup>32</sup> at

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<sup>31</sup> The Hebrew version of the APL uses the term “*Eretz Israel*” (the Land of Israel) which refers, at least in this context, to the territory that became the State of Israel, the West Bank and the Gaza Strip after the 1948 War.

<sup>32</sup> Concerning the state of Jordan, Article 6 of the Law on the Implementation of the Peace Agreement between Israel and the Hashemite Kingdom of Jordan 5755-1995, Laws of the State of Israel No. 1503, 10 February 1995, p. 110 (Hereinafter: “Law on the Implementation of the Peace Agreement between Israel and Jordan”) stipulates that as of 10 November 1994, a property shall not be considered an “absentee property” only because the holder of the rights thereto was a citizen or a subject of Jordan, or was found in Jordan. It is emphasized that this Article is for future cases only and cannot change the status of absentee property that was previously declared as such. Also, it should be mentioned that there is no similar

any time within the period between 29 November 1947 and the day on which it shall be declared that the state of emergency declared by the provisional State council on 19 May 1948 shall cease to exist<sup>33</sup> (the effective period).

- **Absentees by virtue of presence in an enemy country:** anyone located at any time during the effective period in an enemy country or in any part of Palestine outside of the area of the State of Israel.
- **Absentees by virtue of departure from the ordinary place of residence in Palestine:** anyone who is/was a resident of Palestine who departed, between 29 November 1947 and 1 September 1948 from his ordinary place of residence in Palestine to a place outside of Palestine, or anyone who is/was a Palestinian resident who departed to a place in Palestine that was held at that time by forces that sought to prevent the establishment of the State of Israel, or who fought against it after its establishment.

The definition of “absentee” according to this Law is therefore very broad. This definition encompasses, *inter alia*, anyone visiting any of the countries listed in the APL commencing from 29 November 1947; any person who had received status in those countries during the relevant period; and even anyone who merely departed for a short time from his or her ordinary place of residence in Palestine to another place in Palestine that was held at that time by anyone fighting against Israel and who returned to his or her home shortly afterwards. A well-known issue in this context is the problem of “present absentees”. Property belonging to people who departed to a place and consequently became absentees, and then returned after a short while to Israel and even became Israeli citizens was still considered absentee property vested in the Custodian.<sup>34</sup>

The broad nature of the definition can lead to absurd situations, and can include people that the legislature probably did not intend to define as absentees. For example, the definition could include Israeli army soldiers who served in various parts of Palestine in 1948, or soldiers who took part in other wars, or served in South Lebanon as part of the Israeli occupation. This definition also includes Israeli settlers who moved to and have resided in the Occupied Palestinian Territory (oPt) following the 1967 War. They too, by this definition, are absent in relation to property they own within Israel.<sup>35</sup> Indeed, the APL does apply, at least by its wording, to both non-Jews and Jews. It is apparent from the case law that the APL was applied, in a few cases, to property of Jews who fell within

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provision that excludes any property that became “absentee property” after the signing of the peace agreement with Egypt from the applicability of the Article.

<sup>33</sup> It should be noted that the state of emergency has not ceased to exist even as of the date of this paper.

<sup>34</sup> In this matter, see for example what MK *Amin Jarjura* (the democratic party of Nazareth) said during discussions at the Knesset prior to the ratification of the APL (*Divrey HaKnesset, supra* note 6, p. 870); Boling, “Absentees’ Property Laws and Israel’s Confiscation of Palestinian Property”, *supra* note 2, p. 94.

<sup>35</sup> More on the inclusive nature of the definition of “absentee” by this Law see sections 55-61 of the Appeal Notice in Civil Appeal 5931/06 *Hussein v. Cohen*, submitted on July 13<sup>th</sup> 2006. Concerning this appeal and additional appeals dealing with the question of application of the APL in East Jerusalem – see chapter 4.3.2 below.

the definition of absentees.<sup>36</sup> However, it is clear, considering the definition of “absentee” by the APL, that most of those who come within its net are Palestinians who own property within the territory of Israel. Considering the purposes of the APL and the historical context in which it was enacted, it is obvious that there was no real intention of applying it to Jewish property.

However, the Custodian – according to his own statements – does not apply the definition of “absentee” in the APL in a strict manner, even for Palestinians. The Custodian maintains that Palestinians who are citizens of Israel, make a pilgrimage to Mecca, and return afterwards to Israeli territory are not considered absentees. The same is true for Palestinians who are citizens of Israel who travel in the West Bank or even settle there – they are not considered absentees as long as they remain citizens of the State or residents thereof.<sup>37</sup>

The courts have also deemed appropriate, in certain cases, adopting a narrow interpretation of the definition of “absentee” under the APL. In a case heard in the Jerusalem District Court, the Court addressed the definition of “absentee” in Article 1(b)(1)(II) and ruled that:

There is no justification to interpret the words 'was in' that appear in the Article as including a clearly temporary sojourn in an enemy country, which is technical and transient and is done only for the passage into other countries. In this matter as well, weight is given to the interpretive principle according to which it is necessary to interpret the provisions of the Law so as to narrow its scope as much as possible in order to reduce any impingement on the constitutional right to property. This conclusion is in line with the purpose of the Absentee Property Law, which does not justify its application to a sojourn of the type under discussion in one of the enemy countries.<sup>38</sup>

Nonetheless, it seems that time spent in an enemy country, which is not considered to be temporary, shall still be considered as absence, even if it is not continuous.<sup>39</sup>

The same is true regarding the definition of absentee by virtue of citizenship or as subject of country’s authority. It is possible that a person will possess citizenship status in more than one country. In these cases, citizenship in an enemy country, which makes that person an “absentee” under the APL, may not necessarily be his or her effective

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<sup>36</sup> Regarding this matter, see, for example, Civil Appeal 4682/92 *Estate of the late Salim Ezra Sha'ya v. Bet Taltash LTD*, (2000) 54(5) PD 252, p. 280.

<sup>37</sup> See the Custodian’s stance, as submitted to the Supreme Court within the framework of Civil Appeal 2250/06 *The Custodian of Absentee Property v. Daqaq Nuha*, on 26 January 2010, sections 33-34. Concerning these appeals dealing with the question of application of the APL in East Jerusalem – see chapter 4.3.2 below.

<sup>38</sup> Civil Case (Jerusalem District Court) 2514/08 *Awad v. Custodian of Absentee Property* (published in “Nevo”, 8 April 2010), section 27 in the ruling. Also in this matter: Various Civil Requests (Nazareth District Court) 2225/06 *Khoury-Bshara v. Sliman*, Tak-Mech 2006(4), 12256.

<sup>39</sup> Civil Appeal 844/04 *Bahus v. Development Authority* (published in “Nevo”, 9 March 2006), section 5 of the ruling.



citizenship. The Jerusalem District Court ruled that in this context it is appropriate “to distinguish the term 'citizen' in the definition of 'absentee' under international law, according to which a person who holds dual or even triple citizenship is deemed a citizen of the country wherein the centre of his life is situated, and it is his effective, active, actual and obvious citizenship”.<sup>40</sup>

### 3.1.2 What is absentee property?

Article 1(e) of the APL decrees what constitutes “absentee property”: “Absentee property” means property the legal owner of which, at any time during the period between the 16th Kislev, 5708 (29 November 1947) and the day on which a declaration is published... that the state of emergency... has ceased to exist, was an absentee, or which, at any time as aforesaid, an absentee held or enjoyed, whether by himself or through another...”

Therefore, the APL decrees that if that person is an absentee, then any property that he or she owns, or has a right to, in Israel is absentee property as well. The existence of property in Israel is the key in determining that a person is an absentee. The Custodian may not declare a person as an “absentee” if the requirement that they own property within Israeli territory is not met.

In this context, it is instructive to mention a case that came before the Nazareth District Court. The case involved a person who resided and held property in Israel. Following said landholder’s death in 1978, his heirs submitted an application for a succession order. One of the heirs (a son) had left for Jordan in 1956, received Jordanian citizenship, and stayed there for a number of years. The son received American citizenship in 1969, and moved to the United States. The application for the succession order was accompanied by a deposition by that son, affirming that he would waive his part of the estate in favour of his five brothers. The Custodian requested to amend the succession order to vest the son's share in the Custodian. The District Court interpreted the words “was a legal owner of any property” in Article 1(b)(1) in the APL in a manner that simultaneously requires ownership of the property and fulfilment of one of the three alternative conditions appearing in the Article. Since on the day the father died in 1978, his son was no longer a citizen of Jordan but a citizen of the United States and no longer residing in Jordan, it was determined that the APL should not apply to him and no shares would vest in the Custodian.<sup>41</sup>

Article 1(a) in the APL sets forth what is considered “property” under the Law. Similarly to the definition of “absentee”, this definition is also extremely broad and includes “immovable and movable property, money, a vested or contingent right in property,

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<sup>40</sup> Civil Case (Jerusalem District Court) 4030/02 *Halim v. Custodian of Absentee Property* (published in “Nevo”, 13 April 2008), section 17 in the ruling. This argument was also made in H CJ 518/79 *Cockran v. Committee under Article 29 in the Absentee Property Law*, 5710-1950, (1980) 34 (2) PD 326, but the High Court of Justice did not rule on that particular argument.

<sup>41</sup> Civil Case (Nazareth District Court) 187/78 *Custodian of Absentee Property v. Tawfiq Muhammad Shalabi*, (1980) 5741 (2) PM 241, p. 248.

goodwill and any right in an entity of persons or in its management.” As to the expression “a vested or contingent right in property”<sup>42</sup> Israeli case law determined that it includes, *inter alia*:

- **Right of payment of a debt for the benefit of the absentee;**<sup>43</sup>
- **An obligatory right to receive real property:** thus, for example, it was determined that a future right to receive real property, regarding which a transfer agreement was signed while the recipient of the right was an absentee, constituted absentee property;<sup>44</sup>
- **Right of possession protected by a statute of limitations claim:** when an individual has acquired a right of possession in real property and the limitation period has passed (that is, at the end of the limitation period, the possession is considered to be possession by law) and that person becomes an absentee – the real property shall be considered absentee property;<sup>45</sup>
- **Stocks (including bearer stocks):** according to a Supreme Court ruling, a stock constitutes a “contingent right”, that is, one that entitles its owner title to an intangible asset, and is therefore considered “property” according to the APL. A bearer stock entitles its possessor at any given time to all the rights entailed in said stock document. Such stocks can change hands in a manner similar to a banknote. According to the Supreme Court, since bearer stocks are a negotiable document, they constitute “property” under the APL definition, since it is a “vested right”, that is, one that entitles the bearer title in a tangible asset. In

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<sup>42</sup> In Motion (Appeal) 89/51 *Mituba LTD v. Kazem*, (1952) 6 PD 4 it was determined, in page 8 of the judgment, that ““vested right” means property that has already been in the person's possession and which he holds; “contingent” means: property that a person has an *expectation of* or a *right to* (and the opinion of some that: property *in which he has a right* as well)”.

<sup>43</sup> *Ibid.*

<sup>44</sup> The ruling that addressed this question concerned a case in which a couple, citizens of Israel and residents of the village *Yafi*, transferred property from their ownership to two of their sons, who were not absentees. The couple made the sons sign a deposition in 1958, whereby one third of the property would be transferred in the future to a third brother, upon his request. That third brother had lived in Jordan since 1948. The District Court ruled that the property was given to the two brothers in escrow for the third brother. The right of the third brother in the property was created only with the transfer of the possession of the property, not on the day when the escrow was created, since the right of the benefactor is “an obligatory future right”. The third brother demanded his right in the real property in the spring of 1995, after the Law for the Implementation of the Peace Agreement with Jordan came into effect (see *supra* note 32) and therefore, the property in question was not absentee property. The Supreme Court accepted the appeal submitted by the Custodian on the District Court judgment and ruled that the agreement drawn-up by the parents with their children falls into the definition of a “contingent right” in the property, which was consolidated already in 1958. The real property promised to the third brother constitutes, therefore, property, and since that brother constitutes an “absentee” under the APL, the property is absentee property (Civil Appeal 4630/02 *Custodian of Absentee Property v. Abu Hatum* (published in “Nevo”, 18 September 2007).

<sup>45</sup> Civil Appeal 324/56 *Levi v. Custodian of Absentee Property*, (1958) 12 PD 1446, p. 1449.

addition, since it is a “stock” it constitutes a “contingent right”, as explained above.<sup>46</sup>

- **Non-contractual rights and any right that is enforceable through claim:** the case law established that the term “contingent right” in the context of absentee property includes rights of this kind, although their scope was not mentioned.<sup>47</sup>
- **Lease and protected lease:** this issue was considered in a ruling issued by the Jerusalem District Court, which ruled that rights of this kind shall be considered absentee property under the APL.<sup>48</sup>

### A Note on inheritance rights

It follows from the above that rights passing by way of inheritance may be considered “absentee property”. However, some clarifications need to be made. According to Israeli Supreme Court case law, the definition “a vested or contingent right in property” does not include property for which there is only a non-binding expectation of receipt. In the

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<sup>46</sup> In a judgment dealing with this matter, a question arose whether stocks of an Israeli company constitute “property within the territory of Israel” (and therefore are considered “absentee property” as defined by the APL) since they were in the possession of a person claimed to be an absentee while he was residing in Egypt. It was determined that since the APL aspires to concentrate all property in the country held by people who were in enemy countries during the relevant period in the hands of the Custodian, it is appropriate to interpret the definition, in light of this stated purpose, in a manner that gives the Custodian control of Israeli companies to the extent the holders of these bearer stocks are entitled. The Court reviewed the issue in both the Israeli and international context and ruled that bearer stocks are considered “property within the territory of Israel” and therefore do constitute “absentee property” (Civil Appeal 5634/90 *Pinto v. Custodian of Absentee Property*, (1993) 47(4) PD 846, pp. 853-856).

<sup>47</sup> Civil Appeal 5685/94 *Elad Association v. Estate of the Late Al-Abbasi*, (1999) 53(4) PD 730, p. 743; Civil Appeal 9575/02 *Custodian of Absentee Property v. Usmat Baha'i (Azal)* (published in “Nevo”, 7 July 2010) (paragraph 7 of the judgment).

<sup>48</sup> Civil Case (Jerusalem District Court) 1140/96 *Fu'ad Munib Kalbuni v. Arab Land Bank* (published in “Nevo”, 19 November 1997). The plaintiffs in that case were the estate of the owner of a house in East Jerusalem and the heirs, who requested declaratory relief establishing that the house is not considered absentee property. The plaintiffs themselves were not absentees, but the property was leased, apparently under a protected lease, until the outbreak of the 1967 War, to the Arab Land Bank. The Bank abandoned the property upon the outbreak of the war and ceased to possess it. Several months after the war, the property was declared absentee property. The Court ruled that:

It appears to me that the right of a protected tenant that became an absentee should be defended. Why should he lose his title on the day when Israel and the Arab countries reach an agreement, and in what way should his share be reduced compared to a tenant that is not protected, and why should he lose his title to key money? For this reason, it should be acknowledged that protected tenancy has a proprietary aspect and consequently, Defendant No.2 [the Custodian of Absentee Property] came “wearing the shoes” of Defendant No. 1 [the Arab Land Bank] (paragraph 10 of the ruling).

On the grounds of protecting the rights of a protected tenant (who was, in this case, a bank...) the Court sided with the approach of the Custodian, who claimed that it is necessary to hand over property to him, the owner of which was not actually absent. Concerning an unprotected lease – a right which is personal and non-transferable – the Court ruled that this right is a “vested right”, which also falls under the definition of “absentee property” (paragraph 10 of the ruling).

context of inheritance rights, the Court ruled that an expectation to inherit properties when the property holder is still alive is a distant expectation which is not considered a “vested right”.<sup>49</sup>

What about the heirs, qualifying as “absentees” on the day their father passed away, who at the time of his death held no property in Israel, since the part in their father's estate that they were slated to inherit was transferred to the Custodian? This question was discussed in the matter of *Baha'i (Azal)*.<sup>50</sup> In that case, the father went from Israel to Lebanon in January 1948, and, with the permission of the government, returned to Israel in June 1949. He was declared absentee in October, 1950, and passed away approximately one week later. The Custodian decided in 1954 to release part of the late father's property, under Article 28 of the APL.<sup>51</sup> The part of the inheritance that was not released belonged to the son and daughter of the deceased, who were in Lebanon at the time. The son and daughter later passed away while still in Lebanon. The Supreme Court determined that the son and daughter did not acquire the property at all, only the “chance” that if the estate property was released in the future, they would receive it. It was determined that this “chance”, whose materialization was not certain, is not considered “property” that is transferred to the Custodian. Consequently, when the son and daughter passed away, their inheritance rights passed to their other relatives, without the Custodian seizing them on the way.

### 3.1.3 *Who is the Custodian of Absentee Property?*

The APL establishes that the Finance Minister will appoint a custodianship committee for absentee property and will appoint one of its members as the committee chairman. The committee chairman is the Custodian of Absentee Property (the Custodian). The Custodian may submit a claim and initiate legal action against any person, and be a plaintiff, defendant or contestant in any legal action. In any legal action, the Custodian is entitled to representation by the Attorney General of Israel, or the Attorney General's attorney.<sup>52</sup>

## **3.2 Transfer of absentee property to the Custodian and declaration of absentee status**

### 3.2.1 *General*

Article 4(a) in the APL, entitled “Vesting of absentee property in the Custodian” provides:

- (1) All absentee property is hereby vested in the Custodian as from the day of publication of his appointment or the day on which it became absentee property, whichever is the later date;

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<sup>49</sup> The matter of *Elad*, *supra* note 47, p. 743; the matter of *Mituba*, *supra* note 42, p. 15.

<sup>50</sup> See the matter of *Baha'i (Azal)*, *supra* note 47.

<sup>51</sup> In regard to releasing absentee property, see chapter 3.4 below.

<sup>52</sup> The Absentee Property Law, *supra* note 1, Article 2.

(2) Every right an absentee had in any property shall pass automatically to the Custodian at the time of the vesting of the property; and the status of the Custodian shall be the same as was that of the owner of the property.

Case law has determined that absentee property is automatically vested in the Custodian when the conditions of the APL are fulfilled, and it is not contingent on any legal action on the part of the Custodian or registration of the property in his or her name.<sup>53</sup> There is no provision in the APL that obliges the Custodian to register the absentee property in order to complete the transfer and it does not depend on the Custodian's knowledge, or lack thereof, about the absentee property.

*Albeck and Fleischer* write in their book:

The moment the property becomes absentee property (or, if it was before the appointment of the Custodian, then from the moment the Custodian is appointed) the property is vested in the Custodian and the right of ownership has been vested in him. Ownership is transferred without any application to the Land Registrar, and in general without his knowledge and it is transferred automatically without any order or action on the part of the Custodian, the absentee, or any authority whatsoever, but only by reason of the property becoming a property that belongs to an absentee.<sup>54</sup>

The Supreme Court decided to ascribe the reason for this automatic transfer to the circumstances surrounding the APL's enactment. According to the Supreme Court, it was impossible to expect, when the APL was legislated in 1950, that absentee property would be immediately registered in the Land Registry in an orderly fashion. The Supreme Court expressed its regret that many years later the registration was still incomplete, but decreed that in the circumstances of the early years of the State's existence, there was no way, apparently, to determine that an absentee property would only be property that was registered as such.<sup>55</sup>

### 3.2.2 *Property status after vesting in the Custodian*

After the vesting of the absentee property in the Custodian, all ownership rights are held by the Custodian and the absentee loses his ownership rights or any other right in the property. However, the property's vesting in the Custodian does not completely cancel the absentee's interest in the property. In this matter, the Supreme Court ruled that: "we tend to think that the absentee is not totally dispossessed because of the mere fact that he is an absentee, but rather that the rights are passed or vested in the Custodian".<sup>56</sup>

Because of this view, the absentee is seen as retaining the possibility that the Custodian may release the property in the future (under the provision of Article 28 of the APL – see

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<sup>53</sup> The matter of *Golan*, *supra* note 22, p. 645.

<sup>54</sup> Plia Albeck and Ron Fleischer, *Land Law in Israel*, self-published, Jerusalem, 2005, p. 97 [Hebrew].

<sup>55</sup> Civil Appeal 1134/06 *Rushrush v. Mansur* (published in "Nevo", 10 November 2009) (twelfth paragraph of the ruling).

<sup>56</sup> Civil Appeal 43/49 *Ashkar v. Supervisor of Absentee Property Northern District*, (1949) 2 PD 926, p. 933.

below) and, in such a situation, the rights the absentee had in the property prior to its transfer to the Custodian would return to him or to someone in his stead.<sup>57</sup>

### 3.2.3 Declaration of a person or property as absentee

Article 30 of the APL considers the certifications issued by the Custodian declaring that a certain person is an absentee or that a certain property is absentee property.

Article 30(a) and 30 (b) in the APL provide as follows:

(a) Where the Custodian has certified in writing that a person or entity of persons is an absentee, that person or entity of persons shall, so long as the contrary has not been proved, be regarded as an absentee.

(b) Where the Custodian has certified in writing that some property is absentee property, that property shall, so long as the contrary has not been proved, be regarded as absentee property.

Israeli case law determined that, considering the wording of Article 4(a)(1) of the APL, the action of certification by the Custodian is declarative rather than constitutive and its relevance is to the domain of the rules of evidence.<sup>58</sup> In other words, Articles 30(a) and 30(b) do not determine the rights and do not deal with the provisions of vesting the property in the Custodian, but deal solely with the rules of evidence. Because of the vesting, the rights of ownership are vested in the Custodian upon the actualization of the provisions of Article 1 in the APL, regardless of the date of the certificate's issue.<sup>59</sup> However, as detailed below, the issuing of a certificate under Article 30 is not merely a technical matter, since the Custodian's certification that a particular person or a property is absentee has significance in all matters relating to the method of proof and to the transfer of the burden of proof.

Articles 30(a) and 30(b) therefore provide that upon the Custodian's certification that a particular person (or entity of persons) or property are absentee, the burden of proving that this is not so lies with the party challenging the certification. It should be mentioned that when the Custodian issues a certificate under Article 30(a) (regarding a person), he or she cannot rely on such a certificate in cases where the question of ownership of the property is disputed. In such a case, in order for the burden of proof to pass to the other party, the Custodian must issue a certificate under Article 30(b) (regarding property).<sup>60</sup> However, it should be emphasized that when the Custodian issues a certificate under Article 30(b) of the APL, as stipulated under Article 5 of the APL, he is not obligated to

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<sup>57</sup> Civil Appeal 54/82 *Edmond Levi v. Late Afane Mahmud*, (1986) 40(1) PD 374, p. 386.

<sup>58</sup> Civil Case (Haifa District Court) 458/00 *Baha'i v. Custodian of Absentee Property* (published in "Nevo", 19 September 2002) (Section 8 of the ruling).

<sup>59</sup> *Ibid.*

<sup>60</sup> Civil Appeal 127/56 *The Custodian of Absentee Property v. Mawis*, (1957) 11 PD 64, p. 69; Civil Appeal 109/87 *Havat Mekora Ltd. v. Ali Yunes Hasan*, (1993) 47(5) PD 1, p. 16.

mention that the property belongs to a certain absentee.<sup>61</sup> Hence, regarding the burden of proof in the issue of whether a particular property is absentee property, it is sufficient for the Custodian to issue a certificate under Article 30(b) of the APL, and he is not obligated to issue, in addition, a certificate under Article 30(a). A certificate under Article 30(a) has relevance when the provisions of the APL refer to the absentee himself or when the Custodian has no ability to relate to particular property of the absentee.<sup>62</sup>

However, when the Custodian does not issue a certificate as mentioned above, the burden to prove that a certain person or property is absentee or absentee property is imposed upon the Custodian. In this situation, the Custodian is burdened with the obligation shared by every other administrative authority: to establish firm, factual and serious grounds for proving his claim that the conditions required by the APL exist for the person or property to have absentee status.<sup>63</sup> Furthermore, when the Custodian declares that a particular property is absentee property, and later changes his opinion (*i.e.* declares that the property is not absentee property), the burden of proof to show that the property is not absentee property does not pass to the owner of the property.<sup>64</sup>

In practice, there have been many cases in which the Custodian has issued a certificate under Articles 30(a) and/or Article 30(b) only after legal procedures seeking to establish that a particular person or property is not an absentee have begun; this is done, sometimes, many years after the person or property has become, allegedly, absentee. According to the provisions of the APL, the Custodian passes the burden of proof to the person who seeks to establish that he, or the particular property, is not considered absentee in order to force him to prove “to the contrary”. This practice has been criticized by the courts more than once.<sup>65</sup>

Concerning the degree of proof, whoever tries to prove “to the contrary”, meaning that he or she is not an absentee, under Article 30(a) of the APL, or that a particular property is not absentee property, under Article 30(b) of the APL, bears the same degree of proof incumbent upon a plaintiff in a civil complaint – a balance of probabilities.<sup>66</sup>

### **3.3 Property management and transactions**

#### *3.3.1 General*

Although the Supreme Court ruled that the absentee is “not totally dispossessed”, the Custodian of Absentee Property does not have any sort of trustee status regarding

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<sup>61</sup> Article 5 of the APL stipulates that “The fact that the identity of an absentee is unknown shall not prevent his property from being absentee property, vested property, held property or released property”.

<sup>62</sup> Civil Appeal 415/89 *Hasan Salib Darwish v. Custodian of Absentee Property*, (1993) 47(5) PD 521, p. 526.

<sup>63</sup> Civil Case (Jerusalem District Court) 1532/99 *Estate of the Late Taleb Ali Abdulla Abu Zahariya v. Berta Hamdan* (published in “Nevo”, 28 May 2007) (Paragraph 9 of the ruling).

<sup>64</sup> The matter of *Elad*, *supra* note 47, p. 741.

<sup>65</sup> See: Civil Appeal 3166/05 *Custodian of Absentee Property v. Estate of the Late George Naame, Tak –El* 2007(3) 392 (section 9 of the ruling); the matter of *Halim*, *supra* note 40, section 8 of the ruling.

<sup>66</sup> Civil Appeal 1397/90 *Diab v. Custodian of Absentee Property*, (1992) 46(5) PD 789, pp. 794-795.

absentee property. This is clearly set out in Article 4 of the APL, according to which, any right that the absentee had prior to his absence is automatically vested in the Custodian upon the transfer of the property.<sup>67</sup> However, this is not sufficient for revoking the absentee's interest in the property and the Custodian therefore has an obligation to manage the property properly and to preserve its value.<sup>68</sup>

Under the APL, many powers regarding the management of the property are vested in the Custodian. Thus, for example, the Custodian has the power to issue a dispossession certificate to a person that, under the APL, is illegally holding absentee property.<sup>69</sup> In addition, the APL transfers to the Custodian the power to issue stop work orders and even demolition orders for a building that was constructed, or is being constructed, on absentee property without permission from the Custodian.<sup>70</sup>

Conversely, the rights of others, including the absentees themselves, are extremely limited. For example, a person who holds absentee property is obligated to transfer it to the Custodian.<sup>71</sup> Also, Article 22 of the APL gives a long list of actions that no person is allowed to perform without written consent from the Custodian: to hold, manage or otherwise tend to vested property, to hand it over to any other person save the Custodian, to remit debt to any person except the Custodian and so forth.<sup>72</sup> Article 22(c) of the APL states that “an act which has been done in contravention of this Article is null and void”.<sup>73</sup>

However, the Custodian also has many duties. The Custodian is obliged to maintain the property he holds<sup>74</sup> and for this purpose he may spend and invest as necessary to maintain and develop the property concerned.<sup>75</sup> In addition, as mentioned above, the Custodian may only sell the property to the Development Authority.<sup>76</sup> The Custodian is also not permitted to lease the property for a period of over six years, except to the Development Authority or “to another lessee who undertakes in the contract of lease to cultivate or develop the property to the satisfaction of the Custodian”.<sup>77</sup>

### 3.3.2 *Transactions conducted by the Custodian*

Article 17(a) of the APL provides as follows: “Any transaction made in good faith between the Custodian and another person in respect of property which the Custodian

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<sup>67</sup> The matter of *HaBab*, *supra* note 21, pp. 918-919.

<sup>68</sup> The matter of *Baha'i*, *supra* note 58, paragraph 25 of the ruling.

<sup>69</sup> The Absentee Property Law, *supra* note 1, Article 10(a).

<sup>70</sup> *Ibid.*, Article 11(a). It is possible to appeal to the District Court regarding an order issued by the Custodian under this Article.

<sup>71</sup> *Ibid.*, Article 6(a).

<sup>72</sup> *Ibid.*, Article 22(a). It should be mentioned that any person who violates any provision of this Article might even be convicted of a crime. See Article 35(a)(1) in the APL.

<sup>73</sup> *Ibid.*, Article 22(c).

<sup>74</sup> That is, to maintain the property that he is actually holding, see *Ibid.*, Article 1(g).

<sup>75</sup> *Ibid.*, Article 7.

<sup>76</sup> *Ibid.*, Article 19(a)(1).

<sup>77</sup> *Ibid.*, Article 19(a)(2).



considered, at the time of the transaction, to be vested property shall not be invalidated and shall remain in force even if it is proved that the property was not at the time vested property”.

This Article of the APL is concerned with transactions made by the Custodian with a third party (i.e., not the absentee) and it constitutes a sort of specific “market-overt” rule in regard to property that was erroneously considered to be absentee property. It should be mentioned that this Article is different than the “market-overt” rule found in Article 10 of the Israeli Land Law,<sup>78</sup> which provides that “whoever purchases a title in a regulated property with consideration and relying in good faith on the registration, the power of that title shall be valid even if the registration was incorrect”. Contrary to Article 10 of the Land Law, the protection given to the buyer under Article 17(a) of the APL is not contingent on the Custodian, as the seller, registering with the Land Registry. In order for the transaction to remain valid, it is enough that the buyer purchased the property from the Custodian while the latter believed that the property was lawfully vested in him, even if the Custodian is not registered. The reason for this lies in that, as mentioned above, the transfer of the property to the Custodian is not contingent on the registration of the property under the name of the Custodian.<sup>79</sup> Hence, the APL puts the original owner of the property – even if the property was illegally declared as absentee property – at a significantly inferior position in comparison to the position of the person who purchased the property from the Custodian.

In order for Article 17(a) of the APL to be applied in practice, it is necessary to determine that the parties to the transaction were acting in good faith. This determination has relevance to Article 18 of the APL, dealing with the fate of those properties that were erroneously considered to be vested absentee properties. Article 18 deals with the Custodian's discretion when deciding between the option of handing over the property in kind, or the option of handing over its consideration, subject to the legal situation as established in Article 17.<sup>80</sup> In circumstances where both parties to the transaction were acting in good faith, the Custodian is obliged to return the consideration that he actually received for the property to the original owner of the property. However, the Custodian is not obliged to return the property itself, and is also not obliged to pay its worth on the day that it is ruled that the property was not actually absentee property. Whoever purchased the property from the Custodian in good faith shall not be obliged to return the property.<sup>81</sup> In contrast, when it is established that the parties to the deal were not acting in good faith, the protection of the “market-overt” rule does not apply and the person from whom the Custodian received the property is entitled to return of the property.<sup>82</sup>

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<sup>78</sup> The Land Law, 5729-1969, Laws of the State of Israel No. 575, 27 July 1969, p. 259.

<sup>79</sup> Banyan, *Land Law: The Principles and Rules*, *supra* note 11, p. 833.

<sup>80</sup> The matter of *Havat Mekora*, *supra* note 60, p. 17.

<sup>81</sup> Concerning this matter, see, *inter alia*, Civil Appeal 6783/98 *Custodian of Absentee Property v. Estate of Turya (Surya) Abd Al-A'ni Musa*, (2002) 56(4) PD 161, pp. 175-176.

<sup>82</sup> The matter of *Elad*, *supra* note 47, p. 746.

### 3.4 Release of absentee property

#### 3.4.1 Custodian power to release vested property

It appears from the above that the purpose of the APL's provisions is, first and foremost, to protect the interests that the State has in the property of those declared absentees. This purpose is reflected in the automatic manner in which a property is vested in the Custodian, and the broad powers granted to the Custodian. To this end, the APL does not contain a provision limiting the duration of the vesting in the Custodian and it also does not acknowledge the existence of a general arrangement for the release of absentee property. As a rule, this property is not released.<sup>83</sup>

An exception to this appears in Article 28 of the APL. The Article, entitled "the Release of vested Property", allows the Custodian to consider whether to release a vested property. Article 28(a) establishes: "The Custodian may, in his sole discretion, but subject to the provisions of Article 29, release vested property by certificate under his hand; and as soon as he has done so, that property shall cease to be absentee property and any right a person had in it immediately before it was vested in the Custodian shall revert to that person or to his successor". This Article should be read together with Article 29 of the APL, according to which the Custodian shall not use his power to release vested property, "unless such has been recommended, in respect of each case or a particular class of cases, by a special committee to be appointed by the Government". The release of the properties does not cancel their transfer to the Custodian from the outset, but returns them to the ownership of the absentee.<sup>84</sup>

Rulings of the Supreme Court state that the Custodian's discretion under Article 28 of the APL is limited to those cases where the committee has recommended that he release the property. In these cases, the Custodian has final discretion and may choose not to release the property in spite of this recommendation. In contrast, if the committee refrains from recommending releasing the property, or recommends not releasing the property, the Custodian has no discretion to subsequently release the property.<sup>85</sup>

Not only is the Custodian's power to consider the release of property limited to cases where the committee recommends that he do so, it is also customary for the Custodian to decide which applications submitted to him should go to the committee. The Custodian does not pass all property release applications to the committee, as revealed in a case before the Haifa District Court. The District Court criticized this practice and determined that in choosing to pass along only certain property release applications, the Custodian violated his obligation to consult the committee as required under the APL.<sup>86</sup> It should be mentioned that in the appeal of this decision, the Supreme Court determined that the District Court's interpretation that the Custodian has to first consult the committee in each case, "is not free of doubts, since it is possible to interpret Articles 28-29 in the

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<sup>83</sup> The matter of *Golan*, *supra* note 22, p. 645.

<sup>84</sup> Civil Appeal 263/60 *Kleiner v. Estate Tax Administrator*, (1960) 14 PD 2521, p. 2545

<sup>85</sup> The matter of *Cockran*, *supra* note 40, in the ninth paragraph of the ruling.

<sup>86</sup> The matter of *Baha'i*, *supra* note 58, section 20 of the ruling.

Absentee Properties Law as stipulating that it is necessary to receive the committee's recommendation only in cases where the Custodian is in the opinion that the property should be released". The Supreme Court ruled that it saw no need to decide on that point.<sup>87</sup>

### 3.4.2 *Criteria for releasing the property*

Criteria for releasing 'absentee' property under Article 28 are not specified by the APL. When the courts set out to examine the plausibility of the committee's recommendation (and, thereafter, the Custodian's decision) not to release absentee property, they usually discuss the question of whether the continuation of the transfer of the property to the Custodian is in line with the purposes of the APL. Or, in other words, whether the specific case heard in the court is of the kind of case to which the APL is supposed to apply.

For example, in the matter of *Cockran*, where the committee's decision to release property owned by a woman who was considered an "absentee" was discussed, Justice Cohen indicated that Article 28 is supposed to give "a glimmer of hope and relief for those who have fallen under the definition of 'absentee', but should not have been included among the absentees. In his claims before us, the petitioner's representative called these people 'technical absentees'...". In this context, the Justice related to "people that had in fact no legal, physical, ideological or any other link with the enemies of Israel".<sup>88</sup> In that same case, the chairman of the committee mentioned, in the responding affidavit that was submitted within the framework of the petition, his own explanation as to why the property should not be released, reasons which apparently have nothing to do with the purposes of the APL:

Since the petitioner is a resident outside Israel and since she has no need for the property or its consideration for her sustenance, and considering that the Minister of Foreign Affairs did not consider it necessary to release the property for reasons of diplomacy or *hasbara* [a word in Hebrew referring to the need to explain certain governmental action to the Israeli and international public], then the property should not be released.<sup>89</sup>

Eventually, in that same case, the Court ruled that the matter of the petitioner should be returned to the committee for reconsideration of the legal and factual claims.

The question of releasing absentee property also arose in a case before the Haifa District Court. This case discussed the question of the absentee status of property in the area that was owned by the descendants of *Baha'u'llah*, the founder of the *Baha'i* faith. Within the framework of the discussion of whether to release this property from the Custodian's authority, the Court cited the special case of the *Baha'i* religion and decreed:

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<sup>87</sup> The matter of *Baha'i (Azal)*, *supra* note 47, section 16 of the ruling.

<sup>88</sup> The matter of *Cockran*, *supra* note 40, in the 12<sup>th</sup> paragraph of the ruling.

<sup>89</sup> *Ibid.*, in the 7<sup>th</sup> paragraph of the ruling.

Today, the *Baha'i* have no national aspirations, and they do not have any country who could or who wants to be their custodian. On the contrary, while the centre of this religion is in Israel, its believers are scattered all over the world, not necessarily in the Middle East. If so, what do political arrangements in the distant future with the Palestinians or with other countries, have to do with the matter of the *Baha'i*? Where is the link between the purpose of the Law, to retain property for some day in the future, and the continued holding of non-particular portions of land by the Custodian? How will the release of the property violate the principle of mutuality in the future, between *Baha'i* property held in enemy countries and the property of absentee *Baha'is* in Israel? Is there any such property?<sup>90</sup>

Based on this case law, it can be stated in general that the absentee property owner will have a better chance to release the property under Article 28 of the APL if he can demonstrate that he is a resident of Israel, that he is not in a country that was defined as an enemy state, that he did not act against Israel in any way, that the release of the property is preferable for reasons of diplomacy or *hasbara*, and that special humanitarian considerations work in his favour.

At the same time, it has been established that the interest of the State in this property should also be taken into account: the ability to utilize absentee property for furthering the development of the country until the consolidation of political arrangements between Israel and its neighbours, in which the fate of the property shall be decided on the basis of mutuality between the countries. Such an interest could be, for example, the establishment of public institutions.<sup>91</sup> Therefore, it seems that according to the court's approach, each case should be decided on its own merits.

### 3.4.3 Release of property under Article 27 of the Absentee Property Law

Article 27(a) of the APL provides as follows:

(a) If the Custodian is of opinion that a particular person whom it is possible to define as an absentee under Article 1(b)(1)(iii) left his place of residence -

- (1) for fear that the enemies of Israel might cause him harm, or
- (2) otherwise than by reason or for fear of military operations,

the Custodian shall give that person, on his application, a written confirmation that he is not an absentee”.

Article 27(b) of the APL provides as follows:

(b) The Custodian may, in his sole discretion, but subject to the provisions of Article 29, provide written confirmation that a particular person who is at the time lawfully in

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<sup>90</sup> The matter of *Baha'i*, *supra* note 58, section 29 of the ruling.

<sup>91</sup> The matter of *Golan*, *supra* note 22, p. 644.

the area of Israel is not an absentee, even though it be possible to define him as an absentee, if the Custodian is of opinion that such person is capable of managing his property efficiently and that he will not in so doing be aiding the enemies of Israel.

Article 27(a) of the APL, therefore, obliges the Custodian to provide the absentee, included in the alternative of Article 1(b)(1)(III), certification that he is not an absentee, provided that he fulfils the conditions specified in the Article. According to *Alexandre (Sandy) Kedar*, the mechanism facilitated by this Article was designed to exempt Jews who could technically fall within the APL's definition of "absentees", from application of the APL. The wording "left his place of residence for fear that the enemies of Israel might cause him harm" reflects this intent.<sup>92</sup>

The Custodian may not elect to refuse to provide the said certificate.<sup>93</sup> In the event that an absentee owner receives a certificate under Article 27(a), the property under discussion automatically ceases to be absentee property as of the day of the certification without the need for a recommendation by the special committee under Article 29 of the APL.

A question arose in the Israeli courts whether Article 27(a) applies when it is possible to define a person as an absentee under Article 1(b)(1)(III) (that is, a definition of absentee by virtue of departure from the usual place of residence in Israel), but also under one of the other alternatives in Article 1(b)(1) (namely, definition of absentee by virtue of citizenship or being subject of some country or by location in an enemy country). In a 1953 Supreme Court ruling, Justice Landau answered this question in the affirmative. In other words, if a person fulfils the conditions of Article 27(a), then even if it is possible to consider him an absentee according to other definitions in the APL, he should be provided with certification that he is not an absentee.<sup>94</sup>

Anyone not fulfilling the conditions of Article 27(a) of the APL can petition to release the property under Article 28 (see above) or to request not to be considered an absentee under Article 27(b). Then, the Custodian *may*, after receiving a special recommendation from the committee under Article 29 of the APL, grant that request.

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<sup>92</sup> Kedar, "On the Legal Geography of Ethnocratic Settler States", *supra* note 2, p. 425.

<sup>93</sup> H CJ 99/52 *Anonymous Person v. Custodian of Absentee Property*, (1953) 7 PD 836, p. 839; the matter of *Baha'i (Azal)*, *supra* note 47, section 10 of the ruling.

<sup>94</sup> The matter of *Anonymous Person*, *supra* note 93. It should be mentioned that this ruling of Justice Landau sparked controversy. In a 2008 Supreme Court ruling, Justice Grunis stated that in the future it shall be appropriate to give further consideration for this rule because, as he phrased it, there is no reason to improve only the situation of a person who fulfils all conditions of the third alternative in addition to the other alternatives, and not to improve the situation of a person who fulfils only the other alternatives. See the matter of *Baha'i (Azal)*, *supra* note 47, section 13 of the ruling.

## 3.5 Compensation

### 3.5.1 *The Absentee Property (Compensation) Law of 1973*

The Absentee Property (Compensation) Law 5733-1973<sup>95</sup> (the Compensation Law) was passed in 1973; it specifies the cases where compensation for absentee property may be claimed. The Compensation Law was passed in the wake of Israel's unlawful annexation of East Jerusalem in 1967. At the end of the 1948 War, many Palestinians who had previously resided in areas that after the 1948 War were included within the boundaries of the new State of Israel, including in West Jerusalem, fled or were deported to East Jerusalem. These Palestinians, who Israel subsequently considered absentees regarding their property within Israel, became residents of Israel after the annexation of East Jerusalem in 1967. According to *Benvenisti and Zamir*, the Compensation Law was passed as a compromise between conflicting interests held by Israel: On the one hand, acknowledgment by Israel of the right of Palestinians to receive back the property they abandoned (or were forced to abandon) in 1948 could have set a precedent for acknowledgment of a general "right to return" Palestinian property; On the other hand, Israel wanted to return property in East Jerusalem to Jewish citizens who claimed pre-1948 ownership of property in the area, property that was held by the Jordanians from 1948-1967.<sup>96</sup> Total disregard of the ownership claims of Palestinian residents of East Jerusalem would not have been accepted in accord with the desire to transfer property in East Jerusalem into Jewish hands or with the Israeli effort to make the Israeli unification of the city final and irreversible. For this reason, the Compensation Law was passed as middle ground, offering financial compensation as a substitute for the rights that the Palestinians had in lands situated in areas that became part of Israel.<sup>97</sup>

Article 1 of the Compensation Law defines "property" as "immovable property which became absentee property and on the date of the coming into force of this Law [1 July 1973] is vested in the Custodian, or before that date was transferred from him to the Development Authority... or was legally expropriated from him". The Compensation Law, therefore, does not apply to real property that became absentee property after 1 July 1973.

Article 2 of the Compensation Law provides that:

A person entitled to claim compensation for property is a person who is an Israeli resident on the date of the coming into force of this Law or becomes an Israeli resident thereafter and who before the property was vested in the Custodian was one of the following: (1) the owner of the property, including the person who would have been his heir had the property not been vested; (2) in the case of urban property – an absentee who was the tenant thereof, including his wife who lived with him at that time; (3) the lessee of the property; (4) the holder of an easement over the property.

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<sup>95</sup> Laws of the State of Israel No. 701, 6 July 1973, p. 164.

<sup>96</sup> See section 4.1.2 below.

<sup>97</sup> Benvenisti and Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement", *supra* note 24, pp. 301, 310.

Article 4 of the Compensation Law decrees a maximum period for submitting a claim for compensation – 15 years from the Law's effective date or two years from the day that the claimant became a resident of Israel, whichever came later.

### 3.5.2 *Article 18 of the Compensation Law – cancellation of the opportunity to apply for releasing absentee property*

Article 18 of the Compensation Law provides as follows: “from the date of the coming into force of this Law, an absentee's claim for a right in property, or for the release of property under Article 28 of the Absentee Property Law, 5710-1950... shall not be heard save in accordance with this Law”. Theoretically, the conclusion to be drawn from this Article is that after the enactment of the Compensation Law it would no longer be possible to release property under Article 28 of the APL (see chapter 3.4 above).<sup>98</sup> The High Court of Justice also established this in a 1980 ruling.<sup>99</sup> Although it seems that the power to release property, under Article 28 of the APL, remained with the Custodian, in light of Article 18 of the Compensation Law, an individual has no right to apply for the release of absentee property, but only to petition for compensation.<sup>100</sup> Also, in a 2007 Supreme Court ruling, the Court decided that:

It is from the answer of the respondent that we learn that in actual fact, the Custodian is still discussing applications for release under Article 28 of the APL. This court as well did not refrain from hearing petitions that complained about the manner in which the power is exercised under Articles 28-29 of the Law... as we shall see, this issue, concerning the relation between the release arrangement found in Article 28 of the Absentee Property Law and the compensation arrangement in the Compensation Law does not require any decision in the matter before us.<sup>101</sup>

The Compensation Law applies only to absentees residing in Israel (including East Jerusalem). While the right to demand compensation is therefore not granted to absentees residing outside of Israel, these absentees are also exempt from the application of the Compensation Law as a whole, including Article 18. In other words, absentees residing in areas where Israeli law does not apply (for example, the West Bank, excluding East

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<sup>98</sup> This is in contrast to a case seeking to establish that certain property never vested in the Custodian due to the fact that it does not comply with the definition of “absentee property”. In cases such as these, it is still possible to argue for release of the property to its owner (see: the matter of *Afane*, *supra* note 57, p. 385; the matter of *Baha'i*, *supra* note 58, section 22 of the ruling).

<sup>99</sup> H CJ 721/79 *Shukri Nicola Mikhail v. Custodian of Absentee Property*, (1980) 34(4) PD 201, p. 205.

<sup>100</sup> In other words, the individual may still petition the court claiming that the Custodian, in his decision not to release the individual's property, did not exercise his discretion properly. The matter of *Baha'i*, *supra* note 58, section 23 of the ruling; also, see Banyan, *Land Law: The Principles and Rules*, *supra* note 11, p. 831.

<sup>101</sup> Civil Appeal 8481/05 *Lulu v. Custodian of Absentee Property* (published in “Nevo”, 28 February 2007), section 9 of the ruling.

Jerusalem, or other states), may still apply for the release of their property according to Article 28 of the APL.<sup>102</sup>

It should be mentioned that the compensation offered to eligible individuals under the Compensation Law was not generally commensurate with the realistic value of the property. In addition, political considerations also sometimes acted as a deterrent, such as the perception that receiving compensation legitimizes Israel's practices. For these reasons, the actualization of the right to compensation by absentees residing in Israel and residents of East Jerusalem (concerning the latter's property that remained within the Green Line)<sup>103</sup> was very limited.<sup>104</sup>

### **3.6 Interpretation of the Absentee Property Law in light of Basic Law: Human Dignity and Liberty**

As set forth above, the provisions of the APL are widely inclusive. Examples of this include the definitions of "absentee" and "absentee property" under the APL, the manner in which the property is vested in the Custodian, the many powers granted to the Custodian and the broad discretion provided to the Custodian on the question of whether to release absentee property.

The Basic Law: Human Dignity and Liberty, enacted in 1992, elevated property rights in Israel to the status of constitutional rights.<sup>105</sup> In light of this development, it is arguable that the comprehensive provisions of the APL do not accord with the Basic Law.<sup>106</sup> Although according to Article 10 of the Basic Law: Human Dignity and Liberty, the Basic Law cannot annul the validity of any law that was in existence prior to the enactment of the Basic Law<sup>107</sup> the Israeli Supreme Court ruled that the constitutional status that certain rights have received (such as property rights) can affect the interpretation of pre-existing laws.<sup>108</sup>

In a precedent-setting ruling on the issue of land expropriation, the Supreme Court sitting as the High Court of Justice referred to the constitutional status of property rights as a factor that affects the interpretation of the purpose of the law as well:

Within the framework of this new balance a change may take place in the purpose of previous laws. A purpose that was impossible to attribute to the law before the legislation of the basic laws can be attributed following the enactment of basic laws.

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<sup>102</sup> Motion (Jerusalem District Court) 1401/76 *Late Afane Mahmud v. Hashem Khalil Elsaid*, (1981) District Court Rulings 5742(2) 322, p. 331.

<sup>103</sup> The demarcation line resulting from the 1949 Armistice Agreement between Israel and its neighbours, and which marks the line between Israel and the territories it occupied following the 1967 War.

<sup>104</sup> Benvenisti and Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement", *supra* note 24, p. 301.

<sup>105</sup> Article 3 of the Basic Law: Human Dignity and Liberty, Laws of the State of Israel No. 1391, 25 March 1992, p. 150, declares that "there shall be no violation of the property of a person".

<sup>106</sup> The matter of *Baha'i*, *supra* note 58, section 27 of the ruling.

<sup>107</sup> The Basic Law: Human Dignity and Liberty, *supra* note 105, Article 10.

<sup>108</sup> Various Criminal Requests 537/95 *Ganimat v. State of Israel*, (1995) 49(3) PD 355.



The wording of the law has not changed, it is the purpose of the law that may change. The change may be minor. It may reflect a new purpose that is attainable – even if it were not actually attained – in the past. The change may be major. It may reflect a new purpose that was unattainable in the past.<sup>109</sup>

In regard to the APL, the courts did begin to interpret the Law, in some cases, in a manner that was more appropriate to the newly recognized constitutional status of property rights. Thus, Justice *Okon* in the District Court of Jerusalem, interpreted the definition of “absentee” in Article 1(b)(1)(II) of the APL, which relates to a legal owner of property that is found “in any part of Palestine outside of the territory of Israel”, in a limited manner, to make it inapplicable to a resident of territory that is under Israeli military control. Justice *Okon* justified his decision by relying on, *inter alia*, the fact that every provision of law, even if the law is old, should be interpreted in the spirit of the provisions of the Basic Law.<sup>110</sup>

In addition, regarding the term “was in” that appears in the same Article of the APL, it was determined by the Jerusalem District Court, in a different case, that this term should not be interpreted as including a clearly temporary sojourn in an enemy country. In this matter as well, weight was given to the guiding interpretative principle that the provisions of the APL should be interpreted in as limited a manner as possible to minimize any infringement of constitutional property rights.<sup>111</sup>

Another example is the interpretation of the presumption in Article 30 of the APL, according to which, the certificate that the Custodian issues concerning the absentee status of persons or property is presumed true as long as it is not proven to the contrary. According to a ruling issued by the Jerusalem District Court, this presumption must also be interpreted in light of the Basic Law in a reasonable and limited manner. The Court ruled that prior to issuing a certificate of this kind, the Custodian must have complete, well-founded and reliable information on which it is possible to base the decision that the persons or property concerned fall within the definition of absentees.<sup>112</sup>

Clearly, these specific interventions on the part of the courts are not enough to nullify the severe provisions of the APL; perhaps they are sufficient only for alleviating certain effects on very particular points. Amending the APL is a matter for the legislature, which has, so far, chosen not to do so, even in cases where the transgression of justice cannot be clearer, such as the case of “present absentees”.<sup>113</sup>

*In summary thus far:* To this point, we have discussed the provisions of the APL and the circumstances surrounding its enactment in the wake of the 1948 War. We elaborated on

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<sup>109</sup> HCJ 2390/96 *Karsik v. State of Israel, Israel Land Administration*, (2001) 55(2) PD 625, p. 712.

<sup>110</sup> Originating Motion (Jerusalem District Court) 3080/04 *Daqaq Nuha v. Heirs of the Late Naame Atiya Adwi Najar* (published in “Nevo”, 23 January 2006), sections 5-6 of the ruling.

<sup>111</sup> The matter of *Awad*, *supra* note 38, section 19 of the ruling.

<sup>112</sup> Request of Permission to Appeal (Jerusalem District Court) 3093/98 *Custodian of Absentee Property v. Saadi*, (1998) Tak-Mech 98(3) 2781, section 3 of the ruling.

<sup>113</sup> See, in this regard, *supra* text accompanying note 34.

the harsh provisions of the Law that made it possible for the Israeli authorities to transfer a great deal of Palestinian property to Israeli control following the 1948 War. As detailed below, the 1967 War and the annexation of East Jerusalem have introduced new avenues for Israeli authorities to take over Palestinian land using the APL. The Israeli policies and practices in this regard will be discussed in the coming chapters.

## **4. Utilization of the Absentee Property Law in East Jerusalem**

### **4.1 Application of the Law to East Jerusalem post-annexation**

#### *4.1.1 The Law and Administration Procedures Law of 1970*

During the 1967 War, Israel occupied the West Bank, the Golan Heights, the Sinai Peninsula and the Gaza Strip. Immediately after the war, the State of Israel unilaterally annexed approximately 70,500 dunams (7,050 hectares) of West Bank land to the municipal boundaries of West Jerusalem and applied Israeli law, jurisdiction and administration to the annexed territory. The annexed territory included not only Jordanian Jerusalem (approximately 6,500 dunams), but also an additional 64,000 dunams, most of which belonged to 28 Palestinian villages in the West Bank<sup>114</sup>. This annexed territory is known today as “East Jerusalem”.

In 1970, the Knesset passed the Law and Administration Procedures Law [Consolidated Version], 5730-1970 (hereinafter: “the 1970 Law”).<sup>115</sup> This law decreed the legal arrangements required for turning East Jerusalem into a territory in which Israeli law applies. Among other things, this law addressed the question of absentee property.

The State of Israel decreed East Jerusalem a territory to which the State's law applies. Consequently, the APL was applied, exactly the way it is written, to East Jerusalem. This situation led to almost all property in East Jerusalem considered, from that day, as absentee property, since the property in question was, after the annexation – at least according to Israeli law – within the territory of Israel, but the majority of the owners of rights in the property held Jordanian citizenship.<sup>116</sup> In order to prevent this potentially absurd situation, Article 3 of the 1970 Law decreed as follows:

- (a) a person who at the effective date of the Law Application Order [28 June 1967] was within the area of its application and was a resident within it, shall not be considered from that day as an absentee according to the meaning of this term in the Absentee Property Law 5710-1950 concerning a property on the same territory;

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<sup>114</sup> In regard to the legislation that facilitated the annexation, see: Law and Administration Ordinance (Amendment No. 11) – 1948, Laws of the State of Israel No. 499, 28 June 1967, p. 74; The Law and Administration Order (No. 1) – 1967, Israeli Collection of Regulations No. 2064, 28 June 1967, p. 2690; Municipalities Ordinance (Amendment No. 6) – 1948, Laws of the State of Israel No. 499, 28 June 1967, p. 74; Municipalities Ordinance (Declaration on the Enlargement of Jerusalem's City Limits), Israeli Collection of Regulations No. 2065, 28 June 1967, p. 2694.

<sup>115</sup> Laws of the State of Israel No. 603, 13 August 1970, p. 138. A previous version of this law was enacted in 1968 (Law and Administration Procedures Law 5728-1968, Laws of the State of Israel No. 542, 23 August 1968, p. 247).

<sup>116</sup> This status was granted to the residents of the West Bank, including East Jerusalem, after the annexation of this territory by the Kingdom of Jordan after 1948.

(b) for the matter of this Article, there is no practical difference if after the effective date of the Order that person was found, under permit, in a place where his presence there would have made him an absentee were it not for this provision.<sup>117</sup>

Concerning the provisions of Article 3 of the 1970 Law, the following should be mentioned:

- As the Article provides, residents of East Jerusalem are not considered absentees *in relation to property within the annexed territory only*. These residents will continue to be considered absentees in relation to the property that they own in other areas to which Israeli law applies.<sup>118</sup>
- According to the case law, the wording of Article 3(a) – “was within the area of its application and was a resident within it” – posits two cumulative conditions which a person must fulfil in order for this Article to apply such that he shall not be considered an absentee.<sup>119</sup> (1) Being physically located in an annexed territory in 28 June 1967 (the effective date); and, (2) being a “resident” of those areas according to the definition of the term in the Population Registry Law 5725-1965.<sup>120</sup> In this regard, it is noted that immediately after the 1967 War, Israel conducted a census in the areas annexed to Jerusalem. Palestinians who were physically present at the time were registered in the Israeli population registry and were granted Israeli identity cards, but not Israeli citizenship. According to Israeli law, these Palestinians are considered “permanent residents”.<sup>121</sup>

However, over the years the status of permanent resident was granted in a few cases also to people who did not register in the 1967 census and for that reason were not registered as residents. Status of permanent resident was granted to these people where they managed to demonstrate unequivocally that they had been residents of East Jerusalem prior to the 1967 War and continued to live in Jerusalem without interruption since 1967. Although the legal proceedings with regard to these individuals, in some cases, were held many years after the annexation, the Israeli Courts ruled that their residency status would be considered as though granted in 1967.<sup>122</sup> The Jerusalem District Court and the

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<sup>117</sup> The 1970 Law, *supra* note 115, Article 3.

<sup>118</sup> For that matter, see also: Benvenisti and Zamir, “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement”, *supra* note 24, pp. 308-309.

<sup>119</sup> Civil Case (Jerusalem District Court) 4293/02 *Mash'al v. Custodian of Absentee Property* (published in “Nevo”, 9 January 2008), sections 29-33 of the ruling. The Supreme Court upheld this ruling (see: Civil Appeal 4664/08 *Mash'al v. Custodian of Absentee Property* (published in “Nevo”, 11 July 2010)).

<sup>120</sup> The Population Registry Law 5725-1965, Laws of the State of Israel No. 466, 1 August 1965, p. 270, Article 1(a).

<sup>121</sup> The Supreme Court ruled in 1988 that the law regulating the residency of Palestinians in East Jerusalem is the Entry into Israel Law – 1952. See HCJ 282/88 *Mubarak Awad v. Prime Minister of Israel*, (1988) PD 42(2) 424.

<sup>122</sup> See, for example: HCJ 3652/96 *Camal Abu Saad v. Military Commander – West Bank Area*, Dinim Elyon 2005 (38) 335, sections 1 and 3 of the ruling; Administrative Petition (Jerusalem District Court)

Supreme Court held that these individuals also fulfil the cumulative conditions of Article 3(a) and therefore they also shall not be considered absentees.<sup>123</sup>

### **The Jibril Awad case**

A case that was heard in the Jerusalem District Court dealt with additional interesting questions pertaining to Article 3 of the 1970 Law. This case dealt with an East Jerusalem resident, *Jibril Awad*, who was convicted of security offences and sentenced to 15 years imprisonment in Israel. After serving 3 years of his sentence, the State of Israel suggested that instead of serving the remaining part of his sentence, he would be deported to Jordan. *Awad* consented and was subsequently deported to Jordan in 1971, where he remained for one week. He subsequently resided for six months in Kuwait, until moving to reside permanently in Germany, where he received German citizenship. During his stay in Kuwait, *Awad* periodically renewed his permit to stay there by travelling to nearby Iraq and immediately returning to Kuwait. Also, during his original move to Germany, he stopped for a few days in Syria.

In 2008, The Custodian notified *Awad*, who was in Germany, that he is an absentee in relation to his property in East Jerusalem. *Awad* appealed the Custodian's decision in the Jerusalem District Court, requesting that the court declare he was not considered an absentee. The District Court granted the request. In regard to Article 3 of the 1970 Law, the District Court found as follows:

*First*, the wording of Article 3(a) in the 1970 Law relates to a person who was a resident of East Jerusalem on 28 June 1967. The wording of the Article does not require that the person shall continue to be a resident of Israel (including residence in East Jerusalem). In other words, if that person loses the status of resident, this, *in itself*, shall not lead to him being considered an absentee.<sup>124</sup> However, as we shall see below, other circumstances may yet turn him into an absentee.

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812/05 *Shawish Muhammad Sa'id v. Ministry of the Interior*, Dinim Minhali 2006(43) 1475, section 9 of the ruling.

<sup>123</sup> Civil Case 4293/02 and Civil Appeal 4664/08, *supra* note 119. It should be mentioned that the possibility of acquiring the status of permanent resident, which was also available to those who did not register in the 1967 census yet resided in East Jerusalem at the relevant period, is no longer possible. This is under section A of government resolution 2492 dated 28 October 2007. The resolution can be viewed at this link: <http://www.pmo.gov.il/Secretary/GovDecisions/2007/Pages/des2492.aspx> (Site was last accessed on 8 April 2013).

<sup>124</sup> The matter of *Awad*, *supra* note 38, section 20 of the ruling. In the same matter, it was mentioned that adding to the Article a requirement that the person continues to be a resident of Israel in order not to be considered an absentee "will significantly increase the number of people with potential to be injured by the provisions of the Absentee Property Law, because it will lead to the application of this law to all people who were residents at the time that the order was declared but later ceased to be so, even if they became residents of a country that is not among the enemies of Israel. Interpretation of this nature is too broad, does not accord with the clear and explicit wording of the Article, and does not correspond with the interpretative rule according to which the interpretation of any piece of legislation that violates constitutional property rights (even if they predated the legislation of the Basic Law: Human Dignity and Liberty) should be a narrow one to minimize the infringement these rights as much as possible".

*Second*, in regard to Article 3(b) of the 1970 Law, the District Court decreed that the presence of a person who complies with the criteria specified in Article 3(a) of the same law in one of the enemy countries shall not turn that person into an absentee *only* when his or her presence in the enemy country is under permit. Any other behaviour that turns a person into an absentee under the APL – for example, presence in one of the enemy countries without permit – would still bring him within the definition of absentee.<sup>125</sup>

*Third*, in this particular case, the Court ruled that *Awad's* sojourn in Jordan was “under legal permit” since his departure to Jordan was with the State of Israel's consent and even initiated by the State. The Court also ruled that:

Article 3 of the Law does not require the departure to be made through a formal document of one type or another and its wording merely required that the departure shall be under legal permit, that is – it is not a matter of illegal crossing of the border or an unlawful departure. Therefore, it should be determined that the essence of the requirement included in the Article is that the departure shall be done in a manner that is legal and permitted with the consent of the State and not covertly, in a manner of infiltration or by illegal departure.<sup>126</sup>

Later in the ruling, the Court established that “it is possible, therefore, that the reason why those who depart under permit to enemy countries (for example, those who make the pilgrimage to Mecca under permit) do not turn into absentees under the Absentee Property Law, is that being located in an enemy country for the matter of this Law does not include a temporary stay that does not involve the creation of any real link to the state where they are located”.<sup>127</sup>

*Fourth*, regarding *Awad's* stay in Iraq and Syria, the court ruled that it was not under permit, since the permit referred exclusively to the stay in Jordan and therefore his presence there did not fall within the definitions of Article 3(b) of the 1970 Law.<sup>128</sup> However, the Court ruled that since *Awad's* stay in Iraq and Syria only lasted a few days, then it is impossible to conclude that because of these short periods *Awad* had (for the purposes of the APL) become an absentee.<sup>129</sup>

The Custodian appealed to the Supreme Court against the District Court's ruling in the *Awad* case, and argued against both the assertion according to which *Awad* should not be considered absentee and the principles established therein and referred to above. At the hearing, the Supreme Court recommended that the Custodian withdraw his appeal. The Custodian consequently acquiesced to the conclusion of the District Court in this

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<sup>125</sup> The matter of *Awad*, *supra* note 38, section 22 of the ruling.

<sup>126</sup> *Ibid.*, section 23 of the ruling.

<sup>127</sup> *Ibid.*, section 24 of the ruling.

<sup>128</sup> *Ibid.*, section 25 of the ruling.

<sup>129</sup> *Ibid.*, sections 26-29 of the ruling.

particular case, but stressed that the principles asserted by the District Court should be dealt with in a separate case and reserved his arguments pertaining thereto.<sup>130</sup>

#### 4.1.2 *Application of the 1970 Law to Israeli property in East Jerusalem*

Besides the provisions regarding absentee property, the 1970 Law deals with property in East Jerusalem that was owned prior to the 1948 War by Jews, and that was transferred to the Jordanian Custodian of Enemy Property between 1948 and 1967.<sup>131</sup> Following the 1967 War, this property came under Israeli administration and is now managed by the Israeli Custodian General.<sup>132</sup> The 1970 Law, enacted following the Israeli annexation of East Jerusalem, provides for the Israeli Custodian General to release this property, previously under the control of the Jordanian Custodian of Enemy property, to the alleged owners or the owners' heirs.<sup>133</sup>

The asymmetry of Israeli legislation can be seen when juxtaposing the provisions of the Israeli legislation regarding Palestinian absentee property within the Green Line boundaries with the Israeli legislation regarding properties in East Jerusalem owned by Jews prior to 1948.

As noted previously, Palestinians who owned property on the western side of the Green Line (including West Jerusalem) prior to 1948 cannot, in most cases, reclaim their property. This property has been transferred, in accordance with the APL, to the Custodian of Absentee Property, who in turn sold it to the Development Authority, which, in many cases, then transferred the property to Jewish Israelis. The general rule – according to the APL and court rulings – is that this property should not be returned to its previous owners. Article 28 of the APL, which constitutes an exception to this rule, allows the Custodian to use his discretion to *consider* whether to release property already vested in the Custodian. The Custodian's discretion under Article 28 of the APL is limited to those cases where a special committee, formed in accordance with Article 29 of the APL, recommends that he release the property.<sup>134</sup>

The 1970 Law, however, provides a wholly different approach. According to the 1970 Law, once the pre-1948 owners of particular property in East Jerusalem establish that they were indeed the true owners of the property, the Custodian General *must* release the property to them. Thus, the 1970 Law not only decrees that this property – as opposed to

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<sup>130</sup> Civil Appeal 3941/10 *Custodian of Absentee Property v. Awad* (published in “Nevo”, 10 October 2011). To the best of our knowledge, a new case, raising similar issues, has yet to come out in front of an Israeli court.

<sup>131</sup> These properties had been transferred to the Jordanian Custodian according to the Trading with the Enemy Ordinance (Palestine), No. 36 of 1939.

<sup>132</sup> The Custodian General (not to be confused with the Custodian of Absentee Property), who is under the authority of the Ministry of Justice, manages by law all property in Israel whose owners cannot manage it or are untraceable. As we will elaborate below, the Custodian General has also a significant role with regard to property in East Jerusalem that was owned by Jews prior to 1948.

<sup>133</sup> The 1970 Law, *supra* note 115, Article 5.

<sup>134</sup> In regard to the mechanism enabling, in certain cases, the release of absentee property to its previous owner and the lack of guidelines on which kinds of property should be released, see chapter 3.4 above.

property belonging to Palestinian absentees – should be released to its previous owners, but also provides that the Custodian General cannot even exercise any discretion on the subject. He is obliged to hand the property back to the owners.

Moreover, it should be noted that Israeli Jews who abandoned their property in East Jerusalem in 1948 received alternate property in West Jerusalem from the State of Israel as compensation. In most cases, this property was previously owned by Palestinians prior to 1948. According to the 1970 Law, these Jews may also reacquire rights in property they previously owned in East Jerusalem despite the fact that they have already been compensated for the loss of this property.<sup>135</sup>

A completely different regime applies to property owned by Jews prior to 1948 and located in parts of the West Bank that were not annexed to Israel in 1967. Following the Israeli occupation of the West Bank in 1967, the authorization to administer and manage property in these areas came under the responsibility of the Custodian of Government and Abandoned Property of the Israeli Civil Administration.<sup>136</sup> The current stance of the Israeli Civil Administration<sup>137</sup> with regard to this property is that it should not be released to the pre-1948 owners. They base this position, presented by State representatives in cases before the Israeli High Court of Justice, *inter alia*, on Israel's obligation, as the occupying power, to maintain public order in the occupied territory. The State added that releasing this property to the pre-1948 owners may lead to a series of claims by Palestinian refugees to reacquire their property left behind in Israel in 1948. Since, according to Israeli law, these claims would most likely be rejected, it may lead to an increase in disputes over land in the region and, as a result, to an increase in tension.<sup>138</sup> The High Court of Justice has, to date, upheld this position.<sup>139</sup>

The High Court of Justice has also ruled that the post-1948 vesting of this property in the Jordanian Custodian of Enemy Property annulled the ownership rights of the previous owners.<sup>140</sup> Following the 1967 Israeli occupation, this property became “governmental property” that should be managed according to the provisions of international humanitarian law pertaining to public property in an occupied territory. According to these provisions, the occupying force may administer and even enjoy the use of this property, but it does not acquire ownerships rights therein. The administration of the properties should be carried out in the framework of the law of occupation, *i.e.*, for the

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<sup>135</sup> Speech by Adv. Michael Ben-Yair, former Attorney-General, in a seminar “Sheikh Jarrah and Israel's Interests”, held in the Jerusalem Institute for Israeli Studies, 29 November 2010. See: <http://www.jiis.org.il/?cmd=media.341&act=read&id=638> [Hebrew]. (Site was last accessed on 8 April 2013).

<sup>136</sup> The Order concerning Government Property (West Bank Area) (No. 59), 1967, Articles 1-2.

<sup>137</sup> The Civil Administration is the Israeli military governing body, set up in 1981, that operates in the occupied territory of the West Bank.

<sup>138</sup> HCJ 1285/93 *Schechter v. Commander of Judea and Samaria* (published in “Nevo”, 8 December 1996), section 9 of the ruling; HCJ 3103/06 *Valero v. State of Israel* (published in “Nevo”, 6 February 2011), section 12 of the ruling.

<sup>139</sup> The matter of *Schechter*, *supra* note 138, section 18 of the ruling; the matter of *Valero*, *supra* note 138, sections 49-50.

<sup>140</sup> The matter of *Valero*, *supra* note 138 sections 27-31 of the ruling.



purpose of keeping public order and fulfilling the needs of the protected persons (in the present case, the Palestinians).<sup>141</sup>

With regard to property as owned by Israelis prior to 1948 but located in parts of the West Bank that were not annexed to Israel, the Israeli High Court of Justice has endorsed the State's position not to release the property to the previous owners. However, from an Israeli domestic law perspective, this position cannot prevail with regard to the same type of property located in East Jerusalem. As mentioned above, according to Israeli law, East Jerusalem is an integral part of Israel to which Israeli legislation applies, and is not an occupied territory. Consequently, the status of said East Jerusalem property is governed by the 1970 Law.<sup>142</sup>

### **The Sheikh Jarrah case**

The situation of the Palestinian residents evicted from their houses in the East Jerusalem neighbourhood of *Sheikh Jarrah* exemplifies the problems created by applying a different legal standard to East Jerusalem.<sup>143</sup> From the early 1970s, the Palestinian refugee community in *Sheikh Jarrah* has been the target of eviction proceedings brought before Israeli courts by Jewish and settler organisations, who claim ownership pre-dating 1948. Since November 2008, eviction proceedings have resulted in the displacement of at least 68 individuals from three extended families (11 nuclear family units). 25 additional families in this area remain at risk of a similar fate.

The Palestinian families in *Sheikh Jarrah* became refugees in 1948 after displacement from their homes in West Jerusalem and other areas that became part of Israel in the wake of the 1948 War. In a joint project of the government of Jordan and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), these families were housed in homes in *Sheikh Jarrah*. Settler organisations claim these homes were owned by Jews prior to 1948. *Sheikh Jarrah* land, believed to have been owned by Jewish individuals prior to 1948, was under the control of Jordan at that time and held by the Jordanian Custodian of Enemy Property. Following the 1967 War and the annexation of East Jerusalem to Israel, the property that had been managed by the Jordanian Custodian was vested, according to the 1970 Law, in the Israeli Custodian General. At the same time, two Jewish Committees, the 'Sephardic Community Committee' and the 'Knesset Yisrael Committee', laid claim to ownership of this *Sheikh*

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<sup>141</sup> *Ibid.*, sections 33-45 of the ruling.

<sup>142</sup> It should be pointed out that in cases of a clear-cut contradiction between international humanitarian law and Israeli domestic law – the latter prevails. (see, for example, H CJ 256/01 *Rabah v. Jerusalem Court of Local Affairs* (2002) 56(2) PD 930).

<sup>143</sup> What is written below with regard to the *Sheikh Jarrah* cases is based, primarily, on the following: Yitzhak Reiter and Lior Lehrs, "The Sheikh Jarrah Affair: The Strategic Implications of Jewish Settlement in an Arab Neighborhood in East Jerusalem", *The Jerusalem Institute for Israel Studies*, 2010, pp. 23-31; The Civic Coalition for Defending Palestinians' Rights in Jerusalem, *Dispossession & eviction in Jerusalem: The cases and stories of Sheikh Jarrah*, December 2009, pp. 10-17, [http://www.civiccoalition-jerusalem.org/ccdprj.ps/new/pdfs/Sheikh%20Jarrah%20Report%20\(2\).pdf](http://www.civiccoalition-jerusalem.org/ccdprj.ps/new/pdfs/Sheikh%20Jarrah%20Report%20(2).pdf) (Site was last accessed on 8 April 2013).

*Jarrah* property. They initiated legal proceedings for the release of the property from the General Custodian and for primary registration of the property under their names in the Israeli Land Registry. These proceedings concluded in 1972, with the Committees acquiring rights from the Israeli Custodian General and obtaining primary registration of the property. The two Committees launched eviction proceedings against the Palestinian residents and at a certain point transferred ownership of the property to “Nahalat Shimon International” – an organisation that aims to promote plans for Jewish building and settlement in Sheikh Jarrah. The eviction proceedings have led, since 2008, to forced displacement and risk of forced displacement of Palestinian families in the community.

In summary, the 1970 Law and the Compensation Law, passed following the Israeli annexation of East Jerusalem in 1967, combined with the provisions of the APL, have together created a blatant asymmetry. While Jews can reacquire ownership rights in property they owned prior to 1948, Palestinians cannot do so. The inequity is even clearer if we take into account that many of the Israelis today claiming their pre-1948 property have already been compensated and, in some cases, have received replacement property in West Jerusalem, property that was itself previously owned by Palestinians prior to 1948. In addition, some of the Palestinians who are evicted today as a result of this policy are themselves – as in the *Sheikh Jarrah* cases – refugees from 1948.

We will return at this point to the discussion of Palestinians who are considered absentees with regard to their property in East Jerusalem.

#### 4.1.3 *Of the absentees in East Jerusalem*

All persons who have rights in property in East Jerusalem but cannot prove that Article 3 of the 1970 Law applies to them (*i.e.*, cannot prove that on 28 June 1967 they were within the annexed area and were residents within it) are considered absentees in relation to this property. These individuals can be divided into several categories:

- **Present absentees:** persons who were residents of East Jerusalem on 28 June 1967 and continued to reside in this area even after this day, but for some reason did not register in the 1967 census and were not granted status as a result of their residency in Jerusalem on the effective day. Hence Article 3 of the 1970 Law does not apply, according to the above, to these persons.
- **Residents of the occupied Palestinian territory (excluding East Jerusalem):** persons who were residing in the oPt (except for East Jerusalem) on 28 June 1967 are considered absentees in relation to their property in East Jerusalem. The question of the absence of these persons is still contested today.<sup>144</sup> Even persons who resided in East Jerusalem on the effective date and received the status of

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<sup>144</sup> In this matter, see chapter 4.3 below.

permanent resident may be considered absentees if they subsequently relocated to elsewhere in the oPt and Israeli authorities then revoked their status in Israel.<sup>145</sup>

- **Residents and/or citizens of ‘enemy’ countries:** persons who were residing on 28 June 1967 in one of the ‘enemy’ countries listed in Article 1(b)(1)(I) of the APL. As detailed above, this category also includes persons who were residents of East Jerusalem on 28 June 1967 and who received status in Israel by virtue of this presence, but at some later stage relocated to reside in an ‘enemy’ country without acquiring a legal permit from Israel to do so. This category also includes persons who received citizenship in ‘enemy’ countries.<sup>146</sup>

#### 4.1.4 Cabinet resolutions in the matter of the Absentee Property Law's application<sup>147</sup>

From the above, it is evident that the sweeping provisions of the APL, combined with the provisions of the 1970 Law, enable the Custodian to decide that much of the property located in East Jerusalem falls within the definition of “absentee property”. And yet, shortly after the annexation of East Jerusalem, the Israeli government decided to avoid applying the APL to certain property in East Jerusalem. The reason for that was that at least some of the policymakers assumed that “the conditions and circumstances in the matter of Jerusalem are completely different than those that brought about the legislation of the Absentee Property Law of 1950”.<sup>148</sup>

In a meeting that took place on 22 November 1968 with the participation of the Minister of Justice, the Attorney General, the Minister of Agriculture and representatives of the Israeli Security Forces, the Advisor on Arab Matters, the Israel Land Administration and the Custodian, the following points were agreed upon, in regard to property located in East Jerusalem:

1. Immovable property belonging to legal permanent residents of Judea and Samaria<sup>149</sup> or of countries that are not enemy countries – shall be released to them, and also in cases where the property belongs in part to such persons and in part to residents of Arab countries;

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<sup>145</sup> As detailed above (see *supra* note 124), according to the ruling of the District Court, loss of residency in itself is not supposed to cause a declaration that the person is an absentee. However, when the subject of the discussion in addition relocated to reside permanently in the oPt (and his status may have been revoked because of that) – this may cause him to be considered an absentee (for that matter see section 33 of Custodian’s stance, as submitted to the Supreme Court within the framework of Civil Appeal 2250/06, *supra* note 37).

<sup>146</sup> With regard to relocation to reside in Jordan and acquisition of Jordanian citizenship, see *supra* note 32.

<sup>147</sup> This subsection is mainly based on a document formulated by the Ministry of Justice in April 1993, headed “Government Policy Concerning Absentee Property in East Jerusalem – Draft Resolution” [Hebrew]. The document, that was never published, was written according to a government resolution 193, dated 13 September 1992, passed following the *Klugman* report (see chapter 4.2.1 below). To the best of our knowledge, this draft resolution was never submitted to the cabinet.

<sup>148</sup> *Ibid.*, section 2 of the document (under the heading: “explanatory notes”).

<sup>149</sup> The expression “Judea and Samaria” is the term used by Israeli government officials to denote the West Bank area.

2. Property belonging to residents of Arab countries that prior to 5 June 1967 was administered, in whole or in part, by holders of powers of attorney who are residents of Judea and Samaria or Jerusalem – shall be released to the holders of power of attorney;
3. Property that is occupied by tenants – shall be released from the application of the Law and the Custodian shall not handle it;
4. Vacant property belonging to a resident of an enemy country, for which, in whole or in part, there is no legal representative as mentioned above, shall be administered by the Custodian provided that it shall be handed over only to government ministries or those employed by them and that it shall not be handed over in protected lease.<sup>150</sup>

In another meeting dated 3 February 1969, where the matter of the property that was already taken by the Israel Land Administration was discussed, the following points were agreed upon:

1. If all owners are in Jerusalem or in Judea and Samaria or in a country that is not an enemy country – the real-estate shall be returned to their owners.
2. If some of the owners are residents of Jerusalem *and* [*sic*]<sup>151</sup> Judea and Samaria and some of the owners are residents of Arab countries, but in Jerusalem or Judea and Samaria there are holders of a notary power of attorney from the owners who are in an enemy country – the property shall be returned to the owners and the holders of the power of attorney.
3. If some of the owners are in Jerusalem or in Judea and Samaria and some of the owners are in Arab countries and they did not issue a notary power of attorney as mentioned above – *the Custodian of Enemy Property* [*sic*]<sup>152</sup> shall appoint a trustee from among those in Jerusalem of Judea and Samaria for the part for which there is no notary power of attorney as mentioned.<sup>153</sup>

From the above, it is evident that shortly after the annexation of East Jerusalem a real attempt was made to prevent sweeping application of the APL on property in the annexed

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<sup>150</sup> Government Policy Concerning Absentee Property in East Jerusalem – Draft Resolution, *supra* note 147, section 3(a) of the document (under the heading: “Explanatory notes”). Protected lease is a situation where tenants, complying with the provisions of the Protected Tenancy Law (Consolidated Version) 5732-1972, Laws of the State of Israel No. 668, 13 August 1972, p. 176 are not obliged to dispossess themselves of the land at the end of the lease period or the termination of the contract. This right was meant to protect the tenant from being evicted from the property. This is a personal right and its holder may transfer it to another only under particular conditions. In most cases, the death of the holder of the right also terminates the right.

<sup>151</sup> Author’s note: we believe that the right word here is *or*, instead of *and*.

<sup>152</sup> Author’s note: we believe that the right phrase here is *the Custodian of Absentee Property*, not *the Custodian of Enemy Property*.

<sup>153</sup> Government Policy Concerning Absentee Property in East Jerusalem – Draft Resolution, *supra* note 147, section 3(b) of the document (under the heading: “explanatory notes”).

area. In fact, the government ordered that property whose owners were in Jerusalem, the West Bank or in a country that is not an enemy country, should not be transferred to the Custodian, even if a literal application of the APL would have led to this property becoming vested in the Custodian. In addition, a solution was also found for property whose owners are residents of enemy countries, in the form of holders of powers of attorney, whether they were residents of Jerusalem or the West Bank. Even in those cases where the property would be transferred, under these guidelines, to the Custodian – it would be possible to hand it over only to government ministries and not in a protected lease.<sup>154</sup> Indeed, it seems that following these guidelines, very limited use was made of the APL in East Jerusalem during the first decade after the annexation.<sup>155</sup>

This policy changed completely at the end of the 1970's. In 1977, the right-wing *Likud* Party was elected to power. In a forum headed by the Minister of Justice at the time, *Shmuel Tamir*, and the Minister of Agriculture at the time, *Ariel Sharon*, it was decided that:

Property in East Jerusalem belonging to legal permanent residents of East Jerusalem, Judea and Samaria, whose owners held and used it, in fact, continuously from 5 June 1967, may address themselves to the Custodian ... and request permission to continue to hold and to use the property. The request shall be brought to the advisory committee under Article 29 of the Law, and if the petitioner shows in a manner that satisfies the committee that he held and used the property in fact during the entire said period, he shall be allowed to continue to hold it, if in the committee's opinion all the rest of the circumstances justify that. The procedure for handling requests in this matter shall be according to what is mentioned in the Absentee Property Law...<sup>156</sup>

To the best of our knowledge, no petitions were submitted to the Custodian according to this procedure. However, it is clear that the decision actually revoked the policy that was customary until 1977. The new decision enabled the seizure of all property which falls within the broad definition of “absentee property”, except property that complied with the strict conditions detailed in the decision that involve continuous holding and use.<sup>157</sup> In any case – despite the problematic wording of the resolution, as cited above – it can be stated that the possibility of retaining the property was granted only to persons who are residents of the West Bank, own property in East Jerusalem, and comply with said holding and use conditions. The burden of proof to show these conditions were met rested with these residents, rather than the Custodian. It should be stressed that any other

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<sup>154</sup> As set forth below, after the government dropped this policy, many of the absentee properties were handed over by the Custodian to the Development Authority, which leased them under protected lease to settler organisations.

<sup>155</sup> Government Policy Concerning Absentee Property in East Jerusalem – Draft Resolution, *supra* note 147, section 3(c) (under the heading: “explanatory notes”).

<sup>156</sup> *Ibid.* It should be noted that the wording of this decision is copied from the document formulated by the Ministry of Justice in April 1993. We do not know whether the problematic wording cited here was the exact wording of the decision or was just cited that way by the Ministry of Justice's document.

<sup>157</sup> *Ibid.*

behaviour that caused a person to become an absentee according to the APL, made it possible to transfer the property he owned to the Custodian.

This procedure was established as a temporary procedure, to be submitted for reconsideration in light of its practical application. Attorney General *Meni Mazuz* stated in 2005 that, actually, no reconsideration of the procedure ever took place and after the fact, it turned out that under this procedure, the APL was misused, as detailed below.<sup>158</sup>

## **4.2 Actual use of the Absentee Property Law in East Jerusalem**

The annexation of East Jerusalem to Israel and the legislation that followed made it possible, therefore, to decide that much of the property in East Jerusalem is considered absentee property. Despite initial attempts to limit the use of the APL in East Jerusalem, beginning in the late 1970s the restrictions were lifted, and the APL was put to wide use. As detailed below, the Custodian of Absentee Property was utilized as a significant channel for transferring properties to settler associations in East Jerusalem. These associations were aware of the vast potential in the transfer of property to the Custodian, and initiated petitions to the Custodian to obtain his declaration of particular property as absentee property. However, the Custodian has additional methods by which to decide that a certain property or a part thereof, is absentee property. In this subsection, the involvement of the Custodian in matters related to the transfer of real property rights in East Jerusalem, and in planning and licensing procedures, shall also be described.

### *4.2.1 Settler takeover of properties with Custodian assistance*

During the 1980s, an accelerated process began of settler takeover of properties in the heart of Palestinian communities in East Jerusalem. This process was often carried out under the APL and the cabinet resolution from 1977 to broadly enforce the APL. This aspect of the Custodian's activity was revealed in the *Klugman* Committee report; this Committee was appointed in order to examine the way in which the State and its agencies assisted such settler activity. We shall begin by referring to this report and later we will review the attitude of the courts to the behaviour of the Custodian in specific cases brought before them.

### **The *Klugman* report**

In August 1992, the newly-elected government of *Yitzhak Rabin* appointed an inter-ministerial committee that included representatives from the Ministry of Public Security (called Ministry of the Police at the time), the Ministry of Housing and Construction and the Ministry of Finance, and also a representative of the State Attorney and a representative of the Municipality of Jerusalem. The committee was chaired by Attorney *Haim Klugman*, the Director General of the Ministry of Justice at the time. The Committee's mandate was to examine and bring together “all the data relevant to houses

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<sup>158</sup> See: “The application of the Absentee Property Law to property in East Jerusalem belonging to residents of Judea and Samaria”, a letter to the Minister of Finance at the time, *Binyamin Netanyahu*, dated 31 January 2005 [Hebrew] (not published) (hereinafter: “The *Mazuz* Opinion”).

leased, rented or purchased on behalf of private bodies, non-profit associations (*Amutot*) or individuals out of the State budget or with any other assistance from the State and its agencies in East Jerusalem”.<sup>159</sup>

At the start of the report, the Committee indicated that “a significant portion of the property under examination was the legacy of the Custodian's declaring their original owners to be absentees, and thus, by virtue of this declaration, it was sold to the Development Authority”.<sup>160</sup>

In order to carry out its assignment, the Committee heard representatives from various public organizations and asked them for information; most organizations cooperated with the Committee. However, concerning the Custodian of Absentee Property, the Committee indicated that he “did not provide any data at all, claiming that the property regarding which data was requested had been sold to the Development Authority. This claim hampered the Committee's ability to give a detailed picture of the data it examined”.<sup>161</sup> Despite the Custodian refraining from helping the Committee, it was still possible to learn from the Committee report how the method of transferring property to settler associations active in East Jerusalem worked, as described below.

The Committee located 68 properties that were transferred, one way or another, with the assistance of the State of Israel, to Jewish organisations, or to private individuals, in East Jerusalem. The State invested vast sums in those properties in acquisition, renovation, broker fees, and lawyer fees and so on.<sup>162</sup>

As for the involvement of the Custodian, the Committee indicated that property was declared absentee property based on information provided to the Custodian by the settler

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<sup>159</sup> Report of the Committee to Examine Buildings in East Jerusalem, dated 10 September 1992 (hereinafter: “the *Klugman* report”), section 1(a). The report was not published. An English translation can be found in “The *Klugman* Report – Report of the Committee to Examine Buildings in East Jerusalem”, *The Palestine Yearbook of International Law*, Vol. 9, 1996/1997, pp. 417-435.

<sup>160</sup> *Ibid.*, p. 419.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*, pp. 421-423. On the matter of this property see also: Nir Hason, “State gave East Jerusalem lands to rightist groups without tenders”, *Ha'aretz*, 5 November 2010. The article mentions several properties that were sold, leased or let to the *Elad* and *Ateret Cohanim* associations on behalf of the State. Apparently, most of the properties were vested in the State by the power of the APL. Detailed information in the matter of 11 properties was received following two petitions submitted under the Freedom of Information Act 5758-1998, Laws of the State of Israel No. 1667, 29 May 1998, p. 226: Administrative Petition (Jerusalem District Court) 8260/08 *Ir Amim v. The Israel Land Administration* (not published, ruling given by consent on 22 September 2008); Administrative Petition 1974/09 (Jerusalem District Court) *Yesh Din Voluntary Organization for Human Rights v. Israel Land Administration* (published in “*Nevo*”, 21 June 2010). The information includes: general location of property (in what community), property size, sum paid for the property and method of handover). The difference between the number of properties for which information was received within the framework of the petitions (11) and the number specified by the *Klugman* report (68) is explained in the article thus: there are other associations and companies, some of which are not incorporated in Israel, to which the properties were transferred. It is also possible that information concerning the several properties that were transferred to *Elad* or *Ateret Cohanim* was not given to the petitioners despite what is referred to in the rulings.

associations and based on dubious affidavits of Palestinian residents, signed before those associations' lawyers. The Committee asserted that:

The truthfulness of the affidavits was not checked by the Custodian, the Custodian did not visit the properties, he did not examine them, [assess] their value or whether they [their acquisition] involved eviction of families, and did not allow other claimants to argue their claims or their opposition... Some affidavits concerning different pieces of property were made by the same person, without the Custodian making an elementary check of his identity, his credibility, the way in which he got to the lawyer or the association, the source of his knowledge and the payment he received for his services.<sup>163</sup>

The property that the Custodian declared as absentee property was sold by the Custodian to the Development Authority, which entrusted its administration to the *Amidar* Company,<sup>164</sup> or to another branch of the Ministry of Housing. From there, the property was transferred, usually under a protected lease agreement in exchange for nominal payments, which were not in line with market value, to the control of settler associations.<sup>165</sup> In meetings of the Ministry of Housing acquisition committee, where it was decided to whom to lease or rent the properties, sat representatives of settler associations – who, as mentioned above, were involved in locating those properties – as project managers on behalf of the *Amidar* Company. The settler representatives took part in making decisions such as how much money would be allocated for renovating the property before it vested in lessees or renters, and approved their security budgets (budgets designated mainly to protect settlers residing within existing Palestinian communities). The *Klugman* Committee asserted that the participation of settler associations' representatives in the acquisition committee constituted a deviation from proper administration procedures, and indicated a conflict of interest.<sup>166</sup>

In the report summary, the Committee asserted that “the performance of the Custodian of Absentee Property was defective in the extreme and, in the opinion of the Committee, he did not exercise the minimum level of judgment required of one holding this job”.<sup>167</sup>

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<sup>163</sup> The *Klugman* report, *supra* note 159, p. 426.

<sup>164</sup> The *Amidar* Company is a governmental company for public housing established in 1949. Among its other activities, *Amidar* manages absentee property transferred from the Custodian to the Development Authority.

<sup>165</sup> The *Klugman* report, *supra* note 159, pp. 433-434.

<sup>166</sup> *Ibid.*, pp. 426-428. See also: Meron Rapoport, *Shady Dealings in Silwan, Ir Amim*, May 2009, pp. 11-13

<sup>167</sup> The *Klugman* report, *supra* note 159, p. 434.



*Photos: Houses in Silwan which were declared “absentee property” and subsequently transferred to the hands of settlers.*



*The Abbasi House. (Photo by: Emek Shaveh).*



*Beit Hatzofeh ("the lookout house") (Photo by: Peace Now).*



*Beit Hamaayan ("the spring house") (Photo by: Peace Now).*

## Legal proceedings

An example for the manner of conduct referred to by the *Klugman* report can be found in a case that reached the Supreme Court. In September 1987, the Custodian's office issued a certificate declaring that certain property in *Silwan* in East Jerusalem – registered under the name of *Ahmad Al-Abbasi*, who passed away in 1980 – was property that falls in its entirety under the definition of “absentee property” under the APL, and that the rights in this property were, therefore, vested in the Custodian. The Custodian sold the rights in the property to the Development Authority in June 1988, which then transferred the administration of the property to *Amidar*, who leased parts of it under a protected lease to the *Elad* Association.<sup>168</sup> The estate of the deceased and his heirs filed suit in the District Court against the Development Authority and requested that the Court issue a declaratory ruling that the ownership rights in the property belong to them and that any transaction concerning the property should be considered void. The District Court accepted most of the claim, and an appeal of its ruling was submitted to the Supreme Court. At the end of the proceedings it was ruled that only part of the property was considered absentee property and vested in the Custodian, and that the transaction of the sale of the property to the Development Authority, and the transfer of the rights to the *Elad* Association, were void.<sup>169</sup>

Within the framework of the legal proceedings, the conduct of the Custodian was severely criticized. It was ruled that the actions of the Custodian were tainted with extreme lack of good faith. Although the affidavit submitted to the Custodian claimed that only 5/8 of the property is absentee property, it was decided by the office of the Custodian to sell the entire property, without the office verifying or disproving what was stated in the affidavit. The Court also ruled that the Custodian was subject to direct pressure from the Israel Land Administration to sell the property to the Development Authority, and the Custodian refrained from exercising independent consideration whether to do so.<sup>170</sup>

Another case that was heard in the Jerusalem District Court also concerned property in *Silwan* for which the Custodian issued a certificate in 1988 under Article 30(b) of the APL that the property under discussion was absentee property. During the court proceedings, the Custodian admitted that, in fact, the certificate was issued without him knowing for certain who owned the parcel and whether that owner was an absentee. The

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<sup>168</sup> The *Elad* Association, set up in 1986, aims to strengthen the ties of the Jewish people to Jerusalem throughout the ages by tours, educational activities, settlements and publishing information materials (see: <http://www.guidestar.org.il/organization/580108660> [Hebrew]. Site was last accessed on 8 April 2013). *Elad* is also engaged in archaeological excavations that are often being criticised for being, *inter alia*, incomplete and biased as they predominately use a biblical lens to emphasize Jewish history, while neglecting to illuminate several layers of historical remains from other cultures and religions (see: <http://www.truah.org/issuescampaigns/justiceforjerusalem/insideneighborhoods/253-elad.html>. Site was last accessed on 8 April 2013); Yonathan Mizrahi, *Archaeology in the Shadow of the Conflict: the Mound of Ancient Jerusalem (City of David) in Silwan*, Emek Shaveh.

<sup>169</sup> The Matter of *Elad*, *supra* note 47, p. 749.

<sup>170</sup> *Ibid.*, pp. 745-746.

Custodian also admitted that, in this case, the property was declared absentee property based on a single affidavit that the Custodian made no effort to verify. Subsequently, the Court indicated that from statements made by the Custodian of Absentee Property in a discussion in the Knesset concerning this issue, it is evident that the person who gave the affidavit was in fact a “serial affidavit-giver”, who provided between 10 and 15 similar affidavits. It also turned out during the court hearing that the same person was paid for providing these affidavits. The court ruled that the declaration of the parcel as “absentee property” was not valid.<sup>171</sup>

### **Cabinet policy after the submittal of the *Klugman* report**

The *Klugman* report was submitted to the cabinet on 13 September 1992. On that day, the cabinet passed a series of resolutions the purpose of which was a comprehensive examination of the practices and legal rights relating to the property described in the report, and the cabinet's policy in that context. The Attorney General and the Minister of Finance (the Minister responsible for the office of the Custodian of Absentee property) were charged with several tasks, among them examining the Custodian's conduct and drawing the necessary conclusions.<sup>172</sup> The Ministry of Justice subsequently prepared a draft resolution in April 1993, which formulated new policy guidelines concerning the application of the APL in East Jerusalem:

- a. No certification of absentee property shall be given in relation to immovable property of which the full ownership or most of the ownership in it belongs to owners located in Jerusalem or in the territories of Judea and Samaria and in the area of the Gaza District (hereinafter – the territories) or in a country that is not an enemy country, and no possession in them shall be seized as absentee property;
- b. In property as mentioned above where only a minority of the ownership belongs to residents of Jerusalem or the territories or a country that is not an enemy country, the Custodian of Absentee Property may appoint a trustee from among those [*i.e.* the minority owners] for the part in the property whose owners are residents of an enemy country.
- c. A vacated property belonging to a resident of an enemy country without a holder of power of attorney in relation thereto, in whole or in part as mentioned above, shall be administered by the Custodian of Absentee Property, provided that it is handed over exclusively to government ministries or public bodies and not handed over under a protected lease.
- d. Concerning properties whose owners shall request the release of the property and its return to their possession – the existing situation, in which the owners can

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<sup>171</sup> Civil Claim (Jerusalem District Court) 1870/96 *Heirs of the Late Barbanela Nuniz Fatiha v. Himnuta Ltd.*, Tak-Mech 99(2), 4112, sections 12 and 30 of the ruling. In regard to the same issue see: Civil Claim (Jerusalem) 1053/95 *Ruweidi v. Jewish National Fund* (published in “Nevo”, 2 May 2012).

<sup>172</sup> Cabinet Resolution No. 193, dated 13 September 1992. The resolution was not published.

submit a request, as mentioned, to the Custodian of Absentee Property and to the special committee under article 29 of the law, shall remain unchanged.<sup>173</sup>

The Ministry of Justice suggested, therefore, returning to the policy that was declared before 1977. The draft resolution does not distinguish between property of persons located in East Jerusalem, in the rest of the occupied territories, or in countries that are not enemy countries – all of which shall not be declared absentee property and possession shall not be taken thereof as absentee property. The draft sought to establish that the transfer of property to the Custodian's administration will be approved only when its owners have no holder of power of attorney among the residents of said territories. Even in this situation, the property shall be handed over only to government ministries or to public bodies, and shall not be leased under a protected lease. In making this point, the Ministry of Justice emphasized the illegality of transferring the property to private hands under protected lease as set out in the *Klugman* report.

As far as is known, this draft resolution was never brought to the cabinet. However, the Attorney General at the time, *Yosef Harish*, gave instructions to halt application of the APL in this manner and to return to the policy that prevailed until December 1977.<sup>174</sup> Nevertheless, it seems that during the years that followed submission of the *Klugman* report, no real steps were taken in order to prevent the occurrence of the phenomena revealed in the report, and most of the resolutions the cabinet passed subsequent to the report were not followed. Property that was taken from its legal owners was not returned, and no supervision and control mechanisms over the Custodian's conduct were formed. In light of these omissions, a petition was submitted by Knesset Member *Haim Oron* and the *Ir Shalem* Association to the High Court of Justice in 1995, with the purpose of forcing the relevant authorities to implement the conclusions of the *Klugman* report and the subsequent cabinet resolutions. The State Attorney announced in its response to the petition that a professional team was established by the government with the purpose of preventing the recurrence of the practices addressed in the report. The Court dismissed the petition on the basis of this undertaking.<sup>175</sup>

It is important to note that, according to a cabinet resolution dated 13 September 1992, the government of Israel ordered the State Comptroller to conduct a special inquiry concerning the findings of the *Klugman* report.<sup>176</sup> After several years of inquiry, a decision was made to cancel the inquiry. A petition was submitted to the High Court of

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<sup>173</sup>Government Policy Concerning Absentee Property in East Jerusalem – Draft Resolution, *supra* note 147, p. 1.

<sup>174</sup> See: the *Mazuz* Opinion, *supra* note 158, p. 2

<sup>175</sup> HCJ 2179/95 *Ir Shalem Association v. Minister of Finance*, (Submitted on 5 April 1995). The Attorney General's announcement was submitted on 28 March 1996. The ruling in this petition issued on 5 February 1997 (published in "Nevo").

<sup>176</sup> This kind of inquiry is conducted according to the State Comptroller Law 5718-1958 [Consolidated Version], Laws of the State of Israel, No. 248, 20 March 1958, p. 92.

Justice on this matter in 1998. The petition was erased based on the State's undertaking to prevent the recurrence of the practices described in the report.<sup>177</sup>



*Photo: Karm Al-Mufti in Sheikh Jarrah. The land was declared “absentee property” and subsequently leased to the Ateret Cohanim settler association, which intends to build 250 housing units in the area. (Photo by: Mohammad Haddad).*

In spite of the State undertakings set forth above, no serious examination of the conclusions of the *Klugman* Committee was ever carried out, and it is doubtful whether the professional team that the cabinet appointed at the time completed its work.<sup>178</sup> Already in 1997, the government eased the limitations on exercising the APL, and the Custodian was allowed to issue certificates that declared vacant property as absentee property with the authorisation of the Legal Advisor of the Ministry of Finance. Concerning occupied properties, authorisation from the Ministry of Justice was required, in addition to authorisation from the Ministry of Finance Legal Advisor. It seems, however, that this practice was put to use in only a limited fashion.<sup>179</sup> In March, 2000, a ministerial forum comprised of the Minister of Finance, the Minister of Justice and the Jerusalem Affairs Minister, decided that a transfer of any kind whatsoever of East

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<sup>177</sup> HCJ 3723/98 *Ir Shalem Association v. Prime Minister of Israel* (submitted on 14 June 1998). The petition was erased on 21 December 1999.

<sup>178</sup> For further details on this matter and in the matter of the government's conduct following the *Klugman* report, see the petition HCJ 4492/05 *Atiq v. Commander of Central Command* (the petition was submitted on 10 May 2005). For details on this petition see *infra* note 206.

<sup>179</sup> The *Mazuz* Opinion, *supra* note 158, p. 3.

Jerusalem property from the Custodian to the Development Authority, requires the approval of the Ministerial Forum, or anyone authorised by them for this purpose.<sup>180</sup>

A sharp change in direction in government policy occurred again in 2004. On 22 June 2004, the Ministerial Committee for Jerusalem Affairs passed a resolution cancelling the limitations that were established in March 2000. In a June, 2004 meeting in which only two ministers participated – *Natan Sharansky*, the Jerusalem Affairs Minister, and *Zevulun Orlev*, the Welfare Minister – it was decided “to make it clear, in order to remove doubt, that the Custodian of Absentee Property has powers under Article 19 of the Absentee Property Law 5710-1950 that include execution, transfer, sale or lease of East Jerusalem real-estate property to the Development Authority”.<sup>181</sup>

The Attorney General at the time, *Meni Mazuz*, firmly opposed this resolution. He wrote in his letter dated 31 January 2005, to *Binyamin Netanyahu*, the Minister of Finance at the time (the Minister responsible for the office of the Custodian):

This resolution was passed contrary to the opinion of the two representatives of the Ministry of Justice who appeared before the committee. This decision presumes to remove all limitations on exercising the power of the Custodian for Absentee Property concerning properties in East Jerusalem. I would also mention that contrary to the draft resolution, in which the exercise of the power was conditioned “subject to consultation with the Legal Advisor of the Ministry of Finance or his representative, concerning any action as mentioned above in an occupied property”, in the resolution that was passed, this condition was omitted. This resolution came into force as a cabinet resolution on 8 July 2004, in the absence of an appeal thereon (decision number 2207). Regretfully, due to error, this was not brought to my knowledge at the time and I was informed of the resolution only recently because of petitions I received on this matter. It should be immediately clarified that this resolution cannot remain in force. It is not in the power of the Ministerial Committee for Jerusalem Affairs to provide legal interpretation of the limits of the power of the Custodian of Absentee Property, and it is not part of its role to deal with making policy for the use of powers under the Absentee Property Law.<sup>182</sup>

The recommendations of Attorney General *Mazuz* in his 2005 Opinion are concerned only with the specific issue of implementing the APL in regard to East Jerusalem property belonging to residents of the West Bank. After the publication of the Opinion, the Jerusalem District Court decided two cases in support of the position set out in the Opinion. However, two other District Court case rulings contradicted the Opinion. The question, which is addressed in greater detail below, will now be decided by the Supreme

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<sup>180</sup> *Ibid.*

<sup>181</sup> Resolution No. JM/11 of the Ministerial Committee for Jerusalem Affairs dated June 22, 2004, which was validated as a cabinet resolution on July 8, 2004 (cabinet resolution 2207 (JM/11)). The cabinet resolution can be found on the Israel government site: <http://www.pmo.gov.il/PMO/Archive/Decisions/2004/07/des2207.htm> (Site last accessed on 8 May 2012).

<sup>182</sup> The *Mazuz* Opinion, *supra* note 158, p. 3.

Court. Nevertheless, it is clear that this recommendation did not prevent the continued implementation of the APL in East Jerusalem – whether for property belonging to West Bank residents or to others.



*Photo: demolition of the “Shepherd Hotel”, January 2011. The hotel was declared “absentee property” and then sold to settler patron, Dr. Irving Moskowitz, who intends to build a new Israeli settlement on the property. (Photo by: Ahmad Gharabli/AFP/Getty Images).*

The historical review above – based, at least in part, on the *Mazuz* Opinion – reflects the declared governmental policies and not necessarily the reality on the ground. In other words, not every time that Attorney General *Mazuz* indicated that the government changed its policy did the change actually take place. Even guidelines of various Attorneys General were not necessarily fully implemented. One example of this is a Jerusalem District Court case that addressed an absentee certificate issued by the Custodian in July, 2003. During the court hearing, it was discovered that the manner of declaring the property “absentee property” did not accord with the guidelines that were allegedly in force at the time. Also, when the Custodian was questioned about the implementation of the guideline issued in 1969 (see section 4.1.4 above), he responded: “To the best of my knowledge, this guideline was not implemented even a short time after it was issued”. Later on, when asked, concerning the guidelines of subsequent Attorneys General, the Custodian answered: “Absentee Property Law is applied for all purposes...the issue of implementing the policy, there were all sorts of periods, but in general I am able to say that the Law is implemented”.<sup>183</sup>

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<sup>183</sup> Civil Case (Jerusalem District Court) 6161/04 *Ayad v. Custodian of Absentee Property*, transcript of the hearing on 9 September 2008, pp. 37-38. Judgment issued in this case on 2 October 2008, ruling that the property under discussion is considered “absentee property”. An appeal concerning this ruling is being heard now in the Supreme Court, together with other appeals dealing with the issue of the application of APL on property in East Jerusalem belonging to residents of the West Bank (see *infra* note 227).

Transfer of property to the Custodian is not always carried out at the initiative of the settler associations, as was detailed in the *Klugman* report and as it is evident from the legal proceedings described above. The Custodian has additional avenues to identify property that can be considered “absentee property” under the APL. These additional channels are discussed below.

#### 4.2.2 Custodian involvement in transferring property rights

Petitioning the Custodian is in many cases an integral part of the process of transferring rights in East Jerusalem property.<sup>184</sup> The petition to the Custodian can be done at the stage of ownership transfer, or even before that. To illustrate this point, when a person signs a purchase contract for an apartment or land, he may petition the Land Registrar requesting that a warning note be registered on his title in the Land Registry.<sup>185</sup> At this stage the Land Registrar may ask the buyer to provide a certificate from the Custodian stating that the property is not an absentee property. If the Custodian claims that the property is vested in him then, without his authorisation, it is impossible to make any record regarding the property – whether entering a warning note or registering transfer of ownership.<sup>186</sup>

It should be remembered that vesting property rights in the Custodian is not subject to any declaration, and can also be done without the knowledge of the owner or the Custodian.<sup>187</sup> Thus, the mere fact that the property is not registered in the Custodian’s name does not mean that the rights are not vested in him. Even if a person checked the Land Registry prior to the property purchase and found that the seller is the owner of the property, there is no guarantee that after the purchase it shall not be found that the rights in property under discussion (or a part thereof) were vested in the Custodian.

This is what happened in a case before the Jerusalem District Court. The petitioner was a buyer who signed a contract for purchasing property in East Jerusalem. When he asked that a warning note be registered on his title, the Land Registrar asked him to petition the Custodian, and the Custodian claimed that the property in question is absentee property. One of the petitioner's arguments was that the Land Registrar is not authorized to

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<sup>184</sup> In any request for transferring rights in real-estate belonging to an East Jerusalem resident, registered to his name before 1967, the Land Registrar asks, as a condition for registering the rights, to provide a certificate from the Custodian stating that the property is not absentee property. If the applicant refuses, the Land Registrar petitions the Custodian himself. For this matter, see the testimony of Mrs. *Kinneret Cohen*, The Land Registrar in Jerusalem, within the framework of Civil Case 6497/04 *Ali Ajaj v. Custodian of Absentee Property*, transcript of the hearing on 21 December 2008, p. 13 (not published). It should be mentioned that, as far as known, in other places in Israel, the Land Registrar does not routinely address the Custodian.

<sup>185</sup> A warning note is registered in the Land Registry (the “*Tabu*”) under Articles 126 and 127 of the Land Law. The warning generally serves as notice that there is an undertaking to make a transaction or to abstain from making a transaction regarding particular property. The warning note is written beside the name of the registered owner of the apartment or land so that if the seller seeks to sell the property for a second time once a contract for purchasing the property is signed, the prospective second buyer will discover that the seller is already committed to the person who has requested the warning note.

<sup>186</sup> The Absentee Property Law, *supra* note 1, Article 22(d).

<sup>187</sup> See chapter 3.2.1 above.



condition the recording of a warning note on providing a certificate from the Custodian and asking for such exceeds his authority. The Court ruled that since the Custodian's proprietary right is not subject to registration in the Land Registry, the practice of petitioning the Custodian is essential in cases such as these and it is therefore impossible to accept the petitioner's argument. The Court ruled that:

[...] not only is the cooperation of the kind that took place in this case, between the Registrar and the Custodian, not inappropriate, it is very beneficial, since it is an instrument that is essential for effective functioning of the branches of administration (as long as it doesn't entail any breach of privacy), and there is no reason to conclude that it was done without authority. Lack of cooperation between administration authorities that operate on related levels, not only impairs the effective action of the administration by preventing an exchange of information that could have a real effect on the authority's consideration, but may also bring about contradictory administrative decisions, harm to the individual who needs the services of the authority, as well as a long-term harm to the general public.<sup>188</sup>

Authorisation of the Custodian is also required when the Land Registrar is asked to register rights in a property with the heirs of the registered owners' title. A situation is possible where the heirs, or some of them, fall within the definition of absentee and thus, the property, or a part thereof, is in fact vested in the Custodian. In the case heard by the District Court, the heirs of a property asked to register their rights in the Land Registry in accordance with an existing succession order. Following the petition of the Land Registrar to the Custodian, the latter claimed that as long as it is not proven otherwise, some of the heirs are absentees whose rights in the property are vested in the Custodian. Accordingly, the Land Registrar refused to register the succession order. In an appeal of this decision, the heirs claimed that according to the Land Law, the moment the *Shar'ia* court issued a succession order and determined the heirs, the Land Registrar has no authority to refuse to register them as such, and he is not allowed to exercise any additional discretion.<sup>189</sup> This is certainly so in a case where at the time of the petition to register the heirs' title, the Land Registrar had no document from the Custodian that testifies that the property under discussion is absentee property. The Court did not reject the practice of petitioning the Custodian, but stated that in the circumstances of this case, the Custodian – who did not issue certification of absentee status under Article 30 of the APL, and did not specify which of the heirs are absentees – did not establish an evidentiary basis for deciding that the property in question is absentee property.<sup>190</sup>

Although the Court did not completely reject the conduct of the Land Registrar, it questioned whether the Land Registrar was acting within the authority granted under the law when she maintained that the registration of the succession order in the records shall

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<sup>188</sup> Originating Motion (Jerusalem District Court) 210/98 *Edmun Asaf v. Custodian of Absentee Property*, Tak-Mech 99(2) 4354, p. 4359.

<sup>189</sup> The Land Law, *supra* note 78, Article 123(b)(2).

<sup>190</sup> Various Appeals (Jerusalem District Court) 427/07 *Khaled Caluti v. Supervisor of Registration* (published in "Nevo", 25 November 2007), sections 12-16 of the ruling.

be performed on condition that the Custodian is petitioned and his authorisation granted. The Court cited the principle of legality, according to which the administrative authority has only the powers granted to it by the legislator, and added:

The provision of article 123(b)(2) in the Land Law orders the Land Registrar to register a succession order issued by a religious court of law and this is what the Land Registrar is to do, without imposing further conditions. This, of course, subject to the Registrar not having before him – at the time the request for registration was submitted – strong evidence that give grounds to the conclusion that the registration requested refers to a property that is transferred or to absentee property.<sup>191</sup>

The Court subsequently suggested an alternative to petitioning the Custodian:

[...] the Custodian has alternative means of seizing properties of residents under hostile control, or those who relocated to an area under such control. Thus, the final part of the provision in Article 22(d) of the Absentee Property Law provides that if a change in title is registered in relation to a property that is vested in the Custodian, the court shall order, according to the Custodian's request, to remove the registration and any subsequent registration... The difficulty lies in the acknowledgement of a proprietary right of the Custodian in the land, even if and when this right does not receive expression in the Land Registry. And it was already commented in the past that this is indeed an undesirable situation, but the court has no power to change it...<sup>192</sup>

#### 4.2.3 Custodian involvement in licensing and planning procedures

The Custodian is also involved in planning procedures and applications for receiving building permits.

##### **Licensing procedures**

The signature of the owners of rights in the property is required for an application to receive a building permit. If the property is registered in the Land Registry the registered owner of the land or his lessee should sign the application. Where the property is not registered in the Land Registry – the person who is obliged to pay property tax for the property is the one who has to sign the application.<sup>193</sup>

**Application for a building permit for property located on settled land<sup>194</sup> registered in the Land Registry:** in the past, because of the complexity of ownership questions regarding real property and the registration ledgers in East Jerusalem, the building

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<sup>191</sup> *Ibid.*, section 18 of the ruling.

<sup>192</sup> *Ibid.*

<sup>193</sup> The Planning and Building Regulations (request for permit, its provisions and fees), 5730-1970, Israeli Collection of Regulations 2581, 8 July 1970, p. 1841, Articles 2A(1) and 2 A(5).

<sup>194</sup> Settled land is land that has undergone land settlement procedures and, as a result, is registered in the Land Registry.

licensing department in the Jerusalem Municipality was satisfied with the signature of the registered real property owners, or of their heirs, or of those who purchased the land, accompanied by proof that the person signing the application is indeed the owner, such as succession orders or sales contracts. However, in 2000, the Municipality's legal department instructed the licensing department to allow only the real property owner registered in the Land Registry to sign a building permit application, and not any of the heirs or buyers.<sup>195</sup> This requirement obligated anyone who purchased or inherited property rights from their registered owner to register as the property owner in the Land Registry as a condition for applying for the building permit. The potential complication is, as we have seen above, that the registration procedure requires inquiry with the Custodian. If the buyer or one of the heirs fulfils the definition of “absentee”, the property or part thereof shall be vested in the Custodian.

**Application for a building permit in property located on land under land settlement procedure:**<sup>196</sup> as mentioned, according to regulations, an application for a building permit for this type of real property requires the signature of the person who is obliged to pay property tax on the property. In other words, it is necessary to present the registration in the ledgers that are managed under the Property Tax and Compensation Fund Law 5721-1961<sup>197</sup> concerning the relevant parcel. This was the custom in Jerusalem until the early 2000's. However, in October 2001, the legal department of the Jerusalem Municipality instructed the licensing department that the person signing the permit application has to be the same person registered in the real property ledgers of the Israeli Settlement Officer. This registration procedure also entails the possibility that the person claiming rights in the real property will be considered an absentee. In 2004, the Jerusalem District Court decreed illegal the practice according to which it is impossible to open a file for a permit application on the land under settlement before the registration with the Israeli Settlement Officer is arranged, and found it deviated from provisions of the Planning and Building Regulations.<sup>198</sup> Today, following this ruling, an applicant for a building permit for land under settlement is required to provide details, verified by the signature of a lawyer, describing the progression of transfer of ownership of the land from the person registered in the registry of the Jordan Settlement Officer through the person registered in the property tax registers. This chain of ownership is also given to the Custodian by the licensing department to ascertain whether any of the owners hold absentee status.

**Application for a building permit for property on unsettled and unregistered land:** as mentioned, according to regulations, this application also requires the signature of the

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<sup>195</sup> Nati Marom, *The Planning Deadlock*, Ir Shalem and Bimkom, December 2004, p. 62 [Hebrew].

<sup>196</sup> In land settlement procedure, lands in a certain area, town or village in the state are systematically registered in the Land Registry under a certain owner. Registration at the end of this procedure constitutes proof of the registered owner's right in the land. Due to a decision of the Israeli government, the land settlement procedures in East Jerusalem have been effectively frozen since 1967.

<sup>197</sup> Laws of the State of Israel No. 337, 6 April 1961, p. 100.

<sup>198</sup> Administrative Petition (Jerusalem District Court) 333/04 *Basiso v. Local Committee for Planning and Building Jerusalem* (published in “Nevo”, 10 October 2004).

person who is obliged to pay property tax on the property. In the past, the Municipality required in the attachment of an additional document: an ordinary measuring map of the plot, compatible with the city plan, signed by the village *Mukhtar* and the owners of the plots bordering the plot for which the building permit application was submitted. This procedure made it possible even for owners of unsettled lands to open a file for building licensing, without connection to land registry procedures. But since early 2002, the Municipality began to require applicants for building permits on land that is unsettled and unregistered to prepare a Plan for Registration Purposes (PRP)<sup>199</sup> as a condition for opening the file. As part of this, the permit applicant is required to obtain authorisation from the Land Registrar that no fundamental obstacle to the plan exists. However, before granting the authorisation, the Registrar checks the identity of the land owners and explores the possibility that one may be considered an absentee.

As demonstrated, customary procedures for building permit applications in East Jerusalem include petitioning the Custodian as an inherent part of the procedure. According to case law, it is obligatory as a rule to separate the licensing procedures from the proprietary decision concerning rights in the property. This approach dictates that planning institutions are not supposed to decide on proprietary questions. Only in cases where it appears clear, that the permit applicant has no right in the property, can planning institutions choose to not process the application.<sup>200</sup> It seems, therefore, that the policy of the Jerusalem Municipality to examine the question of an owner's absentee status in a comprehensive manner, for each and every application does not accord with court rulings.

Sometimes, even when an application is submitted by a non-absentee registered owner of land, and a permit is granted, settlers who claim rights in the property try to revoke the permit. This happened in a case that was heard before the Jerusalem District Appeals Committee for Planning and Building in which the Sub-Committee for Planning and Building decided to revoke a building permit granted to a Palestinian for property he owned in *Silwan*. The decision to revoke the permit was made based on the premise that the person applying for the permit claiming ownership of the property was not the true owner, and the permit had been fraudulently obtained. The revocation of the permit resulted from a petition submitted by settlers to the Sub-Committee claiming ownership of the property. Although the settlers' claim was not accepted, the Custodian decided to intervene in the procedure, claiming that at least some of the property was vested in him. The Appeals Committee decided that the permit applicant was the owner of part of the property, at a minimum, and for this reason nothing prevented his submission of an application for a building permit. The Appeals Committee decision was based on the theory that a planning institution should refrain from addressing a permit application only where the permit applicant does not appear to have rights in the property that would entitle him to carry out the plans for which the permit is requested. Since in the case

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<sup>199</sup> A plan designated to provide a precise description of the parcel and its borders in order to enable the registration of the land in the Land Registry.

<sup>200</sup> HCJ 1578/90 *Helen Eizen v. Local Committee for Planning and Building Tel Aviv* (published in "Nevo", 24 October 1990).

referred to herein no obstacle existed to prevent authorisation of the permit, the appeal was accepted and the decision of the sub-committee was overruled.<sup>201</sup>

## **Planning procedures**

In order to obtain a building permit, the particular property must be subject to a planning scheme whose parameters make issuing the permit possible. In specific cases, when a demolition order is issued against a building, or when a criminal proceeding is opened against a person because of building without a permit, the alleged transgressor attempts to validate the building retroactively, asking the court for a stay of demolition order. In cases where the construction without a permit contravened an existing building plan, the person responsible for the construction may apply for a specific change in the approved plan (“Specific Town Planning Scheme”).

The Custodian, however, is involved in this planning procedure as well. According to Jerusalem Municipality procedures, within the framework of the application for approval of the scheme, it is required to detail the names of all the land owners within the proposed scheme and to obtain their signatures. These owners, or some of them, might be considered absentees and may therefore lose their rights in the land. This risk exists because the planning institutions to which the applications are submitted address the Custodian during consideration of the application for authorization of the scheme.<sup>202</sup>

The Municipality also requires special documents to prove the ownership of all owners in the land in the case of an application for approval of a planning scheme on unsettled land or land under settlement. Among other things, a certificate is required from the Custodian that the relevant real-estate is not absentee property.<sup>203</sup>

### *4.2.4 Use of the Absentee Property Law in the course of construction of the Wall<sup>204</sup> in the West Bank*

In the early 2000s, it became clear that the government of Israel was using the APL as a means to take over East Jerusalem properties belonging to residents of the West Bank during the course of construction of the Wall around Jerusalem, which separated these owners from their properties.

Procedures for the seizure of land began during 2002, in preparation for the construction of the Wall in the area of the southern municipal border of Jerusalem (as it was defined in

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<sup>201</sup> Appeal (Jerusalem) 254/09 *Sirhan Hussein Ahmad v. Sub-committee for Planning and Building Jerusalem* (published in “Nevo”, 22 December 2009).

<sup>202</sup> Marom, *The Planning Deadlock*, *supra* note 195, p. 65.

<sup>203</sup> *Ibid.*

<sup>204</sup> The term “Wall” is used to denote the physical barrier constructed by Israel in the occupied West Bank since 2002, though, in places, this barrier takes different forms, including an electric fence, fencing with barbed wire, trenches and a concrete wall, six to eight metres high. The use of the term “Wall” is consistent with the terminology used by the UN General Assembly and the International Court of Justice in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004.

1967), and in other areas. At that time, several residents of Bethlehem, who owned agriculture land within Jerusalem's municipal area – land destined to remain on the “Israeli” side of the Wall – requested that the Israeli military provide access to their land even after the construction of the Wall. The Legal Advisor for the West Bank replied that the military will issue entry permits that will enable them to continue cultivating their land. Despite this undertaking, these permits were never issued. Only after over two years had passed and numerous appeals were submitted by the residents, the military sent a new response. In the response, the military stated that it was impossible to issue the requested permits, since the land no longer belonged to those residents, but was, instead, vested in the Custodian of Absentee Property. The reason: after the application of Israeli law to East Jerusalem, West Bank Palestinians’ property in East Jerusalem became absentee property, since the property was located in Israel while the owner was located “in any part of Palestine outside the area of Israel”, as defined by the APL.

The residents petitioned the High Court of Justice to challenge the military’s position. In their petition, they argued against the policy of applying the APL to West Bank residents who hold property in East Jerusalem but do not live there.<sup>205</sup> The petitioners also argued that the State of Israel is taking advantage of the building of the Wall in order to take over thousands of acres of privately-owned Palestinian land. As a result of the petition, permits were issued to the land owners. However, the question of ownership of the land, whether the land is vested in the Custodian, remained in dispute.<sup>206</sup>

### **The Cliff Hotel case**

A glaring example of this practice of securing absentee status for property in the context of the Wall construction is the fate of the Cliff Hotel in Abu Dis. The Cliff Hotel property is situated adjacent to the route of the Wall, and the State of Israel claimed it as necessary for security reasons. The Israeli security forces wanted to take over the hotel, but realized that issuing a seizure order for the property is a lengthy process. The idea then arose that the hotel could possibly be considered absentee property since it is located in East Jerusalem and its owner used to live in Abu Dis, a town in the part of the West Bank that was not annexed to Jerusalem. Consequently, the hotel was declared absentee property and captured by the Israeli forces.<sup>207</sup> In a hearing held on this matter in the Jerusalem District Court, which dealt with the question whether this property is absentee property, the plaintiffs – the children of the person who was declared an absentee – questioned the authenticity of the security arguments. In addition, the plaintiffs argued that an examination of the progression of events close to the time that the property was seized by security forces shows that there were motives other than security needs behind taking over the property. In support of this they noted that a couple of days following the property seizure by security forces, residents moved into houses that had been purchased in the vicinity by a settler association. The intention of the association to establish a

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<sup>205</sup> These arguments are described in detail in chapter 4.3 below.

<sup>206</sup> HCJ 4492/05 *Atiq v. Commander of Central Command* (the petition was submitted on 10 May 2005 and deleted on 24 July 2006).

<sup>207</sup> Meron Rapoport, “This land is your land, this land is my land”, *Haaretz*, 3 March 2005.

settlement near the property was known to the security forces when they took over the Cliff Hotel property, and the plaintiffs also expressed their fear that the ultimate intention was to hand the property over for settler use. The ruling in this suit avoided dealing with the aforementioned arguments raised by the plaintiffs, but rather focused on whether the property may be considered “absentee property” according to the APL. The Court ruled that the property is indeed absentee property, which was legally vested in the Custodian.<sup>208</sup> At the time of this writing, the property is still held by the security forces and the Custodian.



*Photo: Cliff Hotel, Abu Dis. (Photo by: Mohammad Haddad).*

As these examples, and others<sup>209</sup>, demonstrate, the Israeli government has used the situation it created by constructing the Wall to transfer ownership rights to its own possession, through the channel of the APL. In the aforementioned cases, the APL served as a complementary measure to the physical division created by the Wall. As a result, not only are the Palestinian owners residing outside East Jerusalem now physically cut off from their East Jerusalem property, they are also at risk of losing ownership rights therein and therefore any claim to use and enjoyment thereof, through cultivation or other avenues.

*In summary:* in this subsection we have discussed the manner of implementation of the APL in Jerusalem. We have seen that, at times, the alleged evidence that particular property is “absentee property” reaches the hands of the Custodian seemingly

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<sup>208</sup> Civil Case (Jerusalem District Court) 6161/04 *Ayad v. Custodian of Absentee Property* (published in “Nevo”, 2 October 2008). This ruling consisted of legal arguments pertaining to the application of the APL to properties in East Jerusalem owned by residents of the West Bank. This issue will be dealt in detail in 4.3 below. Today, an appeal on this ruling is pending in the Supreme Court and has been joined with with additional appeals that deal with the issue of the application of the APL on properties in East Jerusalem belonging to residents of the West Bank (see *infra* note 231).

<sup>209</sup> See: Meron Rapoport, “Lands Lords”, *Haaretz*, 21 January 2005.

“unintentionally” within the framework of procedures whose purpose is to transfer rights in property or in planning and licensing procedures. Moreover, in some cases the Custodian is provided with information directly from representatives of settlers (see, in this regard, the findings of the *Klugman* Report) or the security forces, who seek to use the APL as a tool for a swift transfer of properties to their hands. Regardless of whether the issue is vesting properties in the Custodian incidental to other procedures, or if the issue is a deliberate action by interested parties, the picture that arises is of a powerful body, acting on behalf of the government, which has the ability to revoke proprietary rights predating many years.

The Israeli policy of using the APL has therefore not only served the settlement expansion in East Jerusalem but also introduced grave implications for Palestinians' ability to receive building permits, to register real property transactions and to secure property rights.

As we have seen, the courts sometimes criticize the manner in which certain property is vested in the Custodian. However, as a rule, the very involvement of the Custodian in the procedures mentioned above is accepted as routine. Moreover, sometimes the courts even approve of this involvement for the sake of system efficiency and prevention of errors. Even the very application of the APL in East Jerusalem is accepted today as a matter of course, except in regard to applying the APL to Palestinian residents of the West Bank who have property in East Jerusalem. This matter, which remains in dispute, is dealt with in the next section.



### 4.3 The legality of applying the Absentee Property Law to Palestinian residents of the West Bank who own possessions in East Jerusalem

As we have seen thus far, the APL severely impinges on rights to property. It was legislated for very specific purposes, first and foremost to transfer ownership rights in property left behind by the Palestinians after they fled or were deported during the 1948 War, to the State of Israel. The APL provisions are also sweepingly inclusive. In principle, as articulated by the APL, it is applicable to a wide sector of property owners in areas where Israeli law applies. And despite that, the State of Israel chose over the years to apply it narrowly and almost exclusively to Israel's Arab citizens and residents. In many cases, the application of the APL gave rise to absurd and difficult situations, as illustrated by the status of "Present Absentees".

As we shall see below, the application of the APL to Palestinian residents of the oPt who have property in East Jerusalem, gives rise to yet another of many absurd situations that result from a literal application – to a particular population, of course – of the provisions of the APL. As discussed previously, Israel annexed a large area of the West Bank in 1967, to which it applied Israeli law. The annexation of this area, which is known today as "East Jerusalem", contravenes international law.<sup>210</sup> Other parts of the oPt were not annexed to Israel, but remained under its military control. The application of Israeli law to East Jerusalem led to the property of the residents of East Jerusalem, which is part of the oPt, becoming "absentee property". East Jerusalem property was by virtue of the annexation located in "Israel", and its owners located in "any part of Palestine outside the area of Israel", according to the wording of the APL. These residents have become absentees solely due to Israel's unilateral action of imposing different legal regimes on areas that it captured in 1967. Thus, these Palestinian residents of the West Bank became "absentees", according to the APL, without even leaving their houses.

This subsection will deal with this issue and will examine the position of the State of Israel in relation thereto over the years, including the response of the courts.

#### 4.3.1 *The position of Israel's Cabinets and Attorneys General*

As noted previously, almost immediately following the annexation of East Jerusalem, a decision was taken to make the application of the APL much narrower regarding properties in East Jerusalem.<sup>211</sup> In regard to the particular issue of real property in East Jerusalem belonging to West Bank residents, *Me'ir Shamgar*, the Attorney General at the time, in a letter to the Israel Land Administration dated 18 August 1969, explained the guidelines according to which the APL should not be applied:

We have seen no tangible vindication for seizing property that has become absentee property simultaneously with the becoming of the property's owner – who is a resident of Judea and Samaria – a person who lives under the control of Israeli

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<sup>210</sup> See chapter 5.1 below.

<sup>211</sup> See chapter 4.1.4 above.

government authorities. In other words, since the property was not absentee property before the day the IDF forces entered East Jerusalem and would not have become an absentee property if East Jerusalem continued to be a part of Judea and Samaria, we have seen no justification that the annexation of East Jerusalem, and that alone, shall cause the taking of a property of a person who is not actually an absentee, but is located from the time his property came to our hands, within the area of rule of the IDF.<sup>212</sup>

The policy of application of the APL to property in East Jerusalem – including property of West Bank residents – changed, as mentioned, in 1977, when an accelerated application of the APL began in East Jerusalem, the annexed area. Later on, the policy underwent shifts following the *Klugman* report, among other triggers. The formerly mentioned government resolution of 2004 led to the Opinion of Attorney General *Mazuz*. This Opinion refers specifically to the application of the APL to properties of West Bank residents and instructs that, except in special circumstances that were not specified, and subject to prior authorization of the Attorney General, the APL should not be exercised regarding these property:

Exercising the powers of the Custodian of Absentee Properties over property in East Jerusalem of residents of Judea and Samaria raises many legal difficulties, both those relating to the application of the Law and the reasonableness of its application under these circumstances, and in the aspect of the State of Israel's duties according to the rules of customary international law, which have obligatory legal validity under Israeli law. First and foremost among these duties is the duty of the State to honour the property rights of residents of an area it holds in belligerent occupation. These duties receive further reinforcement in light of the change in the constitutional regime in the State of Israel, and the redefining of the right to property as a constitutional right.<sup>213</sup>

Despite the 2005 Opinion of then Attorney General *Meni Mazuz*, the State of Israel continues to apply the APL to property in East Jerusalem held by West Bank residents. As discussed below, the present Attorney General holds a different opinion in this matter, which was expressed in the course of legal proceedings that are pending before the Supreme Court on this issue.

#### 4.3.2 *The position of Israel's courts*

##### **Early ruling of the Supreme Court**

The Supreme Court first dealt with the question of the absentee property status of property belonging to residents of the oPt and located in East Jerusalem in the 1986

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<sup>212</sup> The letter is cited in the *Mazuz* Opinion, *supra* note 158.

<sup>213</sup> The *Mazuz* Opinion, *supra* note 158, p. 4. Concerning the significance of the redefinition of the right to property as a constitutional right in Israel, in the context of the APL, see chapter 3.6 above.

judgment in the matter of *Afane*.<sup>214</sup> The Supreme Court ruled that the APL does apply to this property, which is, therefore, vested in the Custodian. The plaintiffs in the proceedings before the District Court were the real property owners who continued to live in the West Bank while their property was located in the area that was annexed to Israel. The heirs of the real property owners argued that in the context of the APL, West Bank land should be viewed as part of Israel and, for this reason, the plaintiffs are not located outside of Israel. Consequently, so the plaintiffs argued, the APL should not apply to them. The District Court, and on appeal the Supreme Court as well, rejected this argument and ruled that accepting the argument would have led to unreasonable results, where the APL would have been applicable to all land in the West Bank. The Supreme Court Justice *Avraham Halima*, citing the District Court, ruled: “as is remembered, one of the alternatives in this definition is that the legal owner is a citizen of Jordan, and since a considerable number of the residents of Judea and Samaria were and still are citizens of Jordan, accepting the interpretation posited by the plaintiffs' attorney turns them all into absentees and their property becomes absentee property”.<sup>215</sup>

It should be mentioned that Justice *Miriam Ben-Porat*, although subscribing to Justice *Halima's* stance, according to which the APL does apply, reflected whether under these circumstances the APL should be implemented:

As an aside, I would like to comment that although it is possible to view the counter-appellants as “absentees” in the meaning of Article 1(b)(1) in the Absentee Property Law... the question might arise whether it is appropriate to exercise the authority under the circumstances of this case. The issue under discussion is the residents of *Kfar Aqab*, who were at that time residents of Judea and Samaria under the rule of the IDF. There is no doubt that they would not have been considered absentees if their lands were not included in united Jerusalem, and from the material before us it could not be understood whether in the special circumstances of the case there was indeed justification for seizing their property following the unification of Jerusalem, while they are present in the place and live under the rule of Israel. The question of the manner in which authority is exercised by the Custodian regarding the parcels under discussion is not one of the questions that arise in this appeal, and therefore, my comment does not change our ruling, as clarified in the ruling of my colleague, Justice *Halima*.<sup>216</sup>

Thus, In the matter of *Afane*, the Supreme Court gave a green light to *apply* the APL to residents of the oPt who have property in East Jerusalem. At the same time, it was possible to rely on the opinion of Justice *Ben Porat* and avoid *exercising* the APL in these cases, in the spirit of the stance of the Attorney General *Shamgar*. However, as we have seen above, the State chose a different policy during those years, according to which the APL was applied in an accelerated manner, often facilitating transfer of property to the hands of settler associations.

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<sup>214</sup>The matter of *Afane*, *supra* note 57.

<sup>215</sup>*Ibid.*, p. 383.

<sup>216</sup>*Ibid.*, p. 390.

Another case, in which the Supreme Court refrained from interfering with the application of the APL to residents of the oPt, was the matter of *Golan*, which was heard before the High Court of Justice in 1994. In that case, the issue was a parcel owned by a resident of *Beit Jala*. After the annexation of East Jerusalem, the parcel was located in the annexed area, within the boundaries of the area on which the Jewish settlement of *Gilo* was established. The High Court of Justice did mention that in cases such as these, the issue is absence of a “technical” nature, that is, property that became absentee property only because of the expansion of the boundaries of Jerusalem, while their owners, West Bank residents, remained in their homes in the West Bank. The Court added that it is possible that these absentees could be distinguished from other absentees, but only within the framework of a claim of humanitarian exigencies that dictate release of the property based on the absentee’s personal circumstances.<sup>217</sup>

The conclusion of the Israeli Supreme Court in the cases of both *Afane* and *Golan* was that the APL applies to East Jerusalem property owned by West Bank Palestinians. Twenty years passed following the Supreme Court ruling in *Afane* (1986) before a different approach to this question was adopted by two judges of the Jerusalem District Court. The combination of the 1970 law, the harsh provisions of the APL and the absence of a Supreme Court ruling directing otherwise, enabled the Israeli authorities during those years (and, actually, until this very day, excluding the few years following the *Klugman* report) to apply the APL in the way described above. The extent to which the APL was enforced was purely a matter of government policy.

### **Later ruling of the District Court**

An in-depth examination of the question of absentee property status of property in East Jerusalem owned by residents of the oPt first appeared in a January 2006 ruling of the Jerusalem District Court in Jerusalem – the *Daqaq Nuha* case.<sup>218</sup> Judge *Boaz Okon* distinguished the situation of oPt residents from those who became absentees through different circumstances, and ruled that the APL cannot apply under the special circumstances of property in East Jerusalem owned by oPt residents.

Judge *Okon* began with characterizing the condition of West Bank residents after 1967 as distinct from the circumstances that informed the drafting of the APL:

This law was legislated in a specific reality, different than that which occurred in this case. Following the Six Day War, all residents of Judea and Samaria were under effective Israeli control and were actually subject to the authority of Israeli law. Particular areas, including the land in dispute between the parties here, were annexed to the area of Israel. Israeli law applies directly to them. Most of the territories remained under the control of the military governor, who became the “sovereign”, by virtue of international law. This sovereign is also subject to Israeli Law (High Court of Justice 302/72 *Abu Hilu vs. The Government of Israel*, 27(2) PD 169). The

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<sup>217</sup> The matter of *Golan*, *supra* note 22, p. 646.

<sup>218</sup> The matter of *Daqaq Nuha*, *supra* note 110, section 4 of the ruling.

residents lost control over their ability to influence the legal situation. They were under Israeli military control and had no way to affect the definition of their identity or the rules of law that would apply to them. In this situation, Israeli law prevailed as well, since it was that law that dictated the rules of recognizing the sovereign and the consequences that applied to anyone trying to challenge this sovereign. Moreover, Israel also established additional settlements in these territories, where Israeli citizens settled and were governed by Israeli law. In this situation, it is hard to conceive that the law would be implemented on those residents who are located “in any part of Palestine outside the area of Israel”, especially if these residents were under Israeli effective control and not under hostile control.<sup>219</sup>

The Court ruled that, although most of the West Bank was not annexed, Israel acknowledged no other authority in that area:

Application of [the Absentee] Property Law in this situation may create an ambiguous condition, where the area is located outside of Israel for the purpose of “seizure of rights” by Israel, without the residents located outside of Israel being defined as residents of another, hostile political entity. This is a sort of legal trick not based in reality, except for annexation orders of particular areas. This is a form of jurisprudence without law. From the point of view of the resident, nothing has actually changed. The residents of this area were under the same effective control and were subject to the same law or government acting under the same law.<sup>220</sup>

Considering this analysis, the Court ruled that the appropriate interpretation was that:

The provision of Article 1(b)(1)(II) of the [Absentee] Property Law, relating to the legal owner of properties as located “in any part of Palestine outside the area of Israel”, is not applied to residents of areas that are under Israel's military control; this is in contrast, for example, to areas under the military control of a country mentioned in Article 1(b)(1)(I) ... this interpretation supports the purpose of the law. The Law declares that a property is considered absentee property if that property is owned or held by one who is under the control of a different country specified in the Law. Absence shall arise whether that man is a subject or a citizen of that country or if he is under its control because he is “located” in it or located outside of it, in Eretz Israel, but under effective control of that country, such as military control.<sup>221</sup>

The Court referred to the fact that its ruling does not accord with the Supreme Court ruling in the matter of *Afane*. However, the Court indicated that it is necessary to re-examine this theory in light of the legislation of Basic Law: Human Dignity and Liberty:

True, in Civil Appeal 82/54 *Levi v. Estate of the Late Afane Mahmud*, 40(1) PD 374 (“the *Mahmud* affair”) it was ruled that it is possible to apply [the Absentee] Property

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<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*, section 5 of the ruling.

<sup>221</sup> *Ibid.*, section 6 of the ruling.

Law to residents of the area, but the matter requires reconsideration in every case. In H CJ 4713/93 *Golan v. Custodian of Absentee Properties*, 48(2) PD 638 this absence was defined as a technical absence, and a question was raised whether it is possible to ascribe weight to this when discussing the release of a vested property. Either way, since the *Mahmud* affair, a change has occurred in the Israeli system, and the weight of human rights, including the right to property and the right to equality, has increased. “Any law provision – whether old or new... whose validity is maintained notwithstanding its infringement of a human right that is anchored in the basic laws, should be interpreted in the spirit of the provision of the basic law” (Various Criminal Requests 537/95 *Ganimat v. State of Israel*, 49(3) PD 355 p. 416). Indeed, it is hard to believe that a court would lend a hand to such a method of taking rights from a person who is located in an area under the control of the State of Israel (without acknowledging some other national identity he holds) regarding an area within the boundaries of the State of Israel.<sup>222</sup>

In the spirit of the provisions of the basic law, Judge *Okon* ruled that the APL should be interpreted in a manner such that the provision of Article 1(b)(1)(II), which refers to the owner of property who is located “in any part of Palestine outside the area of Israel”, is not applied to residents of areas that are in fact under Israel's military control. “The seizure of rights”, rules *Okon*, is a legal trick, made possible only by virtue of the annexation orders. The reality after 1967 is completely different than that which prevailed at the time the APL was enacted. These “absentees” are located today outside of the area of Israel, but they are not defined as residents of another hostile political entity, and they are under the authority of the same government that is active in the annexed area.

The Jerusalem District Court repeated the theory established in the matter of *Daqaq Nuha* in another ruling, from May 2007 (the *Abu Zahariya* case).<sup>223</sup>

In contrast to the rulings mentioned above, two other rulings of the Jerusalem District Court supported the Custodian's position. In the first ruling, Civil Complaint (Jerusalem) 6044/04 *Hussein vs. Cohen*, from May 2006, the court reviewed the ruling of the *Daqaq Nuha* affair and even mentioned that “the reason, as well as the spirit of justice that emerge and arise from the ruling... are clear and precise and require no explanation”.<sup>224</sup> However, the Court ruled that it could not subscribe to the outcome of the ruling in the *Daqaq Nuha* affair. The Court ruled that the decision in *Daqaq Nuha* is not in accordance with the provisions of the APL and with the provisions of the 1970 Law. The Court also ruled that, although the decision in the *Golan* affair<sup>225</sup> was handed down after the enactment of Basic Law: Human Dignity and Liberty, where property rights were elevated to the status of constitutional rights, the Supreme Court in the *Golan* affair still

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<sup>222</sup> *Ibid.*, section 5 of the ruling.

<sup>223</sup> The matter of *Abu Zahariya*, *supra* note 63.

<sup>224</sup> Civil Case (Jerusalem District Court) 6044/04 *Hussein v. Cohen* (published in “Nevo”, 9 May 2006), section 15 of the ruling.

<sup>225</sup> The matter of *Golan*, *supra* note 22.

did not change its approach (in other words, it ruled that the APL applies to East Jerusalem).<sup>226</sup>

In the second decision, the aforementioned *Cliff Hotel* case from October, 2008, the court also ruled that the stance of the court in the *Daqaq Nuha* affair contradicted the Supreme Court's position. The District Court acknowledged that West Bank residents who own property in East Jerusalem may be considered, to a great extent, "technical absentees" since they became absentees only because of the extension of the boundaries of Jerusalem in 1967. However, since the law of the State does not apply to the oPt, and the term "the area of Israel" is not defined by a test of control, it is impossible to say that the oPt are a part of Israel for the purpose of the APL. In the case referred to by the Court the issue is the owner of property in East Jerusalem, who, from 28 June 1967 and, until his death, was a resident of the West Bank and was also a Jordanian citizen. He therefore fulfils the definition of "absentee" according to the APL. The Court pointed out that the guidelines of the Attorneys General cited above, deal only with the policy of *implementing* the APL – under what circumstances the Law should be enforced – and not with the principle issue of the Law's *application* to East Jerusalem.<sup>227</sup>

As demonstrated, the District Court in the *Daqaq Nuha* case (upheld by the District Court's decision in the *Abu Zahariya* case) ruled that the APL should not apply to Palestinian residents of the oPt who have properties in East Jerusalem. The court in the *Daqaq Nuha* case based its decision on the matter of control; a person should be considered "absentee" only if he is located in a place which is under the effective control of states referred to in the APL. In 1967, the occupied Palestinian territory came under Israeli rule and, therefore, persons who reside in them cannot be considered "absentees" with regard to property that is located in territory that was annexed to Israel. This interpretation, ruled the District Court, supports the rationale of the APL, which intended "to get hold of property which belongs to persons that are under hostile control or that moved to a place under such control".<sup>228</sup>

This interpretation was not adopted by the District Court rulings in the *Hussein* and *Ayad* cases. The Court in the *Hussein* ruling decreed that the interpretation that was given by the Court in the *Daqaq Nuha* case was not in accordance with the wording of the provisions of Article 1(b)(1) of the APL. Each one of the three alternatives of the Article, asserted the Court, stands on its own and Article 1(b)(1)(II) explicitly specifies that an "absentee" is anyone who "is... in any part of Palestine outside the area of Israel".<sup>229</sup> The Court in the *Ayad* ruling concurred and added that the argument that the residents of the oPt cannot be defined as "absentees" since they are subject to Israeli control was rejected by the Supreme Court.<sup>230</sup>

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<sup>226</sup> The matter of *Hussein*, *supra* note 224, section 15 of the ruling.

<sup>227</sup> The matter of *Ayad* (the *Cliff Hotel* case), *supra* note 208, section 15 of the ruling.

<sup>228</sup> The matter of *Daqaq Nuha*, *supra* note 110, section 6 of the ruling.

<sup>229</sup> The matter of *Hussein*, *supra* note 224, section 15 of the ruling.

<sup>230</sup> The matter of *Ayad*, *supra* note 208, section 15 of the ruling.

The State submitted appeals on the *Daqaq Nuha* and *Abu Zahariya* rulings to the Supreme Court. At the same time appeals were submitted to the Supreme Court on the *Hussein* and *Ayad* rulings. All these appeals are being heard together before an expanded panel of seven justices. As mentioned, at the time of this writing, the appeals are still pending. We will elaborate on this matter below.<sup>231</sup>

### **Appeals on the District Court ruling**

Each of the appeals in the *Daqaq Nuha*, *Abu Zahariya*, *Hussein* and *Ayad* cases have their own specific circumstances, but they all deal with the same questions. First, the question whether the provisions of the APL *apply* to residents of the oPt who have property in East Jerusalem. Even if the answer to this question is affirmative, the appeals address the question of whether the APL *should be exercised* under these circumstances. On 2 February 2010, a hearing on these appeals took place before the Supreme Court, and a ruling issued, which established, *inter alia*:

In the panel rulings dated 26 March 2009 and 14 June 2009, the Attorney General was asked to solve the concrete matter of the appeals before us, but unfortunately nothing has been done in this matter until now.

When he appeared before us and presented his arguments, the representative of the Attorney General adopted a legal position whose implementation does not accord with the position of the Attorney General as expressed in his letter dated 31 January 2005 and also does not accord with the 1968 guideline of then Attorney General *Me'ir Shamgar*. According to the Attorneys General, the Law should not be implemented regarding residents of Judea and Samaria concerning their property in East Jerusalem. This legal position was not reflected in the actions of the authorities charged with this mandate in their handling of the matters litigated before this Court. The representative of the State who notified us that his written response to the court was written on behalf and with the authorization of the Attorney General, also notified us that work that had commenced regarding this issue was halted pending the ruling given by this court. The State representative's position regarding the handling of this issue is not acceptable. In the spirit of the Attorney General's letter, the State representative argued that it is necessary to separate between the application of the law and its implementation, although the practical outcome might be the same. If this is indeed the Attorney General's view, it would have been appropriate to implement it in practice. It appears from the appeals before us that this was not done. Given this situation, if no solution is presented regarding the manner in which the law is implemented by the respondents, we will consider whether it is appropriate to hand down a ruling concerning both the application and the manner of implementation of the law, as we see fit. However, even now we opine that it is appropriate that the State provide a practical solution to the matters pending before the Court, in addition to a solution to the fundamental question relating to the implementation of the law, which

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<sup>231</sup> Civil Appeal 2250/06 *Custodian of Absentee Property and others v. Daqaq Nuha and others*.



depends on the legal policy of State authorities according to the guidelines of its Attorneys General throughout the years and to date.<sup>232</sup>

Accordingly, the Court instructed the State to submit a notice concerning its revised position. The notice, submitted on 12 May 2010, stated as follows:

The Attorney General hereby announces that he accepts the honourable Court's recommendation in its session on these files dated 2 February 2010. Therefore, the special committee under Article 29 of the Absentee Property Law, 5710-1950, will discuss the release of the property that is the subject of deliberation in these files after the submission of requests for their release by the persons who claim rights therein. This will be carried out on the basis of the position of the State and the Custodian of Absentee Property according to which this property is indeed absentee property.<sup>233</sup>

Despite the wording of the notice, it certainly does not accept the recommendation of the Supreme Court. The notice of the Attorney General does not provide a solution to the specific matters pending in the appeals, but only passes the cases to deliberation before the committee under Article 29 of the APL. Concerning the fundamental issue, the question of the APL's application, the Attorney General repeats his position that the APL applies to all property of the oPt residents. In addition, concerning the implementation of the APL in East Jerusalem, the Attorney General seems to have abandoned his former position according to which no use should be made of the powers given to the Custodian regarding property of this kind, except under special circumstances, subject to prior authorisation of the Attorney General.<sup>234</sup>

Today, ruling on these appeals is pending before the Supreme Court.

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<sup>232</sup> Civil Appeal 2250/06 *Custodian of Absentee Property and others v. Daqaq Nuha and others* (published in "Nevo", 2 February 2010), sections 1-2 of the decision.

<sup>233</sup> Civil Appeal 2250/06 *Custodian of Absentee Property and others v. Daqaq Nuha and others*, notice on behalf of the Attorney General, 12 May 2010.

<sup>234</sup> For this matter, see, *inter alia*, the Custodian's position, as submitted to the Supreme Court within the framework of Civil Appeal 2250/06, *supra* note 37.

## 5. International Law Perspective

### 5.1 The Annexation of East Jerusalem

Following the 1967 War, Israel unilaterally annexed 70.5 square kilometres of West Bank land to the municipal boundaries of West Jerusalem, an area that had been administered by Israel since 1948. The annexed territory is known ever since as “East Jerusalem”. The annexation was constituted through Israeli legislation that applied the law, jurisdiction and administration of the State of Israel to East Jerusalem, and extended the boundaries of Jerusalem to include this recently occupied territory. These legislative measures were enacted within two days at the end of June, 1967.<sup>235</sup> In addition, in 1980, the Knesset enacted the Basic Law: Jerusalem, Capital of Israel. This law stipulates that “Jerusalem, complete and united, is the capital of Israel”.<sup>236</sup>

Israel’s annexation of East Jerusalem and the application of Israeli law to the area are both illegal under international law<sup>237</sup> and, as such, are not recognised as legitimate by the international community. International institutions, including the UN Security Council<sup>238</sup> the UN General Assembly<sup>239</sup> and the International Court of Justice,<sup>240</sup> have repeatedly stressed that the steps adopted by Israel in its annexation of East Jerusalem are in contravention of the rules of international law, and that East Jerusalem remains an occupied territory and is not part of Israel. This position is one shared by the vast majority of the world’s states. All countries that have diplomatic relations with Israel on the ambassadorial level do not recognise the annexation of East Jerusalem and therefore no states currently house their embassies in Jerusalem, despite Israel’s contention that it is the capital of the State of Israel.

As the occupying power, Israel has certain obligations toward Palestinian residents of the West Bank, including East Jerusalem. These obligations are clearly set out under international humanitarian law. We will elaborate below on these obligations, in particular those related to property rights. In addition to international humanitarian law, international human rights law is also applicable to East Jerusalem, as it is to the rest of

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<sup>235</sup> In regard to the legislation that facilitated the annexation, see *supra* note 114.

<sup>236</sup> Basic Law: Jerusalem, Capital of Israel, Laws of the State of Israel No. 980, 5 August 1980, p. 186, Article 1.

<sup>237</sup> See, e.g., Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, “Illegal Occupation: Framing the Occupied Palestinian Territory”, *Berkeley Journal of International Law*, Vol. 23(3), 2005, 551, pp. 573-574.

<sup>238</sup> See: S.C. Res. 252, U.N. SCOR, 23<sup>rd</sup> Sess., U.N. Doc. S/8590/Rev.2 (1968); S.C.Res.267, U.N. SCOR, 24<sup>th</sup> Sess., U.N. Doc. S/INF/24/Rev. 1 (1969); S.C. Res. 298, U.N. SCOR, 34<sup>th</sup> Sess., U.N. Doc. S/10338/Rev. I (1971); S.C. Res. 478, U.N. SCOR, 35<sup>th</sup> Sess., U.N. Doc. S, 14113 (1980).

<sup>239</sup> G.A. Res. 35/169E, U.N. GAOR, 35<sup>th</sup> Sess., U.N. Doc. A/35/L.42/Rev.1 (1980); G.A. Res. 41/162C, U.N. GAOR, 41<sup>st</sup> Sess., U.N. Doc. A/41/L.45, addendum pt. 1 (1986); G.A. Res. 49/36B, U.N. GAOR, 49<sup>th</sup> Sess., U.N. Doc. A/49/49 (1995); G.A. Res. ES-10, U.N. GAOR, 10<sup>th</sup> Emer. Sess., U.N. Doc. A/ES-10/L.5/Rev.I (1999).

<sup>240</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 IL M 1009 (2004), par. 78.

the oPt. Therefore, we will outline below the obligations and rights enshrined in the relevant bodies of international human rights law, as well.

## **5.2 The use of Absentee Property Law under the law of occupation**

### *5.2.1 International humanitarian law and its application to the occupied Palestinian territory*

International humanitarian law applies in situations of armed conflicts, including situations of occupation. Occupation is defined as “the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory”.<sup>241</sup> This definition reflects the principle of the inalienability of the sovereignty through the use of force.<sup>242</sup> Occupation does not confer legal title to the territory.<sup>243</sup> The occupying power is perceived as a kind of trustee over the territory and should administrate it in the interests of its inhabitants and its legitimate sovereign, chosen through an international agreement or any other legal process.

Attempts by the world’s major powers to codify the law of occupation commenced during the second half of the 19<sup>th</sup> century, and concluded with the peace conferences of 1899 and 1907. The most relevant document for our discussion is the Fourth Hague Convention Respecting the Laws and Customs of War on Land of 1907 and its annexed regulations (together referred to as the “Hague Regulations”). Article 43 of the Hague Regulations, which has become the foundation for the establishment of the role of the occupying power in administering the occupied territory, and reflects the temporary nature of occupation, stipulates that “[t]he Authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.<sup>244</sup>

Thus, Article 43 does not confer sovereign powers on the occupying power, but rather limits its authority to maintain public order and civil life, “while respecting... the laws in force in the country”.<sup>245</sup> The occupant may not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must respect the laws in force in the occupied territory at the beginning of the occupation “unless absolutely prevented”. Article 43 is a clause of limitation, the goal of which is not to create privileges for occupants, but rather to impose restraints on them.<sup>246</sup> The occupying power must act in

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<sup>241</sup> Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press (1993), p. 4.

<sup>242</sup> *Ibid.*, p. 5.

<sup>243</sup> Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 237, p. 560.

<sup>244</sup> The Hague Regulations, Article 43.

<sup>245</sup> Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 237, p. 571.

<sup>246</sup> Marco Sassoli, “Article 43 of the Hague Regulations and Peace operations in the twenty-first Century”, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004, pp. 5-6. Available at: <http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf> (Site was last accessed on 8 April 2013).

the best interests of the local population except where prevented from doing so by military necessity.<sup>247</sup>

In 1949, in the wake of World War II, four conventions for the protection of war victims were adopted in Geneva. The most relevant to our discussion is the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War<sup>248</sup> (hereinafter “the Fourth Geneva Convention”). Contrary to the Hague Regulations, the Fourth Geneva Convention focuses on the protection of this civilian population, rather the facilitation of governmental interests.<sup>249</sup> The persons protected by the convention (“protected persons”) are defined therein as those who, either during an armed conflict or during an occupation, find themselves under the control of an occupying power of which they are not nationals.<sup>250</sup> The Convention, which expanded the duties of the occupying power toward the civilian population in the occupied territory, did not replace the Hague Regulations, but rather is a supplement to them.<sup>251</sup>

In 1977, two additional protocols were appended to the Geneva Conventions: Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)<sup>252</sup> and Additional Protocol Relating to the Protection of Victims of Non- International Armed Conflicts (Additional Protocol II).<sup>253</sup> Additional Protocol I, which is the relevant protocol to our discussion, includes articles that deal with occupied territories.

In addition to the codified bodies of law discussed above, sources of international humanitarian law can be found in the common practice of the majority of states (“state practice”), and in judicial interpretation, or jurisprudence, from national courts to international tribunals, such as the International Court of Justice in The Hague, which is a United Nations organ.

Israel is not a party to the Hague Regulations. However, the International Military Tribunal of Nuremberg has found that the “rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war”<sup>254</sup>, and thus they are binding on all states (including Israel),

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<sup>247</sup> David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, Albany, 2002, p. 63.

<sup>248</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

<sup>249</sup> Ben-Naftali, Gross and Michaeli, “Illegal Occupation”, *supra* note 237, pp. 564-565.

<sup>250</sup> Fourth Geneva Convention, Article 4.

<sup>251</sup> Fourth Geneva Convention, Article 154.

<sup>252</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>253</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

<sup>254</sup> IMT, *The Trial against Goering, et al.* Judgment of 1 October 1946, International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals*, (1947), Vol. 1, pp. 64-65.

whether or not they are parties to the Hague Conventions.<sup>255</sup> This was reinforced by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004 (hereinafter: the Advisory Opinion in the Wall case).<sup>256</sup> Israel has formally accepted the Hague Regulations as customary international law, and thus has accepted their application to the occupied Palestinian territory.<sup>257</sup>

Regarding the Fourth Geneva Convention, however, the situation is different. The leading opinion of international law commentators is that in 1949, the Fourth Geneva Convention represented a mixture of both treaty and customary law. However, since the 1990s, the overwhelming majority of modern scholars have taken the view that the bulk of the provisions of the Fourth Geneva Convention have now solidified into customary international law. There has emerged a consensus that at least most provisions concerning occupation under the Convention have been distilled into international law. This is also the view of the ICRC's *Customary IHL Study*.<sup>258</sup>

Although Israel is a party to the Fourth Geneva Convention, the official Israeli government position is that it does not apply *de jure* to the occupied Palestinian territory, including East Jerusalem. This contention relies on a narrow citing of Article 2 of the Convention which, according to Israel, is only applicable to the occupation of the territory of one High Contracting Party by another. Therefore, the Convention is not applicable because Jordan and Egypt were not sovereigns over the West Bank, including East Jerusalem, and Gaza respectively. This narrow interpretation of the Convention's provisions has been rejected by the International Court of Justice, the High Contracting Parties to the Fourth Geneva, the ICRC commentary on the Fourth Geneva Convention and the majority of international law scholars.<sup>259</sup>

As for the customary status of the Fourth Geneva Convention, the official Israeli government position is that it does not reflect customary international law. However, the Israeli government has declared that it is willing to respect the Convention's "humanitarian provisions"<sup>260</sup> (without specifying to which provisions it refers). The Israeli High Court of Justice has left open the question of the applicability of the Fourth Geneva Convention to the occupied Palestinian territory, but has rather cited the Israeli

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<sup>255</sup> Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University press (2009), p. 5.

<sup>256</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 240, par. 89.

<sup>257</sup> See, e.g., H CJ 606/78 *Ayyub v. Minister of Defence*, (1979) 33 (2) PD 113.

<sup>258</sup> Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Leiden, Boston (2009). pp. 59-64.

<sup>259</sup> For further elaboration on the Israeli position and its rejection see: *Ibid.*, pp. 47-54; Ben-Naftali, Gross and Michaeli, "Illegal Occupation", *supra* note 237, pp. 567-570.

<sup>260</sup> See, e.g., H CJ 698/80 *Kawasme v. Minister of Defence*, (1980) 35(1) PD 617, pp. 627-628 ; H CJ 3278/02 *Hamoked - The Center for the Defence of the Individual v. IDF Commander*, (2002) 57(1)PD 385, p. 396; H CJ 7862/04 *Abu Dahar v. IDF Commander*, (2005) 59(5) PD 368, p. 376.

stance according to which it is bound by the “humanitarian provisions” of the Convention.<sup>261</sup>

### 5.2.2 *Annexation and occupation*

As a result of the Israeli application of the “law, jurisdiction and administration of the State” to East Jerusalem, the Israeli legal system has always dealt with all aspects pertaining to the protection of human rights in the annexed territory mainly in the context of Israeli law.

However, international law considers Israel’s annexation void; East Jerusalem remains – according to the international community – an occupied territory. Israel’s failure to acknowledge its status as an occupying power in East Jerusalem does not relieve it of its obligations according to the law of occupation. Article 47 of the Fourth Geneva Convention states as follows:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.<sup>262</sup>

Hence, the drafters of the Fourth Geneva Convention ensured that, even if the occupying power claims the legality of its annexation, it shall not be sufficient to deprive the protected persons of their rights as defined by international humanitarian law.<sup>263</sup> Whereas annexation, particularly in a situation as the one in question, is completely forbidden, modifications to the institutions or laws in force in the occupied territory are not prohibited *per se*. Sometimes changes may even be necessary. The main point, according to Article 47, is that changes must not lead to protected persons being deprived of the rights and safeguards provided for them.

Therefore, despite the Israeli decision to apply its “law, jurisdiction and administration of the State” to East Jerusalem, examining the Israeli legislation and practices in East Jerusalem in light of Israel’s obligations according to international law – in this case, in regard to property rights – is still pertinent. Nevertheless, when doing so, we have to bear in mind the Israeli case law dealing with this collision between international law and Israeli law. The tension between these two sets of rules can be seen in the High Court of Justice ruling in the *Rabach* case from 2003. The petitioners in this case claimed that the Israeli Court of Local Affairs in Jerusalem does not have jurisdiction over issues of alleged illegal building by Palestinian permanent residents in Jerusalem since the

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<sup>261</sup> *Ibid.*, the matter of *Hamoked*, the matter of *Abu Dahar*.

<sup>262</sup> Fourth Geneva Convention, Article 47.

<sup>263</sup> It should be noted that the reference to annexation in the Article cannot be considered as implying recognition of this way of acquiring sovereignty (Jean S. Pictet, *Commentary – The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958, pp. 275-276).

application of Israeli legislation to East Jerusalem is illegal from the international humanitarian law perspective. The High Court of Justice rejected the petition, stipulating that even if the Knesset's enactment on the subject was incompatible with international law – and the High Court of Justice refrained from asserting this – the court must abide by domestic legislation.<sup>264</sup>

### 5.2.3 *The right to property under the laws of occupation*

International humanitarian law has long recognized that property rights should be protected from most types of state intervention. However, the protections granted to immovable property in areas under occupation vary, and are based on the type of use by the occupying power.

The foundation of this notion is found in Article 46 of the Hague Regulations which lays down the general obligation of respecting private property in occupied territory. The article mandates that private property must be respected and “cannot be confiscated”.<sup>265</sup> Thus, Article 46 forbids confiscation, namely, the permanent taking of private property with the transfer of title to it. However, private property is not wholly exempt from interference by the occupying power. One example is seizure of private property – a temporary possession by the occupying power of privately owned property for military use only. It is commonly accepted that seizure of immovable private property in occupied territory is permitted under the law of occupation.<sup>266</sup> Military necessity is the threshold standard for such a taking, with the presumption that when there is no longer any military necessity, the property will be returned to its owners. It ought to be noted that the temporary seizure of private land or buildings, which serves as a pretext for semi-permanent dispossession of the property and *de facto* transfer of title to the occupant, is equivalent to confiscation, which is prohibited under Article 46 of the Hague Regulations.<sup>267</sup>

Another example of permitted interference by the occupying power is the expropriation of private land, namely, the transformation of private property into public property for public use, subject to adequate compensation granted by the government or the occupying power.<sup>268</sup> Expropriation as such is not expressly mentioned in the Hague regulations or in the Fourth Geneva Convention. However, Article 43 of the Hague Regulations, which obligates the occupying power to preserve and maintain public order and safety, has been interpreted by many experts to permit the expropriation of private

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<sup>264</sup> The matter of *Rabah*, *supra* note 142, pp. 934-935. On superior authority of the Israeli domestic law in cases of clear collision between the Israeli and international law see also, *e.g.* HCJ 2690/09 *Yesh Din v. Commander of the IDF in the West Bank* (published in “Nevo”, 28 March 2010), sections 6 of the ruling.

<sup>265</sup> Hague Regulations, Article 46.

<sup>266</sup> See: Dinstein, *The International Law of Belligerent Occupation*, *supra* note 255, pp. 226-227. The Israeli High Court of Justice has ruled that Articles 23(g) and 52 of the Hague Regulations do not prevent temporary seizure of land for military needs and upon payment of compensation for the use of the property (see, *e.g.* HCJ 401/88 *Abu Rian v. Commander of the Military Forces in Judea and Samaria*, (1988) 42(2) PD 767, p. 770).

<sup>267</sup> Arai-Takahashi, *The Law of Occupation*, *supra* note 258, p. 219.

<sup>268</sup> Dinstein, *The International Law of Belligerent Occupation*, *supra* note 255, p. 225.

property when it is carried out using fair procedures and in accordance with the local laws in force in the occupied territory prior to its occupation.<sup>269</sup> In addition, in order for expropriation to be legal, it should also be designed to benefit the local population within the framework of Article 43.<sup>270</sup>

In contrast to the Hague Regulations, the drafters of the Fourth Geneva Convention did not devote particular attention to the issue of property in occupied territories. Instead, the Fourth Geneva Convention implicitly incorporated the protections of property enshrined in the Hague Regulations,<sup>271</sup> adding only a few supplemental provisions. One of them is Article 53, which provides that “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”.<sup>272</sup> In addition, Article 147 provides that the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” constitutes a grave breach of the Convention.

### **Settlements in occupied territory**

Another important provision in this regard is Article 49(6) of the Fourth Geneva Convention, which strictly forbids the transfer of civilians from the occupying power into the territory it occupies. Violation of this prohibition also constitutes a grave breach of the Convention,<sup>273</sup> and has been codified as a war crime in the Rome Statute of the International Criminal Court, Article 8(2)(b)(viii), which explicitly states that the transfer is prohibited whether conducted “directly or indirectly”. Although these provisions, pertaining to settlements in occupied territories, do not explicitly deal with property rights, they certainly impact them, particularly since the establishment of settlements requires, first and foremost, taking over land in the occupied territories and transferring it to the hands of the settlers.

The unlawful nature of the Israeli settlement enterprise throughout the occupied Palestinian territory, including East Jerusalem, has been repeatedly and explicitly confirmed by the UN Security Council and the General Assembly. The UN Security Council called upon Israel:

[...] to abide scrupulously by the 1949 Fourth Geneva Convention, to rescind its previous measures and to desist from taking any action which would result in

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<sup>269</sup> Arai-Takahashi, *The Law of Occupation*, *supra* note 258, pp. 236-238.

<sup>270</sup> See, e.g., H CJ 393/82 *Jamait Askhan v. IDF Commander in Judea and Samaria*, (1983) 37(4) PD 785, p. 809.

<sup>271</sup> Pictet, *Commentary – The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 263, p. 271.

<sup>272</sup> In regard to destruction of property, which is not “imperatively demanded by the necessities of war”, see also the Hague Regulations, Article 23(g).

<sup>273</sup> Fourth Geneva Convention, Article 147, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 85(4)(a).



changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories.<sup>274</sup>

The General Assembly reiterated demands “for the immediate and complete cessation of all Israeli settlement activities in all of the Occupied Palestinian Territory, including Occupied East Jerusalem”.<sup>275</sup>

The International Court of Justice, in its Advisory Opinion in the Wall case, concluded, with regard to Article 49(6):

That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying power in order to organize or encourage transfers of parts of its own population into the occupied territory... since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49 paragraph 6... the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.<sup>276</sup>

### **A note on public property**

The manner in which international humanitarian law relates to public property derives from the basic conception that the role of the occupying power is to preserve existing public and municipal institutions as part of maintaining security, order and public life. Article 55 of the Hague Regulations states that: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates 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”.<sup>277</sup>

According to Article 55, the occupying power is entitled to administer the property and reap its fruits; however, it is obliged to preserve the property and ensure its continued existence. The occupying power must ensure that the capital of public property remains unharmed. Under the usufructuary rule, the title and ownership of immovable public

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<sup>274</sup> See UN Security Council, Resolution 446, adopted by the Security Council on 22 March 1979 (S.C. Res. 446, U.N. SCOR, 34<sup>th</sup> Sess., U.N. Doc. S/INF/35 (1979)); The Security Council has also called upon Israel to cease “the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem”, (S.C. Res. 452, U.N. SCOR, 34<sup>th</sup> Sess., U.N. Doc. S/RES/35 (1979)); See also: S.C. Res. 465, U.N. SCOR, 35<sup>th</sup> Sess. U.N. Doc. S/INF/36 (1980); S.C. 471, U.N. SCOR, 35<sup>th</sup> Sess., U.N. Doc. S/RES/36 (1980).

<sup>275</sup> See: G.A. Res. 61/118, U.N. GAOR, 61<sup>st</sup> Sess., U.N. Doc. A/RES/61/118 (2007); G.A. Res. 62/108, U.N. GAOR, 62<sup>nd</sup> Sess., U.N. Doc. A/RES/62/108 (2008).

<sup>276</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 240, par. 120.

<sup>277</sup> Hague Regulations, Article 55.

property do not pass on to the occupying power, which only acquires possession. The absence of title also means that the occupying power is forbidden to sell it.<sup>278</sup> What is considered “public property”? International law provides a flexible test to this question, which examines the identity of the formal owners of the property as well as the beneficiaries of the property and its holders.<sup>279</sup>

*In summary:* In chapter 2 of this document, we noted that the APL was based on the enemy property doctrine, which states that enemy citizens’ property located in the state’s territory is typically dealt with in some way. According to this doctrine, a country may seize enemy property situated in its territory, in order to prevent the enemy from using it, and vest this property in a custodian to hold in escrow until the end of hostilities. According to at least one interpretation of this, once the property is vested in the custodian, the original owners of this property lose their legal right to return of the property, and they hold nothing more than the expectation of getting their property back, when peace is concluded.<sup>280</sup>

However, as we have seen in this chapter, enemy property located in an occupied territory is considered very different. The occupying power cannot confiscate private property belong to enemy citizens and is legally very limited in seizing and expropriating property. Additional sets of obligations are imposed on the occupying power in regard to public property in the occupied territory.

#### 5.2.4 *Absentee property under the laws of occupation*

In addition to the general obligations the occupying power is compelled by in regard to property in an occupied territory, there is a specific set of rules dealing with absentee property in the occupied territory. International law permits the occupying power to seize control and manage abandoned properties, as long as doing so does not negate the legal connection of the absentee to her or his property. Moreover, the occupying power is forbidden from selling property owned by absentees.<sup>281</sup> This notion reflects the transitory nature of the occupation and the perception according to which the occupying power serves as a kind of trustee over the territory. *The United States Army Field Manual on the Law of Land Warfare* declares in this regard:

Property within occupied territory may be controlled by the occupant to the degree necessary to prevent its use by or for the benefit of the hostile forces or in a manner harmful to the occupant. Conservators may be appointed to manage the property of absent persons... and of internees, property managed by such persons, and property of persons whose activities are deemed to be prejudicial to the occupant. However,

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<sup>278</sup> Arai-Takahashi, *The Law of Occupation*, *supra* note 258, p. 198.

<sup>279</sup> Eyal Zamir and Eyal Benvenisti, *The Legal Status of Lands Acquired by Israelis before 1948 in the West Bank, Gaza Strip and East Jerusalem*, The Jerusalem Institute for Israel Studies, 1993, pp. 122-127 [Hebrew].

<sup>280</sup> See chapter 2 of this document.

<sup>281</sup> Zamir and Benvenisti, *The Legal Status of Lands Acquired by Israelis before 1948 in the West Bank, Gaza Strip and East Jerusalem*, *supra* note 279, pp. 120-121.

when the owners or managers of such property are again able to resume control of their property and the risk of its hostile use no longer exists, it must be returned to them. Measures of property control must not extend to confiscation.<sup>282</sup>

Thus, where abandoned properties are concerned, when the owners of the property or the persons who managed it, prior to the occupation, are again able to resume control of the property, the occupier must return the property to its rightful owners (in cases where is no risk of hostile use of the property). In addition, it stems from the above, that where the absentee has a representative present in the occupied territory and managing the property for him, the occupying power should not seize the property, unless one of the general justifications mentioned above for land seizure in occupied territories apply. In any case, the occupying power is prohibited from confiscating the property or selling it.

### 5.2.5 *Applying the Absentee Property Law to property in East Jerusalem*

From the international humanitarian law perspective, the application of the Absentee Property legislation to East Jerusalem is very problematic. *First*, as the occupying power, Israel may not extend its own legislation over the occupied territory, in particular where this legislation is designed to serve further violations of international law, such as illegal settlements, in occupied East Jerusalem.

*Second*, there are certainly legal grounds to consider the Israeli practices regarding these properties as confiscation, which is forbidden under Article 46 of the Hague Regulations. As stressed in this document, according to the APL, the ownership rights to property declared as “absentee” are transferred to the state and, as a result, the owners lose their rights to the property. It therefore cannot be considered temporary requisition of the land – which is permitted, under certain conditions, according to occupation law. In this regard, it should be noted that respect for private property under Article 46 does not mean merely protection from loss of ownership. For a breach to occur it is enough that the owner be prevented from exercising his rightful prerogatives vis-à-vis the property.<sup>283</sup> The European Court of Human Rights held that even a denial of access to land, where it is continuous, means effective loss of ownership rights over it.<sup>284</sup> Therefore, certainly where the owners permanently lose their rights to the property, as a result of transfer of the title to the Custodian, a violation of the Hague Regulations has occurred.<sup>285</sup> Vesting the ownership rights in the Custodian is also not an act of expropriation, in particular not in this context. For example, following the transfer of property to the hands of settlers,

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<sup>282</sup> United States Army Field Manual, *The Law of Land Warfare (1956)*, par. 399.

<sup>283</sup> *Krupp trial (Krupp et al.)* (US Military Tribunal, Nuremberg, 1948), p. 1344 (<http://werle.rewi.hu-berlin.de/KRUPP-Case%20Judgment.pdf>) (Site was last accessed on 8 April 2013); Dinstein, *The International Law of Belligerent Occupation*, *supra* note 255, p. 225.

<sup>284</sup> *Loizidou v. Turkey (Merits)* (European Court of Human Rights, 1996), 36 *ILM* 440, 455 (1997).

<sup>285</sup> See: Kagan, “Restitution as a remedy for refugee property claims in the Israeli-Palestinian Conflict”, *supra* note 26, p. 451.

the property is clearly then not designated for public use, certainly not for the use of the local population. It is also often executed without providing compensation.<sup>286</sup>

Apart from the application of the APL to properties located in East Jerusalem, it is also the manner in which the APL is applied which raises concerns. As mentioned above, the definition of “absentee” in the APL also brings into its scope many Israeli Jews, as well, whose property in Israel the Custodian of Absentee Property has never conceived of declaring as “absentee property”. The Custodian refrained from transferring to its hands property of settlers who reside in the occupied territory, who are also, according to definition, absentees regarding the property they have within the boundaries of Israel and within East Jerusalem.<sup>287</sup> In this regard, it has been held that property transactions, which are based on discriminatory legislation applied by the occupying power that affect the property rights of private individuals, will constitute a violation of Article 46.<sup>288</sup>

*Third*, the Israeli application of the APL to East Jerusalem properties does not meet international humanitarian law standards pertaining to the specific issue of dealing with absentee property in occupied territory. As mentioned above, according to the law of occupation, the Custodian of Absentee Property may temporarily seize property belonging to absentees only in exceptional circumstances and, in any case, when the owners of such property or their representatives are able to resume control of their property and the risk of its hostile use no longer exists, it must be returned to them. The Israeli practice, according to which such property is confiscated by the Custodian and the owners lose, permanently, their rights to the property, manifestly contradicts these principles.

*Fourth*, the usage of the APL in East Jerusalem cannot be justified by the “enemy property” doctrine. As noted in this document, the APL was based, to a great extent, on the British legislation dealing with enemy property.<sup>289</sup> However, this doctrine is relevant only to property located within the territory of a certain country; not property located in a territory this country has occupied.<sup>290</sup> In addition, using this doctrine may only be justified when it is linked to armed conflict. Arguably, the armed conflict relevant to many of those who are defined by Israel as “absentees” has already ended. Thus, following the conclusion of peace treaties with Jordan and Egypt, it is possible to claim that it is illegal now for Israel to continue holding property owned by Palestinian refugees in these countries.<sup>291</sup> As for Palestinians who own property in East Jerusalem and reside

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<sup>286</sup> As mentioned in chapter 3.5, the Absentee Property (Compensation) Law of 1973 applies only to properties owned by Israeli residents (*i.e.* not to properties owned by Palestinians who reside in the oPt or other Arab countries).

<sup>287</sup> See chapter 3.1.1 of this document.

<sup>288</sup> The matter of *Krupp*, *supra* note 283, p. 1342.

<sup>289</sup> See chapter 2 of this document.

<sup>290</sup> See chapter 5.2.3 above.

<sup>291</sup> Of course, this argument can apply to property in all the territory to which Israel applies the Israeli law, not just East Jerusalem. See Kagan, “Restitution as a remedy for refugee property claims in the Israeli-Palestinian Conflict”, *supra* note 26, p. 454. As mentioned earlier (see *supra* note 32), concerning the state of Jordan, Article 6 of the Law for the Implementation of the Peace Agreement between Israel and Jordan stipulates that as of 10 November 1994, a property shall not be considered an “absentee property” only

in the West Bank, it is worth reminding that when Israel occupied the territory of what is known as “East Jerusalem”, it also occupied the rest of the West Bank. Whether it is Israeli law – which applies, according to Israel, to East Jerusalem – or the Israeli occupation regime – which applies to the rest of the West Bank – both territories came under Israeli administration. Thus, following the Israeli occupation, the properties and their owners came under Israeli control. Consequently, in these circumstances, the whole notion of enemy property, according to which the enemy may use its property located in the country’s territory, practically does not exist.<sup>292</sup>

*In sum*, there is a strong basis for concluding that the Israeli practice of applying the APL to East Jerusalem does not meet international humanitarian law standards. As for the specific issue of Palestinians who own property in East Jerusalem and reside in the West Bank the legal situation is particularly problematic. These people have lost their rights in the property as a direct outcome of the Israeli decision to annex only part of the West Bank (what is considered East Jerusalem) and to apply Israeli law to the annexed territory. This property is vested now in the Israeli Custodian of Absentee Property only because it is located today in a territory which has become “Israel”, according to Israeli legislation, while the owners of the property live in “part of Palestine outside the area of Israel” and, therefore, are considered “absentees” according to the wording of the APL.<sup>293</sup> These residents have become “absentees” without even leaving their houses and only because of the unilateral action of Israel, which chose to apply a different legal regime to land that it captured in 1967. The annexation, as stated in Article 47 of the Fourth Geneva Convention, “of the whole *or part* of the occupied territory”, has resulted in a deprivation of basic rights that are guaranteed to persons under occupation.

### **5.3 The use of Absentee Property Law under human rights law**

#### *5.3.1 International human rights law and its application to the occupied Palestinian territory*

International human rights law establishes a comprehensive set of standards that generally reflect an international understanding of the basic rights owed to all people and that can be applied to all legal systems in the world. The corpus of international human rights law – where these rights are enshrined – includes a wide body of international and regional treaties, United Nations resolutions, the “General Comments” of the assigned UN bodies to several of those conventions, and the interpretations of national and international courts.

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because the holder of the rights to it was a citizen or a subject of Jordan, or was found in Jordan. However, this Article is a forward looking statement only. The provision of this Article is not enough to change the status of absentee property that was previously declared as such .

<sup>292</sup> In this regard, see also the matter of *Daqaq Nuha*, *supra* note 110, sections 5-6 of the ruling.

<sup>293</sup> The Absentee Property Law, *supra* note 1, Article 1(b)1(ii).

Israel is a party to a number of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),<sup>294</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>295</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>296</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>297</sup> and the Convention on the Rights of the Child (CRC).<sup>298</sup> A question arose on the extraterritorial application of human rights law in occupied territory, *i.e.* whether occupying powers are obliged to uphold standards enshrined in human rights treaties in occupied territories in which they are not the sovereign government. In its General Comment 31, the Human Rights Committee, which monitors the implementation of the ICCPR, declared that:

States Parties are required... to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.<sup>299</sup>

The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the ICESCR, has reached the same conclusion in its Concluding Observations on Israel from 2003.<sup>300</sup> Similarly, the International Court of Justice, in its Advisory Opinion in the Wall case, has concluded that, because Israel exercises effective control over the occupied Palestinian territory, including East Jerusalem, it is responsible for implementing its obligations under the various human rights treaties it has ratified with respect to that territory.<sup>301</sup>

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<sup>294</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

<sup>295</sup> International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976.

<sup>296</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc A/6014 (1966), 660 U.N.T.S. 195, *entered into force* 4 January 1969.

<sup>297</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* 3 September 1981.

<sup>298</sup> Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990.

<sup>299</sup> Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, par. 10.

<sup>300</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1/Add.90, 23 May 2003, par. 31.

<sup>301</sup> See, *e.g.*, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 240, par. 102-114.

It should be noted that, while Israel has challenged the applicability of its human rights obligations in occupied territory, it considers East Jerusalem part of its own territory and, therefore, accepts its application therein.<sup>302</sup>

### 5.3.2 *The right to property under international human rights law*

The right to own property is enshrined in Article 17(1) of the Universal Declaration of Human Rights. In addition, Article 17(2) of the Declaration stipulates that “[n]o one shall be arbitrarily deprived of his property”.<sup>303</sup> However, that principle was not reiterated explicitly in either of the covenants of 1966 which set out to give treaty-based form to the provisions of the Declaration, which is not binding. The preparatory work for those covenants shows that the participating delegations failed to agree on the scope of the principle in Article 17, as well as on the restrictions to be applied to it.<sup>304</sup>

Yet, the International Covenant on Civil and Political Rights (ICCPR) of 1966, to which Israel is a party, does address this principle, in a broader way. Article 17(1) of the ICCPR, grants a person the right to be free from “arbitrary or unlawful interference with his privacy, family, *home* or correspondence” (emphasis added).<sup>305</sup> Such interference can generally be interpreted to suggest the freedom from confiscation, unjustifiable destruction and even unlawful eviction. Similar prohibition on arbitrary interference with one's home may also be found in General Comment 16 of 1988 with regard to Article 17 of ICCPR,<sup>306</sup> Article 12 of the Universal Declaration of Human Rights (UDHR) of 1948,<sup>307</sup> and Article 16 of the Convention on the Rights of the Child (CRC) of 1990.<sup>308</sup> Additionally, a prohibition on forced evictions of lawful owners from their homes is found in General Comment 7 of the Committee on Economic, Social and Cultural Rights (CESCR), with regard to Article 11 of the Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, which recognizes the right to adequate housing.<sup>309</sup>

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<sup>302</sup> Israel claims that since East Jerusalem is part of its sovereign territory, the application of Human Rights Treaties is not extraterritorial (as it claims with regards to the West Bank for example), but it is rather territorial application of the treaties to which it is a party.

<sup>303</sup> The Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948), *Adopted on* 10 December 1948.

<sup>304</sup> Sylvain Vite, “The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: the Examples of Food, Health and Property”, *International Review of the Red Cross*, Vol. 90 No. 871, September 2008, p. 642.

<sup>305</sup> International Covenant on Civil and Political Rights, Article 17(1).

<sup>306</sup> General Comment No. 16 (1988) (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)), UN Doc. HRI/GEN/1/Rev.1 at 21 (1994), adopted 4 August 1988.

<sup>307</sup> The Universal Declaration of Human Rights, Article 12.

<sup>308</sup> Convention on the Rights of the Child, Article 16.

<sup>309</sup> General Comment No. 7 (1997) (on forced evictions), UN Doc. E/1998/22, annex IV (1998), adopted 20 May 1997.

## Property rights and the principle of non-discrimination

Non-discrimination is a fundamental principle which constitutes a pre-emptory (*jus cogens*) norm of international human rights law.<sup>310</sup> This principle has been codified by a number of human rights bodies. Thus, Article 2 of the UDHR provides protection of the rights guaranteed under UDHR to all individuals “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The same language is included in provisions of the ICCPR and ICESCR.<sup>311</sup>

In addition, individuals are protected against discrimination by guarantees of equal protection before the law under Article 7 of the UDHR. Article 26 of the ICCPR also provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. The CERD more specifically prohibits racial discrimination in the enjoyment of the right to own property, the right to inherit and the right to housing”.<sup>312</sup>

In this context, it should be emphasized, that the right to property is not an absolute right, as the language of some of the abovementioned provisions would allow for interference if conducted in a non-arbitrary manner (see, *e.g.*, Article 17(2) of the UDHR, Article 17 of ICCPR). The state can limit this right in certain circumstances, such as when it is necessary in the public interest. Any interference must be lawful under both domestic and international law and a fair balance must be struck between the interest of the public and the right of the individual property owner. Interference may be justified, for example, in the interest of national security, public order or general welfare. However, when such sanctions discriminate against a particular racial or ethnic group, they would almost certainly be found to be “disproportionate” and so constitute a violation.<sup>313</sup>

### 5.3.3 *The application of the Absentee Property Law in East Jerusalem in light of international human rights law*

The severe violations of property rights as a result of the application of the APL to East Jerusalem have been discussed at length in the previous chapters. In this subsection we would like to examine the application of the APL in light of the principle of non-discrimination.

There are three primary ways in which Israel’s application and implementation of the APL has violated the principles of non-discrimination and equal protection of the law.

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<sup>310</sup> Kagan, “Restitution as a remedy for refugee property claims in the Israeli-Palestinian Conflict”, *supra* note 26, p. 455. The doctrine of *jus cogens* asserts the existence of fundamental legal norms from which no derogation is permitted.

<sup>311</sup> International Covenant on Civil and Political Rights, Article 2(1); International Covenant on Economic, Social, and Cultural Rights, Article 2(2).

<sup>312</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Articles 5(d)(v), 5(d)(vi) and 5(e)(iii).

<sup>313</sup> Conor Foley, *A Guide to Property Law in Afghanistan*, Norwegian Refugee Council and the United Nations High Commissioner for Refugees, September 2005, pp. 116-117.



*First*, the APL has a major role in the discriminatory regime that governs the whole issue of property captured as a consequence of the Palestinian-Israeli hostilities. This regime, embodied in the APL and the 1970 Law, allows Israelis to reclaim pre-1948 property in East Jerusalem, while denying Palestinians an equivalent right to recover pre-1948 property in West Jerusalem and other parts of Israel.<sup>314</sup>

*Second*, the way the APL is implemented by the Israeli authorities is, by its nature, discriminatory. As mentioned above, the Custodian of Absentee Property has refrained from taking over properties of settlers who reside in the West Bank, despite the fact that they are also, according to definition, absentees regarding the property they have within the boundaries of the Green Line and within East Jerusalem.

*Third*, the application of the APL to East Jerusalem facilitates an additional type of discrimination. The involvement of the Custodian of Absentee Property in real-estate transactions and in planning and licensing procedures generates further inequity between Jews and Palestinians in East Jerusalem. As East Jerusalem Palestinians are extremely intimidated by the Custodian's involvement – which may lead to the confiscation of their property – many real property transactions are not registered and many Palestinians in East Jerusalem avoid applying for building permits and prefer to build, instead, with no permit at all.<sup>315</sup> These phenomena create a considerable gap between the Jewish and Palestinian communities, regarding long-term residential security. Homes built without permits are under constant threat of demolition. Real property purchased with no accompanying registration is much more vulnerable than registered purchases.

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<sup>314</sup> See chapter 4.1.2 of this document.

<sup>315</sup> See chapter 4.2.2 and chapter 4.2.3 of this document.

## **6. Conclusion**

### **6.1 The problematic application of the Absentee Property Law to East Jerusalem**

The APL is a sweeping law that severely harms individual property rights. This was true on the day of its enactment, and its deleterious impact has only been exacerbated since property rights were granted constitutional status in Israel.

The APL was legislated under the very specific circumstances detailed above. Even at the time of its enactment, in the wake of the 1948 War, the APL raised some serious concerns about the actual motives of its drafters. The application of the APL in its entirety to East Jerusalem, and the way in which it has been implemented by the Israeli authorities throughout the years, have raised additional concerns that were addressed in this document. These concerns are not only based on rights and general legal principles enshrined in domestic and international human rights corpuses, but also strongly connected to the legal status of the territory of East Jerusalem. Invoking the provisions of the APL, property is confiscated from the hands of Palestinians, who are protected persons in an occupied territory, in an area to which the application of Israel's sovereignty contravenes provisions of international law and international consensus.

The application of the APL in East Jerusalem is particularly egregious given that many of those harmed are Palestinians who never left their place of residence in the West Bank and came under Israeli occupation in 1967. As shown, when the APL came into force, it was applied to the area that was defined at the time as "the area of Israel". Today, Israel applies the APL to an area that Israel annexed many years after the APL's enactment in contravention of international law. Vesting property in the Custodian is carried out only because the APL technically enables it. Residents of the West Bank to whom the APL applies did not leave their homes at all (in other words, performed no "absence") and their property is sometimes only a few kilometres away from their places of residence. Nevertheless, this property is confiscated from them only because they are located within the area that Israel decided unilaterally to annex.

The Custodian of Absentee Property has the option not to implement the APL in East Jerusalem. In fact, he chooses every day not to apply the APL to certain populations. As detailed above, the definition of "absentee" in the APL brings into its scope many Israelis, Jews, as well. However, the Custodian does not declare their property in Israel as absentee property. The Custodian refrained, for example, from transferring to himself property in Israel belonging to settlers who reside in the occupied territory, who are, according to the APL definition, absentees regarding the property they have within the Green Line. This selective implementation of the APL in East Jerusalem leads, therefore, to inequitable consequences.

### **6.2 The role of the Israeli courts**

As illustrated above, applying the APL to East Jerusalem by way of the 1970 Law enabled the Custodian to take over extensive property of those defined as "absentees". To

date, the Israeli courts have refrained on the whole from intervening in the application of the APL to East Jerusalem.<sup>316</sup> This is the case even regarding property located in East Jerusalem that is owned by Palestinians residing in the West Bank. While acknowledging that their “absence” is of a “technical” nature, the Supreme Court has nevertheless chosen, at least so far, to adhere to the strict wording of the law and decided that the APL should apply to these people and their property. In doing so, the Supreme Court has arguably ignored the special context and realities of occupation. The all-inclusive nature of the APL provisions, in conjunction with the somewhat conservative approach of the Supreme Court, has given the State of Israel a green light for wide-ranging use of the APL. During the reign of right-wing governments in Israel, the APL was implemented more broadly, in order to take control of as much “absentee” property as possible for transfer to the hands of the settlers – as evidenced by the findings of the *Klugman* Report. In other periods, the APL was used in a more restrictive manner.

The less direct ways in which the Custodian takes over “absentee” property – through involvement in transferring real property rights and in planning and licensing procedures in East Jerusalem – were described in detail in this document. Apart from exceptional cases, the Israeli courts accept these practices as *fait accompli*, as they have done in regard to the application of the APL to East Jerusalem in general. Although the courts have criticized the Custodian's conduct in specific cases, they have not prevented the Custodian's involvement in these procedures. On the contrary: sharing information between the Custodian and other authorities, which leads to the declaration of property as “absentee” property, is sometimes considered constructive by the courts and a means to improve the efficiency of the authorities.

### **6.3 The usage of the Absentee Property Law in East Jerusalem – the broader context**

Implementation of the APL in East Jerusalem inevitably results in stripping many Palestinians of their property and housing rights. This is just one of a range of practices employed by Israel to facilitate and bring about forced displacement of Palestinians in East Jerusalem. Some of the more conspicuous of these practices include extensive land expropriations for the purpose of establishing settlements,<sup>317</sup> evictions of Palestinians from their homes based on the 1970 Law,<sup>318</sup> cessation of land settlement procedures in East Jerusalem,<sup>319</sup> imposing a restrictive planning regime, including the harsh practice of house demolitions,<sup>320</sup> revocation of the residency status of Palestinians in East

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<sup>316</sup> In this regard, the District Court's rulings in the matters of *Daqaq Nuha* (*supra* note 110) and *Awad* (*supra* note 38) are quite exceptional.

<sup>317</sup> See, e.g., B'Tselem, *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem*, May 1995.

<sup>318</sup> See chapter 4.1.2 above.

<sup>319</sup> See: Ronit Levine-Schnur, “Privatization, Segregation, Discrimination: The Cessation of Land Settlement in East Jerusalem”, *Tel Aviv University Law Review*, Vol. 34, 2011, p. 183.

<sup>320</sup> Marom, *The Planning Deadlock*, *supra* note 195.

Jerusalem,<sup>321</sup> limitations on family unification between Palestinians and their West Bank spouses, and limitations on registration of children born to these residents in the Israeli population registry.<sup>322</sup> The Israeli authorities are often criticized for initiating these measures in order to reduce the number of Palestinians living in Jerusalem, and increase the number of Jews in order to strengthen Israeli control of the city.<sup>323</sup>

These policies are not always carried out on distinct and separate channels. A certain measure taken by the Israeli authorities might complement and assist in executing another. The implementation of the APL in East Jerusalem, for example, is also linked to other practices implemented by Israel in East Jerusalem. As set forth above, following the annexation of East Jerusalem, Israel decided to halt all land settlement procedures in the annexed territory. In the early 2000s, the Jerusalem Municipality introduced new procedures that introduced significant obstacles for those applying for building permits or initiating building plans, in particular regarding property located on unsettled land or land under settlement. Obtaining confirmation from the Custodian for Absentee Property that the particular property is not “absentee property” is an integral part of the procedure.<sup>324</sup> As a result, many Palestinians refrain completely from engaging in planning and licensing procedures. Accordingly, the decision to freeze land settlement procedures, combined with the Jerusalem Municipality procedures, have enabled the Israeli authorities to trace “absentee property” more thoroughly. The combined effect of these practices and the obstacles imposed has increased the inevitable frequency of Palestinian building in East Jerusalem without permits, which then engenders the Israeli response of house demolitions and other enforcement measures.

The applicability of the APL in East Jerusalem, in itself in violation of international humanitarian and human rights law and inconsistent with the original purpose of the law, leads to a series of negative consequences for Palestinians. It facilitates the confiscation of Palestinian property in East Jerusalem without any military necessity or other permissible justification in international humanitarian law. It promotes settlement expansion, as much of the property allocated to the Custodian is subsequently transferred to settlement organisations. It undermines security of tenure for Palestinians and erodes basic human rights protections. It undermines the right to succession, as heirs may be declared ‘absentees’ and lose their inheritance entitlement. Fundamentally, it acts as a severe deterrent to Palestinians registering property in East Jerusalem and results in unlicensed building to meet family need with the eventual consequence of demolition, loss of property rights and forced displacement.

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<sup>321</sup> See, e.g., OCHA, *East Jerusalem: Key Humanitarian Concerns*, March 2011; B'Tselem and HaMoked: Center for the Defence of the Individual, *The Quiet Deportation: Revocation of Residency of Palestinians in East Jerusalem*, April 1997.

<sup>322</sup> See: B'Tselem and HaMoked: Center for the Defence of the Individual, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, January 2004.

<sup>323</sup> See, e.g., Ardi Imseis, “Facts on the Ground: An Examination of Israeli Municipal Policy in East Jerusalem”, *American University International Law Review* 15, no. 5 (2000), p. 1039; B'Tselem and HaMoked, *The Quiet Deportation*, *supra* note 321, pp. 8-11.

<sup>324</sup> See chapter 4.2.3 above.

The coming period will be critical to the debate around the law as the Supreme Court grapples with the logical applicability of the law to a number of West Bank residents who have been declared 'absentee' from their East Jerusalem properties despite having resided continuously in the same place for many years.

