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BUILDING TRUST IN EAST JERUSALEM: HOUSING ISSUES IN THE ISRAELI-PALESTINIAN CONFLICT

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HOUSING ISSUES IN THE ISRAELI-PALESTINIAN 
CONFLICT

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The opinions expressed in this Article are solely those of the authors.
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ABSTRACT

The Israeli-Palestinian conflict has been one of the world’s most contentious issues for more than half a century, and Jerusalem is at its center. Though frequently treated as one subject of dispute between Israelis and Palestinians, “Jerusalem” actually comprises a complex set of legal, political, and social issues. This Article examines one of them, the issue of housing in East Jerusalem, with a particular focus on whether some of the housing policies in that area violate international law. Believing that housing as a discrete topic can illuminate the nuances and complexities of the broader conflict without becoming too unmanageable or unwieldy, this Article explores housing through an extensive review of existing literature and interviews conducted in Jerusalem over a two-week period with Israelis, Palestinians, and organizations working in Jerusalem. In addition to discussing how the issue of housing relates specifically to the Israeli-Palestinian conflict, this Article also presents a case study on the interaction of international and domestic legal arguments in an international dispute. This Article thus raises questions about the limits of international law as a means of resolving conflict, particularly in contexts in which both sides can formulate non-frivolous, substantive legal arguments in their favor. Finally, we conclude with modest suggestions to Israelis and Palestinians for improving the provision of housing and municipal services in East Jerusalem. These suggestions aim at building trust between the parties as they move towards a resolution of the Israeli-Palestinian conflict.

INTRODUCTION

The Israeli-Palestinian conflict has been one of the world’s most contentious issues for more than half a century, and Jerusalem is at its center. Holy to the three major monotheistic religions, declared capital of the State of Israel, and desired capital of the future State of Palestine, Jerusalem is the subject of two starkly disparate narratives. These competing narratives have sparked disputes about the political and legal status of the city that have heretofore proven insoluble. Indeed, the complexity of the Jerusalem debate has led Israelis and Palestinians1 to

1. We are using the term “Palestinian” to refer to “Arabs—Christian, Muslim and Druze—whose historical roots can be traced to the territory of Palestine as defined by the British mandate borders.”
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delay efforts to resolve the city’s status repeatedly during peace negotiations, making Jerusalem the paradigmatic “final status” issue. The international community’s unparalleled interest in the city adds a further layer of complexity, which frequently elevates the conflict over Jerusalem from a political dispute between two peoples to a global problem.

Though frequently treated as one subject of dispute between Israelis and Palestinians, “Jerusalem” actually comprises a complex set of issues. This Article examines one of them, the issue of housing in East Jerusalem, with a particular focus on whether some of the housing policies in that area violate international law. In light of the fact that housing in East Jerusalem is closely related to the broader Israeli-Palestinian conflict, one could argue that it is impossible to completely separate such an issue from the other contested subjects that enliven the conflict. Yet that is exactly what this Article attempts to do, for we believe that housing as a discrete topic can illuminate the nuances and complexities of the broader conflict without becoming too unmanageable or unwieldy.

The issue of housing also offers an avenue for devising workable solutions that counter the atmosphere of distrust that pervades the Israeli-Palestinian relationship. Although the conflict has been raging for more than sixty years, the substantive positions of the parties are not as far apart as one might imagine. Interviews with former Israeli Prime Minister Ehud Olmert, as well as Palestinian documents leaked to Al Jazeera, show that the parties were once close to reaching a solution that would have transformed Jerusalem into the capital of two states, while still remaining a

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2. The Article is the result of a course at Duke University School of Law taught by Professor Curtis Bradley during the spring semester of 2011. The participants in the course were eleven U.S. law students interested in the practical application of law to an international conflict. The course included a trip to Jerusalem from March 6–13, 2011, under the auspices of Duke Law and Hebrew University. The trip included meetings with Israelis and Palestinians involved in housing issues, including representatives of the Palestine Liberation Organization (PLO) Negotiation Support Unit, the Israeli government, the Jerusalem municipality, and several non-governmental organizations. We also met with representatives of the United Nations, academics, and local residents, and we visited different Jerusalem neighborhoods and Bethlehem. This paper has, as much as possible, attempted to integrate the findings from our trip with our academic research.

3. Because our Article is limited to Jerusalem, issues related to the West Bank or the Gaza Strip are outside of its scope. For purposes of this Article, the “West Bank” encompasses those areas outside of the current municipal boundaries of Jerusalem that are under the current control of Israel and were part of Jordan prior to 1967. We recognize that some Palestinians and foreign countries may consider part or all of East Jerusalem as being included within the West Bank.
formally unified municipality. Sources like these suggest that it is not the drawing of lines on a map that is the biggest problem, but rather the lack of trust between the sides. Taking small steps of the kind we suggest in order to address disputes over housing and municipal services could help to build trust. In the absence of progress toward peace at the leadership level, such grassroots confidence-building measures could play a positive role in renewing peace efforts among Israelis and Palestinians. They may also help secure a more durable solution, since Israelis and Palestinians must find ways to live together even after a final agreement is signed. Alternatively, even in the absence of an agreement, these suggestions could improve the current quality of life for East Jerusalem residents and contribute to the maintenance of peaceful coexistence in the city.

In addition to discussing how the issue of housing relates specifically to the Israeli-Palestinian conflict, this project is also a case study on the interaction of international and domestic legal arguments in an international dispute. Both the Israelis and the Palestinians tend to rely on law when making arguments related to housing. The Palestinian narrative generally relies on international law, specifically the law of occupation and the principle of self-determination. The Israeli narrative rejects many of the premises of the international law arguments made by the Palestinians and instead relies on Israeli domestic law. This Article thus raises questions about the limits of international law as a means of resolving conflict, particularly in contexts in which both sides can formulate non-frivolous, substantive legal arguments in their favor. Indeed, in the Israeli-Palestinian context, legal arguments may function better as negotiating points than as bases for settlement. Nevertheless, because of the enormous weight given to the legal arguments by both parties and because of the central role the competing narratives play in negotiations, it is important to understand them. We have tried to describe the positions on both sides in a neutral and even-handed way in this Article.

As our group quickly discovered, the dispute between Israel and Palestine spills over into language, necessitating precise definitions for key terms. For purposes of this paper, “Jerusalem” is the area within the current

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municipal borders of the city, as established under Israeli law.5 “East Jerusalem” constitutes the portion of the city within the municipal borders that was part of Jordanian territory prior to 1967. This land is on the eastern side of the 1949 armistice line—the “Green Line”—and is regarded by the international community as being under Israeli occupation. “West Jerusalem” is the part of the city within the municipal borders that was part of Israeli territory prior to 1967. “Israel” means the State of Israel within its current borders, which includes the disputed areas of East Jerusalem, the West Bank, the Gaza Strip, and the Golan Heights. “Palestine” refers to the areas envisioned as part of a future Palestinian state, including the West Bank, the Gaza Strip, and East Jerusalem. These terms are used without taking a position on whether the final borders between Israel and Palestine need to track exactly those of 1967. Finally, we will use the term “separation barrier” to refer to the structure that Israel has constructed for the announced purpose of preventing suicide bombings and other terrorist attacks.6

This Article proceeds in seven parts. Parts I and II discuss the historical and legal background of Jerusalem, with particular focus on the historical and legal arguments advanced by Israelis and Palestinians to underscore their claims to the city. Part III examines the issue of housing, focusing on Israeli building, zoning, and land regulatory policies and Palestinian responses to these policies, including unauthorized construction. This Part includes an examination of controversial Israeli measures, such as the construction of settlements/neighborhoods beyond the 1967 borders and the demolition of Palestinian homes. Part IV analyzes two related issues that have had a particular impact on housing in East Jerusalem, the construction of the separation barrier and the provision of municipal services.

Parts V and VI focus on broader questions. Part V ties the issue of housing to the Israeli-Palestinian Peace Process, suggesting that positive steps regarding housing may provide a means for overcoming the pervasive distrust that has been a significant obstacle to the advance of peace

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5. Israel expanded the municipal boundaries of Jerusalem following the 1967 war, greatly increasing the size of the city. See Ruth Lapidoth, Jerusalem and the Peace Process, 28 Isr. L. Rev. 402, 408 (1994) (explaining Israel’s decision to extend the municipal boundaries).

6. We recognize that Palestinians frequently refer to the separation barrier as the “wall,” while Israelis often call it the “security barrier” or the “fence.” We also acknowledge that the security rationale for the barrier is disputed; some have alleged its true purpose is to cut off Palestinians from their land in order to annex the land to Israel. For more on the separation barrier, see infra Part IV.A.
negotiations. Part VI discusses, in light of our findings, the utility of international law in resolving international conflict.

Finally, Part VII offers suggestions to Israelis and Palestinians for improving the provision of housing and municipal services in East Jerusalem. Though alone these suggestions are modest, progress on the issue of housing in East Jerusalem will improve the lives of the city’s residents and perhaps serve to increase trust between the parties. It is this lack of trust that stands as the biggest obstacle to Israeli-Palestinian peace.

I. HISTORY OF JERUSALEM

Though the Israeli-Palestinian conflict is modern, dating from the first half of the twentieth century, the fervor associated with Jerusalem has existed for thousands of years. Jerusalem has long served as a sacred site for three major world religions—Christianity, Islam, and Judaism—and believers from these traditions have grappled for control of the city and its religious landmarks. This longstanding battle over Jerusalem implicates the intersections between religion, culture, and politics, as groups have repeatedly grounded their claims to sovereignty over the city in religious and cultural narratives, in addition to more traditional legal and political arguments.

The Jewish claim to Jerusalem dates back to 1000 BCE, when King David established Jerusalem as the capital of the Israelite nation. David’s son, Solomon, then constructed a temple to solidify Jerusalem’s place as a Holy City. This temple was ultimately burned by the Babylonians and was later replaced by another temple built in 516 BCE after the Israelites returned from exile in Babylon and significantly renovated by King Herod in 19 BCE. The Second Temple was destroyed by the Romans in 70 CE; only a portion of the outer wall remains. This portion is known as the

7. 2 Samuel 5:6–10 (NRSV); Interview with Doron Spielman, Dir. of Overseas Div. of Ir David Found., in Jerusalem, Isr. (Mar. 7, 2011). See generally 1 & 2 Samuel (providing more information about the Jewish religious tradition concerning the establishment of Jerusalem); 1 & 2 Kings (same); Isaiah (same).
8. Sara Japhet, From the King’s Sanctuary to the Chosen City, in JERUSALEM: ITS SANCTITY AND CENTRALITY TO JUDAISM, CHRISTIANITY, AND ISLAM 3, 7 (Lee I. Levine ed., 1999).
9. Id. at 10.
11. Levine, supra note 10, at 60.
Western Wall or Kotel, and it is considered the most sacred place Jews can pray.\(^{12}\)

Christians and Muslims also make religious claims to the city. For Christians, Jerusalem is the city where Jesus died and rose again from the dead.\(^{13}\) The Christian holy sites in Jerusalem include the Church of the Holy Sepulchre, which is thought to be where Jesus was crucified, and the Church of John the Baptist.\(^{14}\) For Muslims, Jerusalem is understood to be the city to which Mohammed traveled during his hallowed Night Journey.\(^{15}\) The sacred spot from which Mohammed is believed to have ascended to heaven is marked by the Dome of the Rock and the al-Aqsa Mosque, Islam’s third holiest site.\(^{16}\)

For centuries, the competing religious claims resulted in violent battles for control over the city and its holy sites, most notably the conflict between the Christian Crusaders and Muslims for control of the city. The Ottoman Empire seized control of Jerusalem in the 1500s and managed to maintain control until 1917, when the British took over.\(^{17}\) British rule was subsequently confirmed by a Mandate from the League of Nations.\(^{18}\) Under its rule, Great Britain agreed to support a “Jewish national home” in Palestine and permitted extensive migration of Jews into the territory.\(^{19}\) Eventually, however, conflicts between the Jewish immigrants and the Palestinian Arab residents caused Great Britain to turn the issue of Palestine over to the United Nations (U.N.).\(^{20}\) In 1947, the U.N. passed a resolution that proposed partition of Mandatory Palestine into a Jewish and an Arab state, with Jerusalem to be a corpus separatum, an international entity governed by the U.N.\(^{21}\)


\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) See Sara 17; see also Teddy Kollek, *Jerusalem*, 55 FOREIGN AFF. 701, 702 (1977) (describing the events the Dome of the Rock and al-Aqsa mosque were built to commemorate).

\(^{16}\) Kafala, *supra* note 12.


\(^{20}\) Id.

The U.N.’s proposal for Jerusalem was never implemented. Shortly after the resolution was passed, a war broke out between the Jewish immigrants and the Palestinian Arabs, who were supported by Egypt, Jordan, Syria, and other Arab countries. At the end of the war, Egypt, Jordan, and Israel divided Mandatory Palestine. The new boundaries left West Jerusalem under Israeli control and much of East Jerusalem, including the holy sites, under Jordanian control and thus off limits to Israelis. The division also led to a demographic shift, as Muslim and Christian Palestinian Arabs fled West Jerusalem to avoid the incoming Israeli army and took refuge in Jordanian-controlled East Jerusalem.24

Nearly two decades later, in 1967, another war erupted between Israel and its Arab neighbors. When Jordan refused Israeli calls to stay out of the conflict and attacked, Israel seized control of East Jerusalem. Israeli politicians described this annexation as the retaking of land that was rightfully theirs and propounded the concept of a “united Jerusalem” to the U.N. and the rest of the international community. In order to solidify its claim, the Israeli government began sponsoring the settlement of Israeli Jews in Arab-dominated East Jerusalem. In addition, despite the international community’s refusal to recognize Israeli sovereignty over East Jerusalem, the Knesset, Israel’s parliament, passed a law declaring that “Jerusalem, complete and united, is the capital of Israel.”

Because Israelis and Palestinians have two very different narratives of the two wars and the subsequent Israeli actions, the legal status of East Jerusalem and its residents is a point of intense contention. Part II examines the legal framework applicable to East Jerusalem and the Israeli and Palestinian residents living there.

23. Id.
24. Quigley, supra note 19, at 771.
25. Lapidoth, supra note 21, at 666. This war is known in Israel and in most Western countries as the Six-Day War and as the June War in most Arab countries.
26. Quigley, supra note 19, at 772.
27. CHERSHIN ET AL., supra note 22, at 7–9.
28. Quigley, supra note 19 at 777.
II. LEGAL FRAMEWORK

This Part explores the legal framework that governs the rights of Israelis and Palestinians who reside in East Jerusalem. Section A summarizes the basic tenets of the law of occupation and the competing arguments regarding the legal status of East Jerusalem. As Section A explains, the Israeli government contends that the law of occupation is inapposite in East Jerusalem, while the international community argues in favor of its application. Section B looks beyond this debate and outlines the legal obligations of any occupying power under the law of occupation. Section C outlines the international human rights law that controls regardless of whether East Jerusalem constitutes occupied territory. Finally, Section D explores the legal status of Palestinians living in East Jerusalem and the distinct sets of rights that accompany a person’s status as a citizen or permanent resident.

A. Legal Status of East Jerusalem

The legal status of East Jerusalem remains one of the key sticking points in the discourse between Israelis and Palestinians. This Section begins with an explanation of the law of occupation, the body of international law that serves as the primary frame of reference in the debate. Next, this Section summarizes the competing arguments with regard to Jerusalem’s legal status, first from the domestic Israeli perspective, and then from the international perspective.

1. Law of Occupation. Within international humanitarian law, there is a smaller subcategory of law that outlines the legality of one sovereign power’s entrance into another power’s territory. The law of occupation serves as a normative baseline for both the Israeli and the Palestinian arguments regarding East Jerusalem’s legal status.

30. To be clear, there is no unanimous domestic Israeli perspective. For the purposes of this Article, “the domestic Israeli perspective” is an amalgamation of several common strands of argument, all of which are grounded in domestic Israeli law.

31. Because the Israeli government insists that the international law of occupation does not apply to Jerusalem, arguments grounded in international law are generally associated with the Palestinian side of the legal debate.

Under the law of occupation, no country can legally acquire sovereignty over another foreign territory by force. Under the Hague Regulations, one of the two key sources that establish the law of occupation, “territory is occupied when it is actually placed under the authority of the hostile army.” “Occupation” need not result from actual fighting. It could be the result of a threat, an armistice agreement, or a peace agreement. Similarly, there need not be a true declaration of war for the law of occupation to apply. Typically, occupation does not end until the occupying power vacates the occupied territory.

2. Israeli View. Israel’s central claim to East Jerusalem is grounded in a “vacuum of sovereignty” theory. Under this theory, Israel argues that East Jerusalem was under a vacuum of sovereignty after Britain abandoned the area in 1948. According to the law of occupation, when such a vacuum is created, it can only be filled by lawful action. Israel contends that Jordan entered East Jerusalem “by an illegal act of aggression” in 1948 and, thus, that Jordan was an unlawful belligerent occupant. Therefore, according to the Israeli perspective, because there was no legal sovereign power in East Jerusalem from 1948 to 1967, Israel lawfully claimed sovereignty during the Six Day War, when it entered East Jerusalem in self-defense. In a related line of reasoning, some scholars contend that Israel simply has a
stronger claim to East Jerusalem relative to Jordan.\textsuperscript{42} Under either theory, however, Israel is considered the legal sovereign of East Jerusalem.

It should be noted that the Israeli government draws a curious distinction between the legal status of Jerusalem and the legal status of the rest of the West Bank and Gaza. Whereas the Israeli government fervently insists that Jerusalem is not occupied territory, it seems to have conceded that the West Bank and Gaza are occupied and, thus, that the law of occupation controls in those areas.\textsuperscript{43} The justification for this distinction is unclear, as Jerusalem, the West Bank, and Gaza were presumably all part of the vacuum of sovereignty that Israel allegedly filled.

3. \textit{International View}. International and Palestinian legal scholars typically offer one of several theories to support a Palestinian claim to East Jerusalem. The first argument is simply that Palestinian Arabs have long been the ethnic majority in East Jerusalem and therefore can claim sovereignty over that area.\textsuperscript{44} The second argument is simply that Israel’s claim to East Jerusalem is illegal. According to this theory, Jordan lawfully filled the vacuum of sovereignty Britain left behind following the British Mandate\textsuperscript{45} and, therefore, Jordan is the rightful sovereign power.\textsuperscript{46} Moreover, because Israel entered East Jerusalem by force in 1967, it has no right to remain and is a belligerent occupant.\textsuperscript{47} The final argument aligns with the position of the United Nations: a corpus separatum has been in

\textsuperscript{42} See Hirsch, \textit{supra} note 40, at 300; see also Lapidoth, \textit{supra} note 21, at 674 ("Under a slightly different interpretation \textendash; of the vacuum of sovereignty,\textendash; Israel has the strongest relative title to the area in the absence of a lawful 'sovereign reversioner' due to Jordan’s lack of valid sovereignty.").

\textsuperscript{43} See Yuval Shany, \textit{In Defence of Functional Interpretation of Article 12(3) of the Rome Statute}, 8 J INT’L CRIM. JUST. 329, 338 (2010) (noting that the Palestinian territories, with the exception of East Jerusalem, are not the object of an Israeli sovereignty claim).

\textsuperscript{44} Lapidoth, \textit{supra} note 21, at 673; Quigley, \textit{supra} note 24, at 768. This argument is grounded in the legal principle of self-determination, which is often contrasted with the law of occupation. The right of self-determination encompasses two concepts: (1) internal self-determination\textemdash;the right of a population to choose its own government and to participate in the political process\textemdash;and (2) external self-determination\textemdash;the right of a people to determine its own international status. The Palestinian people claim that they have a right to both internal and external self-determination in East Jerusalem, and the international community has repeatedly affirmed this contention. Nevertheless, in the realm of international law, the primary debate centers around the law of occupation. Thus, a more extended discussion of the principle of self-determination and its implications for Palestinians lies outside the bounds of this paper.

\textsuperscript{45} Lapidoth, \textit{supra} note 21, at 673.

\textsuperscript{46} See id. ("A third opinion recognized Jordanian sovereignty over East Jerusalem, derived from the exercise of the right of self-determination by the inhabitants . . . .").

\textsuperscript{47} See Shiryaev, \textit{supra} note 33.
effect since 1947, and Jerusalem thus should fall under the control of the United Nations Trusteeship Council.\textsuperscript{48}

In the international community, the Israeli presence in East Jerusalem has been strongly condemned.\textsuperscript{49} With resounding unanimity, international tribunals and governing bodies have determined that Israel is an illegal occupant and thus that the law of occupation applies.\textsuperscript{50} The United Nations continues to pass resolutions rejecting Israeli sovereignty,\textsuperscript{51} and the International Court of Justice (ICJ) has declared that the Israeli presence in East Jerusalem is a breach of international law.\textsuperscript{52}

B. Legal Obligations Under the Law of Occupation

The law of occupation is drawn primarily from two sources:\textsuperscript{53} the Hague Regulations and the Fourth Geneva Convention.\textsuperscript{54} These two documents establish legal obligations to which an occupying power must adhere. According to these sources, an occupying power is responsible for

\begin{itemize}
  \item\textsuperscript{48} Quigley, supra note 19, at 769–70.
  \item\textsuperscript{49} See id. at 777 (“States recognizing Israel have not recognized Israeli sovereignty over either the western or eastern part of Jerusalem, despite nearly half a century of Israeli control . . . .”). Countries around the world have refused to locate their embassies in Jerusalem and have instead placed them in Tel Aviv. Id. at 777–78.
  \item\textsuperscript{50} See Yoram Dinstein, The International Law of Belligerent Occupation 19 (2009) (“[T]he purported unilateral annexation of East Jerusalem . . . is bereft of any legal effect. . . . [I]t is abundantly clear that the unilateral annexation of East Jerusalem by Israel is not valid under international law.”); Darcy & Reynolds, supra note 32, at 223 (“From the perspective of international humanitarian law, Israel’s presence in the West Bank (including East Jerusalem) and Gaza Strip following the 1967 Six-Day War was seen internationally as triggering the application of the rules and principles applicable to situations of belligerent occupation and this view has been reiterated in the four decades since by, for example, the United Nations Security Council and General Assembly, the International Committee of the Red Cross, the High Contracting Parties to the 1949 Geneva Conventions and the ICJ.”); Quigley, supra note 19, at 777 (“States recognizing Israel have not recognized Israeli sovereignty over either the western or eastern sector of Jerusalem, despite nearly half a century of Israeli control in West Jerusalem, and nearly thirty years in East Jerusalem.”).
  \item\textsuperscript{51} Darcy & Reynolds, supra note 32, at 223; Lapidot, supra note 21, at 674.
  \item\textsuperscript{52} See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (Al-Khasawneh, J., separate opinion) (“[F]ew propositions in international law can be said to command an almost universal acceptance and to rest on a long, constant and solid opinio juris as the proposition that Israel’s presence in the Palestinian territory of the West Bank including East Jerusalem and Gaza is one of military occupation governed by the applicable international legal regime of military occupation.”).
\end{itemize}
the management of public order and civil life in occupied territory. In essence, an occupying power serves as a trustee with temporary managerial powers, and is expected to preserve the status quo in the occupied territory to the greatest extent possible. In addition to these broad requirements, the Hague Regulations and the Fourth Geneva Convention also establish a canon of more specific legal obligations. This Section outlines these obligations and summarizes their relevance to Israel.

1. Hague Regulations. The Hague Regulations were drafted during two conferences in 1899 and 1907 respectively. They are intended to “protect the interests of a temporarily ousted sovereign in the context of a short-term occupation.” For example, under Article 43 of the Hague Regulations, an “occupant must respect, unless absolutely prevented, the laws in force in the occupied country.” Under Article 46, an occupying power cannot confiscate private property in the occupied state. And under Articles 46 and 50, the occupying power must protect the civilian population from abuse.

Although Israel is not a party to the Hague Regulations, the provisions are generally regarded as customary international law, including by the Israeli Supreme Court. Thus, they are binding on all States, including Israel.

55. BENVENISTI, supra note 33, at 3; see also Fourth Geneva Convention, supra note 54, at art. 55 (“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population . . . .”).

56. BENVENISTI, supra note 33, at 6; see also Hague Regulations, supra note 34, at art. 43 (“The authority of the legitimate power having in fact passed into the hands of the occupant . . . .”).


58. Id. at 53.


60. Hague Regulations, supra note 34, at art. 43.

61. Id. at art. 46.

62. Id. at art. 46, 50.

63. Phillips, supra note 59; see also DINSTEIN, supra note 50, at 5 (“[T]he Hague Regulations have gradually acquired a declaratory status as a reflection of customary international law.”). The International Military Tribunal in Nuremberg has also declared that the Hague Regulations reflect customary international law. BENVENISTI, supra note 33, at vii.

64. DINSTEIN, supra note 50, at 5. States that have established themselves as persistent objectors are not considered to be bound by customary international law. Israel, however, has made no attempt to position itself as a persistent objector to the Hague Regulations.
2. Fourth Geneva Convention. Along with the Hague Regulations, the Fourth Geneva Convention is one of the “most important international instruments” outlining the law of occupation.65 Adopted on August 12, 1949,66 the Fourth Geneva Convention sprang from an effort to redefine the law of occupation in reaction to the atrocities committed during World War II.67 The “first multinational treaty devoted solely to the protection of civilians in wartime,”68 the Convention aims to “ensure that claims of military exigency do not result in the violation of basic political and human rights of the civilians under military occupation.”69 Because all nations have ratified the Geneva Conventions, they are widely accepted as embodying customary international law.70

Like the Hague Regulations, the Fourth Geneva Convention outlines the obligations an occupying power owes the citizens of an occupied territory. According to Article 27, the occupying power must respect the dignity of all “protected persons”; the occupying power must treat them humanely and protect them against “acts of violence or threats thereof.”71 Article 33 forbids “reprisals and collective penalties against protected persons and their property,”72 and Article 53 prohibits the occupying power from destroying private persons’ real or personal property.73 Finally, and perhaps most importantly for the purposes of this paper, Article 49 bars the

65. BENVENISTI, supra note 33, at 4.
66. GENEVA CONVENTIONS 18 (Gary D. Solis ed., 2010).
67. BENVENISTI, supra note 33, at 98; see also GENEVA CONVENTIONS, supra note 66, at 19 (“[The Fourth Geneva Convention] was almost entirely a reaction to Germany’s policies during the occupation of Europe in World War II and, particularly, the Holocaust.”). Specifically, the Fourth Geneva Convention was an effort to revise the Hague Regulations, in light of the fact that wars were no longer considered “discrete event[s] fought by soldiers,” but were instead far-ranging events that “implica[ed] civilian populations.” Lancaster, supra note 57, at 55; see also Samson, supra note 53, at 924 (“In addressing the changes on the battlefield, the Fourth Geneva Convention was written to supplement the Hague Regulations by filling in the areas in which the Hague Regulations fell short with respect to civilians.”).
68. GENEVA CONVENTIONS, supra note 66, at 19.
70. GENEVA CONVENTIONS, supra note 66, at 17. Israel ratified all four Geneva Conventions in 1951 and is fully bound by them. DINSTEIN, supra note 50, at 20.
71. Fourth Geneva Convention, supra note 54, at art. 27, para. 1.
72. Id. at art. 33.
73. Id. at art. 53.
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occupying power from transferring its own civilian population into the occupied territory. 74

According to Israel, the Fourth Geneva Convention is not applicable to East Jerusalem because it is not an occupied territory. 75 This position, however, has met with harsh criticism in the international community. 76 The U.N. has passed several resolutions reaffirming that the Geneva Convention is applicable to “all the Arab territories occupied by Israel since 1967, including Jerusalem.” 77 Similarly, the ICJ has concluded that the Fourth Geneva Convention applies to East Jerusalem, a development that some legal scholars believe was the “last nail in the coffin” that effectively “ended the debate over all.” 78 Israel has denounced both the United Nations resolutions and the ICJ opinion. 79

C. Legal Obligations Under Human Rights Treaties

On top of its potential legal obligations under the Hague Regulations and the Fourth Geneva Convention, Israel also remains subject to several international human rights obligations, regardless of whether or not the law of occupation applies. In particular, Israel is bound by its commitments under all of the human rights treaties it has ratified, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights

74. Id. at art. 49.

75. See Shiryaev, supra note 33 (“Israel has always stated that it cannot be considered an occupying power within the meaning of the [Fourth Geneva Convention] because ‘Arab States which controlled the occupied territories prior to 1967 were not legitimate Sovereigns in those areas.’” (quoting ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 235 (1995)).

76. See supra notes 49–52 at accompanying text.

77. Shiryaev, supra note 33.

78. Shiryaev, supra note 33.

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(ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).\(^80\)

Israel ratified the ICERD in 1979 and the ICCPR and ICESCR in 1991.\(^81\) By doing so, it obligated itself to protect all of the rights included in the treaties, including several that are implicated by the housing issues in East Jerusalem that this Article explores. These include a possible Palestinian right of return, found in Article 12 of the ICCPR and Article 5 of the ICERD; the right to adequate housing, as well as privacy in the home, required by Article 11 of the ICESCR and Article 17 of the ICCPR; the right to freedom of movement under Article 12 of the ICCPR; and the right to equality and non-discrimination under Article 2 of the ICCPR and ICESCR, and Article 5 of the ICERD. Israel may debate whether the law of occupation applies to East Jerusalem, but it is nevertheless unequivocally responsible for satisfying these international human rights obligations.\(^83\)

D. Legal Status of the Palestinian Population in East Jerusalem

Domestic law regulating citizenship and residency is also a critical part of the legal framework, as it determines the rights of the Palestinian population living in East Jerusalem. This Section summarizes the relevant

\(^80\) Israel has also ratified several other international human rights conventions, such as the Convention on the Rights of the Child, but these treaties are less relevant to the topic of housing in East Jerusalem.

\(^81\) Israel has not entered any reservations to any of the human rights treaties that are relevant to the subject of this report.

\(^82\) The Right of Return is traditionally defined as the right of refugees of armed conflict to return to their home or, if they choose not to do so, to be paid compensation. See G.A. Res. 194 (III), UN Doc A/RES/194 (III) (Dec. 11, 1948), available at http://unispal.un.org/UNISPAL.NSF/0/C758572B78D1C D00852568CF0077E51A. Israel contests that such a right of return exists, particularly to Israel. See Do Palestinian Refugees Have a Right to Return, ISRAEL MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/mfa/peace%20process/guide%20to%20the%20peace%20process/do%20palestinian%20refugees%20have%20a%20right%20to%20return%20to (last visited May 23, 2011) (arguing that “neither under the international conventions, nor under the major UN resolutions, nor under the relevant agreements between the parties, do the Palestinian refugees have a right to return to Israel”).

\(^83\) While these rights create mandatory international obligations binding upon the state, it is important to note that Israel has yet to pass any domestic legislation incorporating the treaties. Under Israeli Supreme Court doctrine, domestic courts may “consider and interpret the provisions of international human rights covenants . . . , but the concrete disposition of rights in any particular case is based on principles contained in Israel’s internal law.” Initial Report of States Parties Due in 1993: Israel, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/81/Add.13 (1998); see also C.A. 25/55, Custodian of Absentee Property v. Samra, 10 PD 1825 [1956] (Isr.); HCJ 606/78, Ayub v. Minister of Defence, 33(2) PD 113 [1978] (Isr.). As a formal matter, then, Israel is undeniably subject to international human rights law, but, as a practical matter, its citizens and residents may struggle to bring their claims in domestic courts.
domestic Israeli law and explains some of the challenges it poses for Palestinians.

After Israel took control of East Jerusalem at the end of the 1967 war, the State granted permanent residency status to Palestinians present in the city at that time.84 “Permanent residents” may live and work in Israel without special permits; they are entitled to social welfare benefits and health insurance; and they may vote in municipal elections.85 Unlike citizenship, however, which is a lifelong status, permanent residency expires every seven years.86 Palestinian residents must therefore regularly prove that their “center of life” is Jerusalem by “furnishing documents including municipal tax receipts, electricity, gas and telephone bills, school and work certificates.”87 Thus, Palestinians who travel, work outside the city, or engage in any other activity that shifts their “center of life” outside Jerusalem’s municipal borders risk losing their residency.

In addition to its temporality, permanent residency comes with several other drawbacks. First, Palestinian residents cannot vote in national elections or be elected to the Knesset.88 Second, because permanent residents do not have Israeli passports, they cannot leave Israel unless they obtain a Jordanian passport or a transit visa.89 Finally, due to recent legislation passed by the Knesset, permanent residents have an exceedingly difficult time transferring their residency rights to their children and spouses.90

89. Id.
90. Legal Status of East Jerusalem and Its Residents, supra note 85; The Legal Status of the Palestinian Residents of East Jerusalem, supra note 88.
Although permanent residents may become citizens if they meet certain statutory requirements, most Palestinians have chosen not to do so for political reasons. As a result, the vast majority of Palestinians remain permanent residents, living in constant fear that their already restricted rights will be revoked.

III. HOUSING

This Part analyzes housing in East Jerusalem. Section A summarizes the acquisition and administration of land by the State of Israel. Section B examines the highly contentious issue of Jewish “settlements” in East Jerusalem. Section C describes the zoning scheme and building permit system that regulate the construction and expansion of housing in Jerusalem. It also details the process for demolishing structures, a controversial practice that may violate international law.

A. State Acquisition of Land

The State of Israel owns ninety-three percent of the total land within its borders. State ownership of such a large quantity of land has had a significant effect on the availability of housing in East Jerusalem, particularly for Palestinian residents. To understand the consequences of this public ownership and its effect on housing, it is important to first understand which governmental organizations own the land and what laws regulate its administration.

There are three agencies that hold the public land: the Israel Land Administration (ILA), the Jewish National Fund (JNF), and the Development Authority. The ILA and the Development Authority are

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91. These conditions include swearing allegiance to the State of Israel and showing some knowledge of the Hebrew language. *Legal Status of East Jerusalem and Its Residents*, supra note 85.

92. *Id.*


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governmental bodies; the JNF is a non-profit organization. Israeli legislation allows each of these agencies to acquire land and administer it for the State of Israel. While all three organizations retain legal title to the land, the ILA is responsible for the administration of all 4,820,500 acres (19,508,000 dunums) of land in the public domain.

1. Israel Land Administration and the Jewish National Fund. Created in 1960, the ILA administers Israel’s public land. Ownership of the land may not be transferred; therefore, the ILA typically grants leasing rights for forty-nine or ninety-eight years. The stated policy objectives of the ILA include preserving land for future uses, making sure that land use complies with the law, and designating land for public use. The Israel Land Council controls the policies of the ILA and determines how to administer the land under its control.

Three legislative acts are the cornerstone of the ILA. The 1960 Basic Law—Israel Lands prohibits the transfer of ownership of public land from the government by any means. The 1960 Israel Lands Law clarifies which categories of land are available for transfer, permitting the sale of public land to absentees in exchange for the land that was expropriated as long as agricultural land is not exchanged for urban land. Finally, the 1960 Israel Land Administration Law established the ILA.

The non-profit JNF is another major holder of Israeli public land, owning approximately thirteen percent of the total. The JNF predates the establishment of the State of Israel; it was founded in 1901 by the World

95. YIFAT HOLZMAN-GAZIT, LAND EXPROPRIATION IN ISRAEL 26 (2007).
96. A dunam is a land area enclosing 1,000 square meters. Pierre Tristam, Dunam or Dunum, About.com, http://middleeast.about.com/od/glossary/g/dunum-dunam.htm (last visited May 23, 2011).
97. ISRAEL LAND ADMINISTRATION, supra note 94.
98. Id. These numbers correspond to the Jewish idea of the year of Jubilee.
99. Id.
100. Id.
102. Israel Lands Law, 5270-1960 (1960) (Isr.). See also CENTRE ON HOUSING RIGHTS AND EVICTIONS & BADIL RESOURCE CENTER FOR PALESTINIAN RESIDENCY & REFUGEE RIGHTS, RULING PALESTINE: THE LEGALLY SANCTIONED JEWISH-ISRAELI SEIZURE OF LAND AND HOUSING IN PALESTINE 47 (2005) (stating that the Israel Lands Law made it clear that Palestinian citizens would not be able to access public land) [hereinafter CORRE].
103. HOLZMAN-GAZIT, supra note 95 at 25–6.
104. Israel Lands Administration Law, 5720-1960 (1960) (Isr.).
Zionist Organization (WZO) to fund the purchase of land in Ottoman Palestine. An agreement between the State of Israel and the WZO provides that while the JNF retained ownership over the land, the ILA would administer the majority of the land, giving it control over all public land.

In 2009, Israel amended the ILA Law, enacting the Land Reform Law. This amendment allowed for the privatization of 800,000 dunums of public land. To accomplish this privatization, the State of Israel and the JNF signed a land swap agreement under which JNF land would be transferred to the State for privatization, and the JNF would receive land in the Negev and Galilee in return. In addition, the law allowed for fifty percent of the membership of the Israel Land Council to be JNF members. Despite Knesset approval, both Israelis and Palestinians found the amendment flawed.

Another major land law is the Land Acquisition Ordinance, originally passed by the British Mandatory authorities and kept in place by the State of Israel. This law allows the Israeli government to expropriate land, often without compensation. This law requires that the land be used for public purposes, but the Finance Minister has broad discretion to determine what constitutes a “public purpose,” and the construction of new neighborhoods has been determined to meet this test. In Jerusalem, this law is frequently used to expropriate land from Palestinians, which is then used to build Israeli Jewish neighborhoods.

107. Id.
109. Id.
110. Lily Hoffman Simon, Israel’s Public Debate over Privatized Land, IN THE MOMENT, Jan. 21, 2011, http://momentmagazine.wordpress.com/2011/01/21/israels-public-debate-over-privatized-land. Palestinians were upset by the number of JNF members on the Israel Land Council, and the fact that most of the privatized land would be going to Israelis who held the leases to that land. On the other hand, some Israelis were concerned that the new law might lead to non-Israelis or non-Jews owning the land.
111. The Land Acquisition Ordinance was enacted during the British mandate and the government of Israel opted to keep it on the books after it declared independence. It does not provide a scheme for compensation. Interestingly, it also does not provide a right to a hearing. See generally, HOLZMAN-GAZIT, supra note 95 (arguing that the AO is discriminatory towards Palestinians).
112. Id.
Recently, the Land Acquisition Ordinance was amended to confirm the state’s ownership of land expropriated under this law. The amendment allows the government to expropriate land for public use, as long as the government utilizes the land for a public purpose within seventeen years. The amendment also expands the definition of “public purposes” and allows the Finance Minister to declare other, new purposes. Finally, the amendment restricts the ability of the original landowner to challenge the expropriation. If the land has been in the possession of the state for more than twenty-five years, or if the land passed into the hands of a third party, the original landowner loses the right to contest the expropriation.

2. Development Authority and Absentee Property. Public land that is not owned by the ILA or the JNF is owned by the Development Authority, a government agency tasked with acquiring and preparing land for new Jewish immigrants to Israel. A significant amount of Development Authority land was expropriated as “absentee” property following the founding of the State of Israel in 1948, when many Palestinians fled their homes during the conflict for parts of Palestine controlled by Arab armies or for neighboring Arab states.

The 1950 Absentees’ Property Law was enacted to regulate this land. This measure allows the Custodian of Absentee Property, under the Minister of Finance, to manage the property of “absentees” and expel any occupants. The Custodian is then granted broad power over the vested land. The legislation defines an absentee as any person who, since November 29, 1947, was a citizen of any enemy nation, or who was in

115. *Id.*
116. *Id.*
117. The Absentees’ Property Law was the culmination of several emergency regulations passed during the first few years of Israel’s statehood. One of these regulations was an earlier form of the Absentee Property Law (Emergency Regulations (Absentees’ Property) Law, 5709-1948 (1948) (Isr.) and another important regulation was the Emergency Land Requisition (Regulation) Law, 5710-1949 (1949) (Isr.). The Land Requisition Regulation allowed for land expropriation as required for national security and to absorb immigrants, among other reasons.
118. When presenting the Absentees’ Property Law to the Knesset in 1949, the Finance Minister stated that the drafters of the law had drawn from the British Trading with the Enemy Act of 1939 and the Rehabilitation Authority created in Pakistan. HOLZMAN-GAZIT, supra note 95, at 110–11.
any enemy nation or a part of Palestine outside Israel. The definition includes anyone who was a resident of Palestine, but left his home for a place outside of Palestine or a place within Palestine that was held by enemy forces. Under this definition, a person who is currently residing within Israel’s border can be an absentee. This definition would include residents of East Jerusalem, who did not reside within Israel when the law was enacted, but who subsequently came within Israel’s borders following the Six Day War. Such a person is considered to be a “present absentee.” Significantly, Jews were understood not to come under the definition of absentee at all.

During the years following the passage of the Absentees’ Property Law, the Knesset amended the law several times. Many of these amendments dealt with minor issues over rental arrangements and tenant rights. One of the most important amendments was the Absentees’ Property (Compensation) Law, which modified the Absentees’ Property Law to make anyone who is an Israeli resident or anyone who becomes an Israeli resident eligible for compensation for land expropriated under this law. Among those eligible for compensation are the owner (or heirs) of the property, a tenant of urban property, the lessee of the property, and the holder of an easement over the property. The compensation is based on the estimated value of the property on November 29, 1947. For several reasons, few Palestinians have tried to claim compensation under this law. First, many object to any solution that only helps a small number of refugees and instead demand a broader resolution. Second, the compensatory value of the property is extremely small in comparison to the present value of the property. Finally, accepting compensation from the

120. Id. at § 1(b)(1)(ii).
121. Id. at § 1(b)(1)(iii). A narrow exception to the definition of absentee does exist. If a person can prove that he left his residence because of either fear that Israel’s enemies might harm him, or some reason other than fear of Israeli military operations, then that person will not be classified as an absentee. Id. § 27(a). Few present absentees were able to prove these facts, partially because the burden of proof is on the absentee. Israel assumes that any person who left his residence during the period of conflict left because of fear of Israeli military operations. Out of the thousands of Palestinians who lost their property, only 209 managed to obtain certificates that released their land back to them. HOLZMAN-GAZIT, supra note 95, at 115.
122. COHRE, supra note 102, at 41.
123. YITZHAK REITER & LIOR LEHRS, THE SHEIKH JARRAH AFFAIR: THE STRATEGIC IMPLICATIONS OF JEWISH SETTLEMENT IN AN ARAB NEIGHBORHOOD IN EAST JERUSALEM 33 (The Jerusalem Institute for Israel Studies 2010).
Israeli government is seen as legitimizing the government’s rule, an action that Palestinians broadly oppose.\textsuperscript{124}

Almost immediately after the passage of the Absentees’ Property Law, the Knesset enacted the Development Authority (Transfer of Property) Law. This law created the Development Authority. It also forbids the sale of any Development Authority-owned land to any entity except the State or an institution approved by the State.\textsuperscript{125} To simplify transactions, the Custodian of Absentee Property and the Development Authority entered into a 1953 agreement transferring all of the land held by the Custodian to the Development Authority. The Development Authority was permitted to hold the land or to transfer it to the Housing Ministry for construction of housing for new Jewish immigrants.\textsuperscript{126}

Approximately 4.2 to 5.8 million dunums were thus appropriated under the Absentees’ Property Law for housing construction.\textsuperscript{127} In the first five years of Israel’s statehood, 350 of the 370 new Jewish housing developments were built on land that was confiscated under this law.\textsuperscript{128} Between 1948 and 1964, most of the 400 new Jewish housing developments and thirty-five towns were built on appropriated land. The use of this law has slowed significantly, however, since the 1950s.\textsuperscript{129}

After 1967, the Israeli government decided, as a matter of policy, that it would not apply the Absentees’ Property Law to East Jerusalem. As a result, the Custodian was not allowed to take possession of East Jerusalem residents’ properties in East Jerusalem.\textsuperscript{130} In 1969, Israel’s attorney general extended the non-application of the law to residents of the West Bank who owned properties in East Jerusalem. In 1977, however, this policy changed. Instead of the Custodian automatically allowing the West Bank’s residents to keep their property, the residents now had to go to the Custodian and ask for the right to use their properties.\textsuperscript{131}

When Israel decided to build the separation barrier, the issue of the application of the Absentee’s Property Law resurfaced. Privately, the

\begin{footnotes}
\textsuperscript{124} Id.
\textsuperscript{125} Development Authority (Transfer of Property) Law, 5710-1950 (1950) (Isr.).
\textsuperscript{126} I\textsuperscript{R}A\textsuperscript{MIM}, sup\textsuperscript{ra} note 100, at 2.
\textsuperscript{127} COHRE, sup\textsuperscript{ra} note 102, at 41.
\textsuperscript{128} HOLZMAN-GAZIT, sup\textsuperscript{ra} note 95 at 140.
\textsuperscript{129} Id.
\textsuperscript{130} However, many of these residents had lost land in West Jerusalem or in Israel proper after 1948.
\textsuperscript{131} COHRE, sup\textsuperscript{ra} note 102, at 41.
\end{footnotes}
government decided that it would apply the law to the East Jerusalem properties of West Bank residents. Once the decision was made public, however, the Ministry of Justice determined that the use of this law was inappropriate. In a subsequent judicial pronouncement, the Israeli Supreme Court determined that the Custodian could not take possession of these properties. The Court reasoned that because Israel controls the West Bank, Israel cannot consider its residents absentees or residents of a hostile state.\footnote{R. \textit{EITETEIR & LEHRS}, \textit{supra} note 123, at 36.}

3. Discrimination in Land Acquisition. Palestinians claim that the Israeli land acquisition regime discriminates against them, making it impossible for them to purchase or lease state-owned land in East Jerusalem. They argue that ILA regulations make the lease of land contingent upon Israeli citizenship and thus discriminate against them as permanent residents. Palestinians gain support for this claim from comments and recommendations issued by human rights treaty bodies. The U.N. Committee on the Elimination of Racial Discrimination (CERD) has expressed concern that “such preference is accompanied by other privileges, in particular regarding access to land and benefits.”\footnote{\textit{UN Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel}, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007), \textit{available at} http://unispal.un.org/UNISPAL.NSF/0/041AB84D2F05080C85257302004A9963 \textit{[hereinafter CERD, Concluding Observations 2007]}.} The U.N. Committee on Economic, Cultural and Social Rights (CECSR) has also expressed concern about “the status of ‘Jewish nationality’, which is a ground for exclusive preferential treatment for persons of Jewish nationality under the Israeli Law of Return, granting them automatic citizenship and financial government benefits, thus resulting in practice in discriminatory treatment against non-Jews, in particular Palestinian refugees.”\footnote{\textit{UN Committee on Economic, Social, and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights : Israel}, U.N. Doc. E/C.12/ISR/Add.90 (May 23, 2003), \textit{available at} http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.90.En?Opendocument.} The Committees have recommended that Israel take measures to ensure that State land is allocated without discrimination, direct or indirect, based on race, color, descent, or national or ethnic origin.

In response, Israel has stated that the only significant difference regarding the enjoyment of human rights between Jewish nationals and...
other citizens exists with regard to determining the right to immigrate to Israel. Under the Law of Return, such preference is made for the purpose of developing the national identity of the State and because of historical persecution of the Jewish people.136

4. Right of Repossession. Palestinians often claim a right under international law to return to their historic properties in Israel proper. In order to distinguish this broader right of return from the claim of Palestinian Jerusalemites to return to their property—which may be in West Jerusalem or East Jerusalem—this Article uses the term right of repossession for the latter claim. The broader Palestinian claim to a right of return is highly controversial. To most Israelis, the recognition of such a right would amount to the end of the Israeli state. Many Palestinians see the right of return as nonnegotiable, at least publicly, and believe international law supports such a right. The United States’ position is that the right of return is a final status issue to be resolved during peace negotiations.

Many Palestinians interviewed during our trip argued that international law supported a Palestinian right of return and thus a right to repossession their properties in Jerusalem. They traced this right back to U.N. General Assembly Resolutions 194 and 3236. G.A. Resolution 194 provides that Palestinian refugees “wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property . . . .”137 G.A. Resolution 3236, passed almost twenty-five years later, reaffirmed “the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return.”138 The Palestinians have also argued that support for a right to return is found in the ICCPR139 and the ICERD.140

139. Article 12, paragraph 4 of the ICCPR states that “No one shall be arbitrarily deprived of the right to enter his own country.” International Covenant on Civil and Political Rights, Article 12(4). The Human Rights Committee, the ICCPR’s treaty-monitoring body, has stated that the right to enter one’s own country includes the right of return, which the Committee described as being “of the utmost importance for refugees seeking voluntary repatriation.” It also implies prohibition of enforced population transfers or mass expulsions to other countries.” Human Rights Committee, General
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Israel, for its part, has argued that a Palestinian right of return or repossession is not required as a matter of international law and is impractical to implement on a large-scale basis. Israel has argued that the General Assembly resolutions are non-binding political statements, not international legal requirements. Similarly, Israel has argued that a right of return is not required by either the ICCPR or ICERD. Rather, the corresponding treaty bodies have interpreted provisions contained therein broadly so as to include such a right, and these interpretations, housed in general comments, are also non-binding on states parties. Israel maintains that the issue of refugees is something to be settled in future negotiations.141

The land acquisition laws significantly impact housing patterns and construction in East Jerusalem. The next Section examines what Israel has done with much of the land it has acquired, namely to build residential areas on it, a major point of contention between the parties.


140. Article 5(d)(ii) of the ICERD references the “right to leave any country, including one’s own, and to return to one’s country.” International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii), Mar. 7, 1966, 660 U.N.T.S. 195. The Committee on the Elimination of Racial Discrimination in interpreting this provision has held that “refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety.” U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 22: Article 5 and Refugees and Displaced Persons, U.N. Doc. A/51/18 (Aug. 24, 1996). Additionally, “such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them.” Id. The Committee has further expressed concern about “the denial of the right of many Palestinians to return and repossess their land in Israel.” UN Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007), available at http://unispal.un.org/UNISPAL.NSF/0/041AB84D2F05080C85257302004A9963.

B. Settlements in East Jerusalem

The establishment of “settlements”\textsuperscript{142} or Jewish residential areas in East Jerusalem has significantly affected the housing market, the availability of land, and the demographic composition of the city. The settlements also play an important role in any future negotiations. This Section will begin by describing the various types of Jewish residential areas in East Jerusalem and then discuss how property is obtained, noting the differences in opportunities for Israeli citizens and Palestinian residents. It then describes the role and policies of the Israeli authorities in establishing and supporting Israeli residences and concludes with a discussion of the relevance of international law.

As an initial matter, defining the term “settlement” in regards to East Jerusalem is difficult because of the legal and political implications of the term. In defining the term, it is helpful to distinguish between the motivations of residents, in addition to classifying areas based on their size and the level of government involvement. Two general categories emerge based on these two distinctions, the first being economic neighborhoods, and the second ideological enclaves.

The first category, economic neighborhoods, refers to large areas of Jewish settlement that have resulted from direct and open governmental initiatives. We call these areas economic neighborhoods because the majority of the residents choose to live there because of economic and quality of life factors. The Israeli government’s decision to build these neighborhoods, on the other hand, is driven by the desire to provide adequate housing in Jerusalem, to solidify control of East Jerusalem by ensuring a Jewish presence, and to secure Jerusalem from attack by placing Jewish populations on strategic hilltops. By the end of 2001, the government had sponsored the construction of 46,978 housing units for Israelis in these neighborhoods.\textsuperscript{143} More recently, from 1999–2008, 5,000

\textsuperscript{142} We recognize deciding what to call these areas implies a position on their legality and political acceptability. For Palestinians and much of the international community, they are settlements, built in violation of international law because they are on the east side of the 1967 border. For Israel, they are neighborhoods with approximately 200,000 residents that form an integral part of Jerusalem. Whether Israel must return fully to the 1967 borders or may keep these areas in a final peace settlement is a matter for negotiations between the parties. See infra Part V. We use the terms “settlements” and “neighborhoods” in this Article without taking a position on the future of these areas.

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publicly sponsored dwellings were sold in Jerusalem.\textsuperscript{144} Applying the term “settlements” to many of these neighborhoods is problematic because most of the Israeli public does not consider the established Jewish neighborhoods built in East Jerusalem after 1967, including Gilo, French Hill, and Pisgat Ze’ev, to be settlements.\textsuperscript{145} Furthermore, it recently became possible for Palestinian residents to legally obtain property rights in many of these areas.\textsuperscript{146}

Although it is difficult to determine the specific motivations of Jewish residents in economic neighborhoods, one can discern that residents of such areas are motivated more by economics than ideology. Economic incentives attract Israeli citizens to economic neighborhoods, sponsored by both the municipality and national government. The municipality provides a ninety percent reduction in the principal municipal tax, the \textit{arnona}, for one year to new immigrants.\textsuperscript{147} The national government has provided over 70,000 Jewish-Israeli families with subsidized housing since 1967.\textsuperscript{148}

The second category of Jewish-Israeli residential areas consists of ideological enclaves, which are often organized by conservative Jewish organizations with limited support of the Israeli government. This narrow definition describes Jewish settlement in the heart of Palestinian neighborhoods in East Jerusalem and the Old City.\textsuperscript{149} The primary motivation of the residents in these enclaves is ideological.\textsuperscript{150} For example, the Elad organization is a conservative Jewish NGO that administers a settlement enclave in the neighborhood of Silwan with the goal of

\begin{itemize}
  \item \textsuperscript{147} Jerusalem Municipality, Discounts, available at http://www.jerusalem.muni.il/jer_main/defaultnew.asp?lng=2 (last visited Apr. 17, 2011). It has also been suggested that an exemption was provided for a period of up to five years, and then a discounted rate was offered. Ardi Imseis, \textit{Facts on the Ground: An Examination of Israeli Municipal Policy in East Jerusalem}, 15 AM. U. INT’L L.REV. 1039, 1054 (2000).
  \item \textsuperscript{148} Imseis, supra note 147, at 1054-1055.
  \item \textsuperscript{149} Character of Settlements, supra note 145.
  \item \textsuperscript{150} OCHA OPr, supra note \textbf{Error! Bookmark not defined.}, at 53.
\end{itemize}
achieving a “foothold in East Jerusalem and [creating] an irreversible situation in the holy basin around the Old City.”

In East Jerusalem and its surrounding area, there are twelve economic neighborhoods. Ideological enclaves are in the Muslim Quarter of the Old City, in Silwan (Ir David), in Ras al-‘Amud (Ma’ale Zeitim and Ma’ale David), in a-Tur (Beit Orot), in Abu Dis (Kidmat Zion), and in Sheikh Jarrah (Nahalat Shimon). In 2008, there were 195,500 Jewish residents in East Jerusalem; of those, it is estimated that about 2,000 live in ideological enclaves.

1. Obtaining Land and Property. Economic neighborhoods in East Jerusalem are located on land owned by the ILA, expropriated from mostly private Palestinian owners after 1967. Established as housing exclusively for Israeli citizens, Palestinian residents were unable to legally obtain property rights in houses or apartments in economic neighborhoods until 2008.

Prior to that date, the terms of the ILA standard lease did not permit owners of properties to transfer land rights to permanent residents, meaning that Palestinian East Jerusalemites could not live in them. Under articles


154. MAYA CHOSEN & MICHAL KORACHI, JERUSALEM INSTITUTE FOR ISRAEL STUDIES, JERUSALEM: FACTS AND TRENDS, 2009/2010 10 (2010), available at http://jiis.org/?cmd=publication.7. Population figures at the end of 2008 for selected economic neighborhoods were: 42,200 in Ramot Alon; 42,100 in Pisgat Zeev; 26,900 in Gilo; 20,400 in Neve Yaacov; 15,100 in Ramat Shlomo (Rekhes Shuafat); and 12,200 in East Talpiot. Id.

155. OCHA OPT, supra note Error! Bookmark not defined., at 53.


157. This includes the land in West Jerusalem expropriated by the Absentees’ Property Law in 1948 and areas expropriated in East Jerusalem in 1967; about 50% of Jerusalem’s land is administered by the ILA. Jerusalem: An Open City?, BIMKOM / IR AMIM (June 2010), http://www.ir-amim.org.il/Eng_/Uploads/dbsAttachedFiles/openCity.pdf. Only rental periods which qualified as
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14 and 19, the ILA is not required to approve the transfer of rights to a “foreigner,” and is entitled to cancel the contract for fundamental breach if such a transfer occurs. Article 19(a)(3) defines “foreigner” as an individual who is not an Israeli citizen, and not someone with the potential to become an Israeli citizen under the Law of Return. Thus, only privately held land was theoretically available to Palestinian residents. Of all the land designated for housing development in West Jerusalem and in the economic neighborhoods in East Jerusalem (35,000 dunums), at least seventy-nine percent (27,642 dunums) is ILA land, and therefore was unavailable for lease by the city’s Palestinian residents.

In 2008, the ILA Council redefined the term “foreigner” as an individual who is not an Israeli citizen or a legal resident. The revised standard contract includes in the introduction a reference to the invalidity of the previous definition. According to the guidelines, however, under any contract signed prior to the 2008 revision, lessees have the right to choose to implement the transfer in accordance with the contract, if they choose to do so.

Even prior to the change, Palestinian families had moved into economic neighborhoods such as Pisgat Ze’ev and French Hill, renting or purchasing apartments without registering them. It is unclear to what extent this change in policy has affected the housing market, as Jews who might wish to rent or sell to Palestinians face significant social pressure not to do so. There have also been reports of protests by Jewish residents trying to push Palestinians out of economic neighborhoods.

transfer of “land rights” qualified, which were greater than 5 years or could be renewed for a period greater than 5 years. Id.


159. Id.


163. ILA Guidelines, 1.1.1.


165. More than 40 municipal chief rabbis supported a ruling urging Jews not to sell or rent apartments to non-Jews. It also urged Jews to ostracize Jews who do so: “[i]t is incumbent upon the
Organizations administering ideological enclaves have obtained property through purchase from Palestinians or by asserting pre-1948 ownership rights in the courts, and with the assistance of the Custodian of Absentee Property. The social pressure amongst Palestinians not to sell to Jews complicates purchasing property; in a-Tur, the entry of Elad settlers resulted in the murder of a Palestinian who was suspected of selling assets to the organization. Palestinian intermediaries are often used to protect residents voluntarily selling to Jewish purchasers, although there have been several reported cases in which Palestinians have been induced to sell through threats, deception, false depositions, or forged documentation.

If Israeli citizens or organizations can demonstrate ownership of land in East Jerusalem prior to 1948, they may claim ownership under Israeli legislation. A significant example is in Sheikh Jarrah, where an extended legal battle has ensued over a number of properties. After leaving homes in Israel in 1948, Palestinian families were resettled by Jordanian authorities and the U.N. in this neighborhood in exchange for forfeiting refugee benefits. After Jewish organizations brought claims demanding the evictions of twenty-three families in 1982, an Israeli court recognized that the organizations owned the land but determined that the Palestinian residents were protected tenants. In order to maintain this status, the families are required to pay rent; most have not done so, providing a legal basis for eviction. The most recent evictions occurred in the summer of

seller's neighbours and acquaintances to warn and caution, first in private and then they are entitled to publish him in public, to distance themselves from him, to prevent trade from being done with him, not to have him read from the Torah and so forth until he reverses his decision that causes harm to so many people." In November, the Israeli Minority Affairs Minister requested that the Justice Minister investigate the author of the letter, Rabbi Shmuel Eliyahu from the northern city of Safed, for incitement, with a view to suspending him from his post as municipal rabbi. Harriet Sherwood, "Dozens of Israeli Rabbis Back Call to Forbid Sale of Property to Arabs", THE GUARDIAN (Dec. 7, 2010), available at http://www.guardian.co.uk/world/2010/dec/07/israeli-rabbis-ban-rental-sale-to-arabs.

168. Rapoport, supra note 151, at 140.
170. THE CASE OF SHEIKH JARRAH, supra note 169, at 1.
171. REITER & LEHRS, supra note 123, at 23–24.
172. Id. at 25–26.
173. Id. at 27.
2009, following an Israeli court decision, and two Palestinian families (Hanun and al-Ghawi) were evicted from their homes in Sheikh Jarrah.\textsuperscript{174} In contrast to the rights of Jewish individuals and organizations, these families are unable to repossess the homes and businesses they left in Israel in 1948.\textsuperscript{175}

The presence of ideological enclaves affects the lives of neighboring Palestinian residents through increasing friction and violence, often exacerbated by the presence of private security guards funded by the Israeli government.\textsuperscript{176} There have been frequent clashes between settlers and Palestinian residents in Sheikh Jarrah since the evictions in 2009.\textsuperscript{177} In addition, the presence of enclaves has resulted in further limitations on public space, residential growth, and freedom of movement.\textsuperscript{178} Although not a direct government initiative, security is an example of the support that enclaves receive from the government.

2. \textit{Israeli government policy and involvement}. The government of Israel has been committed to ensuring that an undivided Jerusalem remains the capital of the State of Israel.\textsuperscript{179} In order to achieve this outcome in light of the perceptions of the international community and any possible future negotiations, the municipality and national government have pursued a policy of control through settlement since the 1970s.\textsuperscript{180} In peace negotiations, Israel has advocated the holding onto these larger neighborhoods and received some support from the United States. For instance, President Clinton’s suggested parameters would have left eighty percent of settlers east of the Green Line in Israel, confirming for Israel the

\begin{itemize}
\item \textsuperscript{174} The evictions displaced 53 individuals. \textit{Id.} at 30.
\item \textsuperscript{175} Palestinian residents have a right to compensation, based on the value of the property on November 11, 1947. Most Palestinian do not exercise this right because the amount of compensation is low compared to the current value, the right is only available to a minority of refugees, and the process is view as granting legitimacy to Israel’s actions. \textit{Id.} at 32–33.
\item \textsuperscript{176} OCHA OPT, supra note \textit{Error! Bookmark not defined.}, at 60.
\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{180} MOSHE AMIRAV, JERUSALEM SYNDROME 61 (2009).
\end{itemize}
value of facts on the ground.\textsuperscript{181} Two aspects of this Israeli policy goal of retaining control of Jerusalem are the construction of economic neighborhoods in strategic locations around the eastern rim of the municipality, and the attempted maintenance of an approximate ratio of seventy-eight percent Jews to twenty-two percent Palestinians.\textsuperscript{182}

This policy of control through settlement was clearly articulated in the Municipality’s 1978 Master Plan for Jerusalem:

\begin{quote}
Any part of the city that is not settled with Jews is in danger of being detached from the territory of Israel and delivered to Arab rule, and therefore the administrative ruling regarding municipal jurisdiction must be translated into action by means of construction in every part of this territory, beginning at its farthest edges.\textsuperscript{183}
\end{quote}

In an apparent effort to assert territorial control over the city and cut off East Jerusalem from the West Bank, the Israeli government built economic neighborhoods along the outer ring of the city.\textsuperscript{184}

Furthermore, it has been suggested that the municipality’s use of green zones\textsuperscript{185} has been designed primarily to block Palestinian development in order to make Israeli construction less difficult if and when expropriation decisions are made.\textsuperscript{186} Land was obtained in this manner for the settlements of Har Homa and Reches Shufaat, both constructed in the early nineties on land previously zoned as green that was expropriated by the government.\textsuperscript{187}

As a mechanism for supporting demographic goals, Israel has provided substantial economic incentives aimed at attracting Israeli citizens to economic neighborhoods. Other support provided to Jewish residents in East Jerusalem includes: allocation of private security guards, paid for by

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{181} Clinton Proposal on Israeli-Palestinian Peace (meeting with President Clinton), Dec. 23, 2000, available at http://www.peacelobby.org/clinton_parameters.htm. See also infra Part V.
\item \textsuperscript{182} Imseis, \textit{supra} note 148, at 1054. This policy has been revised, given the high natural birth rate of Palestinians; the current distribution of the population of Jerusalem is 35 percent Palestinian, 65 percent Jewish. CHOSHEN & KORACH, \textit{supra} note 154, at 10.
\item \textsuperscript{183} AMIRAV, \textit{supra} note 180, at 59.
\item \textsuperscript{184} \textit{Id.} at 72-73.
\item \textsuperscript{185} “Green zones” are parts of Jerusalem zoned to remain open spaces, either for historical or environmental reasons or to provide public recreation.
\item \textsuperscript{186} Imseis, \textit{supra} note 145, at 1056.
\item \textsuperscript{187} \textit{Id.}
\end{enumerate}
\end{footnotesize}
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taxes, to protect the enclaves; sending security forces to accompany takeover of Palestinian assets and houses; funding and promoting building and development projects; and transferring government assets, such as the City of David Archeological site, to the control of Jewish organizations.  

3. International Law. Palestinians argue that Jewish residential areas east of the Green Line violate international law, primarily the Fourth Geneva Convention’s prohibition on transferring an occupying power’s population into occupied territory and numerous U.N. resolutions, including U.N. General Assembly Resolution 194 and Security Council Resolutions 242 and 338. International institutions have agreed with this claim. The CERD has stated that “the Israeli settlements in the Occupied Palestinian Territories . . . including East Jerusalem, are not only illegal under international law but are an obstacle to the enjoyment of human rights . . . . Actions that change the demographic composition of the Occupied Palestinian Territories are also of concern as violations of human rights and international humanitarian law.”

Israel, however, continues to state publicly that the Fourth Geneva Convention is not applicable to Jerusalem and that, even if it applies, the voluntary movement of Israeli citizens does not rise to the level of transfer contemplated by the Geneva Convention.

Regardless of the stance of international law, and particularly in the context of East Jerusalem, settlements have been a significant point of contention in recent efforts to reestablish peace talks, an issue discussed more thoroughly in Part V. Without definitive steps towards a negotiated


190. ISRAEL MINISTRY OF FOREIGN AFFAIRS, Israeli Settlements and International Law (May 20th, 2001), http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm (regarding settlements in the West Bank, the position of the government is that “[t]he provisions of the Geneva Convention regarding forced population transfer to occupied sovereign territory cannot be viewed as prohibiting the . . . movement of individuals to land which was not under the legitimate sovereignty of any state and which is not subject to private ownership . . . . It should be emphasized that the movement of individuals to the territory is entirely voluntary”).
deal, it is unclear if the current foundational premise laid out by President Clinton—that Israeli neighborhoods remain Israeli and Palestinian neighborhoods Palestinian—is appropriate to apply to East Jerusalem, where Israel’s policy choices, in an attempt to assert control through settlement, continue to have a negative impact on Palestinian residents.

Over the past forty years, the limitations on the ability of Palestinian residents to obtain housing and land for development has led to significant difficulties in the planning and zoning of Palestinian neighborhoods. This topic is discussed in the next Section, in addition to the proliferation of illegal construction and the demolitions that often follow.

C. Zoning, Construction Permits, and Demolitions

A comprehensive zoning and building permit process regulates neighborhood planning and construction in Jerusalem. Noncompliance is enforced through fines and selective demolitions. Palestinian residents of East Jerusalem contend that the scheme has the effect of denying them the ability to build adequate housing for a growing population. It is alleged that the purpose of Israel’s land use policies is to limit the Palestinian population in furtherance of Israel’s desire to retain control of Jerusalem as a unified city. Municipal authorities contest these allegations. This Section examines the relevant national and local offices, the planning and zoning process, building permit applications, and the demolition process. It considers allegations that the policies are discriminatory, and sketches out Israeli responses to these allegations. The Section closes by considering relevant international legal norms.

1. Actors. The zoning and permitting processes are governed by Jerusalem’s 1965 Building and Planning Law and overseen by both

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191. OCHA OPT, supra note Error! Bookmark not defined., at 51 (“The large amount of territory expropriated for settlement construction in the Jerusalem area results in a corresponding reduction in the land and resources available for Palestinian residential and commercial growth.”).
192. According to one report, the “gap between housing needs based on population growth and the legally permitted construction is estimated to be at least 1,000 housing units per year.” United Nations Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, The Planning Crisis in East Jerusalem: Understanding the Phenomenon of “Illegal” Construction 2 (2009).
193. Substantial reforms to the law were proposed in the Likud party platform ahead of the most recent Knesset elections and a proposal published the Justice Ministry is currently under consideration. Roundtable: Reforming the Israeli Planning and Building Law (Feb. 24, 2011)
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national and municipal offices, with involvement by high-level government leaders on sensitive matters. The Ministry of Interior’s Jerusalem District Planning and Construction Committee oversees a range of planning decisions, including the approval of new neighborhoods.\footnote{See Isabel Kershner, Pace of Planning for East Jerusalem Projects Slows, N.Y. TIMES, Apr. 27, 2010 http://www.nytimes.com/2010/04/28/world/middleeast/28mideast.html (noting that the committee, composed of national and municipal government representatives, “must approve any sizable projects in the city”).} As mentioned above, the Israel Land Administration administers state land in the city, about half of the total land area.\footnote{Jerusalem: An Open City?, supra note 157.} At the municipal level, the planning office develops neighborhood-level zoning plans, which are submitted for consideration by local and district planning committees, as well as final approval by the Ministry of Interior.\footnote{See B’TSELEM, A POLICY OF DISCRIMINATION: LAND EXPROPRIATION, PLANNING AND BUILDING IN EAST JERUSALEM 52 (1995) (describing the steps in the approval process for a zoning plan) [hereinafter POLICY OF DISCRIMINATION].} The Building Licenses Department\footnote{BUILDING LICENSES DEPARTMENT, http://www.jerusalem.muni.il/jer_sys/picture/atarim/site_form_atar_eng.asp?site_id=2534&pic_cat=4&icon_cat=6&york_cat=9&type_id=418 (“Issuing building permits, starting from opening a file, reviewing the building plans and preparing them for deliberations before the statutory planning committees, actual execution of urban schemes.”).} and the Department for Supervising Construction\footnote{DEPARTMENT FOR SUPERVISING CONSTRUCTION, http://www.jerusalem.muni.il/jer_sys/picture/atarim/site_form_atar_eng.asp?site_id=2535&pic_cat=4&icon_cat=6&york_cat=9&type_id=418 (“Enforcing planning and building laws, supervising construction throughout the city and accommodating it to authorized building permits. The activity includes extensive supervision on site, identifying transgressions, preparing indictments and executing demolition orders.”).} exercise control over new construction or modifications to individual buildings. As planning issues are highly contentious both locally and internationally, especially with regard to the construction of new Jewish housing projects in East Jerusalem, high level government officials exercise oversight over the process and often intervene.\footnote{For example, international actors, especially the United States, frequently seek to influence Israeli decisions on home construction. See Isabel Kershner, Israel Plans 1,000 Housing Units in East Jerusalem, N.Y. TIMES, Nov. 8, 2010, http://www.nytimes.com/2010/11/09/world/middleeast/09mideast.html?_r=1&scp=7&sq=united%20states%20pressure%20israel%20on%20settlements%20in%20east%20jerusalem&st=cse (describing U.S. attempts to encourage Israel to renew a settlement freeze).} For instance, Haaretz reported that Prime
Minister Netanyahu is closely supervising the Jerusalem District Planning and Construction Committee’s decisions due to their implications for Israel’s diplomatic relationships.\textsuperscript{201}

2. \textit{Zoning Plans.} According to the Planning and Building Law of 1965, before construction can proceed in a neighborhood, a zoning plan must be approved.\textsuperscript{202} A zoning plan governs the demarcation of land for certain uses, provisions for municipal services, and allowable building density.\textsuperscript{203} Following the 1967 war, Israel annulled the Jordanian planning schemes governing development in East Jerusalem,\textsuperscript{204} requiring the approval of new plans before construction would be allowed under Israeli law.\textsuperscript{205} In Palestinian neighborhoods, Israel acted slowly to approve these new zoning plans. This failure to act created substantial delay in authorizing new home construction. By the late 1990s, however, zoning plans had been completed for most East Jerusalem neighborhoods.\textsuperscript{206}

Whether all East Jerusalem neighborhoods currently have approved zoning plans is a matter of dispute, with Jerusalem’s planning office asserting they do, while many advocates for East Jerusalem residents to strengthen government oversight over new construction in East Jerusalem, and an order was issued according to which new construction in the eastern part of the city required prime ministerial authorization.


\textsuperscript{202} B'TSELEM, \textit{A POLICY OF DISCRIMINATION}, supra note 196, at 52. The approval process requires a number of steps, including discussion and public comment on the plan before the Local Planning and Building Committee and the District Planning and Building Committee, approval of the plan by both committees, and approval of the plan by the Ministry of the Interior. A notification of final approval is published in the \textit{Official Gazette}. Id. at 53.

\textsuperscript{203} Id.

\textsuperscript{204} Irus Braverman, \textit{Powers of Illegality: House Demolitions and Resistance in East Jerusalem}, 32 Law & Soc. Inq. 333, 340 (2007). Various sources offer contradictory assertions about the extent East Jerusalem was “unzoned” prior to 1967, but it is agreed that the existing schemes were less comprehensive than the detailed zoning plans required under the Planning and Building Law.

\textsuperscript{205} Id.

\textsuperscript{206} Approximately twenty-five zoning plans are approved for Palestinian areas of East Jerusalem, with 7 yet unapproved as of 2007. MEIR MARGALIT, \textit{NO PLACE LIKE HOME: HOUSE DEMOLITIONS IN EAST JERUSALEM} 15 (2007). However, planning schemes took an average of one year to be approved for Jewish neighborhoods compared to thirteen years in Palestinian neighborhoods. Irus Braverman, \textit{Powers of Illegality: House Demolitions And Resistance in East Jerusalem} [English version] 8–9 (Buffalo Legal Studies Research Paper Series, Paper No. 2009-05, 2009).
arguing they do not. The disagreement largely comes down to definitional issues, explained by two factors. First, approximately thirty percent of the land within the municipality is unplanned with few or no residents. The municipality does not consider these areas to be unplanned neighborhoods despite being adjacent to built-up Palestinian or Jewish neighborhoods. Second, some Palestinian neighborhoods were built without approval on land zoned as green space where building is prohibited, such as al Bustan in Silwan. That is, there was a zoning plan in effect but it barred the building of any structures. Such green space amounts to approximately thirty-five percent of land in East Jerusalem under the current zoning plans. Palestinians contend that once green areas, unplanned space, and Jewish neighborhoods are subtracted, the land available for Palestinian construction is only thirteen percent of the total municipal land area, an amount that they assert is both inadequate for their current population and projected growth, and inequitable.

3. Building Permits & Unauthorized Construction. Those seeking building permits can apply through the Jerusalem Building Licenses office. Approval is contingent on whether the proposed building conforms to the neighborhood zoning plan. In addition, applicants must demonstrate that they legally possess the land they propose to build on. Administrative requirements for residents seeking building permits include presenting a registration map and proof of payment of property taxes. Reports vary

207. Interview with Meir Margalit, Member, Jerusalem Municipal Council, in Jerusalem, Isr. (Mar. 6, 2011); interview with Itay Tzachar, Project Manager at Jerusalem Municipality, in Jerusalem (Mar. 9, 2011).
209. Id.
211. “ILLEGAL” CONSTRUCTION, supra note 208, at 8.
212. See JUSTUS REID WEINER, ILLEGAL CONSTRUCTION IN JERUSALEM 97 (2003) (describing the process of applying for a building permit). When a resident wants to seek approval for construction for a use not permitted in the zoning plan, the resident must apply for a non-conforming use permit, which requires a hearing of a local committee. Application for a Non-Conforming Use Permit, http://www.jerusalem.muni.il/jer_sys/publish/showPublishEng.asp?pub_id=38597&father_id=37775.
213. Id.
214. Jerusalem Unit, Office of the Palestinian Authority President, Engineering and Legal Dimensions of the Scheme of the Jerusalem 2000 Israeli “Academic Study” 74 (Nov. 2010) (unpublished manuscript) (on file with author) [hereinafter “Scheme of the Jerusalem 2000 Study”]. The Palestinian Authority argues that some of these requirements, such as proving payment of property
about the length of the approval process. An application meeting the above requirements may receive preliminary approval on the spot by the licensing inspector or trigger a multiyear process before a final determination is made. Significant expenses are also involved, including a fee paid to the city, and the application process may require legal counsel or other assistance, especially for more complicated projects.

Relatively few Palestinian East Jerusalem residents formally apply for building permits even though it appears that a substantial percentage of applications are approved. The penalties for building without a permit include fines, demolition, or jail time. In 2003, for instance, 138 applications were submitted in East Jerusalem and 118 were approved. This number is about 1,000 units below the demand for new construction each year based on population growth, according to one estimate. Between 1967 and 1999, approximately 3,000 building permits were issued for Palestinian residents of East Jerusalem in a period in which the Palestinian population increased by 112,000 people. In comparison, Israel’s Interior Ministry says that approximately 40 percent of the buildings in East Jerusalem were built without permits (15,000-20,000

taxes, only applies to East Jerusalem residents, and the requirement of proving registration creates special burdens on Palestinian residents. Id. 215. Interview with Justus Weiner, Senior Research Fellow at the Jerusalem Center for Public Affairs, in Jerusalem (Mar. 9, 2011). 216. “ILLEGAL CONSTRUCTION, supra note 208, at 11.. 217. Interview with Sami Ersheid, Palestinian lawyer, in Jerusalem (Mar. 8, 2011). 218. Scheme of the Jerusalem 2000 Study, supra note 214, at 74 (“[A]s a result of the administrative barriers imposed on Palestinians, in 2003 for example, 1719 applications for building permits were submitted in West Jerusalem and 1415 were approved. In contrast, only 138 applications for building permits were submitted in East Jerusalem and only 118 were approved.”). But see “ILLEGAL CONSTRUCTION, supra note 208, at 11 ([T]he number of permit applications more than doubled between 2003 and 2007 (138 to 283): however, the number of permits granted remained relatively the same, ranging between 100 and 150.”). 219. MARGALIT, supra note 206, at 8–12. 220. Scheme of the Jerusalem 2000 Study, supra note 214, at 74. 221. ILLEGAL CONSTRUCTION, supra note 208 at 2. Another figure providing some context to the number of permit applications is building starts in Palestinian neighborhoods of East Jerusalem. In 2003, there were 470 building starts in Palestinian neighborhoods, according to data compiled by B’Tselem. Statistics on Building Starts in East Jerusalem, B’TSELEM, http://www.btselem.org/english/Jerusalem/Building_Starts_Statistics.asp (last visited Mar. 1, 2011). Also, advocates for allowing new housing to be approved for Palestinians in East Jerusalem point out that the average density in the Jewish population in Jerusalem was 1.1 persons per room and 2.2 persons per room among Palestinians. B’TSELEM, A POLICY OF DISCRIMINATION: LAND EXPROPRIATION, PLANNING AND BUILDING IN EAST JERUSALEM 6 (1995). 222. Braverman, supra note 206, at 7.
buildings total). The share of illegal buildings is even higher when only new construction is considered. Jerusalem’s Municipal Tax Collection Department claims that only 481 of 5,300 residential units constructed in East Jerusalem between 2000 and 2004 were built with permits.

A number of factors likely contribute to the low number of applications and the high number of buildings constructed without a permit. Many residents do not possess clear title to the land recognized by Israeli law or their land is not zoned for new construction and thus expect that their applications would be denied. For example, the homes built in the al Bustan area of Silwan, most since the 1980s, were constructed both without the homeowners possessing formal title and on land zoned as green space under Israel’s zoning plans. Others may weigh the time, cost, or uncertainty of approval and decide it is easier to take a chance building without a permit. The lack of trust between Israelis and Palestinians, including East Jerusalem residents, likely contributes to the limited willingness of Palestinians to navigate the process, as does a desire by some Palestinians to build without permits as an expression of independence or political protest.

4. Discriminatory Purpose. A central allegation made by those critical of the building permit process is that the regulatory scheme is designed to serve the policy goal of maintaining a specific demographic ratio the city. In 1967, Palestinians comprised 28.8 percent of the population within Jerusalem’s newly expanded borders, including almost

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223. MARGALIT, supra note 206, at 8.
224. Id.
225. Interview with Itay Tzachar, Project Manager at Jerusalem Municipality, in Jerusalem, Isr. (Mar. 9, 2011). However, an attorney for the residents claims there were attempts to acquire building permits by some residents. “ILLEGAL” CONSTRUCTION, supra note 208, at 7.
226. “ILLEGAL” CONSTRUCTION, supra note 208, at 11.
227. Both sides accept that unauthorized building is to some extent a political act. See Arik Ascherman & Amedi Yigal, Should Israel Halt the Demolition of Illegal Arab Homes in Jerusalem? THE JERUSALEM REP. 56 (Aug. 13 2001) (citing an assertion by Jerusalem municipality that illegal building is a form of political action based on a refusal to accept the jurisdiction of the municipality by East Jerusalem residents); Braverman, supra note 206, at 3 (“While the Palestinian discourse moralizes the act of illegal building by what it perceives as the illegality of Israel’s annexation of East Jerusalem according to international law, the Israeli discourse bases the morality of its planning apparatus on the egalitarian and professional application of planning laws that render any act of building in violation with the law, performed in any part of Israel, as illegal.”).
228. CHESIN, et al., supra note 22, at 32.
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the entire population of East Jerusalem. Israel, however, has sought to maintain a significant Jewish majority in the city. While not the current stated policy of Israel or the municipality, this goal has allegedly been pursued by expanding the Jewish footprint in the city through the establishment of new neighborhoods and restrictions on the ability of Palestinian residents to construct new neighborhoods or expand existing ones. In contrast, Israel’s stated policy is that Jerusalem is an open and undivided city. In response to U.S. pressure to halt construction in East Jerusalem, Prime Minister Netanyahu has stated that “there is no ban on Arabs buying apartments in West Jerusalem and no ban on Jews buying or building apartments in East Jerusalem—it is a policy of an open city and an undivided city that is not separated by religion or national identity.”


231 Some historical documents suggest that Israeli leaders were more explicit about the goal of demographic stability in the years after Israel took control of Jerusalem. See A POLICY OF DISCRIMINATION: LAND EXPROPRIATION, supra note 196, at 31 (“In 1973, the Israeli government adopted the recommendation of the Inter-ministerial Committee to Examine the Rate of Development for Jerusalem (hereafter: the Gafni Committee), which determined that a ‘demographic balance of Jews and Arabs must be maintained as it was at the end of 1972… that is, 73.5 percent Jews, and 26.5 percent Palestinians. Over the years, all Israeli governments, through the Ministerial Committee for Jerusalem, have affirmed that goal as a guiding principle of municipal planning policy, and it has been the foundation of demographic and urban plans prepared by government ministries.”) (citations omitted).

232 See CHESIN, et al., supra note 22 at 10 (“Israel’s leaders, knowing that their position in Jerusalem was shaky [after the 1967 war] and that they had to act fast to strengthen it, adopted two basic principles. The first was rapidly to increase the Jewish population in east Jerusalem. The second was to hinder growth of the Arab population and to force Arab residents to make their homes elsewhere.”); A POLICY OF DISCRIMINATION, supra note 196, at 30 (“Official documents of the Jerusalem municipality and statements made by the Israeli policymakers demonstrate that the urban development has been dictated chiefly by national-political considerations intended to achieve one central goal: to create demographic and geographic reality that would preempt any future attempt to challenge Israeli sovereignty over East Jerusalem.”).

5. **Construction & Demolition Process.** Of the approximately 1000 houses built without a permit each year, the municipality only demolishes about 100, or approximately ten percent, due to financial, political, and humanitarian constraints. Enforcement of the building laws through demolitions thus involves a significant amount of discretion on the part of municipal authorities, raising the question of whether or not this discretion is exercised in a discriminatory manner.

Unauthorized construction is reportedly monitored through aerial photography, geographic information systems (GIS) software, and tips by Palestinians. Municipal inspectors "decide which houses are illegal [and] which should then be demolished." Inspectors prioritize enforcement of unauthorized buildings in the Old City, green areas, and public areas, but they retain significant discretion, which some claim leads to arbitrary or discriminatory enforcement against Palestinian residents.

The 1965 Planning and Building Law provides for two types of demolition orders, administrative and judicial. Municipal or regional officials can issue administrative demolition orders to quickly demolish newly constructed buildings. Administrative demolition orders may be appealed to the Local Affairs Court, but can only be canceled if the appellant can prove (with the burden of proof on the appellant) either that the building does have a permit or that the building is not "new construction." Administrative orders expire after thirty days, after which execution requires a lengthy and costly judicial process. Buildings not

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234. The same estimate was given in interviews with, *inter alia*, Dr. Meir Margalit (a member of the Jerusalem Municipal Council), an official from Israel State Attorney’s Office, and Attorney Sami Irshied (a Jerusalem attorney who defends residents who face eviction).

235. The demolition budget only includes enough funds to demolish approximately 10 percent of newly constructed illegal buildings each year. Interview with Meir Margalit, supra note 207. Demolitions also put a strain on the municipal police as each demolition requires a significant police presence due to the tensions surrounding demolitions. Interview with official from the Israel State Attorney’s Office, in Jerusalem, (Mar. 9, 2011). Demolitions may also be limited by domestic or foreign political pressure. For example, pressure by the United States has reportedly prevented the execution of the demolitions scheduled for al-Bustan. See *Jerusalem Mayor Postpones His Municipality’s Project In Al Bustan*, WADI HILWEH INFORMATION CENTER – SILWAN (Mar. 3, 2010, 8:03 AM) http://silwanic.net/?p=1575 (“Washington praised the efforts of Netanyahu to postpone the implementation of the scheme in Al Bustan.”).

236. Interview with Meir Margalit, supra note 207.

237. Braverman, supra note 206, at 352–53.

238. *Id.* at 353.

239. *Id.*

240. *Id.*

241. MARGALIT, supra note 206, at 39.
subject to administrative procedures must be demolished by a judicial order.242

Judicial demolition orders can only be issued after conviction for engaging in illegal construction in a criminal proceeding.243 These proceedings take place in Magistrate Court or Local Affairs Court under rules of criminal procedure.244 The demolition order is not considered a punitive measure, but rather part of the remedy for the defendant’s illegal construction. It may be combined with fines and prison time (up to two years).245 Because these orders are the result of an adjudicative legal process, the judge may consider extenuating circumstances.246 Judges often delay the orders’ implementation for one to two years, in order to allow the defendant to attempt to obtain a post-facto building permit.247 Of course, the defendant still faces the same systemic obstacles that may have originally prevented or dissuaded him or her from seeking or obtaining a permit in the first place, and as a result success rates are not high.248

Judicial demolition orders can take years to execute, as they can be appealed from the local court to the Magistrates Court, District Court, and even the Supreme Court.249 Some reports suggest that most judicial demolition orders end in the destruction of the building,250 while others assert that judicial demolition proceedings typically end years later with only a plea-bargained fine.251

242. The majority of demolitions are conducted under judicial orders. Interview with Dulia Aranki, Norwegian Rights Council, in Jerusalem, Isr. (Mar. 8, 2011); Interview with official from Israel State Attorney’s Office, supra note 242. Typically, judicial demolitions are issued for construction that is less than five years old, as illegal construction carries a five year statute of limitations. However, the authorities can avoid the statute of limitations by charging “use of an illegal house,” whose statute of limitations does not begin to toll until the residents no longer live in the house. Id. For example, in al-Bustan (a neighborhood of Silwan), judicial demolition orders have been issued against buildings constructed decades ago. A Layman’s Guide to House Demolitions, IR AMIM, 2 (Mar. 2009), http://www.ir-amim.org.il/Eng/_Uploads/dbsAttachedFiles/HomeDemolitionGuideEng(1).doc [hereinafter A Layman’s Guide to House Demolitions].


244. Id.

245. Braverman, supra note 206, at 66 n.31 (citing Articles 204 and 205 of the 1965 Law of Planning and Building); A Layman’s Guide to House Demolitions, supra note 242, at 1.


247. Id.

248. Id. (“Sometimes this allows the violator to avoid the demolition; often it does not.”).


250. Id.

251. Braverman, supra note 206, at 67 n.33.
“Voluntary” demolitions constitute the third type of demolition. Authorities advise violators that they can destroy their own house, or else the authorities will do so. Since government-ordered demolitions are likely to be significantly more expensive and damaging, many violators comply. In 2008, almost a third of the demolitions executed by the Jerusalem Municipality were “voluntary.”

Administrative or judicial demolition orders can be executed twenty-four hours after notice is posted on the building. Since the law only requires notice on the building itself, municipal inspectors reportedly employ a number of tricks in order to technically meet the notice requirement without the building inhabitants learning of the demolition order until the bulldozers arrive. The short time frame can prevent the residents from obtaining a court order staying the demolition until hearings can be conducted. Human rights advocates assert that even when the residents’ lawyer obtains a court order staying the demolition, the demolition crews often find ways to ignore it.

The threat of demolition takes a psychological toll on many residents. One empirical study found that women and children who had seen a demolition—and likely feared their day was coming—experienced increased levels of anxiety, depression, paranoia, lack of concentration, constant weeping, flashbacks, night terror, difficulty sleeping, and fear of leaving the house. During our interviews, we heard several stories of

253. Id.
254. Id. (noting that twenty-seven of eighty-five were deemed voluntary).
255. *MARGALIT*, supra note 206, at 39 (“[T]he demolition is issued against the building and not against a person.”).
256. Id. (asserting that inspectors may conceal the notice, may post it to the outside of the building so that it will be blown away, or place it on an outside floor).
257. Id.
258. According to Jerusalem Municipal Council Member Meri Margalit and housing attorney Sami Ershied, demolition workers have turned off their cellular phones in some cases where they believed there was a good chance of a stay. The municipal attorney then tells the court that there was no connection or that the workers could not hear the call because of the noise from the machinery. As both Margalit and Ershied point out, however, these allegations of intentional ignorance are impossible to prove. Interview with Sami Ershied, supra note 258; Interview with Meir Margalit, supra note 207. Even so, one commentator offers a credible explanation beyond mere malice: the contractor that the city hires to demolish buildings requires full payment (approximately 16,000 USD) even if the demolition is canceled twenty-four hours in advance. Thus, by hiding the notice or remaining willfully ignorant of court staying orders, municipal actors save money. Braverman, supra note 206, at 68 n.38.
children emptying the books from their backpacks and carrying their toys with them to school, for fear that their house would be demolished while they were away. Given that forty percent of the buildings in East Jerusalem were built without permits, these worries affect a substantial portion of the population. In addition to anxiety, fines, and incarceration, housing enforcement in East Jerusalem can lead to the break up of families. The State does not provide housing to families after a demolition, considering itself to have no obligation to care for those it considers to be breaking the law. Rather, the family typically goes to live with extended family. However, if one cousin, aunt, or grandparent does not have room for the whole displaced family, the family is split among multiple relatives.

6. Examining Demolition Patterns: Discriminatory Intent or Legitimate Exercise of Government?. Human rights groups such as Amnesty International, Bimkom, B’Tselem, and the Israeli Committee against House Demolitions (ICAHD) all assert that, in practice, housing demolitions are overwhelmingly ordered against Palestinians, even though Jewish Israelis engage in a greater share of illegal construction. Israeli government sources disagree, challenging the statistics and ascribing the remaining difference to the inability of the statistics to differentiate between the minor permit violations typical in West Jerusalem and the major illegal construction endemic to East Jerusalem.

One set of statistics—provided by human rights groups—suggest higher levels of enforcement of housing regulations against Palestinians. In 2004, permit violations in West Jerusalem exceeded those in East Jerusalem by several times. Despite this, only fifty administrative demolition orders were issued for West Jerusalem, and only thirteen (twenty-five percent) occurred. In East Jerusalem, 166 orders were issued,

260. Margalit, supra note 206, at 8.
261. Braverman asserts that fines are the most common punishment for illegal building. These fines, which totaled $16 million in 2004 alone, go directly to the municipal budget of the committee who ordered the demolition. Braverman, supra note 204, at 344, n.35. However, the fines do not go back into the demolition budget. Interview with Meir Margalit, supra note 207.
262. Building without a permit is punishable by up to two years in prison, while using a building in violation of the permit us punishable by up to one year in prison. Interview with official from Israel State Attorney’s Office, supra note 242.
263. Interview with official from Israel State Attorney’s Office, supra note 242; Interview with Meir Margalit, supra note 207.
264. Interview with official from Israel State Attorney’s Office, supra note 242.
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and 115 (seventy percent) were carried out. 265 That is, while the Jewish population is responsible for eighty-two percent of the illegal construction in Jerusalem, the Palestinian population suffers eighty percent of the demolitions (see table). 266

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th></th>
<th>2005</th>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>West Jerusalem</td>
<td>East Jerusalem</td>
<td>West Jerusalem</td>
<td>East Jerusalem</td>
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<tr>
<td>[Recorded] Infractions</td>
<td>5583</td>
<td>1386</td>
<td>5653</td>
<td>1529</td>
</tr>
<tr>
<td>% of Total</td>
<td>80%</td>
<td>20%</td>
<td>79%</td>
<td>21%</td>
</tr>
<tr>
<td>Charges Filed</td>
<td>980</td>
<td>780</td>
<td>1272</td>
<td>857</td>
</tr>
<tr>
<td>% of Total</td>
<td>56%</td>
<td>44%</td>
<td>60%</td>
<td>40%</td>
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<td>Administrative Demolition Orders</td>
<td>50</td>
<td>216</td>
<td>~40</td>
<td>~80</td>
</tr>
<tr>
<td>% of Total</td>
<td>19%</td>
<td>81%</td>
<td>33%</td>
<td>67%</td>
</tr>
<tr>
<td>Demolitions</td>
<td>13</td>
<td>114</td>
<td>26</td>
<td>76</td>
</tr>
<tr>
<td>% of Total</td>
<td>10%</td>
<td>90%</td>
<td>25%</td>
<td>75%</td>
</tr>
</tbody>
</table>

Adapted from “Municipal Enforcement of Building Laws” in Margalit. 267

According to human rights groups, these enforcement statistics are indicative of systemic discrimination: “[p]lanning and building regulations . . . are enforced in a manner that, in the overwhelming majority of cases, discriminates against Israeli Arabs and Palestinians.” 268 While Israeli Jews also violate building regulations, “demolitions of homes of Israeli Jews are virtually unheard of.” 269 Even when Jewish buildings are demolished, usually only additions to buildings are destroyed, and not

265. Scheme of the Jerusalem 2000 Study, supra note 214, at 75.
269. Id.
whole houses. Rather, the “practice in the Jewish sector has tended to be retroactive granting of permits and tolerance of unlicensed buildings, rather than demolitions.” Jerusalem Municipal Council Member Meir Margalit explains that the municipality typically does not enforce violations by Jewish settlers in East Jerusalem because settler construction is not on the priority list for the municipality.

The demolition of Jewish-Israelis’ homes—particularly settlers’ homes—undoubtedly comes with a high domestic political cost. In the case of “Beit Yonatan” in Silwan, for example, the Supreme Court and Attorney General have ordered the demolition of an illegally constructed seven-story building occupied by Jewish settlers. The Mayor of Jerusalem has refused. Like-minded politicians characterized the order as “anti-Jewish” politically-motivated discrimination, since many of the illegally-constructed buildings in Silwan occupied by Arabs have not been demolished. That is, the settlers and their supporters accuse the municipality of discriminating against Jewish-Israelis while favoring Arabs. Three years after the Supreme Court’s order to evict and seal the house, the municipality still has not acted.

Israel, for its part, denies discriminating against Palestinians. The previous Deputy Minister of the Interior Victor Brailovsky asserted that the Interior Ministry “does not differentiate between the demolition of Jewish or Arab structures,” and stressed that “most of the illegal constructions in open areas are in the Arab sector.” At least one journal article has also

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270. Id.
271. Id.
272. It is not clear whether Margalit is referring to a figurative or literal priority list. Interview with Meir Margalit, supra note 207.
273. Silwan is a predominately Arab neighborhood in East Jerusalem.
275. Immediate plans focus on evicting the residents of the building and sealing it.
277. Id.
278. Interview with official from Israel State Attorney’s Office, supra note 242.
281. AMNESTY INTERNATIONAL, supra note 268, at 41 n.52.
questioned the accuracy, objectivity, and political independence of the human rights organizations who decry house demolitions.\textsuperscript{282} A previous Deputy Mayor of Jerusalem, Yigal Amedi, asserts that the demolitions vary because the type of building violations they respond to vary: “[i]n the East, entire buildings floors and wings are being built; in the West, most violations involve enclosure of balconies, minor height deviations, and the like.”\textsuperscript{283} Another official explains that balconies and window enlargements do not merit demolitions; rather, the authorities will pursue criminal processes and charge the violator with violating a court order, rather than ordering a demolition.\textsuperscript{284}

While the pattern of demolitions is largely random, human rights advocates assert that certain trends appear. Human rights group Ir Amim describes four non-random factors affecting demolition decisions in East Jerusalem. First, “on rare occasions,” demolition orders serve a legitimate local public interest—for example, when an illegal structure is preventing the building of a school.\textsuperscript{285} Second, bribery often prevents demolitions.\textsuperscript{286} Third, politically charged plans call for mass demolitions.\textsuperscript{287} For example, the plan to demolish dozens of houses in al-Bustan has been criticized as an Israeli plan “to strengthen the settler hegemony in Silwan and to reduce the Palestinian presence there.”\textsuperscript{288} Fourth, the same political motivations prevent the demolition of settlers’ illegal construction in East Jerusalem, such as Beit Yonatan.\textsuperscript{289} Another advocate asserts that demolitions tend to be carried out if houses are close to settlements, close to roads to settlements, in strategic places, when the construction is viewed as “provocative” (e.g. to “make an example” of big houses), and in places where future settlements are planned.\textsuperscript{290}

The Israeli government denies improper discriminatory motives. For example, an official from the Israel State Attorney’s Office explained in a meeting with the authors that because administrative demolitions are so

\begin{itemize}
  \item \textsuperscript{282} Justus Reid Weiner. \textit{The NGOs, Demolition of Illegal Building in Jerusalem, and International Law}, 17 JEWISH POL. STUD. REV. 47-62 (Apr. 2005).
  \item \textsuperscript{283} Arik Ascherman & Amedi Yigal. \textit{Should Israel halt the demolition of illegal Arab homes in Jerusalem?}, JERUSALEM REPORT, Aug. 13 2001, Page 56.
  \item \textsuperscript{284} Interview with official from Israel State Attorney’s Office, supra note 242.
  \item \textsuperscript{285} \textit{A Layman’s Guide to House Demolitions}, supra note 242, at 8.
  \item \textsuperscript{286} \textit{ld.}
  \item \textsuperscript{287} \textit{ld.}
  \item \textsuperscript{288} \textit{ld.}
  \item \textsuperscript{289} \textit{ld.}
  \item \textsuperscript{290} Interview with Meir Margalit, supra note 207.
\end{itemize}
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expensive, the municipality reserves demolitions for particularly sensitive areas, such as public roads and public areas and buildings. The official explained that both police and prosecutors enjoy discretion with regard to enforcing the public interest. Thus police and prosecutors may be particularly interested in new buildings, sensitive areas, public grounds, roads, public services, archaeological sites, the aesthetic values of new neighborhoods, and the effect on the environment.

The Jerusalem Municipality asserts that their demolition policy is even-handed and fair. First, the municipality asserts that they only demolish buildings standing in the way of public works, such as schools and roads, or that “interfere with the city’s historical heritage.” The municipality also deflects criticism for demolitions to the Ministry of the Interior, which can order demolitions without the permission of the municipality.

The government of Israel further emphasizes the harms caused by illegal building. First, illegal building makes it impossible to plan areas properly. Improper planning can destroy the natural environment. For example, a lack of sewage systems can result in the dumping of sewage back into the groundwater. Second, illegal buildings are not inspected for safety and, therefore, constitute a threat to residents and neighbors. This threat is exacerbated by Israel’s periodic earthquakes. Third, illegal building is a visible criminal offense. When people see illegal buildings and see that no one enforces building laws, they lose faith in the criminal justice system. Fourth, when people do not pay for permits, they do not share in the expense of the planning system and thus end up increasing the permit costs for others.

In addition to general concerns about failing to demolish illegally constructed buildings, Israel has various justifications for its demolition policy. First, demolition ensures zoning and other municipal plans are not threatened. In East Jerusalem, this concern is exemplified by the Palestinian neighborhood of A-Tur. The old neighborhood (West side) of A-Tur faces the Old City, while the new (East) side faces the Judean desert.

291. Interview with official from Israel State Attorney’s Office, supra note 242.
292. Id.
294. Id
295. Interview with official from Israel State Attorney’s Office, supra note 242.
The East side was built illegally. The lower East side was meant to be a national park, due to its unique flora and fauna. The upper part was meant to be a housing project for Arabs of East Jerusalem: four-story condominiums, schools, and parks for the West side of A-Tur. Instead of these condominiums, East A-Tur is filled with two-story buildings constructed on the land that was designated for roads, schools, and parks. In light of the ad-hoc construction, there is no way to properly plan the development, and Palestinian residents of A-Tur suffer.

Second, the Old City is a UNESCO World Heritage site that demands special treatment. For Israel this has translated into the requirement that all building near the Old City be deliberate and organized. For example, buildings should be only a couple stories and there should be space for parks. Third, because Jerusalem has the lowest building violation fines in Israel (a reflection of the economically depressed nature of the city), the demolition must offset the incentive to break the law. Fines are cheaper than a building permit, and many residents do not particularly mind the criminal record.

An attorney from Israel’s State Attorney’s Office offered two further explanations for the demolition policy. First, the Jerusalem Municipality has tried to find alternatives to criminal enforcement by making agreements with the heads of neighborhoods to stop new building. The agreements were not successful, however, and building continued. Second, Israeli criminal law allows the defendant to claim abuse of process and selective enforcement. The court can then either dismiss all charges or take these factors into account at sentencing. In practice, defendants frequently try to make claims of abuse of process and selective enforcement, but even if the judge found the defendant’s assertions to be true, he would more than likely take the circumstances into account at sentencing, rather than dismissing the charges outright.

In sum, the primary defense of Israeli official actors is that the same, neutral laws apply to all, and that it benefits society—Palestinians and Israelis alike—to comply with those laws. If Palestinian assertions of discriminatory enforcement are true, however, it may raise international concerns.

\[296\] Id.
\[297\] Id.
\[298\] Id.
\[299\] Id.
7. Implications under International Law. Several international legal instruments are implicated if demolitions are being carried out in a discriminatory manner. First, under the ICESCR there is a right to adequate housing, which requires some degree of security is one’s home. Second, the ICCPR protects the right to privacy in one’s home from arbitrary interference. Third, under the ICERD, states are required to prohibit and work to eliminate any ethnic discrimination operating to restrict the right to housing. Finally, the Fourth Geneva Convention prohibits occupying forces from destroying private property in the territory they occupy.

First, Israel’s building policies in East Jerusalem implicate the right to housing. This includes discriminatory zoning plans and the construction permit process, as well as forced evictions and demolitions. Article 11 of the ICESCR recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.” The CESCR has interpreted this article broadly as “the right to live somewhere in security, peace and dignity,” not “merely having a roof over one’s head.”

Further the Committee issued a General Comment finding forced eviction from one’s home to be “prima facie incompatible” with the Covenant. CESCR defined forced evictions as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection,” in the context of, inter alia, disputed land rights. Procedural protections necessary to combat a presumption of incompatibility with the Covenant include, “an opportunity for genuine consultation with those affected; adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected.” Governments are also required to ensure that “where evictions do occur,

301. Id.
appropriate measures are taken to ensure that no forms of discrimination are involved.\textsuperscript{303}

The CESCR has criticized a number of aspects of Israeli housing policy. It has called particular attention to “home demolitions, land confiscations and restrictions on residency rights, and [Israel’s] adoption of policies resulting in substandard housing and living conditions, including extreme overcrowding and lack of services, of Palestinians in East Jerusalem, in particular in the old city.”\textsuperscript{304} The Committee has urged Israel to cease “demolishing houses and carrying out arbitrary evictions . . .” and to “. . . implement the right to an adequate standard of living, including housing, of the Palestinian residents of East Jerusalem and the Palestinian Arabs in cities with mixed populations.”\textsuperscript{305}

Israeli housing policies also implicate the right to privacy in one’s home, protected by the ICCPR. Article 17 states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” The monitoring body for the ICCPR, the Human Rights Committee (HRC), has criticized Israeli interference with this right through “frequent administrative demolition of property, homes, as well as schools in the West Bank and East Jerusalem due to the absence of construction permits, their issuance being frequently denied to Palestinians. Furthermore, it is concerned at discriminatory municipal planning systems [in] . . . East Jerusalem, disproportionately favouring the Jewish population.”\textsuperscript{306}

Discriminatory demolition practices would also violate Article 5(e)(iii) of the ICERD, which provides that “. . . States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . economic, social and cultural rights, in particular . . . the right to housing . . . .” The CERD has called “for a halt to the demolition of

\begin{flushright}
\textsuperscript{303} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations: Israel, U.N. Doc. CCPR/C/ISR/CO/3 (July 29, 2010).
\end{flushright}
Arab properties in East Jerusalem and for respect for property rights irrespective of the ethnic origin of the owner.” 307

Finally, if the law of occupation does apply in addition to international human rights law, then Israel’s housing policies in East Jerusalem may be suspect under Article 53 of the Fourth Geneva Convention, which prohibits the “destruction by the occupying power of real or personal property belonging individually or collectively to private persons.” 308

While Israel has not addressed this last argument because it does not recognize East Jerusalem as occupied, it has responded to the criticisms of the various human rights committees concerning zoning, illegal construction, and forced evictions and demolitions. In response to claims of discriminatory zoning practices, Israel underscores the initiation of an extensive project by the Department of Planning in the Ministry of Interior to prepare updated planning schemes for the majority of Arab localities that will account for anticipated population growth while incorporating the local community’s desires. 309 Israel also asserts that “most of the Arab localities have a planning scheme, even if not an updated one, which was initiated by the Government during the 1980s.” 310

In addressing illegal construction in East Jerusalem, Israel expressed recognition that the “housing supply in the eastern neighborhoods of Jerusalem does not meet the demands of the Arab population.” 311 Under the Plan for the Development of Jerusalem of 2000, an additional 29,000 housing units will be built in the Arab neighborhoods of East Jerusalem by the year 2020, resulting in a total of 82,000 total housing units that will be available (including the 15,000 illegal buildings for which demolitions are not currently planned). 312

Finally, concerning forced eviction and demolitions, Israel claims that any forced evictions taking place have been carried out lawfully, following a court determination that the land under review was owned by an Israeli


308. Fourth Geneva Convention, supra note 54, at art. 53.


310. Id. For discussion of the dispute regarding planning schemes, see supra Part III.C.2-3.

311. Id.

312. Id.
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citizen prior to 1948. Further, Israel has stated in response to the criticisms of the human rights treaty bodies that “[a]ll demolitions are conducted in accordance with due process guarantees, following a fair hearing which is subject to judicial review, and where the individuals concerned have the right to appeal without distinction on the basis of race or ethnic origin. Those affected by a demolition order are entitled by law to appeal to the Supreme Court.” 313

Whether or not Israel’s exercise of its zoning power, building permit process, or housing demolitions are carried out in a discriminatory manner, the issue will continue to be highly contentious as long as the perception remains that Israel is targeting Palestinians residents for demographic reasons.

IV. OTHER ISSUES AFFECTING HOUSING

Policies concerning land acquisition, neighborhood demographics, zoning, and demolition—discussed in Part III—directly affect housing decisions in East Jerusalem. This Part focuses on two factors that also affect housing, albeit indirectly. Section A discusses the separation barrier that cuts through much of Jerusalem. Section B then examines provision of municipal services in East Jerusalem.

A. Separation Barrier

Disagreement about the separation barrier begins with what to call it. The Israeli Supreme Court refers to it as the “security fence.” Those sympathetic to the barrier generally follow this designation, sometimes referring to it only as the “fence.” By contrast, the ICJ has described the barrier as a “wall”—a label generally followed by those opposed to it. This paper will use the more neutral term “separation barrier.” 314

The separation barrier arose out of an April 2002 decision by the Israeli Ministers’ Committee for National Security to construct a temporary barrier between Israel and the West Bank in order “to improve and

strengthen operational capability in the framework of fighting terror, and to prevent the penetration of terrorists from the area of Judea and Samaria into Israel.”

The separation barrier runs for over 650 kilometers (just over 400 miles) and, when finished, almost ninety percent of its route will fall east of the Green Line. In Jerusalem, the barrier does not follow either the Green Line or the city’s municipal borders.

The separation barrier’s average width is 50-70 meters, which includes a trench to prevent vehicles from approaching the barrier, a separate service road that can be patrolled by the Israeli police and army and, at the center, an electronic monitoring device that alerts a command center when there is activity nearby. As described in an Israeli Supreme Court decision, the separation barrier consists of a number of different components and looks in some places more like a fence and in other places more like a wall. The sections of the barrier around Jerusalem appear more like a wall than a fence.

Since the separation barrier’s construction, there has been significant contention regarding its impact on the ground. Although accurate statistics are hard to come by, there appears to be widespread agreement that suicide bombings have decreased since the construction of the separation barrier.

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315. Judea and Samaria refer to the West Bank.
318. For a description of the components, see HCJ 2056/04 Beit Sourik Village Council v. Israel, 58(5) PD 807 [2004] (Isr.) at para. 7. The description of the barrier in this paragraph is drawn from the description in this decision.
320. See, e.g., Mitchell Bard, Israel’s Security Fence, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/Peace/peaceness.html (last updated July 8, 2010) (claiming that 457 Israelis were killed the year before the barrier was constructed and that eight Israelis were killed in 2009).
The bombing in Jerusalem on March 23, 2011 was the first terrorist attack in Jerusalem since 2008, and the city has not seen a suicide bomb attack since 2004. At the same time, Palestinians maintain that construction of the separation barrier has considerably diminished their quality of life and access to essential services in East Jerusalem and much of the West Bank.

The rest of this Section proceeds in three Subsections. The first Subsection provides a brief overview of the decisions by the Israeli Supreme Court and the ICJ concerning the separation barrier. The second Subsection identifies a number of ways that the separation barrier affects everyday life in Jerusalem, with a particular focus on housing. Finally, the third Subsection focuses on the separation barrier’s effect on Palestinians’ freedom of movement. Although freedom of movement is not the only human rights concern related to the barrier, its effect on the population generally, and on housing decisions in particular, arguably make it the most important.

1. Legal Background. There have been a number of legal challenges to the separation barrier. This Subsection provides a brief overview of the three most relevant decisions. First, in *Beit Sourik Village Council v. Government of Israel*, the Israeli Supreme Court held that while the separation barrier was legal, the route as planned should be altered. Second, the ICJ determined, in an advisory opinion, that the separation barrier—which it referred to as the “wall”—violated both international human rights and humanitarian law. Third, in *Mara’abe v. Prime Minister of Israel*, the Israeli Supreme Court revisited the legality of the separation barrier in light of the ICJ opinion and found that the ICJ had not taken proper account of the barrier’s security justifications.

   a. *Beit Sourik Village Council v. Government of Israel.* The *Beit Sourik* case presented the question of whether the land seizures made by the Israel Defense Forces (IDF) in order to build the separation barrier, as well as the barrier itself, were legal. After describing the background

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323. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).
324. HCJ 7957/04 Mara’abe v. Prime Minister of Israel (unpublished) [2005] (Isr.).
behind the decision to construct the separation barrier, the Court noted that the appropriate normative framework under which to decide the case was “that Israel holds the area in belligerent occupation.”

325  It noted that “the military commander cannot order the construction of the separation fence if his reasons [were] political,” including a “desire to ‘annex’ territories to the state of Israel.”

326  A close reading of the factual record led the Court to conclude, however, that “the fence is motivated by security concerns.”

327  Accordingly, the Court held the separation barrier to be legal.

The Court then considered specific portions of the separation barrier’s route. In an effort to strike a balance between liberty and security concerns, the Court adopted a three-part proportionality inquiry: (1) whether there was a rational connection between the route of the barrier and the goal of the construction of the separation barrier; (2) whether the route chosen was the least injurious; and (3) whether the injury to local inhabitants was proportionate to the security benefit of the barrier.

328  Applying this test, the Court found the separation barrier disproportionate in certain locations, and ordered its route changed.

b. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories. The same year as the Beit Sourik decision, the ICJ rendered an Advisory Opinion on the separation barrier.

330  After confirming that it had jurisdiction over the matter, the Court conducted a wide-ranging historical analysis to reach the conclusion that all land to the east of the Green Line, including East Jerusalem, constituted occupied territory.

331  Rejecting Israeli arguments to the contrary, the ICJ determined that the human rights conventions (in particular the ICCPR, the ICESR, and the CRC) and international humanitarian law both applied.

332  The ICJ then
expressed a number of concerns, including, *inter alia*, that the separation barrier amounted to *de facto* annexation,\(^{333}\) that construction of the barrier “impede[d] the exercise by the Palestinian people of its right to self-determination,”\(^{334}\) and that the barrier implicated (and violated) a number of other human rights provisions.\(^{335}\)

The ICJ then briefly considered and rejected Israeli arguments rooted in self-defense and necessity.\(^{336}\) The ICJ concluded that although Israel “ha[d] the right, and indeed the duty to respond in order to protect the life of its citizens,” its measures must “remain in conformity with applicable international law.”\(^{337}\) Finding a violation, the ICJ ordered Israel to cease construction of the barrier, including construction in and around East Jerusalem.\(^{338}\) The ICJ’s various conclusions secured overwhelming majorities; Judge Buergenthal dissented in each instance, largely on the ground that the ICJ did not have a sufficient factual record to decide the case.

c. Mara’abe v. Prime Minister of Israel. In *Mara’abe*, the Israeli Supreme Court considered whether the separation barrier was legal in light of the ICJ’s opinion. Importantly, the Court centered its initial discussion on the barrier’s security and antiterrorism objectives.\(^{339}\) It highlighted the fact that the military commander of the IDF had altered the barrier’s route in order to implement the *Beit Sourik* judgment. Moreover, the Court emphasized that the ICJ opinion, as an advisory opinion, was nonbinding.\(^{340}\)

Directly addressing the ICJ opinion, the Court noted that the factual record before the Court, which consisted of a report by the Secretary General and two reports by *special rapporteurs*,\(^{341}\) failed to provide adequate discussion of the security dimension of the separation barrier. Indeed, the Court contended that because it followed the same “basic normative foundation” as the ICJ—namely, that “Israel holds the West

\(^{333}\) Id. at para. 121.

\(^{334}\) Id. at para. 122.

\(^{335}\) See id. at para. 123–37.

\(^{336}\) Id. at para. 138–41.

\(^{337}\) Id. at para. 141.

\(^{338}\) See id. at para. 151.

\(^{339}\) HCJ 7957/04 Mara’abe v. Prime Minister of Israel (unpublished) [2005] (Isr.), at para. 1–2.

\(^{340}\) Id. at para. 56.

\(^{341}\) See id. at para. 43–44. The *special rapporteurs* were John Dugard and Jean Ziegler.
Bank . . . pursuant to the law of belligerent occupation”—the different factual bases before the two courts must explain their different conclusions. In brief, the Court concluded that, either because of an oversight on Israel’s part in compiling the factual record or the ICJ’s unwillingness to rely on the information submitted to it, the ICJ had not properly struck the balance between security and liberty: “Whatever the reason may be, the reality is that the ICJ based its opinion on a factual basis regarding the impingement of Palestinian residents’ rights, without the factual basis regarding the security-military justification for this impingement.”

The Court also noted that whereas in Beit Sourik it had conducted a careful analysis of specific segments of the separation barrier’s route, the ICJ had simply considered the entire route of the barrier; the factual record before the ICJ would not have allowed for such a nuanced inquiry. Finally, the Court concluded that the ICJ’s opinion—again based on a different factual record—“is not res judicata, and does not oblige the Supreme Court of Israel to rule that each and every segment of the fence violates international law.” Accordingly, the Court proceeded to analyze the claim before it under the same proportionality test it had used in Beit Sourik, finding the separation barrier—as well as most of its route—to be lawful.

2. Role of the Separation Barrier in Everyday Life in East Jerusalem. While this legal background is important, it cannot convey the myriad ways in which the separation barrier has changed life in Jerusalem, particularly life in East Jerusalem. Some statistics from 2009 provide a thumbnail sketch:

- The separation barrier will enclose eighty Israeli settlements/neighborhoods, totaling approximately 385,000 Israeli Jews. By contrast, over ten percent of Palestinians—predominantly in East Jerusalem—will be located between the barrier and the 1949 Armistice line when the barrier is completed.

342. Id. at para. 57. Interestingly, the Court did not discuss the applicability of human rights law.
343. Id. at para. 65.
344. See id. at para. 66–70.
345. Id. at para. 70.
346. Id. at para. 74.
347. Unless otherwise indicated, these statistics are drawn from BARRIER TO PEACE, supra note 317.
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- Approximately 35,000 Palestinians—many of them near Jerusalem—holding West Bank ID cards will be enclosed on the western side of the barrier.

- The separation barrier will isolate approximately 268,000 Palestinians in East Jerusalem from the rest of the West Bank.

- Approximately 61,000 Palestinian residents of East Jerusalem will be cut off from family/community networks, employment opportunities, and municipal services by the separation barrier.\(^{348}\)

Beyond the numbers, the separation barrier around East Jerusalem has divided Palestinian towns and villages, notably Abu Dis.\(^{349}\) It has also enclosed the E-1 area, approximately 3,110 acres east of the 1949 Armistice Line where five Palestinian villages currently exist—and where future Israeli development has been planned.\(^{350}\)

Many Palestinians believe the real aim of the separation barrier is not security but land annexation. As the Negotiation Support Unit of the Palestine Liberation Organization (PLO) wrote in 2009: “[T]he route the Wall takes is designed to capture as much land and incorporate as many Israeli settlers as possible west of the Wall, while shutting out and ‘walling in’ as many Palestinians as possible east of the Wall.”\(^{351}\) Additionally, the act of transiting the checkpoints in the barrier gives rise to daily frustrations for many Palestinians.\(^{352}\)

\(\textbf{a. Effect on Housing.}\) The construction of the separation barrier will likely affect housing in a number of ways. In particular, a report for the Jerusalem Institute for Israel Studies (JIIS) identifies three possibilities.\(^{353}\) First, an already dense East Jerusalem will probably see a substantial increase in housing density. The influx of Palestinians who hold Jerusalem identity cards and want to avoid losing their cards by getting stuck on the...
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“wrong” side of the barrier will exacerbate this problem. Second, the report predicts an increase in illegal construction in East Jerusalem. Finally, the report warns that housing shortages may become so acute as to give rise to “tent cities” as temporary housing facilities. The increased East Jerusalem population may also push Palestinian Jerusalemites into other neighborhoods in Jerusalem, affecting the city’s demographic composition.

Although no tent cities have sprouted up, there does appear to have been an increase in housing density and perhaps also in unauthorized construction in East Jerusalem. Demand for housing has been slowly increasing on account of the growing Palestinian population in East Jerusalem; reports indicate that construction of the separation barrier has increased density within the barrier. Unauthorized construction is also evident, although it is not clear whether the barrier has given rise to more such illegal construction than previously. The boom of unauthorized construction in Kufr ‘Aqab, however, suggests this could be the case.

b. Effect on Municipal Services. As could be expected, the barrier has introduced a number of challenges to the provision of municipal services in Jerusalem, particularly in the Palestinian communities. Palestinian residents of the West Bank have faced difficulty accessing schools and medical facilities in Jerusalem. Of particular concern are areas that fall inside Jerusalem’s municipal boundaries but outside the separation barrier. For example, both Shu’afat and Kufr ‘Aqab are communities littered with garbage because the Jerusalem municipality will not service these areas. These communities are forced to rely on irregular Palestinian Authority services from Ramallah.

c. Transiting the Barrier and Potential Human Rights Violations. Construction of the separation barrier has also limited the ability of

354 See generally “ILLEGAL” CONSTRUCTION, supra note 208.

355 Id.

356 See generally OCHA REPORT, supra note 319. As noted in Part IV.B infra, the provision of municipal services significantly influences Palestinians’ ability to find adequate housing.

357 Id. For a more detailed analysis of the barrier’s effect on access to medical care, see OCHA & WHO REPORT, supra note 314.

358 This is based on observations during visits on March 6, 2011 (Shu’a’fat) and March 8, 2011 (Kufr ‘Aqab).

359 The Israeli police apparently refused to enter Kafr ‘Aqab without military escort. The danger in this arrangement was evident in March 2010 when militants took over a school, and Israeli police would not respond because no escort was available. See Separation Barrier: Behind the Wall–Kufr Aqab, IR AMIM, http://www.ir-anim.org.il/eng/?CategoryID=331 (last visited May 12, 2011).
Palestinians in the West Bank and Gaza to access Jerusalem and the religious sites contained therein. Israel maintains a permit system, and reports suggest that the number of Palestinians requesting permits far outstrips the number of permits granted. Moreover, the permit process—which has been described as “very complicated, lengthy and costly”—results in permits that range in validity from one day to several months and that can often only be used at fixed times. Further complicating the process, checkpoints are often closed at the times when a permit is valid, and when they are open, long lines often present additional access problems. Moreover, West Bank ID holders are limited to using four of the sixteen checkpoints located along the barrier and must cross the checkpoints on foot, “further compounding the long delays Palestinians routinely face when crossing Israeli checkpoints.” Finally, in some instances, the Israeli government imposes a total closure of movement from the West Bank into Jerusalem.

All of these restrictions implicate the Palestinians’ right to freedom of movement, a right set out in Article 12 of the ICCPR. Article 12 guarantees to all individuals “the right to liberty of movement and freedom to choose his residence.” It further requires that any restrictions on this right be “provided by law, . . . necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and . . . consistent with the other rights recognized in the present Covenant.” Article 5(d)(i) of the ICERD contains a similar provision, protecting the

360. See Separation Barrier, B’TSELEM, http://www.btselem.org/English/Separation_Banner (last visited May 12, 2011) (“According to figures the state provided to the Association for Civil Rights in Israel, the number of permanent permits given to farmers living east of the Barrier to enable them to work their land west of the Barrier dropped by 83 percent from 2006 to 2009 (from 10,037 to only 1,640.”); see also BARRIER TO PEACE, supra note 317, at 4 (“Applications for permits can take weeks to process, while denials are the norm rather than the exception.”).
362. See id. at 10.
363. See id. It should be noted, however, that this report was written in 2004. More recent research suggests that slowdowns at checkpoints have lessened. See generally JERUSALEM INST. FOR ISRAEL STUDIES, supra note 353.
364. BARRIER TO PEACE, supra note 317, at 6.
365. Id. at 5.
367. Id.
“[t]he right to freedom of movement and residence within the border of the State,” without racial discrimination.\textsuperscript{368}

The HRC, in interpreting the first clause of Article 12, stated that “the right to move freely relates to the whole territory of a State” and that “the right to reside in a place of one’s choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.”\textsuperscript{369}

Concerning the second provision, the HRC stated that the “application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality . . . [T]hey must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result, etc.” The HRC found that “these conditions would not be met, for example . . . if an individual were prevented from travelling internally without a specific permit.”\textsuperscript{370}

The HRC also reiterated that Article 12, like all other rights in the Convention is subject to the fundamental principles of equality and non-discrimination. Thus, it is a clear violation of the right if movement is “restricted by making distinctions of any kind, such as on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\textsuperscript{371}

The international community has supported Palestinians in their claims that the separation barrier violates these rights. In addition to the advisory opinion issued by the ICJ, both the HRC and the CERD have directly addressed the issue. The HRC has expressed concern at “the restrictions to freedom of movement imposed on Palestinians,”\textsuperscript{372} and the CERD has called on Israel to “cease the construction of the wall in the Occupied Palestinian Territories, including in and around East Jerusalem,

\begin{itemize}
\item 370. Id.
\item 371. Id.
\end{itemize}
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dismantle the structure . . . and make reparation for all damage caused by the construction of the wall.”

CERD has expressed the additional concern that “the severe restrictions on the freedom of movement in the Occupied Palestinian Territories, . . . through the wall, checkpoints, restricted roads and permit system, have created hardship and have had a highly detrimental impact on the enjoyment of human rights by Palestinians, in particular their rights to freedom of movement, family life, work, education and health.” In particular, the route of the wall has cut off the access of many Palestinians to the olive groves on which they had previously relied to make a living.

Additionally, the problems that West Bank ID holders face accessing Jerusalem’s Muslim and Christian holy sites raise questions of state interference in the Palestinians’ right to practice their religions. Observers have attributed a sharp decrease in Palestinian Muslims celebrating Ramadan in Jerusalem to permit restrictions, as well as worshippers’ reluctance to attempt to transit the separation barrier.

3. Conclusion. Although controversy over the separation barrier continues, one observation is not in dispute: it has significantly altered the everyday life of Jerusalem residents. A concrete obstacle cutting through a historic city, it has decreased attacks in Jerusalem. It has also restricted Palestinians’ ability to move freely within the municipal borders, as well as between Jerusalem and the West Bank. This restriction, in turn, has affected decision-making on housing. While it is perhaps too early to identify precisely what effect the barrier will have on housing issues in East Jerusalem, early indications suggest that the barrier has made adequate housing for the Palestinians more expensive and harder to locate, and has increased the likelihood that Palestinians will be cut off from family and friends living on the other side. Other “seam” communities, which exist inside the border but outside the wall, have been deprived of municipal services. The topic of municipal services is taken up more broadly in the

375. See OCHA REPORT, supra note 331, at 38-39.
376. Id. at 38.
next section, which reviews the claims by Palestinian residents of East Jerusalem that municipal services are administered in a discriminatory manner, inhibiting their enjoyment of their housing.

B. Provision of Municipal Services

The Jerusalem municipality is responsible for providing services to all citizens and permanent residents in East Jerusalem. Yet it appears that these services are not distributed equally. Palestinian areas of the city are distinguished by limited infrastructure, including dilapidated roads, inadequate trash collection, and homes without connections to the municipal sewage and water systems. Further, Palestinian neighborhoods have few, if any, health clinics and hospitals, schools, libraries, and parks or playgrounds. This is in stark contrast to Israeli neighborhoods in both East and West Jerusalem, where these services are more abundant. Further, those Palestinians living inside the municipal boundary but outside of the separation barrier receive fewer services and have difficulty accessing those facilities located inside the barrier.

Here, as elsewhere, there are dueling narratives about why these inequalities exist. Palestinians assert that the inadequate provision of municipal services in East Jerusalem is due to discrimination and is intended to encourage Palestinians to leave, supporting Israel’s broader demographic goals for the city. In response, city officials argue that this is simply a political issue; elected government representatives respond to their constituents, and, because Palestinians generally choose not to vote, their interests are not attended to. No matter what the reason, substandard and unequal conditions threaten the overall peace and stability in Jerusalem.

This Section first addresses the municipality’s obligations under domestic law to provide services and outline the funding for providing these services. It then turns to examining some of the specific services in order to demonstrate how Palestinian neighborhoods and housing are affected by the lack of adequate municipal services, inhibiting the ability of Palestinians to enjoy and stay in their homes. It also points to the inequality that exists between Israelis and Palestinians with respect to these services, supporting the contention that discrimination is at play. Finally, it addresses Israel’s international legal obligations, particularly questioning whether the unequal distribution violates the Palestinians’ right to equality.

1. Municipal Services. The municipality is responsible for providing services to those living in Jerusalem based on the needs and social circumstances that determine those needs. The municipality functions through by-laws approved by the Ministry of the Interior, which complement national laws. Services are funded through local taxes as well as an allocation from the State’s budget. Despite the fact that East Jerusalem residents are subject to the same taxation rate as all city residents, they do not receive the same municipal services. While Palestinians make up approximately thirty-four percent of the population in Jerusalem, only five to ten percent of the municipal budget is spent in Palestinian neighborhoods. The disparity between East and West Jerusalem has been widely acknowledged and discussed by government officials at every level of the Israeli administration. Israel has declared that Jerusalem is a single municipality, but funding differences point to the use of discriminatory practices in allocating services in Jerusalem.

382. HERSHKOVITZ, et. al, supra note 377.
384. See Revocation of Social Rights and Health Insurance, B’TSELEM, http://www.btselem.org/english/Jerusalem/Social_Security.asp (last visited May 9, 2011); CHESHIN, et al., supra note 22, at 22 (“The taxes east Jerusalem residents pay are not reflected in the services they receive. There is also a feeling among east Jerusalem Arabs that there is no justification for the taxes in east Jerusalem to be on the same level as those in west Jerusalem.”).
385. ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, THE STATE OF HUMAN RIGHTS IN EAST JERUSALEM, FACTS AND FIGURES 35 (2009) [hereinafter HUMAN RIGHTS IN EAST JERUSALEM].
386. CHESHIN, et al., supra note 22 at 20.
387. EU HEADS OF MISSION REPORT ON EAST JERUSALEM, supra note 86, at 12–13.
The negative impact that the provision of unequal services has on Palestinian residents in East Jerusalem is exacerbated by the fact that much of the Palestinian population lives in poverty. The Central Bureau of Statistics (CBS) published data in 2007 that indicated that 66.8 percent of Palestinian families in Jerusalem (as opposed to 23.3% of the city’s Jewish families) lived below the poverty line. The poverty statistics for children are even graver: 74% of Palestinian children in East Jerusalem are beneath the poverty line, as opposed to 47.7% of the city’s Jewish children.388

Municipal services can be broken down into three categories based on the method of distribution. The first category is linear services, or those provided throughout the municipality’s jurisdiction and which reach the population through networks that are part of the city’s basic infrastructure. These include water and sewage. The second category consists of services conveyed to the consumer, such as garbage collection and disposal, as well as the building of roads and sidewalks. The third category includes point-specific services that are provided at a static location, such as schools, hospitals, welfare and social services, and parks and other recreation facilities.389

a. Linear Services. Approximately 160,000 Palestinian residents are not legally connected to the municipal water network.390 This is largely because Israel’s Planning and Building Law prohibits the connection of unauthorized buildings to the network. This leaves every person who has resorted to illegal building without city water, requiring them to either construct provisional connections to water mains or homes that are legally connected to the city’s network or store water in large containers to ensure a temporary supply.391 These interim measures come with risks: the supply is irregular; limited amounts of water reduce hygiene as showers, dishwashing, and house-cleaning become luxuries; and stored water is exposed to various pollutants such as bacteria or vermin which can cause serious illnesses.392 The lack of access to municipal water services undermines Palestinian residents’ rights to adequate living conditions and health.393

389 HERSHKOVITZ, et. al, supra note 377.
390 HUMAN RIGHTS IN EAST JERUSALEM, supra note 385, at 41.
391 Id.
392 Id.
393 Id.
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The separation barrier has also hindered some permanent residents’ ability to access water. The municipality does not provide water to residents who live inside the municipal boundary but outside the separation barrier. As a result, some residents—such as those living in Kalandia—have resorted to getting their water from Ramallah, which supplies these populations with water three days a week.394 Yet these residents continue to pay the Jerusalem municipal tax to maintain their residency status.395

While Israeli domestic law requires the municipality to maintain its sewage system,396 the sewage infrastructure in East Jerusalem suffers from decades of neglect. In some Palestinian neighborhoods, residents have reported open sewage flowing near their homes, causing contamination and endangering the health of residents. This causes particular concern for young children who may unknowingly play in the water. Other neighborhoods simply have no connection to the municipal sewage system and instead use cesspits. Today it is estimated that East Jerusalem lacks approximately seventy kilometers of required sewage lines.397 The installation of sewage lines is contingent on the payment of high fees and development taxes that Palestinian residents often cannot afford. Yet even when Palestinians pay the fees, human rights organizations have reported that the city has delayed laying the infrastructure.398

b. Services Conveyed to the Consumer. The municipality is responsible for the storage, collection, and disposal of solid waste, as governed by its bylaws. Regulations set out under the Planning and

394. Tour of Kalandia with Attorney Sami Ershied (Mar. 8, 2011).
395. Id.; see also, Haaretz Service, Report: East Jerusalem Residents Exempted from Municipal Taxes, HAAARETZ, Mar. 3, 2011, available at http://www.haaretz.com/news/national/report-east-jerusalem-residents-exempted-from-municipal-taxes-1.349799 (stating that the Jerusalem municipality has notified East Jerusalem residents living beyond the separation barrier that they are no longer required to pay municipal taxes, inciting fears that the policy was aimed at confiscating the permanent resident status from those living in neighborhoods outside of the wall but inside of the current municipal boundary).
396. See Local Authorities Law (Sewerage) 5722-1962, Israel Ministry of the Environment, Wastewater, available at http://www.sviva.gov.il/Enviroment/bin/en.jsp?enPage=e_BlankPage&enDisplay=view&enDispWhat=Object&enDispWho=Articals/12410&enZone=wastew_law (stating the Local Authorities Sewerage Law prescribes the rights and duties of local authorities in the design, construction and maintenance of sewage systems; requires each local authority to maintain its sewage system in proper condition; approval of new sewage systems by regional planning commissions and by health and environmental authorities; and provides sewer system charges and sewer system fees).
397. HUMAN RIGHTS IN EAST JERUSALEM, supra note 385, at 41.
398. Id.
Building Law provide for requirements pertaining to the size and type of waste containers. Further, the municipality is authorized to establish landfills and other waste disposal locations in line with municipal and national policies.\(^\text{399}\) A chronic shortage of sanitation facilities, workers, and trucks, however, has led to piles of trash in the streets and numerous illegal garbage dumps—mainly in Palestinian neighborhoods.\(^\text{400}\) A 2008 State Comptroller Report stated that: “Cleanliness in East Jerusalem is much worse than in the other parts of the city. Municipal attention to the cleanliness and care of East Jerusalem is deficient and reflective of ongoing neglect.”\(^\text{401}\) Additionally, persons interviewed during the trip reported that garbage is collected every day in West Jerusalem but only three times weekly in East Jerusalem. Neighborhoods outside of the barrier but still part of the municipality are not serviced at all.\(^\text{402}\) In 1993, the state passed a new recycling law, giving the municipality authorization to collect and dispose of waste for recycling.\(^\text{403}\) In Israeli neighborhoods large recycling bins separating materials from one another can be seen on the side of the street; these containers are largely absent from Palestinian neighborhoods.\(^\text{404}\)

The roads and sidewalks in East Jerusalem in Palestinian neighborhoods, are in serious disrepair—if they exist at all. Indeed, almost ninety percent of the municipality’s roads and sidewalks are located in

\(^{399}\) Legal Framework, Israel Ministry of Environmental Protection, http://english.sviva.gov.il/bin/en.jsp?enPage=e_BlankPage&enDisplay=view&enDispWhat=Zone&enDispWho=wast_law&enZone=wast_law (last updated Jan. 20, 2011); Koby Simana, Waste Collection and Disposal in Local Authorities: A Proposal for Reform (Institute for Advanced Strategic and Political Studies, Division for Economic Policy Research, Policy Studies No. 50, 2001), http://www.israel economy.org/policystudies/po50.pdf (“Sanitation services, including garbage removal, are one of the obligatory services that local authorities are required to provide their residents. The responsibility and authority to provide this service lies in the Municipalities Ordinance, and in the Local Councils Order. The various government ministries (mainly the Ministries of Environment and the Interior) set procedures and regulations for the local authorities.”).


\(^{402}\) Alyan, supra note 400.


\(^{404}\) These observations are based on authors’ visits to these areas in March 2011.
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West Jerusalem.\textsuperscript{405} Driving between a Jewish and a Palestinian neighborhood in East Jerusalem makes clear the stark difference between the two. In Jewish neighborhoods, the roads appear to have been recently paved, whereas in Palestinian neighborhoods the roads are studded with potholes or are unpaved.\textsuperscript{406} These conditions cause harm to both people and cars,\textsuperscript{407} making living in these neighborhoods unattractive.

c. Point-Specific Services. While not directly related to housing per se, access to schools, hospitals, libraries, parks and other recreational facilities deeply affects the ability of residents to enjoy their homes. Palestinian neighborhoods have a limited number of these services, and those that do exist are generally of poorer quality than those found in West Jerusalem. The visible inequality between East and West Jerusalem fosters a belief among Palestinians that the State and city are actively discriminating against them. Statistics support the disparity in the municipality’s provision of public services between East and West Jerusalem. For example: East Jerusalem has forty-five public parks whereas West Jerusalem has 1,000; East Jerusalem has thirty-three sports facilities whereas West Jerusalem has 531;\textsuperscript{408} and East Jerusalem has two libraries, whereas West Jerusalem has twenty-six. These differences point to the municipality’s decision to build infrastructure and provides services in West Jerusalem at a greater rate than in East Jerusalem, a policy that at least points toward a discriminatory intent.\textsuperscript{409}

2. International Law. The disproportionate expenditure of the city’s municipal budget in non-Palestinian neighborhoods and the inequality in the municipal services provided to Jewish and Palestinian neighborhoods may violate Palestinians’ rights to equality and to be free from discrimination under international law. The ICCPR and ICESCR contain

\begin{enumerate}
\item \textsuperscript{405} Human Rights Watch, Separate and Unequal: Israel’s Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories 133 (2010).
\item \textsuperscript{406} These observations are based on authors’ visits to these areas in March 2011.
\item \textsuperscript{407} Human Rights in East Jerusalem, \textit{supra} note 385, at 40.
\item \textsuperscript{408} B’Tselem, Neglect of infrastructure and services in Palestinian neighborhoods http://www.btselem.org/english/Jerusalem/Infrastructure_and_Services.asp
\item \textsuperscript{409} Meir Margalit, Discrimination in the Heart of the Holy City, International Peace and Cooperation Centre, Jerusalem, pg. 29, 127 (2006) (stating that in 2003, 78.8 percent of the 606 public infrastructure plans implemented by the Jerusalem Municipal Planning Administration were located in West Jerusalem, as opposed to 21.2 percent in East Jerusalem.)
\end{enumerate}
virtually identical provisions guaranteeing equal protection under the law without distinction as to “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The ICERD contains a substantially similar provision but which addresses discrimination based on “race, color, descent, or national or ethnic origin.”

The CESCR, in interpreting these provisions, has stated that “discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.” Further, it has found that states have an obligation under this article to “adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds,” and the Committee specifically mentioned the example of private discrimination in housing.

The CESCR has repeatedly expressed its concern to Israel that the “excessive emphasis upon the State as a ‘Jewish State’ encourages discrimination and accords a second-class status to its non-Jewish citizens.” CESCR has found that this “discriminatory attitude is apparent in the continuing lower standard of living of Israeli Arabs as a result, inter alia, of higher unemployment rates, restricted access to and participation in trade unions, lack of access to housing, water, electricity and health care and a lower level of education . . .” The CERD also confirms that “separate 'sectors' are maintained for Jewish and Arab

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410 International Covenant on Civil and Political Rights, Articles 2 and 26; International Covenant on Economic, Social and Cultural Rights, Article 2.
411 International Convention on the Elimination of All Forms of Racial Discrimination, Article 5.
413 Id.
415 Although the CESCR report focused on Israeli Arabs, interviews conducted by the authors during the March 2011 visit to Jerusalem confirmed that similar issues apply to Palestinian residents of Jerusalem.
persons, in particular in the areas of housing and education . . . result[ing] in unequal treatment and funding.”

Israel, in its report to CERD, defended against any such assertions, stating that “[l]ocal municipalities in Israel provide services to all of Israel’s citizens and residents, without any form of discrimination based on religion, race, gender or ethnic background. The employees in all local municipalities in Israel represent the entire State’s population, as well as its various religious and ethnic groups, without any discrimination.” Israel further maintains that equality has been firmly entrenched as a binding, overarching principle in its domestic legal order since its founding.

Attempts to cement the right to quality in law, however, have been met with resistance, as demonstrated by its exclusion from the 1992 Basic Law covering Human Dignity and Liberty. However, even if a right to equality is enforceable in Israeli courts, it does not automatically mean that the state cannot legally distinguish between its Israeli citizens and Palestinian permanent residents. Both the ICERD and ICESCR contain language qualifying their non-discrimination principles, allowing for a diminished standard as applied to noncitizens. Article 1(2) of the ICERD states that the rights and obligations contained therein, “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” Further, Article 2(3) of the ICESCR states that “[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” These allowances, of course, do not allow Israel to openly discriminate against its Palestinian residents. CERD, in interpreting the provision, stated that although some rights contained within the

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419 Legal Violations of Arab Minority Rights in Israel: A Report on Israel’s Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination. Adalah. March 1998, p. 18, 19. (quoting MK Rubinstein, the Knesset member who brought the bill, as saying “there is no general article for equality because such an article was an obstacle to the passage of the bill.”)

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conventions "such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons."

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The unequal provision of municipal services within Jerusalem—and even within East Jerusalem between Palestinian and Israeli Jewish areas—affects the housing decisions of Jerusalem residents. The disparity between well-maintained Israeli Jewish neighborhoods and garbage-littered, disorganized Palestinian neighborhoods is stark. Making progress on housing issues in East Jerusalem will require significant steps to narrow this gap.

V. JERUSALEM AND THE PEACE PROCESS

Although the Article has to this point focused on aspects of the problem of housing in East Jerusalem, this issue is part of a larger dispute concerning Jerusalem that has proven to be a major stumbling block in Israeli-Palestinian peace negotiations. Jerusalem is both the declared capital of the State of Israel and sought by the Palestinians as the capital of their future state. It is a city holy to the world’s three great monotheistic faiths. The vital importance of Jerusalem means, therefore, that the city must be included in any final peace settlement, yet the complexity of the city and the passions it arouses means that achieving a workable solution will be difficult. Indeed, it was this perceived challenge that caused the Israelis and Palestinians, as they embarked on the Oslo Peace Process, to leave Jerusalem for future Final Status Negotiations. Since that time, Jerusalem has loomed over the process, a seemingly unsolvable puzzle of three religions and two peoples.

This Section begins with a look at the major official, as well as unofficial, proposals for resolving the question of Jerusalem. These include the Oslo Accords and the Clinton Parameters; the Arab Peace Initiative and the Geneva Accord; and the Abbas-Olmert Negotiations. It then discusses connections between the focus of this study—housing in East Jerusalem—and the peace process.

Throughout this Section, it is important to keep in mind some general principles. First, it is difficult, if not impossible, to see how a final Israeli-
Palestinian settlement—as well as a broader Israeli accommodation with the Arab world—can be reached without an agreement concerning Jerusalem. Putting off the issue of Jerusalem indefinitely will only make the issue more difficult to resolve. Second, as a practical matter, Jerusalem will remain the capital of Israel, regardless of whether or not it is recognized as such by the international community. Third, the Palestinians must be given significant new rights in the city, including some quantum of sovereignty and greater links with the West Bank, in order to achieve a workable solution. It is hard to envision a peace settlement in which the Palestinian role in Jerusalem remains as it is today. Finally, a significant number of Israelis and Palestinians can be expected to vigorously (and very likely violently) oppose any peace settlement that involves concessions to the other side. Indeed, the greatest obstacle to achieving a just settlement in Jerusalem is not the specific contours of such an agreement, but rather the need to sell that agreement to the Israeli and Palestinian people, especially those that attach the utmost religious significance to Jerusalem. As the following proposals show, it is far easier to draw lines on the map than in people’s hearts and minds.

A. The Oslo Accords and the Clinton Parameters

The Oslo Accords, in which Israel and the Palestinians recognized each other’s “mutual legitimate and political rights,” provided a framework for negotiations in which the question of Jerusalem, among other contentious issues, could be resolved. The Oslo Accords ended decades of nonrecognition between Israel and the Palestinians and resulted from behind-the-scenes negotiations brokered by the Norwegian government. The 1995 Israeli-Palestinian Interim Agreement (“Oslo II”) granted Palestinians living in Jerusalem the right to vote in Palestinian elections, but it reiterated that the issue of Jerusalem would be resolved during subsequent negotiations.
It was not until the 2000 Camp David Summit that a serious attempt was made to resolve Jerusalem and other final status issues between the parties. The direct negotiations between Prime Minister Barak and Palestinian President Arafat failed to reach an agreement, and Jerusalem was a major stumbling block. In September 2000, the Second Palestinian Intifada broke out, leading to renewed conflict between the two sides. As his term was ending, President Clinton called Israeli and Palestinian negotiators back to Washington in a last-ditch effort to resolve the conflict. Notes from this meeting reflect President Clinton’s final proposals to bridge the gap between the two sides. Whereas most of the international community insisted on an Israeli return to the pre-1967 borders, President Clinton proposed as a “general principle” that Arab areas become part of Palestine and Jewish areas part of Israel, including in the Old City. Clinton believed that the issue of the Haram al-Sharif/Temple Mount was more one of “symbolic issues of sovereignty” than practical administration. Clinton proposed Palestinian sovereignty over the Haram al-Sharif, and Israeli sovereignty over the Western Wall and the space sacred to Judaism that is a part of it, with international monitoring to provide mutual confidence. Ultimately, however, the negotiations failed and conflict intensified between Israelis and Palestinians.

B. The Arab Peace Initiative and the Geneva Accord

With the renewal of the conflict between Israelis and Palestinians, the prospects for peace appeared grim. In addition, the September 11 attacks and President Bush’s perception that Clinton’s in-depth involvement in the Peace Process had been a mistake caused the United States to focus its attention elsewhere. The breakdown in direct Israeli-Palestinian negotiations and American disengagement opened space for others to make peace proposals of their own.

For instance, in February 2002 Crown Prince (now King) Abdullah of Saudi Arabia proposed, in an interview with New York Times columnist Thomas Friedman, that the Arab states grant Israel full normalization of relations in exchange for full Israeli withdrawal to the 1967 borders in


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accordance with all U.N. resolutions, including in Jerusalem. This proposal became the basis of The Arab Peace Initiative (API), adopted at the March 2002 Arab League Summit in Beirut. Regarding Jerusalem, the API calls on Israel to withdraw fully to the 1967 borders and for the establishment of a Palestinian state with East Jerusalem as its capital. In exchange, the Arab countries would consider the conflict with Israel ended and would establish normal relations with the Jewish state.

There were also numerous private efforts among Israelis and Palestinians to envision a final settlement between both sides. The most prominent of these private initiatives were the discussions between Ami Ayalon, the former director of Israel’s security services, and Sari Nusseibeh, the president of Al-Quds University. This “People’s Voice” initiative has been endorsed by approximately 400,000 Israelis and Palestinians. The proposal builds on both the Clinton parameters and the API. Jerusalem is envisioned as “an open city, the capital of two states,” in which “freedom of religion and full access to holy sites will be guaranteed to all.” Arab neighborhoods would become part of Palestine; Jewish neighborhoods would remain part of Israel. Israel would compensate Palestine for Jewish neighborhoods across the Green Line with territory elsewhere in an equal exchange (1:1). Finally, neither side would exercise sovereignty over the Holy Places. Palestine would become the Guardian of the Haram al-Sharif for Muslims, Israel the Guardian of the Western Wall for Jews, and the status quo would be maintained for Christian holy sites.

Out of the Ayalon-Nusseibeh negotiations grew, perhaps, the most complete private effort to conceptualize a peace settlement. Developed by former Palestinian and Israeli diplomats and officials, and endorsed by numerous prominent Israelis and Palestinians, the 2003 Geneva Accord was a comprehensive effort to envision a final settlement and to build support for renewed negotiations between the parties. Under the Accord, each side would recognize the other as the homeland of its people and agree to an end of the conflict. Palestine would get 98.5 percent of the occupied territories, to which Palestinians would have a right of return, and most Israeli settlements would be dismantled. Jerusalem would become the

capital of both Israel and Palestine. Jewish areas of Jerusalem would
remain Israeli; Arab neighborhoods would become part of Palestine.\footnote{428} In
exchange for those Jewish neighborhoods built on the other side of the
Green Line, the Palestinians would receive an equal amount (1:1) of
territory elsewhere. Palestinian Jerusalemites would lose their status as
permanent residents of Israel and become citizens of Palestine. A Jerusalem
Coordination and Development Committee would also be established to
foster cooperation between the Israeli and Palestinian municipalities on
matters of municipal administration.

Finally, the Accord envisioned special arrangements for the Old City.
The Haram al-Sharif/Temple Mount would be under Palestinian
sovereignty, though there would be a Multilateral Presence assigned to the
Haram al-Sharif/Temple Mount to monitor security and conservation. The
Western Wall would remain under Israeli sovereignty. Sovereignty in the
Old City would be divided between Israel and Palestine by population\footnote{429}
with limits on the number of police from each side permitted. The
Implementation and Verification Group (IVG)—composed of the U.S.,
E.U., U.N., Russia, and an Arab or Muslim state—would also provide a
police force and have a presence in the Old City. While each side would be
responsible for controlling entry and exit points into the Old City, free
movement within the Old City would be guaranteed.

In addition to the detailed agreement proposed by the Accord, the
Geneva Initiative also attempted to work out the complex details of
implementation. Numerous Annexes to the Accord spell out possible
options for implementation on a range of issues. The Jerusalem Annex,\footnote{430}
for instance, proposes a major transportation and border crossing facility
for French Hill that would foster mobility for both Israelis and Palestinians.
The Annex also envisions turning Route 60, which essentially divides
Israeli and Palestinian neighborhoods in northern Jerusalem, into a bi-
national road (with either separate or merged lanes of traffic as options).
The Annex also discusses options for implementing the border in Abu Tor,
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a densely populated neighborhood abutting Silwan that is one of the few mixed Jewish-Arab neighborhoods in Jerusalem. Although this brief report cannot do them justice, these proposals for implementation demonstrate that it is possible to design creative solutions for executing a peace agreement in Jerusalem. Thus, the engineering is there, even if the political will is not.

C. Abbas-Olmert Negotiations

Despite the resumption of hostilities between Israelis and Palestinians, official peace negotiations were not completely stalled. President Bush proposed the Road Map for Peace in 2003 which aimed at restarting negotiations and achieving a final settlement. Like the Oslo Accords, the Road Map left the issue of Jerusalem for final status talks between the parties. With peace negotiations seemingly going nowhere, however, Israeli Prime Minister Ariel Sharon took unilateral measures to manage the conflict with the Palestinians. First, Israel began construction of the separation barrier, which Israel argued was necessary to prevent Palestinian suicide bombings in Israel, especially in Jerusalem. Second, Israel unilaterally withdrew all Israeli settlers from the Gaza Strip in August 2005. At the same time, the suffering of the Palestinian people during the renewed conflict, the death of President Arafat, and the takeover of Gaza by Hamas convinced the Palestinian Authority under President Mahmoud Abbas to engage in renewed peace negotiations. These negotiations culminated in a draft agreement between Abbas and Israeli Prime Minister Ehud Olmert.431 Though no final settlement was reached, the agreement

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represents perhaps the most significant set of concessions by both sides, especially regarding Jerusalem.

Olmert and Abbas adopted the general principle that President Clinton had first proposed: Arab neighborhoods would become part of Palestine and Jewish neighborhoods part of Israel.\footnote{The one exception would have been Har Homa, which Israel started building after the Oslo Process began. Nevertheless, neighborhoods such as French Hill, Ramat Alon, Ramat Shlomo, Gilo, Talpiot and the Jewish Quarter of the Old City, in which approximately 120,000 Israelis lived, would become part of Israel. At the same time, the Palestinians indicated they would not accept Israeli annexation of Ma’ale Adumim, an Israeli settlement in eastern Jerusalem with more than 30,000 residents. Carlstrom, “The biggest Yerushalayim,” supra note 431. It is unclear whether in subsequent negotiations the Palestinians consented to Israeli annexation of Ma’ale Adumim. Avishai, supra note 431.} For all those lands on the other side of the Green Line that became part of Israel, Israel would compensate the Palestinians with territory elsewhere.\footnote{Overall, Abbas proposed the Israel annex about 1.9 percent of the West Bank and provide Palestine with land of equal size and quality elsewhere. Olmert suggested Israel annex between 6.3 and 5.9 percent, compensating the Palestinians with 5.8 percent of land elsewhere and a twenty-five mile tunnel connecting the West Bank and Gaza. Avishai, supra note 431.} Prime Minister Olmert’s proposal was “unprecedented”; for the first time, an Israeli prime minister had proposed treating land in East Jerusalem like “any other occupied territory.”\footnote{Id. While the issue had been raised at Camp David, it was President Clinton who proposed the division.} In exchange, President Abbas proposed that East and West Jerusalem be separate municipalities contained within one city and that a coordinating body with representatives of each side be established. The Old City and the Holy Places would be under a custodial committee made up of representatives of Israel, Palestine, Jordan, Saudi Arabia, and the United States, and perhaps also including Egypt and the Vatican.\footnote{Swisher, supra note 431 (quoting former Palestinian Chief Negotiator Saeb Erekat telling U.S. Middle East Envoy George Mitchell that the issue of the Holy Places and the Old City is “solved. You have the Clinton Parameters formula. For the Old City, sovereignty for Palestine, except the Jewish quarter and part of the Armenian quarter. . . the Haram can be left to be discussed—there are creative ways, having a body or committee, having undertakings for example not to dig [excavations under the Al Aqsa mosque]. The only thing I cannot do is convert to Zionism.”).} This committee would maintain the holy sites, guarantee access for all, and provide an international force to police and administer the “holy basin.”

Though the gap between the parties appeared small, renewed conflict in Gaza, the pending indictment (and subsequent resignation) of Prime Minister Olmert, and the U.S. presidential transition proved too much for an agreement to be reached. Nevertheless, the proposals indicate that the
gap between the parties had narrowed, awaiting the right constellation of political forces to achieve a final settlement.\footnote{In the meantime, new suggestions have emerged for bridging the gap between the parties. See, e.g., David Makovksy, Sheli Chabon & Jennifer Logan, \textit{Imagining the Border: Options for Resolving the Israeli-Palestinian Territorial Issue}, WASH. INST. FOR NEAR EAST POL’Y (2011), http://washingtoninstitute.org/pubPDFs/StrategicReport06.pdf.}

It is doubtful, however, that political forces in favor of an agreement will coalesce in the short-term. First, Israel elected a more right-wing Likud government led by Prime Minister Benjamin Netanyahu and included in the governing coalition more hawkish parties opposed to territorial compromise with the Palestinians, especially regarding Jerusalem.\footnote{Though the governing coalition also includes at least one party favoring territorial compromise, Defense Minister (and former Prime Minister) Ehud Barak’s Independence Party. Indeed, Barak recently told a Washington think tank that he favored the division of Jerusalem along the lines of the Clinton parameters, a position that Prime Minister Netanyahu disavowed as not representing government policy. \textit{Netanyahu: Barak’s Washington Speech Not Government Policy}, JERUSALEM POST, Dec. 12, 2010, http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=199061.} Second, the recent agreement to create a Palestinian unity government including Hamas may prove to be an obstacle to peace, especially if Hamas is not required to abandon its position of non-recognition of the State of Israel. Third, Al Jazeera’s recent exposure of the Palestine Papers has thrown the Palestinian negotiating team into disarray and “seriously embarrassed the PA leadership.”\footnote{Khaled Abu Toameh, \textit{Erekat Quits After ‘PaliLeaks’ Embarrassment}, JERUSALEM POST, Feb. 12, 2011, http://www.jpost.com/MiddleEast/Article.aspx?id=207929&R=R3.} The Palestine Papers may make it more difficult for the PA to make concessions to Israel in future negotiations.\footnote{See Khaled Abu Toameh, \textit{Hamas: PA Leadership Should Be ‘Isolated and Besieged’}, JERUSALEM POST, Jan. 26, 2011, http://www.jpost.com/MiddleEast/Article.aspx?ID=205360&R=R1 (noting the harsh reaction to the revelation of the Palestine Papers in Gaza and describing a statement of Palestinian groups, including Hamas, “that PA President Mahmoud Abbas and his team do not have a mandate to negotiate on behalf of the Palestinians.”).} Finally, the Arab Spring and the turmoil it has set off across the region may embolden the Palestinians and make the Israelis more cautious. The PA, concerned about its own legitimacy, has called for new elections in September. The new, post-Mubarak Egyptian regime helped to facilitate the Fatah-Hamas rapprochement,\footnote{\textit{Fatah and Hamas Sign Reconciliation Deal}, AL JAZEERA, Apr. 27, 2011, http://english.aljazeera.net/news/middleeast/2011/04/2011427152119845721.html.} and the recent Nakba Day demonstrations indicate that Palestinians may once again take the streets...
demanding their rights. On the other hand, Israelis are concerned about the fate of their peace treaty with Egypt, a cornerstone of Israeli foreign and security policy, and have begun to feel more isolated in the region.

The absence of progress on the ground has already led both sides to take unilateral measures. Israel, for example, built the separation barrier in response to a wave of Palestinian suicide bombings, mainly in Jerusalem, which has limited Palestinian access to Jerusalem. In response to the increased demand for housing in Jerusalem created by Israeli residency policy, Palestinians in those parts of Jerusalem inside the municipal boundary but outside the separation barrier, such as Kufr ‘Aqab, have begun an illegal building boom. These unilateral measures will likely continue as long as peace negotiations remain stalled. Indeed, some Palestinians and Palestinian supporters have suggested that if Israel fails to advance the peace progress, the Palestinians might pursue a one-state solution instead of a two-state settlement, seeking their rights inside Israel, not their independence. At the same time, the Palestinians have been seeking international support for the recognition of an independent Palestine, suggesting that they will seek a U.N. General Assembly vote in September of this year on the recognition of the State of Palestine, including the West Bank, Gaza Strip, and East Jerusalem.

Given the strategic, geopolitical issues at stake in the peace negotiations, the issue of housing in East Jerusalem may appear tangential. Yet when there is deadlock at the highest levels, housing has the potential to play a significant role in overcoming the biggest obstacle to peace: the

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442 See Aluf Benn, Without Egypt, Israel Will Be Left with No Friends in Mideast, HAARETZ, Jan. 29, 2011, http://www.haaretz.com/news/diplomacy-defense/without-egypt-israel-will-be-left-with-no-friends-in-mideast-1.339926 (“[T]he ‘cold peace’ with Egypt was the most important strategic alliance Israel had in the Middle East.”); see also Sheikh Yousaf Al-Qaradawi in Friday Sermon at Cairo’s Tahrir Square: Pray for the Conquest of Al-Aqsa, MEMRI, Feb. 18, 2011, http://www.memri.org/report/en/0/0/0/0/0/0/5020.htm (describing a sermon by prominent Sunni cleric and Muslim Brotherhood leader Yousuf al-Qaradawi who, on a triumphant return to his native Egypt, called on his followers to pray for the re-conquest of al-Aqsa).

443 For discussion of the debate surrounding the “one state” solution, see BENNY MORRIS, ONE STATE, TWO STATES (2009).

444 Ethan Bronner, U.N. Vote on Palestinian State Could Force Israel’s Hand, N.Y. TIMES, Apr. 2, 2011, at A1 (quoting Israeli Defense Minister Ehud Barak as describing such a vote as a “‘diplomatic-political tsunami’” and Fatah foreign affairs department head Nabil Shaath as indicating that the Palestinians’ goal is “‘membership in the United Nations General Assembly in September’”/).
lack of trust between Israelis and Palestinians. Indeed, this lack of trust was a consistent theme of the authors’ trip. In many meetings, our interlocutors expressed a desire for peace and blamed the other side for a lack of meaningful progress toward a settlement. Even those who empathized with the other side expressed doubt about whether Israelis and Palestinians could reach a settlement, preferring instead international intervention or American pressure. If Israelis and Palestinians are to reach a durable settlement, however, it is likely that the two sides must work it out themselves. The international community and the United States are simply not in a position to dictate a settlement that would be acceptable to both sides.

It is in this context that housing and municipal services in Jerusalem may prove to be an effective means of building confidence between Israelis and Palestinians. Housing and municipal services involve basic human needs of daily life, and it is in these areas that Israelis and Palestinians must interact, at least on a surface level, to maintain a functioning municipality. In Part VII, we make several suggestions to both Israelis and Palestinians that, we believe, will increase positive cooperation, decrease tension, and build trust between the two sides. These measures are meant to be small steps; they will not produce a settlement, nor do they purport to do so. Yet it is our hope that both sides realize they have something to gain from cooperation in Jerusalem and from a more technocratic, less political, approach. Our hope is that such cooperation can improve the lives of city residents and build positive momentum toward reaching a workable solution in Jerusalem.

The broad outlines of a peace agreement in the Jerusalem area have been worked out. They key question, therefore, is one of political will and trust. Most Israelis continue to insist that Jerusalem remain the undivided capital of Israel. Most Palestinians continue to insist, along with most of the international community, that Israel withdraw in full to the pre-1967 borders. President Obama recently became the first U.S. president to call explicitly for a peace agreement to be based on the 1967 borders, while allowing for mutually agreed land swaps between the two sides. While

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445. Although we approach this issue as outsiders, we are under no illusions that such cooperation will be easy to achieve. But we do not believe that the status quo is acceptable, nor do we desire to follow the well-worn path of exclusively blaming one side or the other for the lack of progress in Jerusalem.

leaders on each side have demonstrated more flexibility, the challenge will
be selling a settlement in Jerusalem to their respective peoples. External
events may make that more difficult: renewed attacks on Israel from
organizations like Hamas in Gaza or the West Bank or Hizbullah in
Lebanon or a new regime in Egypt or Jordan that renounces peace with
Israel could derail attempts to settle the conflict. Yet while the Israeli and
Palestinian peoples may find compromise on Jerusalem almost impossible,
no peace settlement can be achieved without it.

Before moving on to our recommendations, the next Part of the paper
will examine how our findings call into question the utility of internationa
law in resolving international conflict.

VI. LIMITS OF INTERNATIONAL LAW

This Article examines housing in East Jerusalem under internationa
law. Questions arise not only as to the applicable international legal
framework, but more generally regarding the limits or relevance of
international law in resolving housing issues in this context. This Part
addresses two such questions. First, it briefly discusses the enforcement
problems that are inherent in the international legal system. Second, it
considers the limitations of international law in the face of opposing
domestic legal norms. The Part concludes with a suggestion that the two
sides agree to disagree on the reach and relevance of international law. In
essence, this approach requires each side to acknowledge and then de-
emphasize legal argument, in an effort to foster the trust that will be vital to
reaching agreement on housing—among other—issues.

The first, and most basic, limitation of international law is that of
enforcement. Those supporting Palestinian statehood have long bemoaned

Minister Netanyahu rejected his calls for a return to the 1967 borders, it is not clear that President
Obama’s proposal differs significantly in substance from prior American policy. Indeed, President
Obama indicated that he does not view this position as such a departure. Id. At the same time, the
President criticized the Palestinians’ plan for a U.N. vote on Palestinian statehood, noted that the
inclusion of Hamas in the Palestinian government raised “profound and legitimate questions for Israel,”
and called for the Palestinian state to be non-militarized. Mark Landler & Steven Lee Myers, Obama
Sees 67 Borders as Starting Point for Peace Deal, N.Y. TIMES, May 19, 2011,
cse.

See supra Part II.A discussing the legal status of Jerusalem.

For a comprehensive discussion of such limitations, see generally JACK K. GOLDSMITH &
the lack of enforcement power behind various United Nations pronouncements.\textsuperscript{449} While human rights committees have noted violations in East Jerusalem, their ability to address the documented abuses remains limited to raising concerns.\textsuperscript{450} Although the ICJ’s advisory opinion on the separation barrier concluded that the barrier violated international law and should be removed, there is little evidence that this non-binding opinion has affected Israel’s position on the matter.\textsuperscript{451}

A second important limitation on international law in the context of housing in East Jerusalem also implicates domestic Israeli law. In some cases, plausible arguments from international law stand opposed to plausible arguments rooted in Israeli law. Two examples suffice to illustrate this conflict. First, for many international legal scholars, any Israeli built-up areas east of the Green Line in Jerusalem constitute “settlements” constructed in violation of international law. Under Israeli law, however, those same areas fall within the municipal borders of Jerusalem—the capital of Israel under the Israeli Basic Law—and are thus entirely legal. Second, and as discussed in more detail above,\textsuperscript{452} the separation barrier either violates international human rights and humanitarian law (according to the ICJ) or is a legitimate and necessary measure that adequately balances liberty and security concerns (according to the Israeli Supreme Court). In both examples, non-trivial arguments support the positions taken by both international and Israeli lawyers.\textsuperscript{453}

More accurately stated, this second limitation refers to the limits of legal argument generally—whether international or domestic—in addressing housing issues in Jerusalem. The suggestion here is that, as one scholar writing in a different context has argued, the parties are “too focused on the law and fail[] to take adequate account of other, non-legal

\begin{itemize}
\item \textsuperscript{449} See, e.g., JEAN ALLAIN, BEYOND THE ARMED STRUGGLE 11 (2005) (“If we consider the value which international law has played in seeking to secure a viable state for Palestinians, we must consider that it has, in a very abject way, failed. Likewise the United Nations, although it has been a storehouse of resolutions, reports and pronouncement; has failed.”).
\item \textsuperscript{451} For more discussion of the separation barrier under Israeli law, see supra Part IV.A.
\item \textsuperscript{452} See supra Part IV.A.
\item \textsuperscript{453} Although the precise status of international law in Israel is not entirely clear, it does appear to be settled that in a conflict between an international legal norm and a domestic norm, the latter prevails. SUVI NAVOT, CONSTITUTIONAL LAW OF ISRAEL 33 (2007)
\end{itemize}
considerations that are often central to good diplomacy.”

Rather than relying on either domestic or international legal arguments to characterize actions as legal or illegal, Israelis and Palestinians would do well to acknowledge that both frameworks offer plausible accounts, and then consider looking beyond the relatively narrow range of legal options. While this approach does not amount to putting aside legal argument entirely, it does envision a more flexible mode of negotiation. This may seem an interesting suggestion coming out of a paper analyzing the application of international law, but it is the authors’ belief that an approach to the housing issue that is “more pragmatic, and less legalistic”—that is, one which acknowledges but does not entrench around conflicting legal arguments—may enable trust to develop between the parties. And trust may lead the way to resolution.

To further the chance of resolution, there are some concrete steps that both sides could take related to housing. The concluding section details the authors’ recommendations concerning these steps, after first examining assumptions that were made by the authors in the course of the trip and the writing of this paper.

VI. RECOMMENDATIONS/SUGGESTIONS

Important assumptions drive the actions of Israelis, Palestinians, and other parties in East Jerusalem. Israel does not want to take steps that would undermine its policy of maintaining Jerusalem as its undivided capital. The United States does not want to recognize this claim, believing that any such recognition might undermine its position as an honest broker or prejudice negotiations over a future final status agreement. Many Palestinian East Jerusalem residents do not wish to take actions, such as voting in municipal elections, which might be perceived as legitimizing Israeli control of the city. Recognizing that assumptions such as these guide parties’ actions, the authors’ sought to examine our own. The following three assumptions emerged from our visit and inform the recommendations made below.


455. Id.

456. Israelis and Palestinians are not monolithic groups, of course, and varying assumptions guide the actions of different groups and individuals, but it is still useful to examine the general assumptions behind important policy choices.
First: Significant potential for progress exists compared to the status quo. While the contentious issues are complicated and have successfully evaded solutions for decades, the pursuit of progress is not futile. There are a number of steps that could be taken by Israelis and Palestinians, in both the short and long term, which could produce net improvements for both sides and move the parties closer to a lasting peace.  

Second: A final status agreement is probably not imminent. Therefore, solutions addressing the short-term needs of Palestinian East Jerusalem residents are necessary and should be pursued.

Third: Everything is connected. Any short-term solutions must be sensitive to their implications for a long-term settlement, as the parties are concerned with how changing the facts on the ground or establishing patterns of practice would impact negotiations over such an agreement.

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With these assumptions in mind, we offer the following suggestions to Israelis and Palestinians. We recognize that some of these suggestions will be politically unpalatable to certain segments of the Israeli and the Palestinian populations. These suggestions also require a reexamination of long-cherished dreams among both sides: for Israelis, the notion that a settlement can be achieved without some form of Palestinian sovereignty in Jerusalem; for Palestinians, that each and every Israeli will be evacuated from the east side of the Green Line. Yet we believe that the implementation of these recommendations could build confidence between the parties, perhaps increasing the chances for peace. In the absence of a final status agreement, however, these recommendations offer a modest improvement in the lives of Israelis and Palestinians in Jerusalem and may contribute to the maintenance of a peaceful, if tense, coexistence.

The following list contains more suggestions for the Israelis than Palestinians. This disparity is a reflection of Israel's full control over Jerusalem and the power imbalance between the two sides. These suggestions generally call on Israel to revisit and consider the impact of the

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457. A corollary to this assumption is that it is not necessary to resolve everything to improve some things.

458. Many of the hardships faced by East Jerusalem residents are rationalized by the “temporary” nature of the arrangement. We need more honesty about the likelihood of status quo continuing well into the future and the value of improving the current situation.
rules it has established governing housing and Palestinian life in East Jerusalem. If Israel attempts these changes, these suggestions include a call on Palestinians to take seriously Israeli efforts and to play by the rules. Thus, many of these suggestions are in the form of a quid pro quo. The authors also believe that many of these suggestions would be best implemented through mutual negotiation and coordination, rather than unilateral imposition. For these suggestions to advance the cause of peace in Jerusalem, a measure taken by one side should trigger both recognition and engagement from the other side toward finding a solution.

A. Suggestions for Israelis

1. Streamline the Permit Process. The construction permitting process is expensive, bureaucratic, and complicated for both Israelis and Palestinians. Streamlining the process would make it easier for both Israelis and Palestinians to build or add onto existing structures. It would also increase the likelihood that both sides would seek permits instead of building illegally.

2. Reopen Discussion of Current Zoning. Palestinians allege that the current zoning regime in Jerusalem is biased against them. Specifically, they allege the Israel has artificially limited the amount of land available for Palestinian residential construction by zoning a large portion of East Jerusalem as “green areas” on which no construction is permitted. Palestinians further allege that Israel has rezoned some of these areas to construct Israeli settlements or neighborhoods in East Jerusalem. Though it is important to maintain some land as undeveloped for parks, open space, and historical preservation, Israel should consider reopening discussion of the current zoning plan in East Jerusalem to address these Palestinian concerns. Israel should consider guaranteeing to Palestinians that “green areas” will be used for those purposes or, to the extent they are subsequently rezoned as residential, that they will be open for Palestinian construction.

3. Permit Palestinian High-Rise Construction. Palestinians in East Jerusalem face a housing shortage. The method used in most of the world to address housing shortages is to increase the population density by permitting the construction of high-rise apartment buildings. Israel should consider providing permits for developers to construct larger apartment
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buildings. Given Jerusalem’s historical significance, it is legitimate for Israel to require that such buildings be constructed in neighborhoods more distant from the Old City. By providing more housing in Jerusalem, Israel will lessen the population pressures that spur illegal construction. At the same time, however, Palestinian leaders will need to encourage Palestinians to live in such buildings, thereby overcoming what appear to be historical preferences for detached houses.

4. *Provide a Process for Legalizing Illegal Buildings.* Israel should consider providing Palestinians with a process for legalizing buildings that were constructed without a permit. Currently, Palestinians living in illegally constructed buildings face the constant threat of demolition, and Israel has no way of ensuring that the buildings are properly constructed. A process for legalizing such buildings—as Israel has done in other cities—could address both concerns. A likely objection to this proposal is that it constitutes an amnesty and thus would encourage more illegal building. Israel could, however, limit such legalization to buildings completed prior to a certain date and could review legalization applications on a case-by-case basis using objective criteria. Such criteria could include: that the applicant made a good-faith effort to apply for a building permit; that the applicant attempted to access the existing legal system to challenge the denial; the type of structure; the number of years the building has stood; whether zoning of the area has changed; and whether the builders can produce old deeds or land records demonstrating a longer term presence on the plot.

5. *Consider Repealing or Limiting Application of the Absentee Property Law.* Israel adopted the Absentee Property Law in order to regulate the property of those individuals who had fled to or sided with an enemy state during wartime. Yet the situation has changed dramatically since the law was adopted. Israel is at peace with Egypt and Jordan, is pursuing peace with the Palestinians, and has recognized that there will one day be a State of Palestine. Moreover, Palestinian East Jerusalemites are permanent residents of Israel, not residents of an enemy state. Israel should thus consider repealing the Absentee Property Law for East Jerusalem residents or at least limiting its application. This would limit confiscations of land when the owner or partial owner happened to live in the wrong Arab country at the wrong time.
6. **Increase Funding for Municipal Services in Palestinian Neighborhoods.** The disparity in the delivery of municipal services is a plainly visible problem that Israel acknowledges. The municipality lacks resources, and Palestinians do not vote or pay the same amount of taxes as wealthier Israeli Jerusalemites. Yet those factors do not justify the current failure to deliver an adequate level of services to Palestinians in East Jerusalem. Israel must make a better effort to target funds to Palestinian neighborhoods, providing basic services such as water, sewer, and garbage collection, as well as increasing funding for schools. Involving Palestinians in providing these services could help to address the high rate of unemployment in East Jerusalem while providing opportunities for Palestinian entrepreneurship. Improving education could break the cycle of poverty and provide Palestinian children with meaningful opportunities, decreasing the sense of frustration and powerlessness in the Palestinian community. These measures could show Palestinian East Jerusalemites that there are tangible benefits to cooperating with Israel while preparing them for potential autonomy or independence in a peace agreement.

7. **Increase Use of Neighborhood Councils.** The municipality has begun efforts to reach out to Palestinians about local planning and zoning issues, and Israel should consider expanding these efforts. The municipality at one point worked with community leaders (mukhtars) in Palestinian neighborhoods, but these officials became co-opted and lacked support in the Palestinian community. Instead of reinstituting an appointive system, Israel should consider permitting Palestinians to vote for neighborhood councils that would deal with exclusively local issues like planning, zoning, and municipal services. Whether Jerusalem remains an undivided city in a peace agreement or not, Palestinians in East Jerusalem will likely receive at least significant autonomy. Such neighborhood councils could prepare the Palestinians for such self-rule. Such councils would have to be designed to minimize Israeli concerns that organizations dedicated to Israel’s destruction, such as Hamas, do not control them.

8. **Alter Route of Separation Barrier.** Israel should continue to examine and alter the route of the separation barrier to minimize the impact on Palestinian daily life and to ensure contiguity between East Jerusalem and the West Bank. The barrier has increased the pressure on the East Jerusalem housing market and made it more difficult for Palestinians to access municipal services. Moreover, it is likely that peace will require the
integration of Palestinian neighborhoods in East Jerusalem into the West Bank. Thus, Israel should continue to change the route of the barrier to give Palestinians living in East Jerusalem greater access to and contiguity with that territory.

9. **Consider Abolishing Center of Life Requirement.** The requirement that Palestinian East Jerusalem residents maintain their center of life in the city or risk losing their residency status has distorted the Jerusalem housing market and produced bitterness on the Palestinian side. The requirement has increased demand for housing in East Jerusalem, preventing those who may have considered a move to suburban areas outside the municipal borders or to Ramallah from doing so. It has also forced difficult choices on Palestinians who marry West Bank residents, forcing them to bring their spouse to Jerusalem illegally or risk losing their Jerusalem residency if they move to the West Bank. Israel should consider abolishing the center of life requirement, permitting East Jerusalem permanent residents to maintain their residency status if they move to the West Bank or overseas. Doing so would likely reduce the pressure on the East Jerusalem housing market to some degree, while mitigating the harsh choices faced by permanent residents who marry West Bankers. To the extent that Israel has accepted the notion that Palestinian neighborhoods of East Jerusalem will become part of Palestine, Israel’s concerns about demographic balance in the city—as reflected in the center of life policy—may have been overtaken by events.

10. **Consider Use of Government Expropriation to Avoid Possible Conflicts.** Like any government, the Israeli government is able to take land for public use. In some situations, Israel should consider using this eminent domain power to ensure that certain housing remains in Palestinian hands. Such situations could arise when a Jewish organization wins a favorable court decision—as in Sheikh Jarrah—or when a Jewish group buys the land under questionable circumstances, and the houses in question threaten to become a flashpoint. Although we recognize that Israel may face domestic political problems if it took such a step, in some cases it may be the lesser evil to ensure that Palestinian residents are able to stay in their homes, with the Jewish owners receiving compensation for the land. Indeed, in Gaza and in certain West Bank outposts, the Israeli government has recognized the longer-term positive consequences of removing Israelis from certain land for the sake of peace. Though such a step would be even more
controversial in Jerusalem and thus could only be used sparingly, Israel should consider using it where necessary to maintain peaceful coexistence in the city.

B. Suggestions for Palestinians

1. More Active Cooperation with the Municipality. Israel alone cannot improve the quality of life in Palestinian areas of East Jerusalem. Rather, to the extent that Israel is willing to take steps like increasing the funding for municipal services, Palestinians must be willing to cooperate with the municipality to make sure those services can be delivered. In some cases, this may mean that houses must be sacrificed to provide schools, parks, and access roads. Palestinians should in these cases cooperate with the municipality without trying to internationalize or politicize these decisions. Furthermore, if Israel is willing to engage in discussions about re-zoning certain areas to permit Palestinians construction, change the route of the barrier to better accommodate Palestinian needs, and improve the permitting process, Israel will need Palestinian partners willing to engage Israel on these issues, help to shape the solutions, and encourage cooperation with Israel, not conflict.

2. Commit to Seeking Building Permits Through Lawful Means. If Israel commits to making improvements in the permitting process and making more permits available for Palestinian construction, Palestinians should consider committing to seek building permits through lawful means. It appears that most permits sought in East Jerusalem are granted; however, few Palestinians seek such permits. This may stem from a number of factors: a perception that it is a futile effort, a cost-benefit analysis taking into account the likelihood of getting caught and having one’s house demolished, an inability to pay the cost of the permitting process, or a desire not a legitimate Israel’s presence by seeking a permit. Yet if Israel does change the rules to level the playing field, Palestinians should presume Israeli good faith and apply for building permits through lawful means. Doing so would eliminate the risk of demolition, provide for more ordered development in East Jerusalem that could improve the provision of services, and ensure that new construction was properly designed and inspected.
3. **Consider Voting.** Although likely to prove highly controversial in the Palestinian community, we believe that Palestinians should consider voting in East Jerusalem municipal elections. We recognize that many Palestinian permanent residents refuse to vote because they do not wish to legitimize the Israeli presence in East Jerusalem or because they believe it would not lead to any improvements in their lives. Yet in a democratic system there are few ways to more effectively influence elected officials than by forming voting blocs. If a larger number of Palestinians voted in municipal elections, their voices would be heard on issues such as housing and municipal services. Palestinian voters could exert significant influence on the municipality when it comes to zoning and to the provision of municipal services; they would no longer be simply permanent residents, but rather constituents whose needs would be part of the political calculus in the city.

4. **Recognize Importance of Jewish Sites in Palestinian Neighborhoods.** Palestinians should also recognize the importance of protecting and ensuring access to Jewish sites in Palestinian neighborhoods.\(^{459}\) Concern about such sites is a major factor influencing ideologically motivated Israelis to settle in East Jerusalem and is part of the Israeli government’s decision-making regarding which portions of the city could be ceded in a peace agreement. Elad and likeminded groups fear that if they do not move into Palestinian neighborhoods to protect Jewish sites, Jews will lose access to those sites and they may well be destroyed. What better way for the Palestinians to undermine these arguments and to build trust than to commit to preserving these sites as Jewish sites—even if they should become part of a Palestinian state—and to ensure Israeli Jews have access to them.

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\(^{459}\) We recognize Palestinian concerns regarding the ability of West Bank residents to access the al-Aqsa Mosque and Dome of the Rock. Yet this issue does not appear to bear as directly on housing choices as the concerns of some Israelis about the fate of Jewish sites in East Jerusalem.