

1 of 3 DOCUMENTS

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Columbia Human Rights Law Review

Winter, 2007

38 Colum. Human Rights L. Rev. 263

LENGTH: 26793 words

ARTICLE: DESTRUCTIVE AMBIGUITY: ENEMY NATIONALS AND THE LEGAL ENABLING OF ETHNIC CONFLICT IN THE MIDDLE EAST

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SUMMARY:

... This practice has been partially legitimized by a norm in international law that permits states to infringe the liberty and property interests of enemy nationals during armed conflict. ... Instead, the existence of the enemy nationals rule produced ambiguity that governments could use to lend perceived legitimacy to policies that were actually illegal. ... In the view of this author, there is now a substantial and growing body of historical research - much of it relying on Israel's own official archives - that makes clear that the Palestinian refugee flight resulted primarily from fear of violence, panic, and in many cases intentional measures by Israeli forces aimed at driving away non-Jewish civilians. ... The enemy nationals concept hence facilitated a practice that international law had sought to ban decades earlier by providing a formal mechanism by which non-Jews could be labeled enemies (or in the Israeli legislation, "absentees"). ... In a brief filed on November 6, 2005, the State argued that international law permitted treating all Palestinians as enemies because "Israel is in an armed conflict with the Palestinian Authority and a large proportion of the civilian population supports the conflict and even takes part in it. ...

HIGHLIGHT: In the course of the Middle East conflict since 1948, both the Arab states and Israel have tended to take harsh measures against civilians based on their national, ethnic, and religious origins. This practice has been partially legitimized by a norm in international law that permits states to infringe the liberty and property interests of enemy nationals during armed conflict. Middle Eastern governments have misused the logic behind this theoretically exceptional rule to justify far-reaching measures that undermine the "principle of distinction" between civilians and combatants and erode the principle of non-discrimination that lies at the center of human rights law.

Abstract

In this article I trace the history of the enemy nationals doctrine in international law and its application in the Middle East. I argue that the enemy nationals doctrine, properly understood, in most cases did not actually permit the types of policies applied in the Middle East. Instead, the existence of the enemy nationals rule produced ambiguity that governments could use to lend perceived legitimacy to policies that were actually illegal. Because there were inadequate international means by which to test the legality of such policies, ambiguity in the law facilitated ethnic divisions that still traumatize the region. The dangers posed by such ambiguities in law are an important reason to strengthen international judicial mechanisms capable of addressing high-stakes issues.

TEXT:

[*264]

I. INTRODUCTION

In this article I examine the norms of international law governing the treatment of enemy nationals in wartime, with a particular focus on how these norms have been applied in the course of the Arab-Israeli conflict. However, this article is as much about the misuse of law as it is about the evolution of particular legal norms. The enemy nationals concept is in theory an exceptional rule applicable only to a small set of foreigners and subject to substantial regulation. It is questionable whether it even remains a valid rule of international law today. But the logic behind the enemy nationals idea is in many ways more important than the legal rule itself.

The enemy nationals doctrine presumes that in times of international conflict, a person can be considered potentially dangerous solely on the basis of his or her nationality. In theory, this rule is based on the premise that formal nationality indicates a person's political and military loyalties. This rule would appear increasingly antiquated in an era when non-state actors often eclipse the role of sovereign states in armed conflicts, as the recent war between Israel and Lebanon illustrates. But during World War II, the U.S. Supreme Court extended the enemy nationals logic to hold that people can be considered dangerous solely on the basis of their racial or national origin. The International Committee of the Red Cross has promoted the concepts of "spiritual affinity" and [*265] "ideological affinity" to define enemy nationality. In times of ethnic conflict, such concepts can easily be used to lend apparent justification to policies that would otherwise be labeled illegitimate discrimination.

In the Middle East, the logic behind the enemy nationals concept has been aggressively used by Arab states and Israel to define civilians as enemies on the basis of their ethnic, religious, or national origins rather than on their actual involvement in armed conflict. By this practice, Middle Eastern governments deepened the Arab-Israeli conflict and undermined the "principle of distinction" between civilians and combatants that lies at the center of humanitarian law. The enemy nationals rule in international law certainly did not cause the Arab-Israeli conflict, but it encouraged policies that made the conflict much more difficult to resolve. As such, this exceptional rule created legal ambiguity that essentially prevented international law from playing the role it should have in minimizing, managing, and eventually resolving conflict.

This study is relevant for two distinct reasons.

The first is to trace the evolution and current status of the international legal rules governing treatment of enemy nationals in wartime. Because its underlying logic is so easy to manipulate, the enemy nationals doctrine threatens to weaken the protection of civilians in armed conflict, erode protection of refugees, and facilitate ethnic conflict. For these reasons, the treatment of enemy nationals warrants legal analysis, especially at a time when the world's leading military power is engaged in a long-term and open-ended "War on Terror" in which the distinction between civilians and combatants is increasingly blurred.

Second, law has played an understudied historical and political role in fueling ethnic conflict by providing a measure of moral legitimacy to discriminatory policies. My thesis is that ambiguity surrounding legal doctrines can effectively legitimize policies that are actually illegal. In this thesis I am building on the recent work of Jeremy Forman and Alexandre (Sandy) Kedar describing the legal history of Israeli legislation relating to Palestinian private property. Surveying research into several mid-twentieth century ethnic conflicts, Forman and Kedar noted:

One relatively constant element of dispossession has been the use of law in effecting and or normalizing the outcome. The central role of legislation in such situations derives from the fact that the provision, or, alternatively, the [*266] transformation or negation of property rights, is invariably institutionalized by some type of law. It is surprising, then, that the role of legislation in the dispossession of displaced ethnic and national groups has not received greater academic attention.¹¹

The normalizing effect of law poses a particular problem when legal norms are ambiguous on a high-stakes issue. I suggest that in some situations, actual legality is not necessary to achieve the normalizing effect that Forman and Kedar describe. A condition of legal ambiguity is often sufficient to provide the legitimizing effect sought by political actors.

Ambiguity is part and parcel of any legal process, and would normally be addressed through a judicial mechanism that could authoritatively decide how to interpret a specific principle in a particular case. But these same ambiguities are likely to be exploited, especially when international law is invoked as a political tool to build up the perceived legitimacy of a particular policy. I argue that the fact that most Arab and Israeli policies toward enemy nationals have actually been in violation of international law did not prevent the enemy nationals concept from providing a quasi-legal founda-

tion for destructive policies. When perception of legality matters more than actual legality, ambiguity in the law becomes a dangerous thing. At the same time, legal clarity is difficult to achieve when judicial mechanisms are weak. This quandary poses a major challenge to efforts to use international law as a means to manage and resolve armed conflict, and is an argument in favor of strengthening judicial mechanisms for interpreting international law.

II. Historical evolution of the enemy nationals concept

A. Origins: The recent decline of war booty

Modern humanitarian law is based on the idea that the conduct of armed conflict should be regulated, especially so that civilians and their property should not be a target of attack during war. Though the distinction between civilians and combatants is now [*267] a bedrock rule of humanitarian law, it has had a long historical evolution that has continued up to the present. To some extent, the modern protections have roots in ancient religious laws that can be found in Jewish, Christian, and Muslim sources. To this extent, modern humanitarian law probably represents relatively stable norms of human morality. But until very recent history, certain types of attacks on civilians were not just permitted but were considered legitimate objects of warfare. This suggests that our modern protections of civilians are quite fragile, and therefore vulnerable to erosion. It is important to account for these fragile foundations in order to understand the reasons why exceptions within humanitarian law can be so easily exploited.

The three monotheistic religions generally permitted the killing of combatants (defined as able men), while protecting civilians (defined as women, children, and the elderly). But the religious laws also allowed for war booty and spoils, a concept that remained part of international law until the twentieth century. The Old Testament spared women and children from execution, but allowed a conquering army to take them and their property as spoils of war.

When you draw near to a town to fight against it, offer it terms of peace. If it accepts your terms of peace and surrenders to you, then all the people in it shall serve you at forced labor. If it does not submit to you peacefully, but makes war against you, then you shall besiege it; and when the Lord your God gives it into your hand, you shall put all its males to the sword. You may, however, take as your booty the women, the children, livestock, and everything else in the town, all its spoil. You may enjoy the spoil of your enemies, which the Lord your God has given you.⁵²

The concept of spoils is also mentioned in the New Testament.⁵³

Like the Old Testament, Qur'anic law prescribed limits on warfare for the protection of civilian lives: "Fight in the cause of God those who fight you, but do not transgress limits. God loveth not transgressors."⁵⁴ But Qur'anic law also allowed Muslims to take spoils [*268] and booty of war, so long as they were distributed according to the Islamic mandate to give alms to the poor:

And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah, and to the Messenger, and to near relatives, orphans, the needy and the wayfarer...⁵⁵ But (now) enjoy what ye took in war, lawful and good; but fear Allah.⁵⁶

These religious sources can be read in at least two ways. A humanitarian reading would see the Biblical and Qu'ranic protections of women, children, the elderly, and the needy as the seed of modern legal protections of civilians in wartime. But a political realist reading would argue that the "limits" on warfare appear only as disciplinary rules for the self-interest of the victors. Women and children are not protected because they have rights; they are given the same status as cattle because they can be used later.⁵⁷ The humanitarian reading would indicate that twentieth century expansions of civilian protection in wartime are new branches on a tree with very deep roots. But the realist reading would lead us to the conclusion that the distinction between civilians and combatants is in fact a recent and possibly radical idea.⁵⁸

[*269] In secular humanitarian law, civilian property was considered a legitimate object of warfare (spoils of war) until at least the nineteenth century. It wasn't until the twentieth century that civilian property earned clear protection in international law, and it was not until World War II that civilians were clearly protected. In early secular international law, war booty and pillage were permitted because property was viewed as linked to sovereignty. In medieval norms,

civilian lives might be spared by the principle of *jus armorum*,ⁿ⁹ but civilian property was a legitimate object of warfare. International law considered "that war declared against a particular sovereign necessarily implied war against all his subjects, collectively or individually, wherever found."ⁿ¹⁰ When a new sovereign acquired territory, pre-existing property claims were considered essentially moot.ⁿ¹¹

The first dent in the spoils of war doctrine came during the Enlightenment when European legal publicists and political philosophers began to describe property as a natural institution that is a foundation of the state, rather than being founded on the state.ⁿ¹² John Locke linked a person's personal liberty to ownership of the products of his labor, and concluded that "thus Labour, in the Beginning, gave a Right of Property."ⁿ¹³ The spoils of war doctrine eroded further in the nineteenth century as courts and governments began seeing private property as a right that could continue [*270] independent of changes in sovereignty.ⁿ¹⁴ Treaties began to prohibit confiscation of private property in wartime, so that one leading treatise on international law reports that there has not been a case of legal wartime private property confiscation since the 1793 war between Britain and France.ⁿ¹⁵

In 1833 the U.S. Supreme Court cited customary international law in a case concerning a Spanish private property claim in Florida (which the US had acquired from Spain). The Court held that even if a sovereign changes, people's "relations with each other, and their rights of property, remain undisturbed."ⁿ¹⁶ This principle was affirmed in the early twentieth century by the Permanent Court of International Justice in the *German Settlers Case*.ⁿ¹⁷ Today, the concept of war booty is limited to moveable state property, which may be taken only by a state. An individual soldier who takes booty would commit the crime of pillage.ⁿ¹⁸

Before World War I, the new concept that civilians and their property should be protected during wartime became enshrined in treaty law. For protection of private property, the most important instruments in ending (or at least limiting) the war booty doctrine were the 1899 Hague Conference and the 1907 Hague Convention IV respecting the Laws and Customs of War on Land (hereafter "Hague Convention") and its annexed Regulations concerning the Laws and Customs of War on Land (hereafter "Hague Regulations"). The Hague Regulations remain among the most specific set of rules protecting public and private property during armed conflict.

By World War II, the Hague Convention's provisions (including its protections of property) had become binding customary norms so that violations could be considered prosecutable war crimes.ⁿ¹⁹ The 1945 London Charter establishing the Military Tribunal at Nuremberg defined "plunder of public or private property" as a war crime.ⁿ²⁰ In its final judgment, the Nuremberg [*271] Tribunal stated, "By 1939 these rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."ⁿ²¹ The International Court of Justice has held that the Hague Regulations constitute customary norms.ⁿ²²

The Hague Regulations provide protection to both private and public property. Its provisions protect virtually any immovable property of a civilian character; they explicitly protect not just private property, but also public and municipal state property. The only property confiscations that would be legitimate are those justified by military necessity,ⁿ²³ and those of state-owned financial [*272] and moveable property "which may be used for military operations."ⁿ²⁴ The concept of prohibited property seizure has been given a broad, functional interpretation. During the *A. Krupp* trial at Nuremberg, the defense argued that the prohibition on seizure in occupied territory would only be violated if there is a definite transfer of title. The Tribunal rejected this argument, noting that customary law required "respect" for private property, and explaining that an occupying army depriving a factory owner of the use of his factory could constitute a war crime.ⁿ²⁵

The protections afforded property in the Hague Regulations were soon extended to people via the "principle of distinction"ⁿ²⁶ between combatants and non-combatants, which the International Court of Justice has called an "intransgressible" rule of customary international law.ⁿ²⁷ The basis of this distinction is the principle that military operations should be directed only at military objectives.

The coinage "military objectives" first came into use in the (non-binding) 1923 Hague Rules of Air Warfare. It was replicated in the 1949 Geneva Conventions (which fail to define it), the 1954 Hague Cultural Property Convention (and especially the 1999 Second Protocol appended to the Hague Convention), as well as the 1998 Rome Statute of the International Criminal Court.ⁿ²⁸

B. Enemy aliens or enemy race? British and U.S. policies in World War II

Almost as soon as the civilian-military distinction gained a foothold in international law, it was subject to important exceptions. Despite their general protection of civilian property, the Hague Regulations allow property confiscations for military purposes as "imperatively demanded by the necessities of war,"ⁿ²⁹ and do not [*273] prevent a warring state from taking "many kinds of measures against enemy persons and enemy property" as part of an overall war effort.ⁿ³⁰ The theory behind this is that civilian assets could be used to generate funds for the war effort.ⁿ³¹ Beyond their assets, enemy nationals were presumed during World War I and II to be potentially dangerous as saboteurs or spies. Both Britain and the United States adopted this logic during the two world wars, but through very different policies. British policies became precedents for substantial regulation of the enemy nationals rule. American policies illustrated how easily the underlying logic of the enemy nationals rule can be used to support across-the-board discrimination against particular racial groups.

1. British policies toward enemy nationals

In World War I, the 1914 British Enemy (Amendment) Act created a custodian of enemy property in order to collect revenues on German property, a practice continued in World War II.ⁿ³² British policies toward the property of enemy nationals were then revived in the Second World War with the Trading with the Enemy Law of 1939.ⁿ³³ These measures defined a person's enemy character in terms of his place of residence, not his nationality or permanent domicile (in law, domicile is more permanent, while residence can be temporary).ⁿ³⁴ In World War II, this meant that even nationals of neutral states could have enemy character if they were voluntarily present in Germany, or even in German-occupied territory, during the war.ⁿ³⁵ The purpose of appointing a custodian was not to permanently seize the property (which would violate the Hague Regulations), but to hold it in escrow until the end of hostilities.ⁿ³⁶

The Allies in World War II took steps against the persons of enemy nationals, not only their property, especially by imposing restrictions on their freedom of movement and in some cases placing them in internment camps. These policies were motivated by fears [*274] that enemy nationals would engage in espionage or sabotage. But early in the war, the British authorities recognized that many or most of the Germans who remained abroad after September 1939 were actually refugees who "feel no loyalty to the National Socialist Government... . Therefore, although they are 'enemies' by origin, speech, and culture, they are often admirers of the enemy state in which they live."ⁿ³⁷

The British Government defined three categories of enemy aliens. Every German in the country was required to register and be screened by police, and 112 aliens tribunals were set up around the country.ⁿ³⁸ "Class A" enemy nationals were considered actual threats and were subject to internment. "Class B" was a middle ground category that avoided internment, but restricted people from moving more than five miles from their homes and from possessing cameras or driver's licenses. "Class B" aliens were also required to report regularly to police.ⁿ³⁹ "Class C" aliens were subject to no restrictions and had "Refugee from Nazi Oppression" stamped on their registration cards.ⁿ⁴⁰ The British tribunals found the vast majority of the "enemy aliens" in the country to in fact be "Class C" refugees (86.7% out of 74,233 cases); during the first six months of the system, only 2.5% of the "enemy nationals" were interned.ⁿ⁴¹

The British policy toward enemy aliens in World War II set a remarkable precedent in several respects. First, the work of the aliens tribunals provided powerful empirical evidence that in a conventional war, formal ties to an enemy sovereign do not necessarily make a person a genuine threat. Second, from a political point of view, the British tribunals stand out given that another government might easily have adopted a more reactionary approach. The British aliens tribunals worked mainly early in the war when Britain was under the most dire military threat from Germany and when one might have expected the greatest pressure of xenophobia against Germans. Indeed, Britain's nuanced World War II policy was a marked departure from World War I precedents, when the country [*275] interned ninety-nine percent of the enemy aliens in the country.ⁿ⁴² It also stands in stark contrast to American policies.

2. American policies toward people of Japanese origin

The United States took a much harsher and less nuanced approach toward people of Japanese ancestry than Britain did toward German citizens. In large part, this was the result of simple racism, evidenced by the fact that American policy toward Japanese differed from American treatment of Germans. Yet the American approach in World War II also was founded on a differing conception of the enemy. Both British and American policymakers quickly came to the conclusion that formal nationality alone was a poor indicator of whether a person was actually dangerous. But while this observation led Britain to intern fewer people, it led Americans in the opposite direction. American policymakers, and later judges, came to the conclusion that ethnic and national origins were more important than citizenship in identifying

potential threats. The concept of an enemy race thus became a substitute for the concept of an enemy nationality.

In its early phases, American policy during World War II targeted only foreign nationals. Initially after entering the war, President Roosevelt authorized the detention of any aliens deemed "dangerous to public peace or safety."ⁿ⁴³ On January 13, 1942, British Prime Minister Winston Churchill urged Roosevelt to follow the British in setting up tribunals to assess the actual danger posed by Japanese, Germans, and Italians in the United States.ⁿ⁴⁴ Churchill is reported to have told Roosevelt, "We separated the goats from the sheep, interned the goats and used the sheep."ⁿ⁴⁵ For non-Japanese, the United States set up Alien Enemy Hearing Boards which released around a quarter of the aliens detained in the first year after American entry into the war.ⁿ⁴⁶ Yet, in the United States even those released lived with restrictions on their freedom of movement.ⁿ⁴⁷ [*276] Hence, even if one looks only at treatment of Germans, the United States took a more harsh approach than Britain.

The racial rather than national approach toward Japanese in the United States had its origins in long standing discrimination that had little to do with armed conflict. There had been nativist groups pushing for restrictions on Japanese long before World War II.ⁿ⁴⁸ A discriminatory anomaly of American immigration law regarding Japanese blurred the line between enemy aliens (a category that in theory should apply only to foreigners) and citizens of Japanese descent. U.S. law restricted Japanese immigration in 1907 and banned it in 1924. "First-generation immigrants from Japan, who were known as Issei, were resident aliens... forbidden by law from ever becoming naturalized citizens."ⁿ⁴⁹ Their children, known as Nisei, were born in the United States and were hence American citizens.ⁿ⁵⁰ This meant that there was a large group of people in the United States in 1941 who had been permanent residents for decades and who were parents of American citizens, but who were nominally foreigners.

The United States has had a law against enemy nationals on its statute books since the 1798 Alien and Sedition Acts. It is still in place today,ⁿ⁵¹ having been amended only in 1918.ⁿ⁵² It permits the President to issue a proclamation for "all natives, citizens, denizens, or subjects of the hostile nation or government... to be apprehended, restrained, secured, and removed as alien enemies." The months following Pearl Harbor saw anti-Japanese hysteria sweep the United States.ⁿ⁵³ The xenophobia influenced American policymakers as much as actual or perceived security fears.ⁿ⁵⁴ Executive Order 9066, signed by Roosevelt on February 19, 1942,ⁿ⁵⁵ did not mention Japanese residents by name. It simply gave wide discretion to the Department of War to designate military areas from which "any or all persons [*277] may be excluded..."ⁿ⁵⁶ This became the legal basis for forcibly displacing and interning more than 100,000 people. Around seventy percent were American-born Nisei who were U.S. citizens.ⁿ⁵⁷ On the eve of President Roosevelt's executive order authorizing the internment, General John L. DeWitt spoke not of enemy aliens but of an "enemy race."ⁿ⁵⁸

In one of its most infamous twentieth century decisions, *Korematsu v. United States*, the U.S. Supreme Court held this internment to be constitutionally justified by military necessity.ⁿ⁵⁹ *Korematsu* was convicted of refusing to register for relocation to an internment area away from the West Coast. The decision by Justice Black began with an analytical premise that is essential to civil rights law and equal protection doctrine: "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."ⁿ⁶⁰ The Court said that such restrictions must be subject to "rigid scrutiny" because "pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."ⁿ⁶¹ But the *Korematsu* Court ultimately upheld the internment as a sensible military measure with relatively little scrutiny:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders - as inevitably it must - determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was [*278] great, and time was short. We cannot - by availing ourselves of the calm perspective of hindsight - now say that at that time these actions were unjustified.ⁿ⁶²

The *Korematsu* decision reflected excessive deference to the military during times of war more than it did direct racism. To some extent the Court was saying one thing about the law - that racial restrictions require rigid scrutiny - while doing something else with the actual facts at hand. Had Justice Black's opinion for the Court actually scrutinized the

empirical basis of the military's decision and the availability of other alternatives, a different conclusion might have been reached. Instead, the Court justified its assumption that people of Japanese ancestry posed a military threat through uncritical references to the assertions of "our military leaders." The Court reasoned, in essence, that military necessity could justify internment based on ancestry, and that military leaders can be trusted to decide on their own whether people of a particular ancestry pose an actual threat.

But the *Korematsu* case followed another decision with almost identical facts, *Hirabayashi v. United States*,⁶³ in which Chief Justice Stone offered a more developed defense of using national or ethnic ancestry as an indicator of military threat. Chief Justice Stone's reasoning began with the premise that the government had to take some harsh measures to contain the threat purportedly posed by hostile civilians, and that it was reasonable to look for some means of focusing its restrictions so as to not infringe the liberty of everyone:

The alternative [to interning only people of Japanese descent] which the appellant insists must be accepted is for the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat.⁶⁴

Chief Justice Stone thus implicitly dismissed the idea of interning only individuals about whom there were specific reasons for concern, as Britain was doing at the same time.⁶⁵ But Chief Justice Stone also [*279] dismissed the idea of limiting internment to foreigners. He argued that the central question was not formal nationality but "the nature of our inhabitants' attachments to the Japanese enemy," which he called "a matter of grave concern."⁶⁶ Noting that the majority of people of Japanese descent on the West Coast were actually citizens of the United States, he explained why formal nationality was not a reliable indicator of enemy identity:

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population... . The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.⁶⁷

With this, the U.S. Supreme Court used the underlying theory behind enemy nationals rules - that connections to a hostile power can justify infringements on liberty - to defend the alternative policy of infringing the liberty of an entire race or ethnic group. First, Chief Justice Stone cited maintenance of minority culture (i.e. failure to integrate) as a general warning sign of disloyalty. Second, without citing extensive evidence, he made loose allegations that "some" Japanese schools and institutions were "generally believed" to be disseminating enemy "propaganda." Third, he stated vaguely that some people of Japanese descent maintained contacts with Japanese consulates, no doubt because many were Japanese citizens. Fourth, he acknowledged that the U.S. government had been discriminating against Japanese people for a long time, but said that this makes their loyalty even more suspect because they had good reason to feel closer to Japan than to America.

It is easy to see Chief Justice Stone's opinion as a shameful exercise in insinuation, guilt by association and simple racism. But [*280] his reasoning cannot be dismissed so easily. The idea in international law that states may restrict the rights of enemy nationals is based on the idea that foreigners may be reasonably suspected of having hostile allegiances. What was novel about Chief Justice Stone's reasoning was that he saw formal nationality as a weak indicator of affiliation with the enemy, and therefore thought it reasonable to look instead at race. Empirically, it is hardly unreasonable to assume that ancestry bears a strong correlation to political opinion. By making this simple observation, Chief Justice Stone used the long-standing logic behind restrictions on enemy nationals to justify interning people based solely on their ancestry. This shows how easily the enemy nationals rule can be used to legitimize more far reaching forms of discrimination.

Though notorious for upholding the Japanese internment, *Korematsu* was an analytical step forward for the principle of non-discrimination in American civil rights law. Because the Court had dealt with an almost identical case one

year earlier, the Korematsu decision could easily have been redundant.ⁿ⁶⁸ But Korematsu at least established the rule that racially-based restrictions are suspect and subject to heightened scrutiny. Hirabayashi stated only that racial distinctions are "in most circumstances irrelevant and therefore prohibited" but that the government could nevertheless conclude that "a group of one national extraction may menace [public] safety more than others."ⁿ⁶⁹

C. Codification of "exceptional measures"

After World War II, the British policies toward enemy aliens became the precedent for several provisions in widely ratified treaties, providing for the first time a codified set of rules regulating the measures that states may take against enemy nationals. The Fourth Geneva Convention of 1949 on the Protection of Civilians in Wartime and the 1951 Convention Relating to the Status of Refugees both prescribe important limits, while simultaneously acknowledging that the enemy nationals concept has a legitimate place in [*281] international law.ⁿ⁷⁰ The less widely ratified 1954 Convention relating to the Status of Stateless Persons contains a provision analogous to the one in the Refugee Convention limiting the doctrine's application to stateless persons.ⁿ⁷¹

The most comprehensive codification of the treatment of enemy nationals in wartime appears in the Fourth Geneva Convention in articles 35 through 44. These provisions contain four primary rules. First, the Convention states explicitly that warring states may impose restrictions on enemy nationals, including confinement, internment, or assigned residence.ⁿ⁷² Second, the Convention provides that enemy nationals must be considered protected persons, and therefore are entitled to humane treatment, medical care, and religious services, along with provisions for employment and livelihood.ⁿ⁷³ Third, the Convention requires states to review any internment or assigned residence in individualized hearings every six months,ⁿ⁷⁴ and permits internment "only if the security of the Detaining Power makes it absolutely necessary."ⁿ⁷⁵ Fourth, the Convention prohibits the application of enemy nationals measures to refugees.

At the urging of Israel and the International Refugee Organization (the predecessor of the High Commissioner for Refugees), the Geneva Convention drafters aimed to enshrine in law the British practice from World War II of excepting refugees from enemy nationals policies.ⁿ⁷⁶ The Fourth Geneva Convention's article 44 provides:

[*282]

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

By this provision, the Fourth Geneva Convention codified the limits on enemy nationals restrictions developed during World War II. The International Committee of the Red Cross commentary on the article notes:

Various belligerent countries made allowances for this state of affairs by introducing laws exempting such persons from measures taken against enemy aliens. This course was, for example, adopted in certain English-speaking countries where the number of refugees was particularly high.ⁿ⁷⁷

The 1951 Refugee Convention contains a complementary provision in its article 8:

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.ⁿ⁷⁸

The drafting history of the Refugee Convention suggests that states wanted to reaffirm article 44 of the Fourth Geneva Convention and perhaps extend it. The International Refugee Organization, which proposed the original text for the Refugee Convention, made explicit reference to article 44 and to the history of state practice that produced it.ⁿ⁷⁹ The U.N. Secretary General asked states to extend a [*283] rule written for wartime to peacetime as well.ⁿ⁸⁰ The Refugee Convention extends not just to times of war but also to "threat of war or severance of diplomatic relations or other tension between two states."ⁿ⁸¹ By extending the refugee exemption beyond armed conflict, the Refugee Convention in

some ways offers more protection than the Fourth Geneva Convention. But in other ways the Refugee Convention's final text is more equivocal, or at least considerably less clear. Article 8's second sentence appears to allow domestic legislation to override the rule of international law, provided only that there be a vague possibility of making an exception "in appropriate cases."ⁿ⁸² This second sentence "was added in the Conference of Plenipotentiaries after a prolonged and seemingly confused discussion."ⁿ⁸³ Commentators have tended to see the second sentence as merely giving states an option whether to implement the basic principle by changing their legislation or by making individual exemptions for refugees.ⁿ⁸⁴ In any case, the Refugee Convention's equivocation is of little legal importance unless a state enters a reservation to article 44 of the Fourth Geneva Convention.ⁿ⁸⁵

While the Refugee Convention's article 8 prohibits exceptional measures against refugees based solely on their nationality, article 9 allows states "in time of war or other grave and [*284] exceptional circumstances" to take measures for the sake of national security "in the case of a particular person."ⁿ⁸⁶ Articles 8 and 9 hence represent a clear trade-off. On the one hand, they substantially restrict governments' authority to take sweeping measures against all members of a particular nationality. Yet they grant states broad authority to take measures against particular individuals who are believed to pose security threats.

These overlapping provisions put the enemy nationals doctrine on awkward legal footing. In the aftermath of World War II, the idea that foreigners' rights might be restricted in wartime because of their enemy nationality received explicit sanction in several widely ratified treaties. While these treaties seriously curtail the use of the enemy nationals concept, they do not prohibit using enemy nationality as a warning factor of potential security danger in individual cases. Yet the regulatory framework established by these treaties attempts to strike a difficult balance. They completely exempt refugees from the rule and establish a general requirement that states must limit the harshest measures against enemy nationals to cases of absolute necessity. By requiring periodic individual hearings of any case of internment, the Fourth Geneva Convention actually prohibits detention based solely on nationality. Instead, there must be an individualized assessment of each case.ⁿ⁸⁷ This raises questions about the principle underlying the entire doctrine, which is by definition a means of restricting the rights of whole groups. The ICRC has stated:

When the Convention stipulates that the position of an enemy alien must not be considered solely in the light of his legal nationality, it in fact invites belligerents to take into consideration a whole set of circumstances which may reveal what might be called the "spiritual affinity" or "ideological allegiance" of a protected person.ⁿ⁸⁸

This leaves the door at least slightly open for a government to consider an individual's national, religious, political, and ethnic background in assessing whether he or she poses a real threat. The ICRC's approach is thus only slightly removed from Chief Justice Stone's reasoning in *Hirabayashi*.

[*285] Today, the enemy nationals concept's legal validity is subject to even more doubt, though it has never been explicitly abolished by a treaty. Today, the internment of the Japanese is widely considered a notorious and shameful episode in American history, though its legal status is more ambiguous. Neither *Korematsu* nor *Hirabayashi* have ever been explicitly reversed by the U.S. Supreme Court. Yet in 1976 President Gerald Ford issued a proclamation entitled "An American Promise" that included a formal apology for the internment of Japanese-Americans, and called on the American people to ensure that it never be repeated.ⁿ⁸⁹ In 1986, a federal district court vacated Mr. *Hirabayashi*'s 1942 conviction for resisting internment, largely because the government had concealed evidence revealing that racial stereotyping rather than actual military assessments formed the basis of the exclusion order.ⁿ⁹⁰ In affirming the decision below, the Ninth Circuit Court of Appeals said:

The *Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history. In the ensuing four and a half decades, journalists and researchers have stocked library shelves with studies of the cases and surrounding events. These materials document historical judgments that the convictions were unjust. They demonstrate that there could have been no reasonable military assessment of an emergency at the time, that the orders were based upon racial stereotypes, and that the orders caused needless suffering and shame for thousands of American citizens.ⁿ⁹¹

Nevertheless, President Ford did not specifically apologize for interning alien Japanese. No President has issued a proclamation under the Enemy Aliens Act since the close of World War II.ⁿ⁹² The disuse of the Enemy Aliens Act is not-

able given the fact that the United States has been engaged in a number of armed conflicts over the last half century. Yet, the federal government opposed vacating Mr. Hirabayashi's conviction, which is the only reason the case could reach the Court of Appeals. This shows the degree to which key [*286] questions relating to the treatment of enemy nationals remain unresolved in American jurisprudence.

Yet the rule is challenged at its foundations by non-derogable prohibitions on discrimination, and appears increasingly difficult to justify in the context of contemporary armed conflict. Non-discrimination is one the most fundamental principles of human rights law, recognized in the opening articles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Equality is highlighted in the preamble of the U.N. Charter and as one of the organization's purposes of existence.⁹³ The 1945 London Agreement defining crimes against humanity for the Nuremberg trials included non-discrimination elements.⁹⁴ Common article 3 of the 1949 Geneva Conventions included a non-discrimination provision.⁹⁵ Ian Brownlie argues that the prohibition on racial discrimination is a jus cogens or preemptory norm from which no state may absolve itself.⁹⁶

For present purposes, the most important rules against discrimination are set out in the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").⁹⁷ The CERD's [*287] scope includes distinctions made on the basis of "national or ethnic origin."⁹⁸ Immigration remains a special area in which states are permitted to make discriminatory distinctions that would otherwise be prohibited. The CERD explicitly does not apply to distinctions between citizens and non-citizens,⁹⁹ nor to provisions "concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."¹⁰⁰ This last clause poses a serious challenge to the enemy nationals rule, because the entire concept requires singling out a particular nationality for disadvantage. Rather than distinguishing between citizens and non-citizens, the enemy nationals rule distinguishes between non-citizens. Given that the CERD contains no provision allowing exceptions in times of emergency, this rule may override the Fourth Geneva Convention's regulated authorization for restrictions on the liberty of enemy nationals. There may be debate about whether a general treaty such as the CERD can override the more specific provisions of the Fourth Geneva Convention. But, at a minimum, the norm of non-discrimination strengthens arguments that an enemy national may be detained only in the event of specific individual reasons to consider the person dangerous.

A more conceptual challenge to the enemy nationals rule is its highly formalistic conception of enemy identity. The enemy nationals rule is rooted in a historical era in which civilian status during warfare was bound up in the assumption that citizens are inexorably linked to their sovereign governments. As I have already discussed, this assumption was under serious attack by the nineteenth century. In World War II, states came to recognize that many people could be citizens of Germany and yet not supportive of the German war effort. It would have been irrational to penalize Jewish refugees and Nazi opponents for a Nazi-led war effort, but that is exactly what a rigid application of the enemy nationals rule would require. The enemy nationals concept is even more artificial in the context of conflict with non-state organizations such as those involved in the War on Terror. It makes little sense to presume automatic loyalty between citizens and a sovereign government in a conflict defined by the prominent role of non-state actors.

[*288] The 2006 war between Israel and Lebanon illustrates the problem vividly. The war began when Hezbollah, a mainly Shiite Muslim militia in Lebanon, attacked an Israeli army patrol inside Israel and captured two soldiers, leading to a massive Israeli counter-attack by air and land on Lebanon. Though the war was clearly international in character, only one of the two main combatants was a sovereign state. Israel did not allege that the Lebanese government knew about the Hezbollah attack, and the Lebanese army did not engage in any direct hostilities with Israel. Lebanon is a famously factionalized country, where political groups like Hezbollah tend to draw support only from particular segments, defined mainly by religious sect. The weakness of the Lebanese state was in fact a major issue in the war; one of Israel's major demands was that Lebanon deploy troops up to the border with Israel and exert control that had effectively been in the hands of non-state militias. In other words, one of Israel's stated objectives was to strengthen the government of the country with which it was at war. That is essentially the opposite of what the protagonists of the two world wars tried to accomplish. Legal doctrines defining enemy character that are founded on the connections between sovereign governments and their citizens do not fit easily in this context.

I have already noted that the weak linkage between formal nationality and actual likelihood to support an enemy war effort could lead one in two opposing directions. First, one could conclude that there is no justification for taking harsh measures against a group of people based solely on their nationality. Instead, states should only take measures against specific individuals who pose a security threat.¹⁰¹ I argue that this is in fact the approach required by [*289] international human rights and humanitarian law, given the strong guarantees against discrimination and the provisions of

both the Refugee Convention and the Fourth Geneva Convention requiring individual hearings and assessments of each case.

However, one could also respond to the formalistic nature of the enemy nationals rule by imposing even more extreme forms of discrimination. Instead of basing harsh measures on formal nationality alone, a state might instead restrict the rights of an entire ethnic or religious group. A state might do this through an explicit policy directed automatically against all members of a particular group. Or a state might take a slightly less direct but still discriminatory approach in which all members of a particular group are suspected of potential disloyalty and then subject to surveillance and scrutiny that would not fall on other people.

States are especially likely to take such steps when conflicts are defined more by ethnicity, religion, and ideology than by fixed sovereign borders. The current War on Terror is not the first global conflict to shift focus away from enemy citizenship and toward enemy ethnicity or ideology. In a recent article, Karen Engle notes that fear of Communist infiltration led the U.S. Congress to pass measures against Communist party members, regardless of whether they were citizens of friendly or enemy states.

Although the foreign threat had its origins in an enemy state (the Soviet Union), it could not be contained. Sympathizers were part of a transnational organization, and could potentially enter the United States from many different countries. Thus, white Europeans, many from countries whose nationals had long been admitted to the United States, posed the threat. Neither the alien infiltrators nor the citizens they successfully affected or infected were easily identifiable.ⁿ¹⁰²

Even before Congress passed measures directed specifically at Communists, the United States had deported non-citizen residents with Communist affiliations. The Supreme Court approved of such action by making direct analogy to the enemy nationals concept,ⁿ¹⁰³ [*290] illustrating how easily its logic can be adapted to justify infringing the liberty of groups marked by criteria other than nationality.

III. Middle Eastern (mis)Uses of the Enemy Nationals Concept

Though treaties enacted immediately after World War II sharply curtailed the enemy nationals rule, what proved most important in the emerging conflict in the Middle East was the simple fact that the rule was not completely abolished. Directly and indirectly, Israeli and Arab governments have used the enemy nationals concept to justify discriminatory policies that lie at the heart of the Middle East conflict. To be precise, Middle Eastern governments did not utilize the enemy nationals rule per se; by the 1950s the legal rule itself was subject to too many limitations to actually legitimize the types of policies that have been invoked against Jews and Arabs. Instead, they used the underlying logic that a person's formal identity alone can render him or her a threat and hence justify infringing upon her liberty.

In the remainder of this article, I will outline the ways in which Israel and selected Arab states have used or misused the enemy nationals rule in ways that worsened the regional conflict. Through this analysis, I will argue that there was a common intellectual foundation underpinning Israeli policies that drove Palestinians into exile and Arab policies that inflicted a similar dispossession on Arab Jews. Yet linkage between the fates of Palestinian refugees who fled from Israel and Jewish refugees who fled from Arab countries is highly controversial. From the earliest years of the State of Israel, Israeli leaders have on occasion argued that the two migratory movements should be considered a population exchange and that refugee property losses should be off-set against each other.ⁿ¹⁰⁴ This position has been opposed by advocates for [*291] Palestinian refugees,ⁿ¹⁰⁵ who have argued that there should be no linkage between the exodus of Palestinians and of Arab Jews.

In recent years, legal historians have published detailed histories of the development of Israeli law vis-a-vis Palestinian refugees and their property. In addition to Israeli policies, I examine the legal mechanisms used in Egypt and Iraq to put pressure on Jewish citizens in the 1950s and 1960s. I chose Egypt and Iraq as case studies because they are particularly large and influential Arab states that had significant Jewish populations, and because there are detailed published histories of what happened to the Jewish communities in both countries. I am only drawing a thematic analogy between Israeli, Egyptian, and Iraqi policies, arguing that they were all supported by the ambiguities of the enemy nationals doctrine in international law. This limited analogy in no way supports the argument that the exile of Arab Jews justifies preventing Palestinian refugees from returning to their homes inside Israel. First, as Jan Abu Shakrah has noted, Arab states did not expel Jews in order to make room for Palestinian refugees;ⁿ¹⁰⁶ there was in fact no agreement to carry out a population exchange.ⁿ¹⁰⁷ Second, although it is not the topic of this article, serious doubts should be raised

about whether forced population exchanges can be legitimate in modern human rights and humanitarian law.ⁿ¹⁰⁸ Third, the Palestinians bear [*292] no responsibility for the policies of other governments toward their Jewish citizens. Only the fate of Jews from pre-1948 Palestine would be relevant in bilateral negotiations between Israel and the Palestine Liberation Organization. I would argue that Palestinians are correct to refuse any linkage between the two exile communities in the negotiation of a remedy, but they are nevertheless theoretically linked with reference to the enemy nationals concept.

A. Israeli policies toward Palestinian refugees and citizens of Israel

At the beginning of 1948, the year of Israel's creation, Jews were a minority in Mandate Palestine, a country that included the lands that currently form the State of Israel and the occupied Palestinian territories (West Bank, East Jerusalem, and the Gaza Strip). By the end of the year, the country was remade politically and demographically; Israel was established on approximately seventy-eight percent of the territory, inside what is today called the "green line," and approximately seventy-five percent of the non-Jewish Palestinian population was displaced. Israel continues to insist officially that Arab states bear the primary responsibility for the Palestinian exodus. In the view of this author, there is now a substantial and growing body of historical research - much of it relying on Israel's own official archives - that makes clear that the Palestinian refugee flight resulted primarily from fear of violence, panic, and in many cases intentional measures by Israeli forces aimed at driving away non-Jewish civilians.ⁿ¹⁰⁹

[*293] The fewer than 200,000 Palestinians who remained inside Israel after 1948 were placed under military rule until 1966. The Defense (Emergency) Regulations prohibited them from moving outside their areas without permits, and allowed military governors to impose exile or arrest arbitrarily.ⁿ¹¹⁰ These measures bear direct similarity to the American internment of Japanese because they imposed severe restrictions on basic liberty explicitly according to ethno-national lines, but were justified by vague security regulations that were themselves facially neutral.

The legal status of the military rule that was imposed on the Palestinian minority in October 1948 was grounded in the mandatory emergency regulations the British had issued in 1945 against the Jewish underground, which gave military governors extended authority over the people under their rule... . Political activists even vaguely suspected of identifying with Palestinian nationalism were expelled or imprisoned.ⁿ¹¹¹

Similar to the case of the Japanese internment, retrospective histories have created a fair amount of skepticism about whether Israeli military rule over Arab citizens was really necessary even on narrow security grounds. According to Ian Black and Benny Morris' history of Israel's intelligence services, "Official monitoring of Arab [*294] activities [within Israel] had less to do with the danger of espionage and sabotage than with the authorities' fear of political radicalism among the minority."ⁿ¹¹² Israel's domestic intelligence agency, Shin Bet, initially used the military rule "to apply pressure to Arabs by granting or withholding favours[.]"ⁿ¹¹³ but by the late 1950s the Shin Bet had come to see military rule as overly harsh and of limited utility.ⁿ¹¹⁴

A more vivid and longer-lasting impact of the enemy nationals concept can be seen in Israel's treatment of the immovable property that displaced Palestinians left behind in 1948. At the beginning of the war, very little of Palestine was actually owned by Jews or Jewish institutions.

Land officially owned by Jewish individuals and organizations only amounted to approximately 8.5% of the total area of the State. With the addition of land that was owned formerly by the British Mandatory government and thereby inherited by Israel, only about 13.5% (2.8 million dunums; 700,000 hectares) of Israeli territory was under State or Jewish ownership. Thus, a large discrepancy existed between the sovereignty and control of land by the Jewish State on one hand and its ownership and possession on the other.ⁿ¹¹⁵

Israel sought to correct this discrepancy by confiscating the property left behind by the Palestinian refugees who left the country. As Israel consolidated its military victory, it worked to create legal and regulatory structures for confiscating property.ⁿ¹¹⁶

From mid-1948 through 1950, Israel's confiscation policy was repeatedly revised and redefined.ⁿ¹¹⁷ Property confiscations began ad hoc in spring 1948 during the course of fighting,ⁿ¹¹⁸ but became more formalized on June 21, 1948,

with the Abandoned Property Ordinance, which attempted to regularize seizures that were already [*295] taking place.ⁿ¹¹⁹ Three days later, the Abandoned Areas Ordinance permitted confiscation of any land "conquered by or surrendered to armed forces or deserted by all or part of its inhabitants."ⁿ¹²⁰

Israel's June 1948 focus on conquest as a legal criterion for property confiscation was clearly rooted in the antiquated doctrine of war booty, in which conquest alone was enough to justify seizing property. This policy violated the Hague Regulations and likely fell under the definition of "plunder" used at Nuremberg. However, in December 1948 Israel revised its policy so as to make the owner's identity more important than the land's vacancy or military conquest.ⁿ¹²¹ Modeled after the 1939 British Trading with the Enemy Act, these regulations allowed the Custodian of Absentee Property to indefinitely seize and administer land, but not to acquire or transfer title.ⁿ¹²² On March 14, 1950, the Knesset enacted the Absentees' Property Law of 5710/1950, which solidified Israeli control over refugee property in permanent legislation (rather than emergency regulations).

A new amendment on March 15, 1951, permitted the Custodian to sell land to the Development Authority.ⁿ¹²³ A separate statute, the Development Authority (Transfer of Property) Law (1950), allowed the Development Authority to sell either to the State for general public use, or to the Jewish National Fund (JNF). By 1951, the Development Authority, the State, and the Jewish National Fund held around ninety-two percent of all of the land in Israel.ⁿ¹²⁴ These statutes established a legal means by which property owned by Palestinian refugees could be first seized by the Custodian, and then transferred for permanent use by Jewish institutions.

While the original 1948 Absentee Property Ordinance had been based on a British model, the 1950 legislation was modeled on a Pakistani legislative scheme that allowed property belonging to Hindu and Sikh refugees to be reallocated to Muslim refugees from India.ⁿ¹²⁵ In the Pakistani system, a Custodian of Evacuee Property [*296] was authorized to transfer property to a Rehabilitation Authority that could then transfer land to others.ⁿ¹²⁶ Israeli Government officials told the Knesset that the Custodian of Absentee Property would be acting to safeguard refugee property, and would behave as a trustee.ⁿ¹²⁷ But the legislation actually allowed the Custodian to surrender control of the property. Instead of holding refugee property in anticipation of a peace settlement, Israel transferred it for the benefit of Israeli Jews, without any provision for the property to be preserved for its original owners' benefit.

Just as British laws had defined "enemy character" by a person's residence, even if temporary, Israel defined "absentee" by a person's residence in territory controlled by any of the Arab armies with which it fought. By defining the confiscations based on the owners' purported connection with Arab states and their armed forces, Israel followed (at least in form) accepted precedents about the treatment of enemy civilian property.ⁿ¹²⁸ This mechanism allowed Israel's custodian to claim property belonging to Palestinian refugees, not just citizens of other Arab states.

Although the Israeli legislation was facially neutral in terms of ethnic or religious identity, in practice, Jewish-owned property was exempted from confiscation.ⁿ¹²⁹ The Israeli law included special exceptions allowing the Custodian to exempt absentees who left their homes for fear of Israel's enemies, or who were "capable of managing their property efficiently without aiding Israel's enemies."ⁿ¹³⁰ In addition to this discrimination, Israel's law was too over-inclusive to logically match the formal rationale of the enemy nationals doctrine. Israel's definition of an absentee included people who traveled [*297] outside the Middle East, not just to countries that fought with Israel. It also included Arabs who were actually residing inside Israeli territory but whose homes had briefly fallen under the control of Arab armies; this is peculiar since their assets could not any longer be easily used by any enemy state.ⁿ¹³¹ Under British policy the "enemy character" of the internally displaced would likely have ended when the enemy army lost control of the territory on which they were residing (i.e. when Israeli forces conquered their new places of residence), although this rule was still subject to some ambiguity.ⁿ¹³²

This over-breadth and discrimination supports arguments that Israel followed the enemy property doctrine only in form. Its policies are better understood as an application of the war booty doctrine, where conquest by Jewish forces alone effectively led to permanent dispossession. Instead of holding refugee property in anticipation of a peace settlement, Israel transferred it for the benefit of Israeli Jews without any provision for the property to be preserved for its original owners' benefit. The enemy nationals concept hence facilitated a practice that international law had sought to ban decades earlier by providing a formal mechanism by which non-Jews could be labeled enemies (or in the Israeli legislation, "absentees").

B. Iraqi policies toward Jews

Iraq provides one of the most vivid examples of an Arab state using legislation to pressure its Jewish citizens to such an

extent that most fled the country; the legislation was purportedly justified by a security rationale during war with Israel. Iraq was home to between 125,000 and 160,000 Jews in 1950, and had seen incidents of anti-Jewish violence and discrimination during World War II.ⁿ¹³³ Iraq's government was fragile, and the army that it sent to Palestine in 1948 was defeated. Throughout the first half of 1948 the country was torn by riots that nearly toppled the regime, fed by economic woes and anti-British sentiment, along with anti-Zionism.ⁿ¹³⁴ Historian [*298] Moshe Gat describes the beginnings of state discrimination against Jews in terms very similar to the historical origins of the American internment of Japanese just a few years earlier, with a regime torn by a desire to prevent vigilante attacks on Jews and a political need not to seem too solicitous of a minority popularly perceived as an enemy.

The Iraqi government adopted several limited measures to protect Jewish life and property from extremist elements... Reinforced police units patrolled the streets of the capital and particularly the Jewish quarters. But as far as the regime was concerned, the defense of Jewish life and property at a time when the forces of Iraq and its Arab brethren were fighting the Zionist state was liable to arouse angry reactions among pan-Arab elements... It was essential for the government to adopt a policy which would prevent extremist circles from organizing anti-Jewish riots, on the one hand, and would protect the Jewish community in general, on the other. Making every effort to maintain its ascendancy, the government chose a policy of controlled oppression and anti-Jewish discrimination.ⁿ¹³⁵

Beginning in November 1947 (when the U.N. General Assembly recommended the partition of Palestine), Iraq's government imposed an escalating series of measures specifically against Jews. These began with a ban on foreign travel without payment of a bond and prior government approval.ⁿ¹³⁶ Jews were prohibited from selling property, but were permitted to submit property as a bond for travel. This allowed many to travel but also began a process of dispossession.ⁿ¹³⁷ The government pressured the Jewish community to make "donations" or "loans" to support Iraq's war effort, and Jews were often subject to arbitrary fines to support both the war and government corruption.ⁿ¹³⁸ According to Abbas Shiblak, the outbreak of war in Palestine eroded the popular distinction in the Iraqi nationalist press between Judaism and Zionism.ⁿ¹³⁹ Shiblak reports that in November 1948 the Iraqi Ministry of Foreign Affairs told the U.S. Department of State that the main object of martial law was to fight Communism and Zionism, though it [*299] also implied that many Jews were Communists and directly analogized Iraq's treatment of Jews to Israel's treatment of Arabs.ⁿ¹⁴⁰

Anti-Jewish measures worsened following elections on June 15, 1948. In July, the Iraqi Parliament passed a law criminalizing Zionist activity; punishments ranged from seven years imprisonment to death and the testimony of two Muslim witnesses could support a conviction.ⁿ¹⁴¹ In August, the Iraqi Government declared that any Jew who had left Iraq since 1939 and had not returned would be considered to have defected to the enemy, subject to trial in absentia by a military tribunal.ⁿ¹⁴² By the end of the year, Jewish banks were closed and Jewish civil servants dismissed from state employment. A number of Jews were arrested and subjected to rapid military trials on accusations of aiding Israel or Zionism, most prominently Shafiq Ades, a wealthy executive with the Ford Motor Company who was arrested in August, tried for three days in September, and hung in public on September 23.ⁿ¹⁴³

However, the escalation in pressure on the Jewish community waned as the war wound down in late 1948. Toward the end of the year, the Iraqi Government tried to articulate a legitimate explanation for its policies. After the departure of a highly anti-Jewish defense minister, the Iraqi Prime Minister told Parliament that not all Jews were Zionists and emphasized that Jews were entitled to equal rights.ⁿ¹⁴⁴ The government's measures, he asserted, were aimed at Zionist supporters, whatever their religion or race.ⁿ¹⁴⁵ At an international level, such softened rhetoric seemed to produce results. When British Jews asked the Foreign Office to intervene on behalf of Iraqi Jews, the British Government demurred. According to Gat, citing Foreign Office communications, the British had a number of reasons for avoiding intervention, including a fear of antagonizing Arab Governments that had just suffered military defeat. However, the British Government also appeared to view the Iraqi Government's policy as reasonable and restrained under the circumstances.ⁿ¹⁴⁶ One British diplomat wrote that it would be difficult to support "people who are doubtless widely regarded in Iraq [*300] as fifth columnists."ⁿ¹⁴⁷ Though the British were aware of anti-Jewish discrimination, diplomats credited the Iraqi Government with avoiding mass anti-Jewish violence.ⁿ¹⁴⁸

After a year of relative calm, developments late in 1949 set off a rapid chain of events that led to the near-total exodus of the Iraqi Jewish community by 1951. Martial law remained in force, and with it the anti-Jewish restrictions on travel and property sales. In October, Iraqi police uncovered an underground Zionist organization in Iraq, supported by Israeli intelligence, that was collecting arms and smuggling Jews out of the country.ⁿ¹⁴⁹ Widespread arrests produced allegations of torture and mistreatment, and the Israeli Government appealed to both the United States and the United

Kingdom to pressure Iraqi authorities to end the crackdown.ⁿ¹⁵⁰ The American and British Governments viewed Israeli complaints as exaggerated and self-serving, and viewed the arrests as a legitimate campaign against foreign subversion.ⁿ¹⁵¹ Whereas in 1948 the British had avoided confronting genuinely racist laws, Iraqi actions in 1949 were far less discriminatory, and much more focused on actual members of the underground.ⁿ¹⁵² But the arrests sparked a crisis nonetheless because the Zionist underground mobilized the Jewish community in protests and boycotts.ⁿ¹⁵³

In 1950, the Iraqi Parliament passed the Ordinance for the Cancellation of Iraqi Nationality for Jews, Law No. 1 of 1950 (March 4, 1950).ⁿ¹⁵⁴ The ordinance had the effect of easing Jews into exile, offering an exemption from the travel ban to a community under severe pressure. Under the ordinance, a Jew could leave Iraq if he or she signed a form renouncing Iraqi citizenship. Within a year, at least 85,893 people registered.ⁿ¹⁵⁵ Exiles were allowed to take only a small amount of clothing and jewelry out of the country.ⁿ¹⁵⁶ Then, on **[*301]** March 10, 1951, the Iraqi government enacted two new measures, Law No. 5 of 1951 and Regulation No. 3 of 1951, which confiscated property from any Jew who renounced Iraqi citizenship.ⁿ¹⁵⁷ By these legal tools, Iraqi Jews were effectively pressured out of the country and simultaneously dispossessed of their property.ⁿ¹⁵⁸

Shiblak maintains that Law No. 1 of 1950 was enacted under British and American pressure to ease emigration, and that the Iraqi Government did not know it would lead to the mass exodus of Jews.ⁿ¹⁵⁹ He notes that at first Iraq did not confiscate the property of departing Jews, although in 1950 British diplomats urged Iraqi officials to study Israeli treatment of "property left behind by the Arab refugees." Iraq initially resisted the temptation to match those policies.ⁿ¹⁶⁰ According to Shiblak, the British and American hesitancy to protest the Iraqi moves stemmed in part from their knowledge that Israel had confiscated vast amounts of Arab property.ⁿ¹⁶¹

Of all the case studies examined in this article, the Iraqi treatment of Jews involved the most explicit and open targeting of a single ethnic or religious group. Both the legal foundations for American policies toward Japanese, Israeli treatment of Palestinians, and (as we will see) Egyptian policies toward Jews were all for the most part facially neutral, though highly discriminatory in practice. But because the Iraqi case was so extreme, both on its face and in the rapidity of the Jewish exodus, it further illustrates how easily the enemy nationals concept can be used politically to legitimize very troubling policies. Jews were seen as linked to the enemy (Israel) based on their ethnicity alone; citizenship was irrelevant. But British diplomats could nevertheless advise Iraq's government to use Israeli laws as a template to justify confiscating Jewish property. The Israeli laws were themselves a distortion of British precedents and of the actual international legal norms.

[*302]

C. Egyptian policies toward Jews

Like their Iraqi counterparts, Egyptian Jews suffered from a government clampdown during the first two decades of the Arab-Israeli conflict. Yet, whereas in Iraq the State passed laws that were explicitly targeted at Jews, the Egyptian state's reaction was more complicated. The U.N. Partition Recommendation of November 29, 1947, and the May 15, 1948, entry of Egypt into the Israel/Palestine war sparked two sets of actions that put pressure on the Egyptian Jewish community. The first consisted of anti-Jewish violence by private organizations, especially the Muslim Brotherhood, and inflammatory writing in the press. The second was a series of more ambiguous actions by the Egyptian state. The State portrayed itself as clamping down on sedition, while simultaneously trying to head off racist vigilantism from the public. Epitomizing this ambiguity, an Egyptian diplomat warned before the U.N. partition resolution that "if Arab blood is shed in Palestine, Jewish blood will necessarily be shed elsewhere in the world despite all the sincere efforts of the governments concerned to prevent such reprisals."ⁿ¹⁶²

A dozen Jewish homes in Cairo were bombed on June 20, 1948, killing 22.ⁿ¹⁶³ On July 15, after an Israeli warplane reportedly bombed Cairo, rioters attacked a Jewish neighborhood; police arrested Jewish youths from a self-defense organization and the district was looted.ⁿ¹⁶⁴ A few days later, an explosion at a Jewish-owned department store killed several people.ⁿ¹⁶⁵ Several more buildings in the Jewish quarter of Cairo were bombed on September 22, killing 19, followed by riots and looting of Jewish businesses.ⁿ¹⁶⁶ Early in May 1948, King Faruq declared that most Jews were loyal Egyptians and that action would be taken only against Zionists.ⁿ¹⁶⁷ This was actually a change of policy, since Zionism had been "considered quasi-legal or had been tolerated" until 1948.ⁿ¹⁶⁸

The legal instruments that led to the greatest insecurity among Jews were born in the middle of May 1948 when Egypt's army entered Palestine. The King imposed martial law on May 14. **[*303]** Egyptian authorities quickly detained around 1300 people, around one thousand of them Jews who had been associated with Zionism.ⁿ¹⁶⁹ Proclamation

No. 26 of 30 May 1948 allowed authorities to sequester the property of any person interned in Egypt or residing outside the country whose activities were considered "prejudicial to the safety and security of the state."ⁿ¹⁷⁰ Indeed, "from the end of May 1948 until early 1949 (particularly while Egypt and Israel were still at war) significant Jewish private, commercial and communal assets were seized and placed under the custody of the director-general of sequestered property."ⁿ¹⁷¹ Hence, the Egyptian government gave itself legal tools very similar to those utilized in Israel against Palestinians.

Nevertheless, Egyptian official policies were more nuanced than either their Israeli or Iraqi counterparts in that most did not explicitly single out Jews, at least in the early years. It is clear that the Egyptian state used the war with Israel to expand unchecked repressive police power, that harsh measures fell disproportionately on Jews, and that Zionist political affiliations were enough to render a person a perceived threat to the state.ⁿ¹⁷² Historical accounts are ambiguous about whether the Egyptian state's harshest measures were anti-Jewish, mainly anti-Zionist, or simply a crackdown on all political opposition.ⁿ¹⁷³

Though the Jews did become victimized as a result of the Palestine war, they were by no means the only victims... . Whereas Zionists and non-Zionists were harassed by the authorities, the severe political measures adopted by Egypt were equally, if not more so, part of a policy to crack down on the opposition forces ranging from the communists to the Muslim Brotherhood.ⁿ¹⁷⁴

However, while internment and sequestration laws were not exclusive to Jews, Egyptian authorities took other severe measures that were targeted specifically at Jews. Jews with dual nationality were pressured to leave the country with just a few hours notice.ⁿ¹⁷⁵

[*304]

Jewish gatherings were forbidden and Jewish communal organizations were compelled to supply the names and addresses of their membership... . During the summer of 1948 as many as thirty Jewish families were evicted each week from their homes in those parts of Cairo within a radius of one kilometer of King Faruq's residence or places he frequented.ⁿ¹⁷⁶

While several thousand Jews did leave Egypt immediately after the 1948 war, Egypt did not see a mass exodus of the kind experienced in Iraq in the early 1950s.ⁿ¹⁷⁷ Egyptian Jewish life remained relatively stable even through the July 1952 "Free Officers" revolution, though Egyptian authorities maintained tight surveillance on Zionist underground organizations.ⁿ¹⁷⁸

The period of relative calm ended in 1954.ⁿ¹⁷⁹ Beginning in 1951, Israeli intelligence had organized small groups of Egyptian Jews into cells of saboteurs.ⁿ¹⁸⁰ In 1954, they placed explosives at several Western-oriented civilian locations in Alexandria and Cairo in an attempt to disrupt Egypt's relations with Britain and France.ⁿ¹⁸¹ Egyptian police arrested many of the underground members, and several were hanged after military trials.ⁿ¹⁸²

During the 1956 Suez War, the new Egyptian regime invoked a "state of siege," permitted by Emergency Law No. 533 of 1954, authorizing the military government to detain anyone who "prejudices public order and security."ⁿ¹⁸³ Hundreds of Jews were interned, and nearly all of the Jews of Cairo and Alexandria were confined to their homes for long periods.ⁿ¹⁸⁴ A separate law allowed for the confiscation of property belonging to any person placed under surveillance or internment.ⁿ¹⁸⁵ While none of these measures specifically named Jews, they imposed severe hardship on the Jewish community.ⁿ¹⁸⁶

The persons and firms affected by this measure represented the bulk of the economic substance of Egyptian Jewry, the **[*305]** largest and most important enterprises, and the main sustenance, through voluntary contributions, of the Jewish religious, educational, social and welfare institutions in Egypt. The resulting paralysis of these institutions substantially aggravated the uprooting effect of the government's anti-Jewish policies and greatly intensified the pressure for Jews to leave the country.ⁿ¹⁸⁶

In form, the confiscated property was only temporarily sequestered and was handed over to a commissioner to hold it in the interim. Yet Egyptian legislation allowed the commissioner to deduct ten percent of all income and capital that

came under his control.ⁿ¹⁸⁷

Internment and property confiscations were preludes to more direct measures aimed at forcing Jews out of Egypt. By the end of November 1956, around 500 Jewish families, both Egyptian and stateless, had received direct orders of expulsion requiring them to exit the country within a week.ⁿ¹⁸⁸ Another harsh measure was Egyptian nationality law, which had been enacted in 1950 and then amended in September 1956 by decree of President Gamal Abdel Nasser. The revised nationality law strictly defined an "Egyptian" as a person who did not fall under the jurisdiction of a foreign state and who was "resident on Egyptian territory before 1 January 1900," and who had maintained his or her residence continuously ever since.ⁿ¹⁸⁹ This was used by Egyptian authorities to denationalize any person who could not prove their families had been resident in 1900 (which few Egyptians could prove), or who had traveled abroad even briefly.ⁿ¹⁹⁰ In addition, the law explicitly prohibited "Zionists" from Egyptian nationality, without defining the term.ⁿ¹⁹¹ The State stopped issuing direct expulsion orders after November, but adopted other forms of pressure on Jews to induce them to leave "voluntarily." Departing Jews received laissez-passer documents that prohibited their return and renounced all claims against Egypt.ⁿ¹⁹² More than 20,000 left from November 1956 to June 1957. By 1958, around forty percent of the Egyptian Jews had left.ⁿ¹⁹³

[*306] The military order allowing property confiscation was cancelled in April 1957.ⁿ¹⁹⁴ Up to this point, Egyptian law had not been explicitly anti-Jewish; it mentioned Zionism, but not Jews specifically. This changed in 1958, when Egypt briefly joined in a political union with Syria. On April 15, 1958, the Minister of Interior published a decree explicitly prohibiting "Jews" resident in Egypt who left the country or denationalized from ever returning.ⁿ¹⁹⁵ By the time of the 1967 Arab-Israeli War, there were only about 2,500 Jews left in Egypt,ⁿ¹⁹⁶ down from close to 80,000 in the 1940s.ⁿ¹⁹⁷ A week after the beginning of the 1967 war, Egyptian police arrested 425 Jewish males.ⁿ¹⁹⁸

Until September 19, 1968, Jews who had not been imprisoned were permitted to leave the country once they had renounced Egyptian citizenship and pledged never to return... . By the end of 1968, only one thousand Jews remained.ⁿ¹⁹⁹

On September 19, 1968, Egyptian authorities seemed to reverse policy and actually prevented boats with Jewish emigres from leaving the country.ⁿ²⁰⁰ Though people continued to leave quietly, "as late as [June 15,] 1970, Jews could leave for Europe only if they could confirm that they were dependent on a prisoner already released and out of the country."ⁿ²⁰¹ Some of the men imprisoned in June 1967 remained jailed until September 1970, when they were finally expelled from the country.ⁿ²⁰²

There are therefore conflicting interpretations about why nearly all Egyptian Jews eventually left the country. Historian Joel Beinin explains that even as events were unfolding there were two narratives of the pressure placed on the Egyptian Jewish community in the 1950s.ⁿ²⁰³ While Egyptian officials portrayed their prosecution of accused Zionist militants as a routine action against espionage and sabotage,ⁿ²⁰⁴ Israel and American Jewish organizations compared **[*307]** them to Nazi tactics.ⁿ²⁰⁵ Beinin argues that the Israeli version largely held sway with western powers.ⁿ²⁰⁶ This was in part because Egyptian and Arab nationalists often linked Zionism with Communism, which appeared similar to Nazi propaganda that asserted Jews supported an international Communist conspiracy.ⁿ²⁰⁷ Western support also grew from Egyptian propaganda that stressed the Jewish defendants' western and cosmopolitan appearance.ⁿ²⁰⁸ Nevertheless, both the British and American governments avoided making any formal protests with the Egyptian authorities.ⁿ²⁰⁹

That there were two narratives explaining the Jewish situation in Egypt can be explained by the way in which Egyptian policy evolved. At least at first, Egyptian policies could be explained solely by security considerations, though they fell hardest on Jews. The Egyptian state targeted political opposition, especially Zionism, and hence may have violated its citizens' civil and political rights. But as the 1950s wore on, Egyptian policies became increasingly directed at Jews alone. This represents a shift from two different incarnations of the enemy nationals policy. The first conceived of an enemy political opinion (Zionism) that was tied to an enemy state (Israel), and was analogous to American restrictions on Communists regardless of their nationality. The second conceived of an enemy religious group, and was analogous to American policies toward Japanese.

Egyptian laws were similar to Israeli measures used against Palestinians, in that they did not single out a minority group by name, but instead used plausibly security-related criteria to justify policies that nevertheless led to the disenfranchisement of an entire community. This pattern continued even after most of the Jews had departed. Egypt's 1975 Nationality Law bans "Zionists" (undefined) from Egyptian citizenship.ⁿ²¹⁰ The same law allows the state to strip any Egyptian of their citizenship if "he was described of being a Zionist at any time" or "he worked for a State or foreign

government **[*308]** at war with Egypt, or with whom diplomatic ties have been cut, and his work could negatively affect the military, diplomatic, or economic position of the country or jeopardize any other national interest."ⁿ²¹¹

D. Israeli immigration and asylum policy

Since 2000, Israel has developed two new applications of the enemy nationals concept, both involving foreigners and migration. The first and most explicit involves asylum law. Israel has no asylum legislation, but has been a party to the 1951 Convention relating to the Status of Refugees since 1954.ⁿ²¹² In 2001, the Attorney General adopted a procedural mechanism by which refugees fleeing persecution may seek asylum.ⁿ²¹³ Normally, refugees who are recognized through this procedure receive one-year renewable residence permits, which entitle them to work and enjoy social security benefits on the same basis as Israeli citizens. But the procedure includes a critical exception that effectively excludes nationals of most states in Israel's immediate vicinity. Section 6 of the Attorney General's procedure provides:

The State of Israel reserves the right, not to absorb into Israel, or to grant a permit to enable the stay in Israel, of subjects of enemy or hostile states - as determined from time to time by the relevant authorities, and for as long as such states possess that status. The issue of the release of such persons on bail will be examined on a case-by-case basis, in accordance with the prevailing circumstances, and security considerations.ⁿ²¹⁴

The author of this study is a lawyer in Tel Aviv University's Refugee Rights Clinic, which by April 2006 had represented more than fifty refugees from Sudan, Iran, the occupied Palestinian **[*309]** Territories,ⁿ²¹⁵ and elsewhere who were subject to this policy. In practice, Section 6 allows refugees to be detained indefinitely when people in the same circumstances of another nationality would be released and in most cases granted a temporary work permit while their cases were pending. By the end of March, at least 160 Sudanese had been detained in Israel, many of these refugees from Darfur. Although court petitions in a handful of cases had led the State to agree to less stringent forms of detention (usually house arrest on a kibbutz or collective farm), no Israeli court has yet ruled on the legality of Section 6.

Israel's enemy nationals exclusion in asylum is notable because it puts Israel in direct violation of Article 44 of the Fourth Geneva Convention, an article that Israel sponsored in 1949. Israel's change of heart after 1949 was signaled by its 1954 reservation to the Refugee Convention's article 8 (which exempts refugees from exceptional measures defined by nationality). The legal significance of this reservation is marginal; Israel is still bound by the Refugee Convention's article 3 (prohibiting discrimination by country of origin), the Fourth Geneva Convention's article 44, and the Convention on the Elimination of All Forms of Racial Discrimination. But the reservation to the Refugee Convention adds an element of confusion about Israel's obligations that helps to detract from the explicit terms of other bodies of law.

A more legally plausible invocation of the enemy nationals doctrine concerns a ban, in place since 2002, on granting any residency status to Palestinians from the West Bank or Gaza Strip.ⁿ²¹⁶ Under a 2005 amendment, the law targets family unity immigration in which Israelis marry Palestinians and then seek their immigration **[*310]** to Israel. The exclusion applies to men under thirty-five years of age and women under twenty-five, and exempts children if their parents live legally in Israel. It was challenged by Israeli human rights organizations both in U.N. bodies and in Israel's High Court.

By singling out a particular nationality for disadvantage in immigration law, Israel violated the Convention on the Elimination of All Forms of Racial Discrimination article 1(3), and has been subject to corresponding criticism by the U.N. Committee on the Elimination of Racial Discrimination.ⁿ²¹⁷ In response, Israel argued to the U.N. committee that the measure is "a security oriented law, the result of the wave of atrocious and indiscriminate Palestinian terrorism," and claimed that family unification involving Palestinians from the occupied territories had contributed to "23 murderous terrorist attacks."ⁿ²¹⁸ In its submissions to the U.N., Israel offered only a partial defence of the legality of the entry restrictions, noting that the law was temporary and subject to both a court petition and possible amendment.ⁿ²¹⁹ But in 2005, Israel defended the exclusion of Palestinians to its own High Court by explicitly invoking the enemy nationals doctrine, arguing that many democracies refuse immigration to citizens of enemy states in times of war. In a brief filed on November 6, 2005, the State argued that international law permitted treating all Palestinians as enemies because "Israel is in an armed conflict with the Palestinian Authority and a large proportion of the civilian population supports the conflict and even takes part in it."ⁿ²²⁰

In May 2006, in *Adalah v. Minister of Interior*, an eleven-judge panel of the High Court temporarily upheld the law in a closely divided ruling that left the future of Israel's enemy nationals policies **[*311]** in continuing doubt.ⁿ²²¹ The

majority decision by Justice Michael Cheshin, signed by five justices, cited the enemy nationals rule extensively in holding that Israel's armed conflict with the Palestinians justified restricting migration by Palestinians.ⁿ²²² The Court's President, Aharon Barak, wrote a lengthy dissent - also signed by five justices - in which he argued that the law should be struck down as a disproportionate violation of equality and family life, and that individual security checks should be used instead.ⁿ²²³

Cheshin referenced international law extensively. He argued that "international law assumes that in times of war citizens of warring states become enemies to each other and that every citizen has a natural loyalty to his country of origin and will be hostile to its enemies."ⁿ²²⁴ Though this rationale is strongly tied to traditional notions of the relationship between citizens and sovereign states, he argued that it applied equally in cases of conflict with non-state entities.ⁿ²²⁵ Cheshin argued that individual security checks would not address the threat posed by Palestinians because they might become dangerous after having been admitted to Israel.ⁿ²²⁶ Adopting arguments that had originally been submitted by the state, Cheshin suggested that all Palestinians have the potential for terrorism because a Palestinian who is not dangerous today may become so tomorrow. He reasoned that the people who enter Israel might change their ideology later or be coerced to participate in terror by pressure on their immediate families left behind. "Even if we can ascertain at a given moment that a person is not involved in terror, how could we be sure that tomorrow, after he will get the permit he wants, he would not take part in terror?" he wrote.ⁿ²²⁷ Because of this uncertainty, Cheshin found the infringement of human rights justified.

I agree that a collective violation has negative and oppressive results, and that a democratic country should try to refrain from this. However, I think, that sometimes it is **[*312]** unavoidable. This is especially true when it is impossible to trace and identify the few who wish to harm, while the potential harm from them is very severe... . When the offence of the few is so severe, it justifies collective restrictions.ⁿ²²⁸

Cheshin's willingness to consider all Palestinians potentially dangerous attracted sharp criticism from dissenting judges. Referring to the Korematsu decision of the U.S. Supreme Court, Justice Ayala Procaccia wrote, "We have to be weary of the danger of stigmatizing a whole community by saying they are all a potential security risk."ⁿ²²⁹ Justice Salim Joubbran argued the law violated the rights of the entire Arab population of Israel by envisioning them all as potential threats. But Cheshin and others brushed the analogy aside, noting the factual differences in the cases. Whereas the U.S. had interned its own citizens, Israel was simply preventing the entry of foreign citizens, in a situation where Palestinians posed a danger that was much less speculative than that posed by Japanese Americans.ⁿ²³⁰

In the lead dissent, Justice Barak conceded that there was a rational connection between the ban on Palestinian entry and the State's goal of enhancing securityⁿ²³¹ and that an across-the-board ban on Palestinians is more effective than individual screening.ⁿ²³² But he concluded that the resulting rights violations were out of proportion to the actual security threat.ⁿ²³³ He wrote:

Democracy does not impose a sweeping prohibition, dividing its citizens from their spouses and making it impossible for them to conduct family life; democracy does not impose a sweeping prohibition that leaves its citizens with the option to live in the state without the spouse or leave the state in order to conduct family life; democracy does not impose a sweeping prohibition that separates parents from their children.ⁿ²³⁴

With five justices signing both Cheshin and Barak's opinions, the decisive vote was cast by Justice Edmond Levy, who wrote that he agreed with Justice Barak on the substantive issues. He wrote that **[*313]** the current form of the law violates not only the rights of those who wish to get married but also the democratic values of the State and the relationships between the communities who live in Israel.ⁿ²³⁵ But he reasoned that judicial deference required allowing the Parliament a chance to revise the law rather than striking it down. Because the law was temporary and due to expire within nine months, he voted with Justice Cheshin to uphold it. He held that the Parliament will need to find a less abusive means to achieve its security goals, for instance by requiring Palestinians entering Israel to submit extensive documentation to prove they are not threats, to refrain from entry into Israel until granted a permit, to declare allegiance to the State of Israel and to its laws, as well as a declaration forsaking allegiance to any other country or entity.ⁿ²³⁶ He stressed the need to give the Parliament a chance to find creative solutions, but warned that he believed the law would have difficulty passing a second round of judicial scrutiny if it is not changed.ⁿ²³⁷

The Israeli High Court's conflicted decision reflects the confusion surrounding the enemy nationals doctrine. A narrow majority of the Court (including Justice Levy) argued that enemy nationality alone should not prevent a person's immigration, even in times of war, though a small number of the potential immigrants may pose a threat. But a law that imposes exactly such an exclusion was nevertheless sustained, albeit only temporarily and on narrow jurisprudential grounds.

Much of the confusion stemmed from the way in which international and comparative sources were used. Superficially, the lead opinion relied extensively on international law. But it would be more precise to say that Justice Cheshin relied on the mere fact that there is an enemy nationals doctrine in international law; he did not explore how international law regulates it and arguably has dismantled its foundations. Cheshin's simplification of the enemy nationals doctrine has its roots in how the concept was imported to Israeli academic literature. He relied extensively on the Israeli law review article by Amnon Rubenstein and Liav Orgad, *Human rights, state security and the Jewish majority: The case of immigration for purposes of marriage*, published in 2006 in the Hebrew-language law journal *Hapraklit*. Rubenstein and Orgad presented no original [*314] research or analysis of the enemy nationals rule, but cited an American law review article by Karen Engleⁿ²³⁸ that discusses its existence. I have also cited Engle's work.ⁿ²³⁹ But Engle's article is actually focused on American domestic immigration law rather than international norms, and it did not extensively analyze whether enemy nationals rules are actually legitimate. Her thesis was that American immigration laws in general are an index of which groups are subject to disfavor at any given time. Thus, rather than conduct direct analysis of the body of international law on which he relied, Justice Cheshin depended on a second-hand account of an article that was actually focusing on something else. This is not only flawed judicial reasoning, but it is also an indication of how poorly understood norms of international law can lend apparent legitimacy to policies that may actually be illegal.

The true American ancestor of the Adalah decision is *Hirabayashi*, not *Korematsu*. It is true that the Japanese internment concerned a much more severe violation of human rights (racially-based deprivation of liberty) than the Israeli law (discriminatory limitation on family-based immigration). In theory, this distinction should make the Israeli policy more easily justified. After all, if the enemy nationals rule has any validity, it applies only to foreigners. But it is important to remember that in World War II the United States interned both citizens and aliens under the same policy. The line between citizens and non-citizens blurred because they had the same assumed connections to Japan. Like Cheshin's ruling in Adalah, Chief Justice Stone's decision in *Hirabayashi* also concluded that all members of a particular nationality are potentially threatening because of their personal and cultural connections, and that this potential threat justifies collectively violating the rights of an entire group. While the Adalah case only concerned immigration, Cheshin's logic is equally applicable to Arab citizens of Israel, many of whom also have family connections not just in the occupied Palestinian territories but in Palestinian refugee communities around the Middle East. That is why Justices Joubran and Procaccia were correct to see Cheshin's decision as opening the door to more far-reaching infringements on human rights.ⁿ²⁴⁰

[*315] On November 23, 2006, shortly before this article went to press, the Government of Israel circulated a draft proposal to again extend the ban on Palestinians from the Palestinian Territories, which was set to expire on January 16, 2007.ⁿ²⁴¹ The draft would expand the ban on Palestinians to include any "resident" of any other country or territory where "activities liable to endanger the security of the State of Israel or its citizens takes place."ⁿ²⁴² If applied literally, this broad rule would give the government wide power to exclude not only citizens from countries that are at war with Israel, but also "residents" of countries like Egypt and Jordan, and perhaps even other states where anti-Israel militant groups may operate. Israeli human rights groups expressed alarm that in addition to discriminating against Palestinians the proposal would solidify the ban on granting asylum to refugees from "enemy states."ⁿ²⁴³

Rather than singling out a particular nationality, the November 23 proposal returns to the model used in Israel's Absentee Property Law, whereby residence on hostile territory was the main criterion for exclusion.ⁿ²⁴⁴ But the new proposal represents a continued evolution of the enemy nationals concept. The traditional enemy nationals rule is rooted in the bond between a citizen and a sovereign state. The 1950 Israeli definition of an absentee expanded this to include temporary residence either in an enemy state or on territory temporarily controlled by an enemy army. The 2006 version expands the concept even further, including residents of countries where any hostile activities take place. At time of writing, the proposal was still pending in the Parliament, and if passed was expected to face immediate challenges in court. This legal evolution thus expands the enemy nationals concept to fit an era when most warfare involves non-state actors who may operate in virtually any [*316] country. But by this expansion, the enemy nationals doctrine will have fostered dramatic and arguably limitless expansion of a state's power to exclude people on potentially discriminatory grounds, despite the fact that the rule is formally subject to substantial limits in international law.

IV. Conclusion

Israel and the Arab states used the existence of the enemy nationals doctrine to provide political cover for policies that were in fact illegal and that deepened conflict in the Middle East. The doctrine produced ambiguity where there should have been clarity. In a conflict where ethnicity defines the armed struggle more than international boundaries, the belligerents are tempted to define their enemies accordingly, and hence blur the lines between combatant and civilian while casting racial discrimination as a legitimate means of warfare. This in turn contributes to a climate in which civilians are often seen as legitimate targets in an armed struggle.

While Britain's nuanced and restrained wartime policy prevailed in the drafting of treaties for the justification for infringements of the Fourth Geneva Convention, it was Chief Justice Stone's rationale for infringing the liberty of ethnic and religious groups that carried the day in the Middle East. To a great degree, this is a reflection of the fact that international law has often been ignored in the course of the Arab-Israeli conflict. But neither Israel nor the Arab states broke the law without restraint; they framed their policies in a conscious effort to make them appear at least plausibly legitimate. The fact that the enemy nationals rule still existed in international law helped them do this. Israel, Iraq, and Egypt all worried about obtaining international legitimacy for their policies, or at least about blunting international criticism. If the enemy nationals law had not produced confusion, international law might have influenced government policy so as to lessen conflict and protect human rights.

In the international arena, clarity is often essential to translate law into political will. By contrast, ambiguity in the law provides an opening for political exploitation. The Israeli and Arab governments did not necessarily look for legal justifications that could stand up in court, but they did look for plausible arguments to give their policies the veneer of legitimacy. On their face, Arab and Israeli policies have had much more in common with the U.S. [*317] internment of Japanese Americans than with British policies toward Germans in World War II. Yet it was the British policies that gave the policies a cover of legitimacy because the British approach was embraced by international law. The impact of this quasi-legality should not be minimized; the exile and dispossession of Palestinians and Jews from Arab countries remain among the most sensitive and divisive issues in the Arab-Israeli conflict.

I do not argue international law caused Arab-Jewish tension and violence in the Middle East. But I do argue that legal ambiguity acted as an enabler for ethnic conflict by easing the institutionalization of discrimination and weakening the protections owed to civilians. Clearer legal rules might have lessened the severity of discriminatory measures by making it harder for governments to legitimize more extreme measures; ambiguity deepened discrimination and heightened the divisions between warring groups. Ambiguity in the law made it more difficult for international law to achieve at least four of its primary goals: maintenance of peace, resolution of conflicts, protection of human rights, and the shielding of civilians in armed conflict.

A natural response to the danger of legal ambiguity is to strengthen international judicial mechanisms for issuing authoritative interpretations in order to produce necessary clarity. This proposition is currently the subject of an intense debate among legal scholars following the 2004 advisory opinion by the International Court of Justice (ICJ) that Israel's wall/barrier in the West Bank violated international humanitarian law.ⁿ²⁴⁵ One of the strongest criticisms of the ICJ's opinion has been that the Court should have refrained from dealing with the issue because it was overly politicized, and hence endangered the court's legitimacy.ⁿ²⁴⁶ Others have applauded the ICJ's involvement, arguing that there is a need for an independent body to clarify the standards binding on states.ⁿ²⁴⁷

[*318] In a provocative essay, Michael Y. Kieval has recently observed that the resolution of this debate depends on whether we believe law should be descriptive or aspirational.ⁿ²⁴⁸ Descriptive law describes current state practices, and therefore faces little opposition and "has the advantage of having people already following it."ⁿ²⁴⁹ Aspirational law "has the positive attribute of trying to make the world a better place, but it is hard to implement, because many countries... must be induced to change their behavior."ⁿ²⁵⁰ Kieval argues that humanitarian law should be descriptive rather than aspirational because inconsistent and weak enforcement would endanger the legitimacy of the law.ⁿ²⁵¹ The descriptive-aspirational dichotomy is a useful analytical framework for understanding the challenges facing international law, but Kieval's ultimate conclusion is unconvincing. Treaty-based humanitarian and human rights law has always been and probably always will be aspirational. In a world where combatants and governments often commit abuses, these bodies of law were from their earliest days a conscious attempt to raise the standards of state behavior and to restrain political impulses to compromise the welfare of vulnerable people.

The dangers of legal ambiguity are essential factors to consider in this debate. Advocates of international judicial restraint incorrectly assume that avoiding judicial intervention will de-politicize international law. This assumption ig-

noses the ways in which governments can exploit ambiguities in the law to normalize and legitimize destructive policies. Limiting judicial intervention does not de-politicize law; it simply surrenders the legal playing field to governments and increases the likelihood that political power rather than principle will carry the day. At the end of the day, if international law is to be relevant it cannot be neutral on high stakes issues.

[*319] Whatever criticism one may make of the ICJ or other international bodies mandated to interpret international law, they are the only means we have to independently and impartially resolve legal ambiguities in the international field. While lack of enforcement and judicial overreaching can certainly undermine the rule of law, so can leaving ambiguities about legal norms unresolved. At best, such ambiguity will render international law irrelevant when standards are needed most. At worst, ambiguity will aid political actors who pursue policies that international law was meant to counter. This is what has happened in the Middle East.

Legal Topics:

For related research and practice materials, see the following legal topics:
 GovernmentsAgriculture & FoodProcessing, Storage & DistributionInternational LawDispute ResolutionLaws of War-
 International LawDispute ResolutionTribunals

FOOTNOTES:

n1. Jeremy Forman & Alexandre (Sandy) Kedar, From Arab land to "Israel Lands": The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948, 22 *Environment and Planning D: Society and Space* 809, 810 (2004).

n2. Deuteronomy 20:10-14 (New Revised Standard Version).

n3. Luke 11:21-22 (Revised Standard Version) ("When a strong man, fully armed, guards his own palace, his goods are in peace; but when one stronger than he assails him and overcomes him, he takes away his armor in which he trusted, and divides his spoil.").

n4. Qu'ran Sura 2:190 (The Meaning of the Holy Qur'an: New Edition and Revised Translation and Commentary (Abdullah Yusuf Ali trans. 1992)).

n5. Qu'ran, supra note 4, Sura 8:41.

n6. Qu'ran, supra note 4, Sura 8:69.

n7. The Old Testament in particular appears to conceptualize war as total conflict between peoples, with the victor being justified in killing all civilians in a practice that today might be labeled genocide. After prescribing rules for governing attacks on enemy cities, Deuteronomy continues with a passage calling for the Hebrews to "annihilate" (20:17) those groups who inhabit "towns ... that the Lord your God is giving you as an inheritance... You must not let anything that breathes remain alive."(20:16).

n8. In the wake of the 2006 Israel-Lebanon war, the difference between these two interpretations was illustrated in sharp debates among Jewish and Muslim clerics about whether religious law permitted the killing of enemy civilians. Compare Rabbinical Council of America, RCA solidarity mission to Israel expresses view of "Tohar Haneshek" in light of the unprecedented realities of recent war with Hezbollah (Aug. 17, 2006), available at <http://www.rabbis.org/news/article.cfm?id=100826> ("Judaism would neither require nor permit a Jewish soldier to sacrifice himself in order to save deliberately endangered enemy civilians.") with Barry Leff, For purity of arms, The Jerusalem Post (Sept. 4, 2006) (arguing that rabbinical interpretation of Biblical law forbids killing innocent people and requires that violence be used only proportionately). See also Alain Navarro, Muslim authorities disown fatwas on killing Jews, The Daily Star Egypt (Aug. 24, 2006) (describing a debate between Egyptian clerics on whether the Lebanon war justified killing Israeli Jews who visit Egypt).

n9. Hilaire McCoubrey, *International Humanitarian Law* 177 (2d ed. 1998).

n10. Coleman Phillipson, *International Law and the Great War* 93 (1915).

n11. See L. Benjamin Ederington, Property as a Natural Institution: The Separation of Property from Sovereignty in International Law, 13 *Am. U. Int'l L. Rev.* 263 (1997).

n12. In his study of the evolution of property rights in international law, Ederington cites Hugo Grotius' *De Jure Belli ac Pacis Libri Tres* (1625) and Emmerich Vattel's *The Law of Nations* (1797) as particularly influential in reconceptualizing property as a natural right independent of sovereignty. *Id.* at 266, 268.

n13. John Locke, *Two Treatises of Government* 317 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). Locke explains this conclusion by arguing:

Every Man has a Property in his own Person... The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.

Id. at 305-6.

n14. Ederington, *supra* note 11, at 263; Phillipson, *supra* note 10, at 94.

n15. Oppenheim's *International Law* 326 (7th ed. 1952).

n16. *U.S. v. Percheman*, 32 U.S. 51, 87 (1833) (Marshall, C.J.).

n17. Questions Relating to Settlers of German Origin in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10).

n18. See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 215 (2004).

n19. *Id.* at 10.

n20. Charter of the International Military Tribunal (IMT) at 6(b), in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

n21. International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1946, 41 Am. J. Int'l L. 172, 248?9 (1947). *Accord International Military Tribunal for the Far East (Tokyo)*, 1948, [1948] AD 356, 366.

n22. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. at para. 89 (July 9) [hereinafter *Wall in OPT Advisory Opinion*] available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited Jan. 16, 2007).

n23. The following are the most important provisions:

Article 23

It is especially forbidden ... (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Article 28

The pillage of a town or place, even when taken by assault, is prohibited.

Article 46

Private property ... must be respected.

Article 47

Pillage is formally forbidden.

Article 53

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for military operations

Article 56

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Convention with Respect to the Laws and Customs of War on Land, *Regulations Concerning the Laws and Customs of War on Land*, July 29, 1899, 32 Stat. 183 [hereinafter *Hague Regulations*].

n24. Hague Regulations, *supra* note 23, art. 53.

n25. Kriangsak Kittichaisaree, *International Criminal Law* 174-75 (Oxford University Press 2001).

n26. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, 1996 I.C.J. 26, 257 (July 8).

n27. *Id.*

n28. Dinstein, *supra* note 18, at 82-83.

n29. Hague Regulations, *supra* note 23, art. 23(g).

n30. Oppenheim, *supra* note 15, at 268-69.

n31. *Id.* at 399, 407; see Phillipson, *supra* note 10, at 101.

n32. Oppenheim, *supra* note 15, at 327-28.

n33. Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 *Am. J. Int'l L.* 295, 302-03 (1995); Forman & Kedar, *supra* note 1, at 7.

n34. See Lord McNair & A.D. Watts, *The Legal Effects of War* 78 (1966).

n35. McNair & Watts, *supra* note 34, at 89, 91.

n36. Oppenheim's International Law, *supra* note 15, at 333-35.

n37. Robert M. W. Kempner, The Enemy Alien Problem in the Present War, 34 Am. J. Int'l L. 443, 444 (1940).

n38. *Id.* at 444-45.

n39. *Id.* at 445.

n40. *Id.*

n41. *Id.* at 446.

n42. *Id.*

n43. Greg Robinson, By Order of the President: FDR and the Internment of Japanese Americans 75 (2001).

n44. *Id.* at 93.

n45. *Id.*

n46. Robert R. Wilson, Treatment of Civilian Alien Enemies, 37 Am. J. Int'l L. 30, 42 (1943).

n47. *Id.* at 43.

n48. Robinson, *supra* note 43, at 90.

n49. *Id.* at 4.

n50. *Id.*

n51. 50 U.S.C.S. §21 (2006).

n52. The 1798 version had applied only to men over age 14. The 1918 amendment removed the gender limitation and applied the law to both sexes. 5 Cong. Ch. 66, 1 Stat. 577 (1798), amended by 50 U.S.C.S. §21 (1918).

n53. Robinson, *supra* note 43, at 89-90.

n54. *Id.* at 112.

n55. Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

n56. Robinson, *supra* note 43, at 108.

n57. *Id.*

n58. *Id.* at 106.

n59. 323 U.S. 214 (1944).

n60. *Id.* at 216.

n61. *Id.*

n62. *Id.* at 223-24.

n63. 320 U.S. 81 (1943).

n64. *Id.* at 95.

n65. Had the United States adopted the British approach, it seems highly unlikely that Hirabayashi would have been considered a threat. He was born in Seattle, educated in public schools, and was a senior at the University of Washington at the time of his arrest. He had never visited Japan, and had no documented contacts with anyone in Japan. *Id.* at 84.

n66. *Id.* at 96.

n67. *Id.* at 96-98.

n68. Hirabayashi concerned a person convicted for resisting a curfew imposed on people of Japanese descent, while Korematsu concerned relocation and internment.

n69. Hirabayashi, 320 U.S. at 100.

n70. See Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. Rev. 1, 84-85 (2001).

n71. Convention Relating to the Status of Stateless Persons, adopted Sept. 28, 1954, art. 1, 360 U.N.T.S. 117, 136 (entered into force March 6, 1960). Of the states discussed in this article, only Israel is a party to the Status of Stateless Persons Convention; none of the Arab states bordering Israel have signed it. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp> (last visited Jan. 17, 2007).

n72. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 37, 42, 41, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter *Fourth Geneva Convention*].

n73. *Id.* arts. 37-40, 75 U.N.T.S. at 310-14.

n74. *Id.* art. 43.

n75. *Id.* art. 42.

n76. International Committee of the Red Cross, Commentary, Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 44, available at <http://www.icrc.org/ihl.nsf/COM/380-600050?OpenDocument> (last visited Jan. 17, 2007) [hereinafter ICRC Commentary].

n77. ICRC Commentary, *supra* note 76.

n78. Convention Relating to the Status of Refugees, adopted July 28, 1951, art. 8, 189 U.N.T.S. 137, 159-60 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]

n79. See U.N. High Commissioner for Refugees, Ad Hoc Committee on Statelessness and Related Problems, United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and stateless Persons), art. 25, UN Doc. E/AC.32.2, available at <http://www.unhcr.org/protect/PROTECTION/3ae68c164.html> (last visited Jan. 29, 2007).

n80. See *id.* ("If this rule is to be applied in time of war, a similar rule must a fortiori be applied in time of peace.") See generally Atle Grahl-Madsen, Commentary on the Refugee Convention art. 8 para. 1 1951 (1963, re-published by UNHCR 1997) (explaining article 8 of the Refugee Convention, which deals with exceptional measures).

n81. Grahl-Madsen, *supra* note 80, art. 8 para. 2 ("The article also applies to measures taken in peace-time, e.g. during crises of a non-military type (economic or financial crises), or retaliation and retortion against subjects of States with which a temporary disagreement exists, for example over the payment of a substantial sum as damages."). See also Nehemiah Robinson, Convention Relating to the Status of Stateless Persons: Its History and Interpretation (originally published by World Jewish Congress 1955; re-printed by UNHCR 1997).

n82. See Robinson, *supra* note 81, art. 8 para. 3 ("The second sentence considerably restricts the import of this article.").

n83. Grahl-Madsen, *supra* note 80, art. 8 para. 1.

n84. Id. art. 8 paras. 7-9 ("The expression 'in appropriate cases' may seem vague, but ... it seems clear that it refers to any and all cases where measures are taken against aliens solely on account of their nationality.").

n85. Robinson, *supra* note 81, art. 8 para. 5 ("Unless they enter a reservation to Article 44 of the latter Convention, they will have to adhere to it regardless of the limitation permitted under this Convention.").

n86. See Grahl-Madsen, *supra* note 80, art. 8 para. 1.

n87. See Christine Ann Lobasso, *Elevation of the Individual: International Legal Issues That Flow From the American Internment of the West Coast Japanese during World War II*, 8 *Touro Int'l L. Rev.* 45, 46-47, 61-62 (1998).

n88. ICRC Commentary, *supra* note 76.

n89. Proclamation No. 4417, 3 C.F.R. 8, 41 Fed. Reg. 35 (1977). See generally Lobasso, *supra* note 87, at 54 (explaining that President Ford stated that evacuation and detention were wrong, and that such action would never again be repeated).

n90. *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986).

n91. *Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987).

n92. Proclamation No. 2685, 11 Fed. Reg. 4079 (April 11, 1946).

n93. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 302 (entered into force Jan. 3, 1976).

n94. Charter of the IMT, *supra* note 20, art. 6(c) at 288 ("Persecutions on political, racial or religious grounds ...").

n95. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Persons tak-

ing no active part in hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.").

n96. Ian Brownlie, *Principles of Public International Law* 546-49 (Oxford University Press 2003) (1966). See also *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 223 (1987-II) ("Discrimination is widely held as prohibited by customary international law in the field of expropriation."); *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belg. v. Sp.)* 1970 I.C.J. Rep. (1970), 4, 32 (holding that "protection from slavery and racial discrimination" are preemptory norms of international law).

n97. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

n98. *Id.* art. 1 para. 1.

n99. *Id.* art. 1 para. 2.

n100. *Id.* art. 1 para. 3 (emphasis added).

n101. Lobasso argues:

The drafters of Geneva IV could have left the agreement in a condition wherein an individual's mere status as an enemy alien would allow the state to intern him, but the drafters did not choose this course. Instead, insertion of Article 42 [allowing internment only "if the security of the Detaining Power makes it absolutely necessary"] makes it clear that being a national of an enemy state alone is not a sufficient reason to justify internment. There must be additional facts to indicate that such a measure is "absolutely necessary." Similarly, a bare assertion that the state is at war would not be sufficient justification for an internment, because Geneva IV's provisions all contemplate the existence of an international armed conflict. The inclusion of Article 42 demonstrates that more is needed in this regard as well.

Lobasso, *supra* note 87, at 62-63 (citations omitted).

n102. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. Colo. L. Rev. 59, 78 (2004).

n103. *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) ("Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy."), discussed in Engle, *supra* note 102, at 80-81.

n104. Lex Takkenberg, *Status of Palestinian Refugee in International Law* 16 (1998); see also Ruth Lapidot, *Do Palestinian Refugees Have a Right to Return to Israel?*, Israel Ministry of Foreign Affairs, Jan. 15, 2001, <http://tinyurl.com/2p5qnv> ("The [Security] Council did not propose a specific solution, nor did it limit the provision to Arab refugees, probably because the right to compensation of Jewish

refugees from Arab lands also deserves a "just settlement.") (on file with Human Rights Law Review).

n105. See, e.g., Jan Abu Shakrah, *Deconstructing the Link: Palestinian Refugees and Jewish Immigrants from Arab Countries*, in *Palestinian Refugees: The Rights of Return* 208 (Naseer Aruri ed., 2001).

n106. *Id.* at 210, 212-13. It is also noteworthy that Israel refrained from insisting on any agreement on population exchanges in peace treaties with Egypt and Jordan.

n107. However, I must disagree with Abu Shakrah's assertion that "emigration from Arab countries was voluntary and connected to events totally unrelated to the 1948 war." *Id.* at 213. Although this was certainly true for some individuals, and may be more accurate regarding some Arab states, it is not supported by the historical studies I have reviewed regarding Jews from Egypt and Iraq. As described in the text of this article, Egyptian and Iraqi Jews faced an array of harsh and often discriminatory government measures, hostility and occasional violence from fellow citizens, and a general climate of ethnic tension and insecurity. These problems grew directly from the Arab-Israeli conflict.

n108. See generally U.N. Comm'n on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, *Freedom of Movement: Human Rights and Population Transfer*, E/CN.4/Sub.2/1997/23 (June 27, 1997) (detailing the ways in which population transfers violate human rights and are prohibited by international law where the consent of those transferred is absent).

n109. See generally Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (2004) (detailing events leading up to and causing different waves of Palestinian exodus, including official Zionist policies and military strategies that resulted in displacing many remaining Arabs); *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Walid Khalidi ed., 1992) (describing the circumstances surrounding the destruction of 418 Palestinian villages in the countryside, including the reasons for which inhabitants fled). Although there is little debate about whether violence and fear were the main causes of refugee flight, debate continues among historians over the degree to which whether refugee flight was part of a systematic plan by Israeli/Zionist leaders. Compare Morris, *supra* note 109, at 592-98 (arguing that Israeli strategy against Arabs resulted in civilian flight, but was intended to "harm and deter militiamen, not to precipitate an exodus") and Benny Morris, *Revisiting the Palestinian Exodus of 1948*, in *The War for Palestine: Rewriting the History of 1948* 37-56 (Eugene L. Rogan & Avi Schlaim eds., 2001) (arguing that newly declassified Israeli government documents do not suggest any Zionist "master plan" to expel Palestinian Arabs), with Nur Masalha, *A Critique on Benny Morris*, in *The Israel/Palestine Question* 211-20 (Ilan Pappé ed., 1999) (arguing that Zionist plans to form an "exclusivist state" and address security threats translated into plans for expulsion by 1948) and Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* 7-41 (2003) (arguing that Zionist leaders long planned to expel or transfer Palestinians in order to facilitate the establishment of a Jewish state); Rashid Khalidi, *The Palestinians and 1948: The Underlying Causes of Failure*, in *The War for Palestine: Rewriting the History of 1948* 12-36 (Eugene L. Rogan & Avi Schlaim eds., 2001) (examining internal weaknesses in Palestinian society that made Palestinians vulnerable to pressures that led them to flee) and Ilan Pappé, *Were They Expelled?: The History, Historiography and Relevance of the Refugee Problem*, in *The Palestinian Exodus 1948-1988* (Ghada Karni & Eugene Cortran eds., 1999) (demonstrating that the divide between the Palestinian and Zionist narratives on the cause of the Palestinian exodus has narrowed, with "new historians" agreeing that Israel bore primary responsibility for the exodus and pursued plans that made expulsion inevitable).

n110. Ian J. Bickerton & Carla L. Klausner, *A Concise History of the Arab-Israeli Conflict* 108 (3d ed. 1998).

n111. Ilan Pappé, *A History of Modern Palestine* 155-56 (2004).

n112. Ian Black & Benny Morris, *Israel's Secret Wars* 141 (1991).

n113. *Id.* at 140.

n114. See *id.* at 140, 166-67.

n115. Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 *Int'l L. & Pol.* 923, 945-46 (2001).

n116. See Michael Fischbach, *Records of Dispossession* 14-18 (2003).

n117. This legal history is taken *id.* at 14-26.

n118. See *id.* at 14-15.

n119. See No. 12 of 5708/1948 (enacted June 21, 1948), quoted in Fischbach, *supra* note 116, at 18.

n120. *Id.*

n121. See *id.* at 21.

n122. See Kedar & Forman, *supra* note 1, at 815.

n123. See Fischbach, *supra* note 116, at 23-26.

n124. See Kedar & Forman, *supra* note 1, at 823; Fischbach, *supra* note 116, at 23-26.

n125. See *id.* at 816.

n126. See *id.*

n127. See *id.* at 817.

n128. See Fischbach, *supra* note 116, at 22 (noting that South Asian policies toward land left behind by Muslims in India and Hindus in Pakistan and the British Trading with the Enemy Ordinance were used as models).

n129. See Kedar & Forman, *supra* note 1, at 815 ("In fact, [the absentee definition] was so all encompassing that it included most residents of Israel - Jews and Arabs alike. Israel, however, had no intentions of applying this status to Jews, so the regulations contained a clause by which Jews could be systematically exempted, without incorporating explicitly discriminating provisions.") (citations omitted).

n130. Fischbach, *supra* note 116, at 25 ("Jewish absentees owning property in Israel were treated differently from Arabs. The custodian generally released to them any property they owned in Israel upon their immigration to Israel. On other occasions, such land was released to their representatives.").

n131. Benvenisti & Zamir, *supra* note 33, at 300. See also Fischbach, *supra* note 116, at 23 (quoting a Knesset member objecting that "we are not dealing with enemy property, but with the property of a substantial part of the population of our country.").

n132. See McNair & Watts, *supra* note 34, at 22.

n133. See Carole Basri, *The Jewish Refugees from Arab Countries: An Examination of Legal Rights - A Case Study of the Human Rights Violations of Iraqi Jews*, 26 *Fordham Int'l L.J.* 656, 659-75 (2003).

n134. See Moshe Gat, *The Jewish Exodus from Iraq 1948-1951* 33-34 (1997).

n135. *Id.* at 34-35.

n136. Id. at 35.

n137. Id.

n138. Id. at 35-36.

n139. Abbas Shiblak, *The Lure of Zion: The Case of the Iraqi Jews* 67-68 (1986).

n140. Id. at 70.

n141. Gat, *supra* note 134, at 36.

n142. Id. at 37.

n143. Id. at 37-39.

n144. Id. at 40-41.

n145. Id. at 41.

n146. Id. at 44-46.

n147. Id. at 45.

n148. Id.

n149. *Id.* at 51-52.

n150. *Id.* at 53.

n151. *Id.* at 55-56.

n152. *Id.* at 56-57.

n153. *Id.* at 58-66.

n154. Basri, *supra* note 133, at 680.

n155. *Id.* at 682. However, there appear to be no uniform figures in historical studies. Gat states that more than 105,000 Jews registered, though most remained in the country. Gat, *supra* note 134, at 144.

n156. *Id.*

n157. Basri, *supra* note 133, at 683.

n158. *Id.* at 683-84. In 2005, the provisional Iraqi Government permitted all previously denationalized Iraqis, including Jews, to vote in parliamentary elections and effectively reclaim their citizenship. Cynthia Johnston, *Could Israeli Jews Vote in Iraq's election?* Reuters, Jan. 19, 2005, at 1; Ramit Plushnick-Masti, *Israeli-Iraqis Have the Right to Vote*, Associated Press Online, Jan. 13, 2005, at 1.

n159. Shiblak, *supra* note 139, at 88.

n160. *Id.* at 89.

n161. Id. at 90.

n162. Michael M. Laskier, *The Jews of Egypt 1920-1970* 126 (1992).

n163. Id. at 133.

n164. Id.

n165. Id.

n166. Id. at 135.

n167. Id. at 126.

n168. Id.

n169. Id.

n170. Id.

n171. Id. at 126-27.

n172. Id. at 130.

n173. Id. at 129.

n174. Id. at 130-31.

n175. Id. at 130.

n176. Id.

n177. Id. at 146.

n178. Id. at 199-205.

n179. Id. at 205-36.

n180. Id. at 207-08.

n181. Id. at 209-12

n182. Id. at 214-16; id. at 236.

n183. Id. at 253-54.

n184. Id. at 254.

n185. Id.

n186. Id. at 255.

n187. Id. at 256.

n188. Id.

n189. Id. at 257.

n190. Id. at 261.

n191. Id.

n192. Id. at 256.

n193. Id.

n194. Id. at 262.

n195. Id. at 265.

n196. Id. at 290.

n197. Id. at 7.

n198. Id. at 290.

n199. Id.

n200. Id. at 291.

n201. Id. at 293.

n202. Id.

n203. Joel Beinin, *The Dispersion of Egyptian Jewry* 90-102 (1998).

n204. Id. at 99-102.

n205. Id. at 91-99.

n206. Id. at 102-03.

n207. Id. at 100.

n208. Id. at 103.

n209. Id. at 103-04.

n210. Tarek Badawy & Abdallah Khalil, *Rights of Foreigners and Access to Citizenship, Africa Citizenship and Discrimination Audit: The Case Study of Egypt* 35 (American University in Cairo Forced Migration and Refugee Studies) (report pending publication, May 2005).

n211. Id. at 39.

n212. Israel has also ratified the Refugee Convention's 1967 Protocol. United Nations High Commissioner of Human Rights, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63>.

n213. See generally Anat Ben-Dor & Rami Adut, Physicians for Human Rights/Tel Aviv University Public Interest Law Resource Center, Israel: A Safe Haven? Problems in the Treatment Offered by the State of Israel to Refugees and Asylum Seekers (Sept. 2003), available at http://www.phr.org.il/phr/files/articlefile_1108318126083.pdf.

n214. *Id.* at 70 (citing Internal Directive, Ministry of the Interior, Regulations Regarding the Treatment of Asylum Seekers in Israel (Aug. 22, 2001)).

n215. Israel also excludes Palestinians via a strained reading of the 1951 Convention's article 1(D). Refugee Convention, *supra* note 78, art. 1(D) at 137 (excluding from the benefits of the Convention persons receiving protection or assistance from any UN agency or organ not the UN High Commissioner for Refugees).

n216. In March 2002 the Minister of Interior ordered his Ministry to not accept new requests for family unification from Palestinians, a decision ratified on December 5, 2002, by the Israeli government. See Decision no. 1813. The Knesset (Parliament) then enacted the ban into formal legislation in 2003. Nationality and Entry into Israel Law (Temporary Order) (published in official gazette Aug. 6, 2003). The original legislation applied to all Palestinians and was initially valid for only one year, but was extended three times. The Knesset then enacted an amended version of the law that went into effect on its publication in the official gazette on August 1, 2005.

n217. CERD Decision 1(63), CERD/C/63/Dec.1. (2003) (calling for the revocation of the law); CERD Decision 2(63), CERD/C/63/Dec.2. (2003) (expressing concern at the renewal of the law); CERD Decision 2(65), CERD/C/65/Dec.2. (2004) (same).

n218. Comm. on the Elimination of Racial Discrimination, Reports submitted by states parties under article 9 of the Convention, para. 284, U.N. Doc. CERD/C/471/Add.2 (June 23, 2005).

n219. *Id.* at paras. 285-86.

n220. HCJ 7052/03, 7102/03, 7642/03, 7643/03, 8099/03, 8263/03, 10650/03, *Abdalah v. Minister of the Interior* [2006] (not yet published), additional State Response at para. 56.

n221. HCJ 7052/03, 7102/03, 7642/03, 7643/03, 8099/03, 8263/03, 10650/03 *Adalah v. Minister of the Interior* [decision dated May 14, 2006] (not yet published).

n222. Id.

n223. Id. (Barak, J., dissenting)

n224. Id. at para. 79.

n225. Id. at para. 80.

n226. Id. at para. 109.

n227. Id. at para. 110.

n228. Id. at para. 115.

n229. Id. at para 21 (Procaccia, J., dissenting).

n230. Id. at para. 22 (Naor, J., concurring); id. at para. 136 (majority opinion).

n231. Id. at para. 84 (Barak, J., dissenting).

n232. Id. at para. 89.

n233. Id. at para. 92.

n234. Id. at para. 93.

n235. *Id.* at para. 9 (Levy, J., concurring).

n236. *Id.*

n237. *Id.* at para. 111.

n238. Engle, *supra* note 102.

n239. See *supra* notes 102, 103 and corresponding text.

n240. Justice Procaccia noted that according to the State's evidence, many more Arab citizens of Israel had been involved in terrorism than Palestinians entering Israel on family unity visas (247 compared to 26). With Justice Joubran, Justice Procaccia raised doubts about whether security was really the State's only rationale for the law, suggesting that it might also have been aimed at maintaining a Jewish demographic majority in Israel. Adalah, *supra* note 220, at para. 14 (Procaccia, J.).

n241. Memorandum from Yehuda Zamaret, Legal Advisor to the Minister of Interior (Nov. 23, 2006) (requesting comments from law school deans on the proposed law). See also Shahar Ilan, Gov't seeks to extend order that can curb Arab family reunification, Haaretz, Nov. 29, 2006.

n242. Zamraet, *supra* note 241, proposed section 3D.

n243. Shahar Ilan, Human rights expert: Extension of entry law meant to keep out Darfur refugees, Haaretz, Dec. 5, 2006.

n244. See *supra* notes 120-131 and accompanying text.

n245. Wall in OPT Advisory Opinion, *supra* note 22.

n246. See, e.g., Michla Pomerance, The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial, 99 Am.

J. Int'l L. 26 (2005).

n247. See Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 Am. J. Int'l L. 42, 49, 51 (2005) (arguing that there is a need to upgrade the status of advisory opinions because "a primary role of international law is to provide all international political actors, including states, with guidance as to agreed standards of behavior."); David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 Am. J. Int'l L. 88, 102 (2005) (criticizing aspects of the ICJ's opinion on the merits, but calling for judicial mechanisms for enforcing international humanitarian law to be strengthened because the advisory opinion offered a "unique opportunity to address and clarify some of the issues that had previously remained in the exclusive domain of the Supreme Court of Israel.").

n248. Michael Y. Kieval, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 Mich. J. Int'l L. 869 (2005).

n249. *Id.* at 870.

n250. *Id.*

n251. *Id.* at 874.