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The Sheikh Jarrah Property Dispute and the False Claim of Israeli Land Discrimination

Professor Avi Bell

The real estate dispute in the Sheikh Jarrah neighborhood of Jerusalem has played a crucial role in international accounts of current fighting between the State of Israel and the Hamas terrorist organization ruling the Gaza Strip.

The Sheikh Jarrah dispute concerns several eviction orders issued by Jerusalem's Magistrate Court, upheld on appeal by Jerusalem's District Court, and awaiting a ruling by Israel's Supreme Court on a request for a final appeal. The controversy has been widely misreported as an effort by the state of Israel to evict a number of Palestinian Arab families from their ancestral homes in a purely Palestinian Arab neighborhood of eastern Jerusalem. The more prosaic truth is that the eviction orders are the result of a decades-long legal battle by the owners of private property in Sheikh Jarrah to recover possession of their land from squatters and tenants who have not paid rent for decades; the State of Israel has never been a party to the legal proceedings.

Among the many false claims made with respect to the Sheikh Jarrah controversy, perhaps most devastating is the charge that Israeli law permits Jews to reclaim ownership of lands they owned in eastern Jerusalem prior to 1948, but denies Palestinians the right to reclaim ownership of lands they owned in west Jerusalem or elsewhere in Israel until 1948.

This description of Israeli law is false in every particular.

The truth is that:

- **Israeli law does not grant anyone a right to simply reclaim sequestered property on the basis of pre-1948 ownership.**
- **Israel has released sequestered property on many occasions, including a one-time release in 1970 of property sequestered by the Jordanian Custody of Enemy Property.**

- **The one-time release in 1970 was not a granting of ownership to those whose title had been extinguished in 1948, but a relinquishing of custody to the property owners at the time.**
- **All owners or former owners of sequestered properties are guaranteed several rights by Israel including the right to compensation and the opportunity to request release from sequestration.**
- **Jews and Palestinian Arabs have the same rights to compensation or to request release. The laws are neutral.**
- **Jews benefited more from release of property sequestered by the Jordanian Custodian due to Jordanian discrimination, but Palestinian Arabs have benefited more from other Israeli releases and compensation than Jews.**
- **Most sequestered property has never been and will never be returned to the former owners (including property sequestered by the Jordanian Custodian of Enemy Property), because Custodians have the right to transfer title. However, former owners are entitled to financial compensation.**
- **Israeli practices regarding sequestered property fit customary patterns of international law and international practice.**

I. Background to the Dispute

The context for the property dispute is the larger Arab-Israeli conflict. Sheikh Jarrah, like the rest of eastern Jerusalem, has gone through a series of rulers in the last century. Like all of Israel, it was part of the Ottoman Empire until World War I. Britain conquered the land during World War I, and was charged with reconstituting the Jewish homeland in the territory designated by the League of Nations and Allied Powers as the new British Mandate of Palestine. When Israel declared its independence in 1948, Jordan (then called Transjordan) invaded and occupied eastern Jerusalem and the West Bank. Following Jordan's attack on Israel during the Six Day War of 1967, Israel terminated the Jordanian occupation and united eastern Jerusalem with the rest of the city.

While property law remained remarkably stable during the transitions from Ottoman to Mandatory to Jordanian to Israeli rule, property rights have been affected by widespread sequestration of "enemy property."

Sequestering enemy property—that is, seizing control of the private property of enemy civilians during conflicts—is a common practice that was nearly universal at the time of Israel's independence. The official commentary to the Fourth Geneva Convention of 1949, for instance, observed that "in nearly all countries engaged in a war, property belonging to enemy subjects is put into the hands of a Custodian of Enemy Property and no longer remains at the disposal of its owners."

According to international law and practice, when enemy property is sequestered, the Custodian takes control but not ownership of the property. The Custodian has the right to dispose of the property, including the right to make someone else the owner or to assign title

to the state for public use. Sequestered property that is not sold, given away, or assigned to the state for public use, is generally returned to the owners after the conflict. In practice, most sequestered property is never returned. Owners are not entitled to compensation for the sequestration, but they may have a right to compensation after the conflict if they fail to get the property back.

Sequestration was used by all the various rulers of the territory in question. The British Mandate of Palestine utilized its Trading with the Enemy Ordinance to sequester properties of civilians of enemy states, mostly German. Jordan (established 1946) and Israel (established 1948), the two states that emerged from the British Mandate, both inherited the British Trading with the Enemy Ordinance. Israel made little use of the Ordinance, instead relying primarily on the newly enacted Absentee Property Law of 1950. Jordan used its Trading with the Enemy Ordinance widely in order to seize all land owned by Jews in territory it occupied.

The land of Israel has been conquered and reconquered, and it is full of assets that were sequestered as enemy or absentee and abandoned property. Jerusalem's facility for pre-trial detention, for instance, is located on property that was owned by the Russian Czars, but sequestered by the Ottoman Empire during World War I, with title eventually passing to the British Mandatory government and later the State of Israel. The first Attorney General of the British Mandate of Palestine resided in a house that had been sequestered from German civilians as enemy property; the residence is now privately owned property in Jerusalem's German Colony neighborhood.

The Sheikh Jarrah properties that are subject to the current lawsuits were sequestered by the Jordanian Custodian of Enemy Property in 1948, but released from sequestration by Israel in the aftermath of the 1967 war.

II. Israeli law does not allow Jews or anyone else to reclaim ownership of land they vacated in 1948.

Those who claim that Israeli law permits Jews to reclaim ownership of lands they owned in eastern Jerusalem prior to 1948 are apparently referring to paragraph 5 of the Law and Administrative Arrangements Act of 1970, which gave a one-time instruction to the Israeli Receiver to release land in Jerusalem that had been sequestered by Jordanian Custodian of Enemy Property to the rightful owners. The release took place shortly after passage of the law.

Neither the Law and Administrative Arrangements Act of 1970, nor any other Israeli laws, give an ongoing right to reclaim ownership. Release under paragraph 5 was a one-time instruction that applied to a limited number of sequestered properties.

The instruction in paragraph 5 was ethnically neutral. The law does not mention Jews or Arabs—it ordered release of property held by the Jordanian Custodian, whatever the ethnicity of the owners. Formally, the Jordanian Custodian of Enemy Property sequestered all property of all Israeli citizens in areas occupied by Jordanian forces during the 1948 war; in practice Jordanian forces expelled Jews and not Arabs from the areas they occupied.

The instruction in paragraph 5 excluded cases where the Jordanian Custodian granted someone else title to the land, or where the Jordanian government took title to the sequestered lands for public use. This means that, in practice, most property sequestered by the Custodian was never returned to its former owners, and the owners received only a right to monetary

compensation. The land that was released by paragraph 5 was land that was held in custody by the Custodian without final termination of the rights of the pre-sequestration owners.

III. Israeli law does not deny to Palestinians or to anyone else the ability to obtain the release of properties from which they fled in the 1948 war.

Israeli law grants everyone—Palestinian, Jewish or of any other ethnicity—the right to request the return of sequestered property, and the law authorizes such releases.

In claiming that Israeli law denies Palestinian Arabs the ability to obtain properties they left behind in the war, critics are apparently referring to Israel's 1950 Absentee Property Law, which sequestered primarily enemy abandoned property—i.e., property abandoned by those fleeing the war zone who decamped to territory controlled by enemy states. The Absentee Property Law places no limitations based on ethnicity. The law directs the Israeli Custodian of Absentee Property to sequester absentee property and to hold it until a future date. Where the Custodian transfers title to the sequestered property, the Custodian is directed to keep the money received in the sale as compensation for the owners.

Paragraph 28 of the Absentee Property Law authorizes the Israeli Custodian of Absentee Property to release sequestered property to the pre-sequestration owner, or to swap sequestered property with the owner.

The law is ethnically neutral. It does not target Palestinian Arabs or exclude Jews. However, the enemy states referenced by the Absentee Property Law have expelled nearly all their Jewish populations, or never permitted Jewish residents to begin with. Therefore, in practice the law overwhelmingly applies to Palestinian Arab, rather than Jewish absentees.

There have been many transactions in which the Custodian has utilized the authority of paragraph 28 to release or swap sequestered property, with such released or swapped property going to the pre-sequestration owners, most of whom are Palestinian Arabs.

Israel has settled a large portion of the claims related to the Absentee Property Law. In 1973, three years after enactment of the Law and Administrative Arrangements Act of 1970, Israel adopted the Absentee Property (Compensation) Law 1973 which grants a right to financial compensation (in lieu of the property itself) to residents of Israel (inclusive of eastern Jerusalem) for property sequestered by the Israeli Custodian of Absentee Property. According to figures released in 1993, as of that time the Custodian for Absentee Property had already successfully settled nearly 15,000 claims for compensation or land swaps.

IV. Israeli law concerning sequestered property reflects common, lawful international practices.

Given that the conflict between Israel and the Palestinians (and most of the Arab world) hasn't yet ended, Israel is following customary practice in postponing final resolution of many Palestinian (and Jewish) property claims until a comprehensive peace deal. It is worth remembering on this score that there is an enormous amount of Jewish property that was seized around the Arab world, including in Iraq and Egypt, that also awaits a final resolution.

At the same time, Israel's one-time release of sequestered properties to individual Jews and Arab claimants, its release of sequestered Jordanian "enemy property" fifty years ago, and its payment of compensation in lieu of releasing property, likewise reflect common

practice.

Most of the sequestered properties—whether sequestered by the Ottoman Empire, British Mandate, Israel or Jordan—have not been and will never be returned to their former owners because title was assigned to someone else before the resolution of the conflict.

Israel reserves money for financial compensation to those whose property was sequestered and will never be returned. In many cases, compensation has already been paid; in others, compensation has been offered but not accepted; and, in yet others, compensation has been deferred to a future peace deal and the end of the conflict. The Israeli Custodian of Absentee Property no longer has custody of most of the land sequestered seventy years ago.

Where sequestered property has been released, the relevant Custodians have exercised case-by-case judgments (reviewable in court) that have not been based on ethnicity.

The legislatively ordered release of properties sequestered by the Jordanian Custodian of Enemy Properties in the early 1970's also reflects common practice. One of the central purposes of sequestration, according to the Max Planck Encyclopedia of International Law entry on the subject, is “ensuring that enemy property is not used directly or indirectly against the State in which the property is situated.” When Israel terminated the Jordanian occupation of eastern Jerusalem in 1967, it took custody of property that Jordan had sequestered due to its connection with the “enemy state” of Israel. It would be absurd to expect Israel to maintain sequestration of the property pending peace between Israel (as itself) and Israel (standing in the place of Jordan).

Although Jordan's discrimination against Jews and their property rights necessarily meant that releasing sequestered Jordanian Custody property benefited Jews more than Palestinian Arabs, Israel took several steps in 1970-1973 to benefit other owners and former owners of sequestered property that were of greater benefit to Palestinian Arabs than to Jews, most notably the legislated right to financial compensation.

There is no evidence that a rule of international law requires states to release all sequestered property at once, or not at all.