FROM OCCUPATION TO ANNEXATION

THE SILENT ADOPTION OF THE LEVY REPORT ON RETROACTIVE AUTHORIZATION OF ILLEGAL CONSTRUCTION IN THE WEST BANK

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GLOSSARY

State land (public land) – Land registered in the land registry as government property (in the name of the Hashemite Kingdom of Jordan) and land declared by the Israeli military government as state land. State land is administered by the military government and is meant to serve the public. Nearly all state land has been exclusively allocated by the Civil Administration and the Israeli military forces in the West Bank to the Israeli settlement enterprise.[1]

Privately owned Palestinian land – Land that is privately owned by Palestinians. In 1967, Israel halted the process of registering land in the land registry in the Occupied Palestinian Territories (known as the 'Tabu') which began before it occupied the West Bank. Therefore, only a small portion of this land was recorded as privately owned and registered under the names of the Palestinian owners.

Survey land – The proprietary status of such lands is undetermined, and ownership rights are in doubt. The State is conducting land surveys in order to determine the status and consider the possibility of declaring it state land. The Civil Administration's position is that survey land is land claimed by the Supervisor of Governmental Property in Judea and Samaria, but its final status as state land (by way of an official declaration) has not yet been finalized.

Land seized for military purposes – Privately owned Palestinian land seized for urgent, imperative military needs by military order issued by the military commander of the area (GOC Central Command). Seizure does not affect ownership of the land, but temporarily expropriates the right to use the land and transfers it to the military, until there is no longer an urgent, imperative military need for it.

Master plan - A legal document that regulates what use may be made of a certain area. A master plan designates land use (residential, public, commercial etc.) and is necessary for issuing building permits. Master plans in the West Bank are approved by the supreme planning committee – an arm of the Civil Administration staffed by relevant professionals from the Civil Administration and military legal professionals. There is no Palestinian representation on the committee. Building without or contrary to a master plan, as well as using land for purposes except those stipulated in a valid master plan, is unlawful. Building permits issued pursuant to master plans are a condition for undertaking lawful construction. Master plans for land seized by military order are termed “planning guidelines”.

Jurisdiction Area – The municipal borders of a local authority, as stipulated in the order issued by the military commander of the area (GOC Central Command). In 2013, 2.1 million dunams (some 520,000 acres) were in the official jurisdiction area of Israeli settlements (including regional councils) - approximately 63% of Area C. Settlement jurisdiction areas span most of the land defined by Israel as state land. Many settlements have jurisdiction areas that are significantly larger than the area they actually use.[2]

The Blue Line Team – In 1999, the Civil Administration established the “blue line team”, which was tasked with reviewing previous declarations of state land carried out during the 1970s and 1980s, when hundreds of thousands of dunams were declared state land. The object of this review is to ensure that allocation and planning processes are advanced only on state land, where, according to Israel’s position, Israeli settlements are permitted.

1 As part of a Freedom of Information petition filed by The Association for Civil Rights in Israel and Bimkom – Planners for Planning Rights against the Civil Administration, the State provided figures on the allocation of state land to Palestinians (Hebrew). The figures indicate that since 1967, the Civil Administration has allocated only 8,600 dunams – or 2,125 acres - (7%) to Palestinians (AP 40223-03-10 **Bimkom – Planners for Planning Rights v. Civil Administration**).

2 B'Tselem website. See also **And Thou Shalt Spread: Construction and development of settlements beyond the official limits of jurisdiction** (Peace Now, July 2007).

Settlement – To date, there are 125 Israeli settlements in the West Bank, home to some 370,100 Israeli citizens.[3] Although the establishment of settlements in occupied territory is prohibited under international law, Israel's Supreme Court has evaded deliberating the issue, claiming it is a non-justiciable, political question.[4] The Government of Israel (GOI), therefore, regards the establishment of settlements on state land with government approval as legal.

Unauthorized outposts – Settlements established without government approval, mainly between the mid-1990s and the early 2000s. The Sasson Report defines unauthorized outposts as communities that fail to comply with one or more of the following conditions: (1) There is an official government resolution to build the settlement; (2) The land is state land or owned by Jews; (3) The community is built strictly according to a master plan, pursuant to which building permits may be issued; (4) The community's jurisdiction is determined by order of the commander of the area.[5] There are currently some 100 unauthorized outposts, populated by approximately 10,000 Israeli citizens.[6]

Retroactive authorization – The retroactive approval of buildings and communities established without permission from Israeli authorities and in contravention of the law.

PREFACE

The Levy Committee Report, published in the summer of 2012, presents a legal doctrine according to which the laws of occupation do not apply in the West Bank and there is no impediment or prohibition under either international or Israeli law to build Israeli settlements there. Based on this determination, the Committee recommended several concrete steps that were designed for retroactively authorizing all construction thus far considered unlawful under Israeli law, and supporting the expansion of the Israeli settlement enterprise in the West Bank.

This position paper describes the Government of Israel's discernable adoption of the Levy Report's legal doctrine and several of its recommendations. While no official government resolution has been made to adopt the Levy Report, in practice, over the three and a half years since it was presented to the Prime Minister, some of the Levy Report's recommendations are being implemented by the government and its agencies.

The de-facto implementation of the Levy Report's recommendations is best reflected in the marked increase in retroactive authorization of outposts over the past few years, during which more than a quarter of the unauthorized outposts have either been retroactively authorized, or are in such a process towards becoming legal under Israeli law.[7] Following the Levy Report recommendations, the Government of Israel (GOI) is seeking ways to overcome legal and other obstacles that have so far prevented it from retroactively authorizing settlements and outposts built on both private and state land. Along with the approval boom, Israel is promoting legal, legislative and institutional changes designed to retroactively authorize and expand the Israeli settlement enterprise.

3 The Central Bureau of Statistics, "Localities and Population by District, Sub-District and Type of Locality", **Statistical Abstract of Israel** 2014 (this figure does not include 12 neighborhoods in East Jerusalem which are also considered settlements).

4 HCJ 4481/91 Bargil v. Government of Israel, [1992-4] IsrLR 158, Judgment, August 25, 1993.

5 Adv. Talya Sasson, **Opinion Concerning Unauthorized Outposts** (Jerusalem, February 2005), pp. 20-21 (hereinafter: **Sasson Report**). The report was presented to Late Prime Minister Sharon in February 2005. Government Resolution No. 3376 (Hebrew) endorsed the report's findings and recommendations on March 13, 2005. Then Attorney General Menny Mazuz recognized the four conditions by which Sasson defined unauthorized outposts.

6 Peace Now website, http://peacenow.org.il/eng/content/settlements.

7 For a full list see: **Under the Radar: Israel's silent policy of transforming unauthorized outposts into official settlements**, Yesh Din, March 2015 (hereinafter: **Under the Radar**). The report provides an analysis of the shift in Israel's policy on the outposts and their future. Since its publication, the State announced it intends to retroactively authorize the outposts of Tapuach West, Mitzpeh Danny, Ahiya, Kida, Esh Kodesh and Adei Ad.

Many of the unauthorized outposts which the State of Israel now seeks to retroactively authorize are built either entirely or partially on privately owned Palestinian land. In some cases, retroactive authorization entails theft of private Palestinian property and its transfer to those parties who illegally invaded their lands, often using violence. The policy of retroactive authorization rewards dispossession and land grab. It is generally safe to assume that the GOI plans to retroactively authorize all Israeli construction on privately owned Palestinian land and allow it to remain in place. To this end, the GOI has taken several courses of action: it established the land regulation committee and has been promoting legislation of the land regulation bill, known also as the outpost bill (Hebrew: 'Hasdara' bill). It is also establishing a land court specifically for the Occupied Palestinian Territory (OPT), which would have jurisdiction over matters concerning land ownership and possession. These actions reflect the GOI's shift towards a new position, whereby it is not obligated to protect Palestinians' property or bound by the prohibition on confiscating or damaging it. Israel has also adopted the Levy Committee's practical recommendations with respect to methods for overcoming obstacles that previously prevented promoting planning and authorization procedures for outposts built on state land.

Adopting the Levy Committee's position that the laws of occupation do not apply in the West Bank has far reaching implications. If the GOI adopts this position in full, it would mean that Israel would gradually extricate itself from the obligations imposed by the legal normative framework that has guided its actions since 1967. Yet, the GOI has so far avoided officially annexing the West Bank to Israel and granting Palestinians all civil rights afforded to Israeli citizens. This situation produces a legal limbo, where it is unclear which legal framework guides Israel's actions in the West Bank and which duties and restrictions it considers itself to be under when it comes to protecting the Palestinian residents of the West Bank and their rights. This ambiguity enables the GOI to take actions that do not conform with the laws of occupation.

The first chapter of this position paper demonstrates how the GOI is gradually adopting the Levy Committee's main legal doctrine, namely that the laws of occupation do not apply in the West Bank and there is no prohibition on building Israeli settlements there. This process leads to the implementation of some of the Levy Report's recommendations, which aim to retroactively authorizing all illegal Israeli construction in the West Bank. To this end, the State is working towards changing the legal framework in the West Bank dramatically.

The second chapter addresses the implementation of recommendations related to the proprietary status and ownership of land. The GOI is pursuing concrete changes that will enable it to address the proprietary status of privately owned Palestinian land or survey land as a step towards retroactively authorizing illegal Israeli construction established on it.

The third chapter concerns the implementation of recommendations about formalizing the planning status of Israeli communities established on state land, where the status of the community itself and construction inside it has not been determined. The need to determine planning status arises from the fact that no government decision to build a new settlement preceded the establishment of these outposts. They were therefore not assigned a jurisdiction area, and no master plans were drawn up for them, so no building permits can be issued. The Levy Committee recommended resolving the status of these outposts by pursuing planning procedures, and the implementation of this recommendation is manifested in the increase in the number of outposts retroactively authorized. As stated, over a quarter of the unauthorized outposts have already been – or are in the process of being - retroactively authorized, based in part on the Levy Committee's position. The idea is to authorize outposts that function as independent communities as neighborhoods in older, authorized settlements. The outcome of this policy is the establishment of new settlements without requiring a government decision. This allows the GOI to bypass the administrative control mechanisms set in place under Israeli law, which reflect the view that a decision to establish

a new settlement is of a magnitude that warrants government involvement, with everything this entails. It also allows the GOI to avoid criticism, both domestically and internationally, for expanding the Israeli settlement enterprise.

This institutionalization of land grab and dispossession reinforces the impression that Israel is planning to reduce the number of Palestinians in Area C, where the settlements and outposts are located, by forcing them out of the area. This raises the concern that Israel's ultimate goal is to facilitate the official annexation of Area C to Israel.

THE LEVY REPORT - BACKGROUND

In February 2012, Prime Minister Benjamin Netanyahu appointed a committee to examine the status of construction in the West Bank (Judea and Samaria Area). The letter of appointment tasked members of the committee with making recommendations to the Prime Minister on "the status of Jewish settlement in Judea and Samaria in general, and its expansion in particular".[8] The late former Israel Supreme Court Justice Edmund Levy was appointed to chair the committee. Committee members also included former District Court Judge Tchia Shapira and former Foreign Ministry Legal Advisor and Israeli Ambassador to Canada, Dr. Alan Baker. According to media reports, the committee was to be an advisory body whose recommendations would be subject to the Attorney General's approval.[9]

The background for the establishment of the Levy Committee was a number of legal petitions pending before Israel's High Court of Justice, in which the State was asked to demolish illegal construction by Israeli citizens and remove outposts that had not been authorized by the GOI.[10] These petitions led to political pressure to counter the arguments presented in the petitions, and reverse the impact of the outpost report authored by Adv. Talya Sasson in 2005 at the behest of then Prime Minister Ariel Sharon.

Appointing the committee was a way for the Netanyahu government to seek legal justification for refraining from executing demolition and demarcation orders the State itself had issued against buildings and unauthorized outposts, and for retroactively authorizing them.[11] Some six months after the report was published, a recording of then Deputy Prime Minister Silvan Shalom surfaced, in which he is heard explaining to the audience at a conference held in the settlement of Halamish (Neve Tzuf) that the three committee members were chosen in order to reach conclusions favored by the government.[12]

The report of the Levy Committee was published on June 21, 2012.[13] Its first part exceeds the committee's mandate and concerns "the status of the Judea and Samaria [West Bank] areas from the perspective of international law". Levy and his colleagues found that the laws of occupation, as reflected in the relevant international conventions, do not apply to the West Bank. This determination is based on the Committee members' position that "Israelis have a legal right to settle in Judea and Samaria and the establishment of settlements cannot, in and of itself, be

8 **Report on the Status of Building in Judea and Samaria** (hereinafter: **the Levy Report**), Jerusalem, June 21, 2012, p. 1.

9 Tomer Zarchin, Jonathan Lis, "Senior Source: AG Won't Approve Report Declaring West Bank Outposts Legal", **Haaretz English website**, July 9, 2012.

10 Many of these proceedings were filed with Yesh Din's assistance.

11 Yesh Din was invited to present its position to the Levy Committee but declined to do so in a detailed letter sent to the Committee in April 2012.

12 Yehoshua Breiner, "Minister Shalom Admits: The Justice was appointed because he is a Likud man", **Walla website**, December 10, 2012.

13 The Committee provided the Prime Minister and the Minister of Justice with a copy of its report prior to official publication. In July 2013, the report was submitted to the Attorney General, who said he was not bound by its conclusions.

considered to be illegal", and that there are legitimate legal ways of retroactively authorizing outposts built without permits, even if they were built on privately owned Palestinian land.[14]

The second part of the report concerns the legal status of unauthorized outposts and the feasibility of retroactively authorizing them as recognized settlements, legal under Israeli law. In this part of the report, the Levy Committee developed a legal argument according to which, even if the outposts were established without official government approval, the conduct of ministries and other government agencies, which, over the years, have encouraged, supported and assisted the outposts, constitutes an "administrative promise" to the settlers.

Following this assertion, the report calls to change ("regulate" in the Committee's words) Israel's policy with respect to unauthorized outposts and settlements in a way that would render them fully legal under Israeli law, dispelling any ambiguity concerning their legal status, and consequently their fate. Further along in the report, the Committee drafted a series of recommendations for establishing mechanisms for determining legal, planning and proprietary aspects that would, in turn, allow retroactively authorizing the outposts and the buildings illegally erected in them. These mechanisms would also serve to resolve the status of the land on which these outposts and structures were built. The recommendations are designed to allow the outposts to continue to exist, and further be considered ordinary communities.

The report concludes that once its recommendations are implemented, the State's actions, as well as Israeli proponents of settlement in the Occupied Palestinian Territory (OPT), must abide by the law (which will then, according to Levy's vision, enable the settlement enterprise to continue legally).[15]

The Committee's findings ignore the broad consensus within the legal community about the status of the territories occupied by Israel in 1967 and the illegality of the settlements and outposts. This consensus is expressed in countless judgments issued by Israel's Supreme Court, as well as decisions of international bodies and scholarly articles and books published by senior legal experts. In June 2014, Yesh Din and the Emile Zola Chair for Human Rights published a report entitled "Unprecedented", which offered a comprehensive legal critique of the main arguments made in the Levy Report.[16]

The Committee's implausible findings prevented the GOI from officially adopting the report.[17] Israel would have paid a heavy political price in its relations with the international community had it adopted a policy that denies the application of the laws of occupation in the West Bank and gives a sweeping legal stamp of approval to all the unauthorized outposts. And so, despite political pressure at home, the decision not to formally adopt the Levy Report remained.

This position paper presents how over the three and a half years since the Levy Report was presented to the Prime Minister, the government and its various arms have undertaken various actions intended to alter the normative foundations for the executive's operations and gradually shift to adopt the Levy Report's legal doctrine and implement some of its recommendations, although the government never officially adopted the Report.

14 **Levy Report**, p. 83.

15 **Ibid.**, p. 88.

16 **Unprecedented: A Legal Analysis of the Report to Examine the Status of Building in the Judea and Samaria Area [the West Bank] ("The Levy Committee") – International and Administrative Aspects**, Yesh Din and the Emile Zola Chair for Human Rights, January 2014 (hereinafter: **Unprecedented**).

17 After the publication of the report, the PMO prepared a draft proposal for a resolution adopting some of its principles. The proposal, meant to be discussed in the Knesset plenum, was ultimately shelved. "Netanyahu plans to adopt principles of outpost report", **Reshet Bet Radio Station, Israel Broadcasting Authority**, October 17, 2012.

THE LEVY REPORT RECOMMENDATIONS - ADOPTION AND IMPLEMENTATION

A. THE TREND: ADOPTING THE LEGAL DOCTRINE UNDERLYING THE LEVY REPORT

In 2011, Israel's position on the future of the outposts and their legal status shifted dramatically, and the State began seeking legal avenues to retroactively authorize them.[18] In this context, the Levy Committee was appointed, and its report provided a legal framework and legal reasoning for implementing the GOI's new policy.

According to the Levy Report's legal doctrine, the laws of occupation do not apply in the West Bank, and consequently, Israeli settlements in the West Bank are permitted under international law. This controversial position is perhaps the main reason why the GOI stopped short of officially adopting the report. And yet, despite never being adopted, the legal doctrine the Levy Report presented has been incrementally implemented.

A clear expression of the shift in Israel's official position can be found in a new document published by the Israeli Ministry of Foreign Affairs (headed by Prime Minister Benjamin Netanyahu) in late November 2015, entitled "Israeli Settlements and International Law". This document presents Israel's legal position regarding the West Bank, and is largely based on the arguments presented in the Levy Report. Publication of this document indicates that Israel has adopted the Levy Committee's position on the legal status of the West Bank and the Israeli settlements. According to media reports, Israeli diplomatic missions abroad will be obliged to post the document on their official websites.[19]

According to this document, Israel's official position, as it is to be presented internationally by state delegates, is that legally the West Bank is not occupied territory and Israel has legitimate claims to it:

> ***In legal terms, the West Bank is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations […] Israel has valid claims to title in this territory*** *based not only on the historic Jewish connection to, and long-time residence in this land, its designation as part of the Jewish state under the League of Nations Mandate, and Israel's legally acknowledged right to secure boundaries, but also on the fact that* ***the territory was not previously under the legitimate sovereignty of any state and came under Israeli control in a war of self-defense***.[20]

The document also presents Israel's position that Israeli settlements outside the Green Line are lawful and do not contravene international law. Since Israel does not regard the West Bank as occupied territory, it maintains that Article 49(6) of the Fourth Geneva Convention, which prohibits the transfer of the population of the occupying power into the occupied territory, does not apply to the West Bank.

18 The new position was first presented in a petition filed by Peace Now for the evacuation of six outposts against which demarcation orders had been issued. It was formulated just a few days ahead of a hearing in the petition, following a consultation the Prime Minister held with ministers, jurists and military representatives. HCJ 7891/07 **Peace Now Shaal Educational Enterprise v Minister of Defense et al.,** Supplementary Affidavit of Response on behalf of the State, July 3, 2011.

19 Udi Segal, "The Next Political Storm: The Settlements are Legal", **Israel Channel 2 News**, December 3, 2015; Ariel Cahana, "Israel to Present Document Asserting Settlements are Legal", **nrg website**, December 3, 2015.

20 Israeli Settlements and International Law, Israeli Ministry of Foreign Affairs Website, posted on November 30, 2015 (emphases added).

The document also states: "Israeli settlements in the West Bank have been established only after an exhaustive investigation process, under the supervision of the Supreme Court of Israel, and subject to appeal, which is designed to ensure that no communities are established illegally on private land". This foreign ministry statement blatantly ignores the one hundred unauthorized outposts (and other neighborhoods) unlawfully built in the West Bank. Their status as unauthorized settlements, and as such, unlawful under Israeli law, has been recognized in High Court rulings which criticized the illegal construction and, in a number of cases, ordered the State to enforce its own demolition orders which it never executed, and remove buildings and settlements built without the necessary permission and in contravention of the law. In addition to the outposts, some of the settlements were also built on privately owned Palestinian land with direct or indirect assistance from the State (for instance, Ofra, which was built on private land with ministerial approval), sometimes under the guise of security needs used as an excuse to seize the land from its rightful owners (for instance, Beit El and Elazar, built on private land seized by military order).

The conclusions and recommendations section of the Levy Report opens with a sweeping recommendation for the GOI to follow the Committee's finding that the establishment of settlements in the West Bank is not unlawful, and to promote retroactive authorization of the outposts. The main practical indication of the GOI's adopting the Levy Committee's legal doctrine is its dramatic shift in policy regarding unauthorized outposts. For many years, the status of the outposts remained ambiguous. On the one hand, they received extensive support from successive Israeli governments, which took no action to remove them. Yet, on the other, very little was done to retroactively authorize them. The State declared its intent to remove outpost construction in the course of several High Court cases, and has even pledged to do so during diplomatic discussions, both unilaterally and as part of several multi-lateral agreements.[21] However, over the past few years, this policy has been replaced with a surge of retroactive authorization of outposts, reflecting the revolution in the GOI's approach to their legal status.

Ever since Ayelet Shaked took office as justice minister, there has been a marked increase in the involvement of her office in matters concerning the legal status of the outposts and the status of land in the West Bank. She is personally involved in formulating and drafting the State's position in High Court petitions regarding illegal construction and removal of outposts. Shaked noted that collaboration with Minister of Defense Moshe Ya'alon resulted in a change in the State's position since she took office.[22] Shaked is also focusing on creating the conditions necessary to ensure legal feasibility for retroactively authorizing outposts through the land regulation committee and by advancing and approving master plans. As part of her efforts, in December 2015, Shaked visited the Civil Administration for the purported purposes of "getting to know" the units and staff officers overseeing construction issues and issues related to Israeli settlement in the OPT. Israeli justice ministers do not normally interfere with the work of the Civil Administration, which is subordinate to the Ministry of Defense. The last time a justice minister visited the Civil Administration was in the 1990s.[23]

The dramatic shift in the government's position on the outposts is also reflected in the new content introduced into the curriculum of the Foreign Ministry's cadet course, which trains Israel's future diplomats. The current course, which opened in November 2015, now includes training on the legality of settlements in the West Bank, based on the contention that it is not occupied territory. With regard to this new content, Deputy Foreign Minister,

21 Primarily following the Roadmap for Peace in the Middle East to end the Israeli-Palestinian conflict, presented by the Quartet in April 2003. One of major points of the roadmap was the cessation of all construction in the settlements (including to accommodate natural growth) and the dismantling of all outposts built after March 2001. Then Prime Minister Sharon supported the plan, but the pledge to remove the outposts was never fulfilled. The text of the roadmap is available on the UN website: http://www.un.org/News/dh/mideast/roadmap122002.pdf

22 Hizki Ezra, "ISA Uses Never Before Seen Measures", **Arutz 7**, December 21, 2015.

23 Hizki Ezra, "Detainee did not Attempt Suicide", **Arutz 7**, December 22, 2015.

Tzipi Hotovely said that "Jewish settlement in Judea and Samaria is entirely legal, and when I say legal, I mean international law as well".[24]

Adopting the legal doctrine that does not regard the legal situation in the West Bank as occupation as it is defined in international law, and consequently holds that the laws of occupation do not apply to the area and there is no legal impediment to establishing Israeli settlements there, paves the way for the adoption of the recommendations made in the second part of the Levy Report, concerning retroactive authorization of existing construction and the expansion of the settlement enterprise.

B. IMPLEMENTING RECOMMENDATIONS CONCERNING STATUS AND OWNERSHIP OF PRIVATE AND SURVEY LAND

The analysis offered in the Levy Report is based on the premise that the West Bank is not occupied territory, since international law prohibits settlement by citizens of the occupying power in the occupied territory. It also prohibits the occupying power from making long-term changes in the occupied territory.[25]

According to the Levy Report, a resolution of the proprietary status of land is required with respect to privately owned Palestinian lands and survey lands.[26] This affects many settlements and structures in the West Bank. According to figures provided to Peace Now by the Civil Administration, 80% of the outposts were built entirely or partially on privately owned Palestinian land.[27] These figures were corroborated by right wing activists, who claimed that roughly 2,000 structures in settlements and outposts were built on privately owned Palestinian land.[28]

Several of the Levy Committee's recommendations rely on the Committee's claim that the procedures used to rule on disputes concerning land ownership are biased in favor of Palestinians' claims to title, and thus discriminates against Israelis living in the West Bank. The Levy Report, therefore, recommends revoking the existing procedures and establishing alternative institutions and mechanisms to adjudicate issues concerning the identity of land owners to those currently in place, which focus on the land's status (private vs. public). A ruling that the land is not privately owned results in its classification as state land.

In addition to mechanisms for resolving land ownership issues, the Levy Report also determined that even if Palestinian ownership is proven over land where an outpost or neighborhood has been established, such a finding will not necessitate returning the land to its owners. According to the Levy Committee, other solutions, such as compensating the owner, should be preferred over evacuation and demolition.

The GOI is simultaneously pursuing a number of bureaucratic and legislative measures intended to ensure the settlement enterprise is able to take root and expand, while forcing Palestinians off their land and dispossessing them of their property. Below is a description of the way the Levy Committee recommendations are being implemented towards addressing ("regulating") the propriety status of privately owned Palestinian land on which Israeli settlements were built, and the arrangements suggested in the Report for allowing them to remain where they are and retroactively authorizing them under Israeli law. We also address the implementation of the Levy Report recommendations regarding adjudicating disputes over ownership of land.

24 Ilil Shahar, "The Foreign Ministry Cadet Course According to Tzipi Hotovely", **Israel Army Radio**, November 1, 2015.

25 Israel previously claimed that despite the occupation, the prohibition on settlements does not apply. This argument was based on a distinction between the Hague Convention, which Israel considered as applicable, and the Geneva Convention, which Israel claimed did not apply because the West Bank was not taken from a "High Contracting Party", as phrased in the convention and that Jordan was never the legal sovereign in the West Bank.

26 For information about the terms used to describe the proprietary status of land in the West Bank (privately owned land, survey land and state land) see glossary.

27 Peace Now website

28 Chaim Levinson, "2,026 Settlement Homes Built on Private Palestinian Land, Right-wing Study Finds", **Haaretz English website**, May 3, 2015.

The establishment of a land tribunal

> *We suggest the establishment of courts for the adjudication of land disputes in Judea and Samaria, or alternatively, extending the jurisdiction of district court judges in order to enable them to handle in their courts, land disputes in Judea and Samaria.*
> (Recommendation 5, Levy Report, p. 86).

The Levy Report contends that Palestinians' and Israelis' claims to lands are held to different standards of evidence in order to prove their claims. According to the Report, Palestinians are held to a lower standard of evidence and may present a receipt or a document attesting to having paid tax on the land, while Israeli citizens are required to present a land purchase contract.[29]

In practice, proving ownership (and/or having the land registered in the land registry) requires one to produce a legal source attesting to ownership of the land, as well as proof the land has been cultivated for ten consecutive years by the owner. Given that some of the land purchase transactions in question were made in different historical periods, the ambition to standardize the evidence necessary to prove land ownership is unreasonable. The main document used for proving past ownership of land is the "maliyeh", proof of property tax payment to the Ottoman Empire authorities (and later to the British, Jordanian and Israeli regimes). In contrast, more recent land purchase transactions can be proven using the contract and subject to the legal provisions on transaction permits.[30] Hence the differences in the evidence required for proving ownership are between new and veteran owners (rather than between Israelis and Palestinians).

The Levy Report further determined that the High Court of Justice is not the appropriate instance for resolving land disputes, as this is a private law matter that requires a professional tribunal where evidence and facts are weighed.[31] To remedy the situation, the Levy Committee recommended establishing a tribunal dedicated to matters concerning land in the West Bank to adjudicate and rule on land right disputes.[32]

To implement this recommendation, on the orders of the Minister of Defense, several bodies inside the Israeli military and the Ministry of Defense have begun preparations for establishing a land dispute tribunal in the West Bank. The annual report of the Coordinator of Government Activities in the Territories (COGAT) for 2013 notes that during that year, staff work began on the "establishment of a land tribunal and a land inspector position".[33] As part of this staff work, COGAT is considering which issues would be brought to the tribunal.[34] The Military Advocate General's Corps (MAG Corps) is also working towards the establishment of the tribunal. In its 2013 annual report, the section detailing the work of the Legal Advisor for the Judea and Samaria Area (LA-JS) states: "Another important initiative concerns the establishment of a quasi-judicial institution (the land inspector) to address land disputes in the West Bank". The report further states that the department's work on this issue will continue in 2014.[35]

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29 **Levy Report**, pp. 70-71.

30 The Order regarding Land Transactions (Judea and Samaria) (No. 25) 1967 stipulates that any land transaction in the West Bank requires approval (a license, or in some cases a permit) from the military commander (or an official acting on his behalf). The order stipulates that any transaction that is undertaken without a permit is not legally valid; and a violation of the order constitutes a criminal offense punishable by incarceration. One of the objectives of the permit is to ensure transactions are lawful and prevent fraud and forgery.

31 **Levy Report**, p. 74.

32 **Ibid.**, p. 77.

33 **Office of the Coordinator of Government Activities in the Territories Annual Report for 2013**, Office of the Coordinator of Government Activities in the Territories, April 2013.

34 Chaim Levinson, "State to Hinder Removal of Settlers From Private Land", **Haaretz English website**, May 27, 2014.

35 **Military Advocate General's Corps Annual Activity Report for 2013**, Military Advocate General's Corps (undated).

The West Bank land tribunal is expected to be part of the military court system and, like all other military courts, its judges will be exclusively Israeli.[36] These courts will have jurisdiction over land ownership disputes. The fact that no Palestinian judges will serve on the tribunal may influence both their decisions and Palestinians' faith in them, which will be a major deterrent against turning to these tribunals. In fact, it is safe to assume even at this early point that Palestinians will avoid taking their cases to the tribunal, much the same way as they already avoid the military justice system, which they perceive as discriminatory, biased and oppressive.[37]

Establishing a special tribunal for land disputes is meant to circumvent the High Court of Justice, and thus cancel specific rulings it gave and eliminate the model that has developed over the years through High Court petitions that addressed construction on privately owned Palestinian land or agricultural invasion of lands.

As an administrative instance, the High Court does not rule on land ownership issues, but rather examines whether state authorities had the power to act as they did and whether they acted reasonably. The High Court never addressed the issue of the specific identity of those claiming title to the land in any of the cases it heard concerning unauthorized outposts and illegal construction. Rather, it was required to rule whether the Israeli authorities acted reasonably when they did not execute demolition orders issued by the Civil Administration, and thereby refrained from enforcing the law. To this end, contrary to criticism voiced by the Levy Committee, the High Court never considered "facts and evidence" but relied on the State's own position on the status of the land (whether the land was privately owned, state land or survey land) and considered whether the authorities' conduct was reasonable.

The model that was developed through High Court rulings is based on the right to property as a fundamental right in Israel's legal system, a right enshrined in international law, which governs the relationship between Palestinians and government officials in the West Bank. Thus, the Court repeatedly ruled that the property rights of Palestinians, as protected persons in an occupied territory, may not be violated, that Israeli construction on privately owned land is unlawful and, therefore demolition orders issued by the Civil Administration against such structures built on private lands must be executed. Yesh Din estimates that the land tribunal is meant to prevent the High Court from hearing petitions for the removal of illegal Israeli construction by creating a situation where as soon as a proprietary claim is made – however farfetched – the matter will be transferred to the land tribunal, even though proprietary claims have no direct impact on whether or not the construction was conducted lawfully.

Unlike an administrative instance, such as the High Court, the land tribunal is designed to rule on the question of land ownership. However, the intent is clearly to introduce the possibility of delaying any proceedings for the removal of illegal construction by bringing claims to title by a private individual. This would shift the focus to the proprietary proceeding. In fact, the Civil Administration would forfeit its monopoly on determining the status of land (whether it is state land or private land), and transfer the issue to a new proceeding that is likely to be lengthy and expensive, and which will have no capacity to rule on the administrative aspect of lack of enforcement.

Another concern is that the establishment of a land tribunal in the West Bank is a step toward the implementation of another Levy Committee recommendation, the advancement of a land registration process:

> *With a view to promoting stability and preventing uncertainty in terms of land rights, we believe both Palestinian and Israeli residents of Judea and Samaria should be encouraged to register their rights in*

36 Chaim Levinson, "State to Hinder Removal of Settlers From Private Land", **Haaretz English website**, May 27, 2014. Judges in military courts are soldiers serving their mandatory military service or reserve soldiers. They are jurists trained in Israeli law schools and in the military justice school. Those of them who are career or reserve soldiers may be lawyers by training, law school faculty or officials in public legal positions. See: Smadar Ben Natan, "Men of their People – The application of Israeli law in courts martial in the OPT", **Theory and Criticism**, 43, Fall 2014 (Hebrew).

37 See for example **Backyard Proceedings: The implementation of due process rights in the military courts in the Occupied Territories,** (Yesh Din, December 2007); **Presumed Guilty: Remand in Custody by Military Courts in the West Bank**, (B'Tselem, June 2015).

> *the land within a predetermined period of time (four to five years seems reasonable), after which, those who do not register will have forfeited their rights, inasmuch as they had such.*
> (Recommendation 10, Levy Report, p. 87)

Land registration was halted by the military government in 1967, after Israel occupied the West Bank. Today, registration is sporadic, usually initiated by private individuals rather than the authorities,[38] and conducted by the primary registration committee. Unlike a centralized registration process that is conducted by the authorities and involves judicial resolution of land disputes, the primary registration process is usually initiated by private individuals and any disagreements are resolved by the primary registration committee – an administrative rather than judicial body. Resolution of land disputes is currently the purview of civil courts. Initiating land registration would constitute a dramatic departure from the principle that has guided the Civil Administration in the West Bank so far, whereby no long term, far reaching changes are made to land status and rights.

In terms of international law, a comprehensive land registration process in the West Bank would constitute a long term change and hence violate the legal provisions stipulating that the occupying power must act as temporary trustee of the occupied territory and prohibiting any long term changes.[39] Comprehensive land registration would constitute a long term change in the legal status in the West Bank, which would also affect the situation on the ground.

As stated, work on the land tribunal is in its infancy, and the tribunal's powers have yet to be disclosed. However, if the tribunal is granted powers to order changes to the registry, it will be possible to initiate a land registration process in the West Bank.[40] If this were to take place, Israel could seek to register under its name any land that is not claimed or registered by others. Palestinians whose land is not registered in their name will lose their title to the land, and it will be registered as state land.

The land regulation committee – revisiting the evidence required as proof of title

As work on establishing the land tribunal continued, in July 2015, Prime Minister Benjamin Netanyahu ordered the establishment of a government team referred to as "the [land] regulation committee" in order to "outline a process for the legalization of Jewish structures and neighborhoods built in Judea and Samaria with the involvement of the authorities".[41] The land regulation committee was initiated by Justice Minister Ayelet Shaked,[42] and its membership includes Government Secretary Avichai Mandelblit[43] (chair), Ministry of Agriculture Executive Director Shlomo Ben Eliyahu (representing the Minister of Agriculture), Ministry of Defense Legal Advisor Ahaz Ben Ari (representing the Minister of Defense), Dr. Chagai Vinitzky (representing the Minister of Justice) and the Legal Advisor to the Prime Minister's Office. The committee's letter of appointment, signed by the Prime Minister, states that recommendations were to be handed in within 60 days.[44] In October 2015, according to the State's response in HCJ 7986/14 ("blue line team"), the committee was expected to complete its task by early 2016 and that the results of its work would "become clear" at that time.[45]

38 In the northern Dead Sea area, where receding shorelines expose land, the State has initiated primary registration of land in its name, but this is the exception to the rule.

39 Articles 43 and 55 of the Regulations concerning the Laws and Customs of War on Land annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land (1907) (hereinafter: Regulations annexed to Hague Convention IV (1907)).

40 Presently, the Office of the Land Registrar and the District Court have the authority to order changes to registered land.

41 Letter of appointment for the professional team appointed to outline a process for the legalization of construction in Judea and Samaria, PMO, July 19, 2015.

42 According to media reports, establishing the land regulation committee was part of the coalition agreement between Likud and Jewish Home parties.

43 In December 2015, Mandelblit was selected by an appointment committee to be the next attorney general. He was the only candidate.

44 Letter of appointment for the professional team appointed to outline a process for the legalization of construction in Judea and Samaria, PMO, July 19, 2015.

45 HCJ 7986/14 **Bimkom – Planners for Human Rights et al. v. Head of the Civil Administration et al.**, Response to Petitioners' Response to the Updating Notice on behalf of the Respondents, October 21, 2015.

One of the land regulation committee's tasks is to classify what lands are considered private by examining the evidence required to prove ownership. Addressing the committee's work, Justice Minister Ayelet Shaked said it would lead to comprehensive regulation of land in the West Bank, and that "It's time to clear the legal fog and let residents who live in Judea and Samaria, most of them in communities set up by various Israeli governments, stop worrying about a constant threat to the ownership of their homes".[46] Comprehensive regulation of land in the West Bank in order to establish the permanency of the Israeli settlements there contradicts international law, under which the occupying power is prohibited from making long term changes to the occupied territory and must administer the territory solely as a temporary trustee.[47]

Some insight into what the results of the committee's work might be can be found in the State's response to a petition regarding illegal construction in the outpost of Derech Ha'avot. The State asked the High Court for an extension to submit its response to the order nisi issued in the petition only after the land regulation committee completed its work. According to the State's motion, the committee was expected to consider using re-division for regulating construction in the West Bank.[48] Planning bodies inside Israel have the power to compel land owners to have adjacent lots consolidated and then re-divided to allow for the development of the area and its optimal use for public purposes. The statement implies that the committee plans to "import"[49] a similar tool into the security legislation that governs the West Bank, establishing powers to force Palestinian landowners into arrangements whereby they are assigned alternative plots of land instead of their land, on which structures were built unlawfully. This would allow the State to leave outpost buildings intact, while distorting the original purpose of the Israeli law – which was meant to provide for public and planning needs. In an affidavit of response submitted in December 2015, the State argued that land regulation could not be pursued using re-division in this case.[50]

The land regulation bill - proven title to the land does not require restoring it to rightful owners

> *Even if private ownership over land on which a Jewish settlement had been built is proven, possible defenses by the party in possession and alternative solutions that are preferable to evacuation and demolition should be considered. For instance: payment of compensation to the owners.*
> (Levy Report, pp. 74-75).

The current Netanyahu government's concerted efforts to find ways to retroactively authorize outposts without having to remove structures built on privately owned Palestinian land are also reflected in a bill that has been referred to as "the land regulation bill", (or "the outpost bill"). Since the summer of 2012,[51] there have been several attempts to push legislation through the Knesset that would grant the State power to compel Palestinian landowners to enter into compensation arrangements that would force them to waive their rights to their land.

46 Revital Hovel, "New Israeli Panel Eyes Legalizing West Bank Outposts", **Haaretz English website**, July 22, 2015; Akiva Novick, "New Committee to Look into Legalizing Construction in Judea and Samaria", **Nana10 website**, July 21, 2015.

47 Regulations annexed to Hague Convention IV (1907), arts. 43 and 55.

48 HCJ 7291/14 **'Ali Muhammad 'Issa et al. v. Minister of Defense et al.,** Motion to Postpone Submission of the Response of Respondents 1-4, November 12, 2015.

49 A similar tool exists under Jordanian and Ottoman law, but is not identical to that in Israeli law.

50 HCJ 7291/14 **'Ali Muhammad 'Issa et al. v. Minister of Defense et al.,** Affidavit of Response on behalf of the State, December 31, 2015. The State's response was prepared by Attorney General, Yehuda Weinstein, and in fact disqualified the recommendation of the land regulation committee, which was headed by Avichai Mandelblit, who will take over as attorney general in January 2016.

51 The land regulation bill was first presented in June 2012, after the State undertook to remove the Ulpana neighborhood in Beit El in a High Court petition filed by Yesh Din along with the landowner from Dura al-Qar'a. The bill, initiated by MK Zvulun Orlev, was rejected in a Knesset plenum vote after the Prime Minister said the government would not support it, given the opinion of the Attorney General. Similar bills were later tabled by MK Yaakov Katz, MK Miri Regev and MK Yariv Levin.

Such efforts by government coalition members seek to incorporate the Levy Committee's position in primary legislation that proven ownership of land by Palestinians does not necessitate the evacuation of Israeli citizens from it and its restoration to the owners, and that payment of compensation is preferable to evacuation and demolition.[52]

The most recent attempt was in October 2015; MK Yoav Kisch of the Likud party presented a bill designed to legislate Israel's authority to retroactively authorize illegal construction on privately owned Palestinian land by expropriating the land and providing the owners with compensation (alternative land and monetary compensation), without the right to appeal.[53] The bill explicitly states that the status of the settlements of Beit El, Amona, Ofra and Mitzpe Kramim should be addressed first. These are unauthorized communities and the High Court of Justice has issued orders to remove structures in them that were built on privately owned land.[54] The bill was to be presented to the Ministerial Committee for Legislative Affairs on October 11, 2015 where it was expected to pass with an overwhelming majority, but was removed from the agenda the day before the session due to the sensitive security situation. The decision was apparently also influenced by diplomatic pressure on the Government of Israel not to advance the bill.

The land regulation bill has several far reaching implications: under international humanitarian law, a regime of occupation is temporary. The occupying power is not the sovereign and has only temporary administrative powers.[55] According to this principle, existing law in the occupied territory must remain in effect, and the basis for legislation in it is local law, which the occupier is required to preserve as best as possible. The occupying power may only enact legal provisions that are required for fulfilling its duties under international law: maintaining public order and safety, and the security needs of its own forces and of the occupying power. According to this principle, the legislature of the occupying country has no right to pass laws and apply them in the occupied territory.[56]

The Israeli parliament, the Knesset, is not the legislature in the West Bank, which is under Israeli occupation. The military commander functions as the sovereign in the occupied territory, and has exclusive legislative powers there. Applying Knesset laws that introduce far-reaching changes to the West Bank may be an indication of de-facto annexation of the West Bank to Israel.[57] Assuming legislative powers with respect to the West Bank, particularly ones directly related to Palestinian residents, would reflect the adoption of the Levy Committee's position. Based on the Levy Committee's rationale that the laws of occupation do not apply to the West Bank, the Knesset should not be prohibited from passing laws related to this occupied territory.

From the perspective of international law, the land regulation law in its various versions reinforces and expands the ongoing violation of the prohibition on the transfer of parts of the civilian population of the occupying power into the occupied territory (Article 49(6) of the Fourth Geneva Convention), and the prohibition on damaging the property of protected persons in the occupied territory (Article 46 of the Regulations Annexed to Hague Convention IV), which includes an unequivocal, peremptory prohibition on the confiscation of private land. In addition, the occupying power must administer the territory as a trusteeship and is prohibited from exploiting the territories under its control

52 **Levy Report**, pp. 74-75.

53 Land Regulation Bill 2015.

54 This was a response to the High Court order to remove the outpost Amona by December 2016, and nine houses in Ofra by February 2017. A petition against construction in the outpost of Mitzpe Kramim is still pending.

55 Regulations annexed to Hague Convention IV (1907), arts. 43 and 55; Article 49 (6) Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (Fourth Geneva Convention) (hereinafter after: Fourth Geneva Convention (1949)).

56 Smadar Ben Natan, "Men of their People – The application of Israeli law in courts martial in the OPT", **Theory and Criticism**, 43, Fall 2014 (Hebrew); Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", **Berkeley Journal of International Law**, Vol. 23 (3) (2005), pp. 581-582.

57 Application of domestic law in the occupied territory may amount to an attempt at unilateral annexation, which is prohibited under international law. See: Yael Ronen, "The Application of Basic Law: Human Dignity and Liberty in the West Bank", **Shaarey Mishpat**, 7, 5774, p. 162.

for the benefit of the occupying power, barring security needs (Article 43 of the Regulations Annexed to Hague Convention IV). Regarding usage of land, the occupying power is bound by restrictions that are meant to ensure the temporary nature of the occupation. The purpose of the proposed bill is to dispossess Palestinians of their property in order to help strengthen and expand the settlement enterprise, and serve Israel's settlement interests, in violation of international law.

In terms of Israeli law, the proposed bill negates Palestinians' right to property, subordinating this right to the ideological interests of Israelis in the West Bank. It rewards individuals who took over land unlawfully and forces Palestinians who have rights to these lands to waive their rights. The bill also significantly jeopardizes the status of the right to property as a fundamental right in Israel's legal system. Israeli Basic Law: Human Dignity and Liberty is not part of the law of the West Bank applicable to Palestinians,[58] yet Israel's official authorities are bound by the country's administrative and constitutional principles even when operating outside its borders.[59]

Additionally, the land regulation bill contradicts High Court decisions aimed at guaranteeing the right to property of the Palestinian population of the West Bank[60] and seeks to deny dozens of judgments handed down over the years by various justices who unequivocally ruled that the building of Israeli communities on privately owned Palestinian land is intolerable.[61]

On the political and international level, the land regulation bill paves the way to retroactive authorization of outposts and the creation of new settlements, contrary to Israel's pledge to the international community that it would not build new settlements in the OPT.[62] The bill's purpose starkly contradicts both the legal and policy position of the international community, that all Israeli settlements in the West Bank violate international law.

No impediment to building inside a settlement on land seized for military purposes

> *The Civil Administration should be instructed that there is no prohibition whatsoever on additional construction within the bounds of a settlement built on land initially seized by military order, and such requests should be considered at the planning stage only.*
> (Recommendation 14, Levy Report, p. 88).

The Levy Report criticized the Civil Administration's practice of not approving expansion plans for settlements built on land seized for military purposes.[63] This refers to privately owned Palestinian land seized in the 1970s by military seizure orders for imperative, urgent military needs, but was not in fact used by the military. Many settlements built on such land in the past seek to expand to adjacent areas that are also private lands seized for military purposes, or expand within a seized area that has not been fully developed in planning terms. In the early years of Israeli settlement in the West Bank, settlements were built on land seized by military order but the

58 The court left this question open, but ruled that the Basic Law does apply to Israelis. See, HCJ 1661/05 **Gaza Coast Regional Council v. Knesset**, IsrSC 59(2), para. 80 of majority opinion; Yael Ronen, "The Application of Basic Law: Human Dignity and Liberty in the West Bank", **Shaarey Mishpat**, 7, 5774, p. 162.

59 HCJ 69/81 Basel Abu Aita v. Regional Commander of Judea and Samaria, IsrSC 37(2) 197, pp. 226-227 (1983), HCJ 7015/02 Ajuri v. IDF Commander in West Bank [2002] IsrLR.

60 E.g.: HCJ 7862/04 **Abu Dhaher v. IDF Commander in Judea and Samaria,** IsrSC 59(5) 2005, 368, pp. 377-376.

61 E.g.: HCJ 8887/06 **Yusef Musa Abd a-Razeq al-Nabut et al. v. Minister of Defense et al.** Judgment, August 2, 2011 (outpost of Migron); HCJ 5023/08 **Sa'id Zahdi Muhammad Shehadeh et al. v. Minister of Defense et al.** Judgement February 8, 2015 (nine houses in Ofra); HCJ 9949/08 **Maryam Hassan Abd al-Kareem Hamad v. Minister of Defense,** Judgment December 25, 2014 (outpost of Amona); HCJ 9669/10 **Abd al-Rahman Qassem Abd al-Rahman v. Minister of Defense,** Judgment, September 8, 2014 (Dreinoff compound, Beit El).

62 See supra footnote 21.

63 As a rule, no wide use was made of planning guidelines for settlements built on seized private land. However, even before the publication of the Levy Report, there were cases in which planning guidelines were advanced, for instance, in 2009 in Mevo Horon (industrial zone) and in Elazar.

practice was subsequently ruled illegal by the High Court in the Elon Moreh (Dweikat) case in 1979.[64] The Elon Moreh ruling decreed that private land seized for military purposes could not be used for civilian needs in the absence of genuine military necessity. The ruling meant that Israel was not permitted to build Israeli communities and neighborhoods on land other than state land, insofar as there was no serious argument that the settlements serve a security purpose. Following this ruling, Israeli policy was to refrain from building new settlements on land seized for military purposes.

According to the Levy Committee, construction of Israeli settlements on land seized for military purposes was based on the understanding that settlements assist in the regional defense of the area. It argued that the fact that private land seized for military purposes not used, nevertheless was not returned to its owners, as evidence that the security need was still valid.[65] The Levy Report further argued that the needs of these settlement communities to grow and develop must be addressed and that their expansion and population growth is an objective outlined in Government Resolution No. 145.[66] Therefore, the Levy Committee determined that there are no grounds to prohibit construction on land seized by military order located inside a settlement or in its jurisdiction area.[67] With respect to construction on seized land outside the settlement's jurisdiction area, the Levy Committee maintained that security officials should state their position on the necessity of the proposed construction for security needs before an application is considered at the planning level. Thus, the Committee recommended that the Civil Administration be instructed that regarding the proprietary aspect, there is no prohibition or impediment to authorizing further construction inside settlements built on land that was seized for military purposes.

Civilian construction on land seized for military purposes is also a violation of international humanitarian law which prohibits harm to the property of protected persons, except when this is required by military necessity and only for as long as this necessity persists.[68] The fact that the military is not using the land for its own purpose shows that there is no imperative military need. The failure to return the land to its owners is not an indication that the security need is still present, as the Levy Committee posited, but rather a wrong that must be corrected. Aspiring to formally recognize settlements and permanent civilian structures is also indicative of the fact that the seizure is not temporary but permanent. Civilian construction on land seized for military purpose also violates the principle of distinction between combatants and civilians and is a breach of the duty to keep civilians away from military targets.[69]

The shift in the GOI's approach, reflecting its desire to implement Recommendation 14 of the Levy Report, is evident in the Beit El Dreinoff Compound case. On July 16, 2015, the sub-committee for objections in the Civil Administration's supreme planning committee approved the planning guidelines (the military equivalent of a master plan) for two residential structures in Beit El that were built on land owned by a resident of the Palestinian village of Dura al-Qara, seized by military order in 1979. The planning guidelines were to retroactively authorize construction in an area known as the Dreinoff Compound in Beit El, in defiance of a High Court ruling that the construction was unlawful and must be removed.[70] In other words, upon orders issued at the governmental level, the Civil

64 HCJ 390/79 Dweikat v. Government of Israel, judgment dated October 22, 1979.

65 **Levy Report**, p. 81.

66 Government Resolution No. 145 of November 11, 1979 regarding the "Settlement Policy", a government decision to expand settlements but limit new ones to state land.

67 Parenthetically, we note that there is an inherent contradiction between this recommendation and other parts of the Levy Report: seizure of the land is carried out with powers granted to the occupier under the laws of occupation. Seizure is not confiscation and the rules governing seizure and use of the seized asset are entirely different from those governing confiscation. The Levy Committee's reliance on land seizure for military needs while arguing that the situation on the ground does not support the application of the normative framework of the laws of occupation is an internal contradiction between various parts of the report.

68 Fourth Geneva Convention, art. 53.

69 Yuval Shani and Orna Ben-Naftali, **International Law between War and Peace**, Tel Aviv, 2006 (Hebrew), p. 151.

70 See HCJ 5165/15 **Abd al-Rahman Ahmad Abd al-Rahman Qassem et al.,** July 26, 2015.

Administration adopted the Levy Committee assertion that from the proprietary aspect, there is no impediment to authorizing construction for civilian-settlement needs on land seized for military purposes.[71]

Revocation of the Order concerning Interfering Use in Private Land

> *With regard to the "Order concerning Interfering Use in Private Land" — we are of the view that this order must be cancelled.*
> (Recommendation 10, Levy Report, p. 87).

The Order concerning Interfering Use of Land (Private Land) was issued in 2007.[72] It was designed to provide authorities with a statutory tool to protect Palestinian property and address the issue of agricultural invasions, and determines how this is to be done. This order empowers the head of the Civil Administration to issue administrative evacuation orders which allow for a swift and immediate resolution of agricultural invasions instead of lengthy legal proceedings.

The backdrop for the issuance of the order was the absence of an appropriate legal mechanism for effectively addressing invasions of an agricultural nature by Israeli citizens into Palestinian land.[73] The main tool used previously was the Order for Removal of Trespassers, which allows for self-administered justice for a period of some 30 days, wherein the owner may remove trespassers from his land subject to the approval of the police commander, and may use reasonable force to do so.[74] However, this provision failed to provide Palestinian landowners with real protection against invasions.

The Levy Committee harshly criticized the order, stating that it is draconian and that "a proper legal system should not accept it". The Levy Report claims that the term "interfering use" is problematic, as is the assumption that invasion into land constitutes a disturbance of the peace. The report also asserts that land disputes are private law matters and should therefore be resolved by a judicial, rather than administrative authority "particularly one perceived as being biased against the Israeli settler", as the report contends. According to the Levy Committee, resolving land disputes requires facts and evidence to be heard by professional judges.[75] Given this view, the Committee recommended the order be revoked in full, or at least be amended so that the appeals committee's decision would bind the head of the Civil Administration.[76]

Though no official decision was made to revoke the order, its use has all but ceased, and the power to use it (previously vested in the head of the Civil Administration) has been taken over by Defense Minister Moshe Ya'alon.[77]

These steps are the de-facto adoption of the Levy Report recommendation, even before an alternative to the order has been introduced. The recommendation to revoke the order relied on an implied assumption that the land tribunal would rule on land disputes, but the tribunal has not been established yet. The fact that the order is no longer in use has left Palestinians whose land was invaded by Israeli citizens without an adequate remedy that

71 Then Deputy Supreme Court President Miriam Naor accepted, in a dissenting opinion, the State's position that the military necessity had "frozen in time", **ibid**.

72 Order regarding Land (Interfering Use of Private Land) (Judea and Samaria) (No. 1586) 2007.

73 The order was issued following the recommendations of the Sasson Report, which stated, at the time of writing, that there were no adequate legal mechanisms available for addressing agricultural invasions by Israeli civilians of Palestinian land. Sasson noted that the difficulty arose from the fact that while most land in Israel is registered in the land registry, approximately 70% of land in the West Bank is unregistered (**Sasson Report**, pp. 314-317).

74 According to Order regarding Land (Removal of Trespassers), Military Order No. 1427, Judea and Samaria.

75 **Levy Report**, pp. 71-73.

76 **Levy Report**, p. 78 (Recommendation 10).

77 Chaim Levinson, "State to Hinder Removal of Settlers From Private Land", **Haaretz English website**, May 27, 2014. Organizations Yesh Din and Rabbis for Human Rights report that use of the order has been significantly reduced, to the point of complete disuse.

allows them to defend their rights to the land quickly and efficiently. Their only avenue is seeking a court injunction or a military order ordering the trespassers to leave. The Sasson Report has already determined that these tools are not effective for protecting Palestinians' property rights.[78]

This recommendation and its implementation also completely contradict the High Court's ruling that the provisions of the order fulfil the military commander's duty to maintain public order and safety and safeguard the property of protected persons, which is "one of the most fundamental duties of the military commander".[79]

Even before the Levy Report, the Civil Administration made scarce use of its power to issue interfering use orders, and even when these were issued, little was done to enforce them.[80] In 2015, Israeli NGO Rabbis for Human Rights petitioned the High Court to order the enforcement of two orders issued in cases of invasion of Palestinian land in the Shilo Valley. The orders were issued in 2007, and despite the fact that appeals against them had been rejected, the head of the Civil Administration has taken no action to enforce them and remove the trespassers.[81] In December 2015, the court delivered its judgment in the petition, accepting the position presented by the State and trespassers that the latter would voluntarily leave the land within a year.[82] This decision further undermines the status of the interfering use order.

Revocation of the land dispute procedure

> *The "Procedure for Handling Private Land Disputes" must be revoked. Such disputes must only be considered and adjudicated by a judicial body.*
> (Levy Report, Recommendation 12, p. 88).

The procedure for dealing with private land disputes came into effect several years ago and it empowers the Legal Advisor in Judea and Samaria (LA-JS), or someone acting on his behalf, to "make a summary administrative decision regarding private land disputes, in order to prevent the dispute from escalating into violence or bloodshed".[83]

This procedure is meant for situations in which both parties claim ownership over the same land and it empowers the LA-JS (or someone acting on his behalf) to determine who has actual possession and the likelihood that it is lawful. The procedure also empowers the LA-JS to review the issue and make a decision on the right to possession within a short timeframe. The military and the police are required to obey the decision of the LA-JS so long as it has not been overturned by a court or the Military Appeals Committee.[84]

Ever since it came into effect, the procedure has been severely criticized by members of the Israeli right wing, who view it as giving the LA-JS excessive power and claim it discriminates against them.[85] This criticism was presented to the Levy Committee as well, which recommended revoking the procedure, stating it was another example of how land disputes were resolved by a non-judicial body.[86]

78 **Sasson Report**, pp. 312-320.

79 HCJ 543/09 **Ahmad Abd al-Qader et al. v. Military Appeals Committee under the Appeals Committee Order,** Judgment March 20, 2012.

80 See **The Road to Dispossession: A Case Study – the Outpost of Adei Ad**, Yesh Din, February 2013, pp. 81-87.

81 HCJ 6174/15 **Fauzi Ibrahim Abed Haj Muhammad v. Head of Civil Administration in the West Bank, Beit El,** Petition for Order Nisi, September 10, 2015.

82 HCJ 6174/15 **Fauzi Ibrahim Abed Haj Muhammad v. Head of Civil Administration in the West Bank, Beit El,** judgement, December 22, 2015. Majority opinion by Justices Handel and Solberg, with a dissenting opinion by Justice Vogelman.

83 Procedure for Handling Private Land Disputes, MAG Corps, (Hebrew).

84 **Ibid**.

85 See for example Yehuda Yifrah, "How the LA-JS is fighting the settlements", **nrg website**, October, 14, 2013.

86 **Levy Report**, pp. 73-78.

While this recommendation too has not been fully adopted and the procedure has not been officially revoked, it appears that the MAG Corps, and the LA-JS in particular, are working on alternative ways to resolve land disputes. The reports issued by the MAG Corps in the years since the Levy Report was published devote more and more attention to this issue. The 2012 annual report notes that "staff work has begun to review current legal procedures governing legal treatment of land disputes…"[87] The 2013 annual report notes that the trend toward intervention by the authorities in land disputes will continue and even increase, and that in this context, the demand "to change current procedures for determining title to land" is expected to resurge.[88] Media reports also indicate that the option of revoking the procedure, and with it the power of the MAG Corps, through the LA-JS, to instruct security forces on the ground how to act in cases of land disputes, is apparently being considered.[89]

Even if the land tribunal is established, abandoning the current procedure will lead to the absence of a mechanism for adjudicating land disputes in real-time and to resolution of disputes by force. This situation clearly favors Israeli civilians who are allowed to bear weapons, and benefit from a policy that grants them near complete impunity for harm and violence against Palestinians.[90] Israeli civilians are also protected by Israeli soldiers, who seldom protect Palestinians during violent altercations.[91]

The existing system for resolving land disputes arose out of a need for rapid resolution of disputes (sometimes of a violent nature) that develops on the ground, and in order to prevent situations in which matters reach the point of "fait accompli" and possession of land is obtained by force. Abandoning the use of the 'interfering use order' and the land dispute procedure undermines Palestinians' ability to be protected from situations in which Israeli civilians invade and take over their land. As stated, the two practices provided a way to address the absence of an appropriate legal tool for quickly and efficiently resolving agricultural invasions of Palestinian land by Israeli citizens. Their revocation leaves only the option of seeking an order for the removal of trespassers, but these orders cannot afford Palestinians protection from such invasions given the security situation in the West Bank, the inadequacy of the Samaria and Judea District Police (an order requires the approval of the police chief) and travel restrictions imposed on Palestinians, which prevent timely discovery of invasions (many Palestinians are prevented from reaching their land, or have great difficulty doing so due to travel restrictions and prohibitions on entering settlements and the areas surrounding them, which prevents them from knowing what goes on in their land).

Granting a land tribunal the sole authority to consider such disputes means there will be no possibility to resolve disputes rapidly. Judicial proceedings, in which facts and evidence are weighed, are typically lengthy, and where land rights are concerned, time is of the essence. Lengthy proceedings serve the interests of Israeli invaders and work against Palestinians claiming title to land. Israel would thereby violate the duty international law imposes on the military power on the ground to protect Palestinians' property – including against harm by third parties – and take positive action to ensure their ability to use their property and exercise their rights therein.[92]

Completion of the land survey process in the West Bank

> *[I]t is necessary to accelerate the slow survey process in all areas of Judea and Samaria, complete it within a fixed time period, and to this end, even consider, using assistance by external bodies. Once the*

87 2012 Annual Report of the MAG Corps, (undated), p. 5.

88 2013 Annual Report of the MAG Corps, (undated), p. 42.

89 Chaim Levinson, "State to Hinder Removal of Settlers From Private Land", **Haaretz English website**, May 27, 2014.

90 See: **Prosecution of Israeli Civilians Suspected of Harming Palestinians in the West Bank**, Yesh Din data sheet, May 2015; **Law Enforcement on Israeli Civilians in the West Bank**, Yesh Din data sheet, (October 2015).

91 See: **Standing Idly By: IDF Soldiers' Inaction in the Face of Offenses Perpetrated by Israelis against Palestinians in the West Bank**, Yesh Din, (May 2015).

92 Regulations annexed to Hague Convention IV (1907), art. 46; Fourth Geneva Convention (1949), art. 53.

process is completed, treatment of each settlement will continue according to the results of the land survey and the determination of the type of land, in accordance with the framework proposed by us. (Levy Report, Recommendation 5, p. 86).

The marked increase in retroactive authorization includes efforts to resolve the proprietary status of lands used by the outposts through survey procedures and declarations of state land, as well as efforts to authorize a planning status of the outposts themselves, and the structures built in them, by promoting master plans and approving them in the Civil Administration planning bodies. The list of outposts where the State is pursuing retroactive authorization or land survey procedures is not made public, and it is often only through court cases that Palestinian landowners and the public at large discover the State's plans. This recently occurred in the case of the outpost of Mitzpeh Danny, and four outposts in the Shilo Valley.[93]

The land survey process is conducted by a designated team in the Civil Administration and is used to determine whether a particular plot of land may be declared state land. This process is carried out with respect to land where title (and therefore status) is determined and includes a review of aerial photographs from previous years, site visits and publicizing the intent to declare the area state land. The Civil Administration does not publish comprehensive information about surveys conducted throughout the West Bank with the objective of determining the status of the land.

Many survey processes are currently underway in locales that are the focus of High Court petitions concerning unlawful construction of Israeli neighborhoods and outposts. The survey's objective in these instances is to clarify the land's status as a preliminary stage in the process of evaluating the feasibility of retroactively authorizing the illegal construction in terms of planning. Gilad Palmon, who is in charge of the team that handles most land issues in the West Bank (including the "survey" and "blue line" teams), testified in an appeal against state land declarations near Kafr 'Aqab, it was the Ministry of Defense who issued the order to conduct a land survey in this area because it was looking for ways to avoid removing illegal construction in Kochav Ya'akov due to a petition filed by the head of the village council and land owners from Kafr 'Aqab.[94]

In addition to the team conducting land surveys in the West Bank, in 1999 another team began operating in the Civil Administration. The blue line team is tasked with reviewing state land declarations made in the 1970s and 1980s in order to ensure that allocation and planning are pursued only on state land.[95]

Following assessments conducted by the blue line team between 2012 and 2015, 63,777.61 dunams (approximately 15,760 acres) were confirmed as state land.[96] This vast amount of land was reconfirmed or added to the reservoir of state land, which the State allocates almost exclusively to the Israeli settlement enterprise.[97] According to Palmon, the work of the blue line team is the core of his team's operations.[98]

93 In both cases, the petitioners, Palestinian landowners and Yesh Din, learned that the State was planning to advance the retroactive authorization of the outposts. In the Shilo Valley case, the State's response to the petition for the removal of the outpost of Adei Ad indicated that the blue line team was reviewing the status of the lands inside the outpost (HCJ 4621/13, 5383/09 **Abdallah Muhammad Manasra v. Minister of Defense**, State Brief, November 8, 2015 (Mitzpeh Danny); HCJ 8395/14 **Head of Turmusaya Village Council, Mr. Ribhi Abd al-Rahman Abu 'Awad et al. v. Minister of Defense et al.,** Response on behalf of Respondents 1-4 (September 27, 2015).

94 Testimony of Gilad Palmon in Appeal 68/13, **Head of Kafr Aqab Council et al. v. Supervisor of Governmental and Abandoned Property et al.,** February 18, 2014.

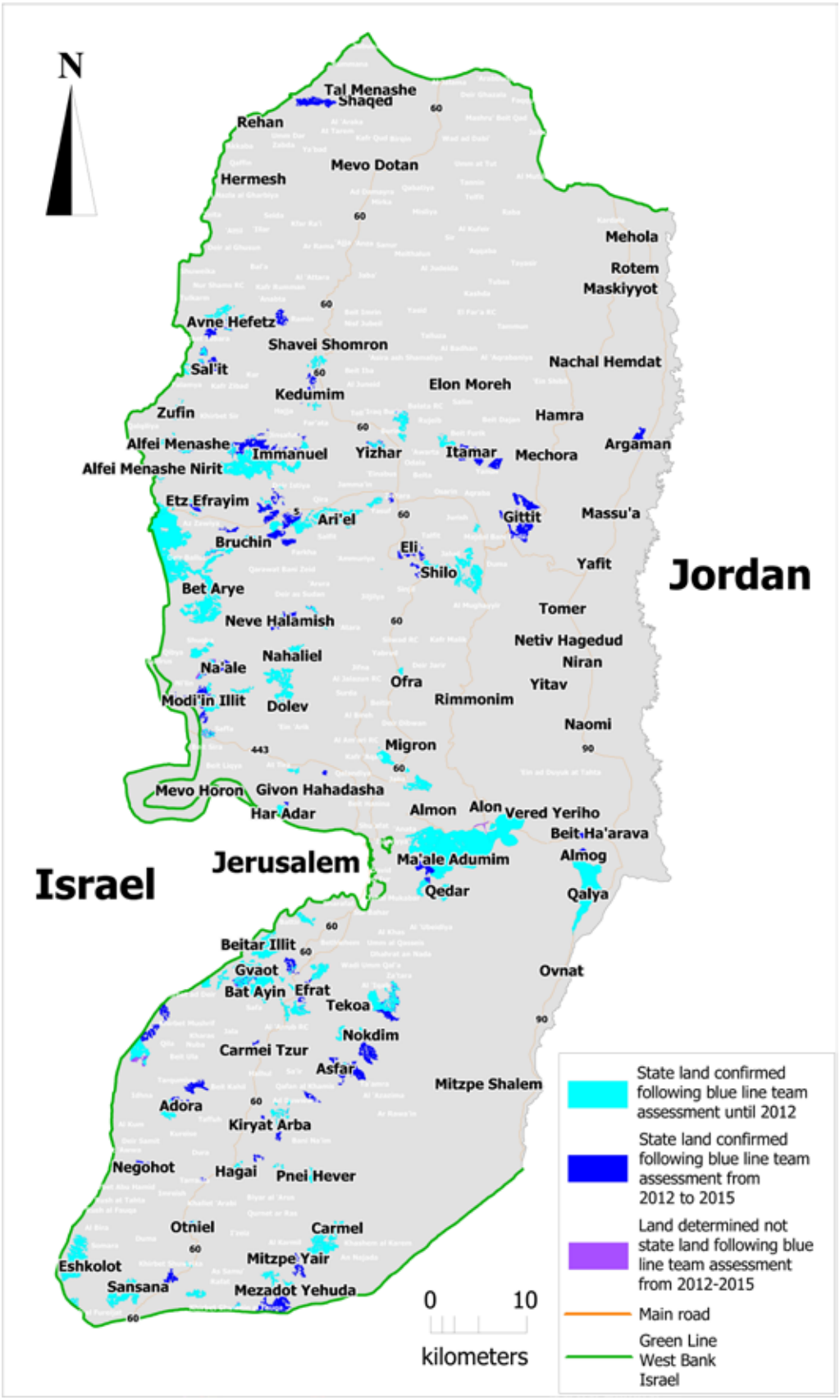
95 See MAG Corps website, "The State Property Delimitation Team" (The blue line team).

96 This figure is based on a comparison of GIS strata received from the Civil Administration. Blue line layer in 2012 and 2015.

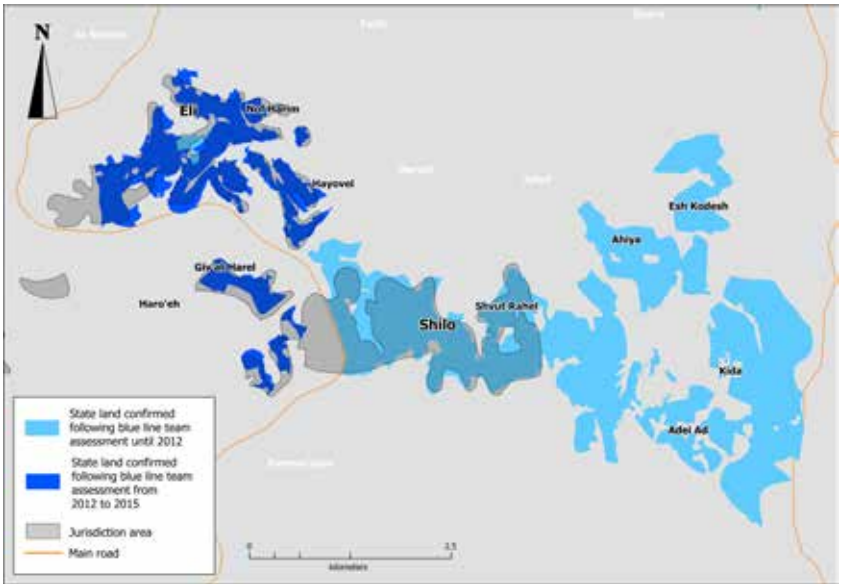
97 See supra footnote 1.

98 Testimony of Gilad Palmon in Appeal 68/13, **Head of Kafr Aqab et al. v. Supervisor of Governmental and Abandoned Property et al.,** February 18, 2014.

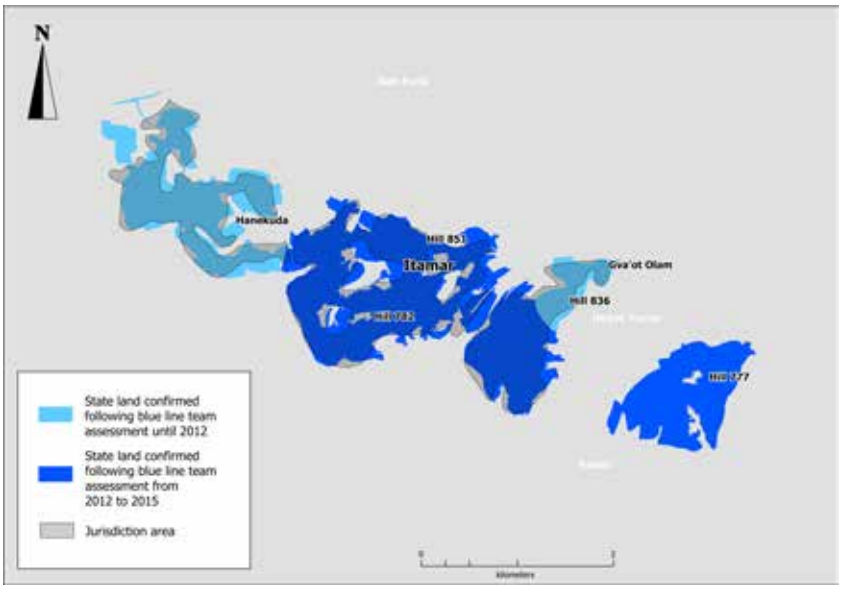
Work undertaken by the blue line team in the West Bank



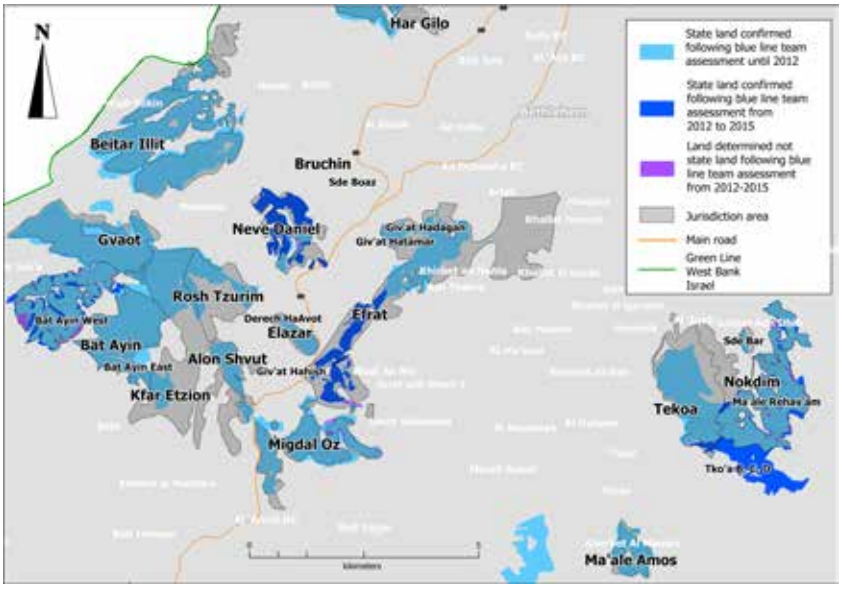
*The map does not include outposts



Work undertaken by the blue line team in the area of Eli and the Shilo Valley



Work undertaken by the blue line team in the area of Itamar



Work undertaken by the blue line team in the area of Gush Etzion

The blue line team also reviews the status of land located inside unauthorized outposts and neighborhoods the state is seeking to retroactively authorize. The objective is to determine whether the amount of private Palestinian land inside these localities can be reduced, such that structures built on what was erroneously considered private land may remain in place. This has recently been taking place in the outpost of Adei Ad, which the State has recently told the High Court it is seeking to retroactively authorize. During a hearing of the petition for the outpost's removal, the State informed the court it had begun a blue line assessment there.[99] In fact, one of the reasons the State has undertaken land surveys and blue line reviews in recent years, despite there being no apparent shortage of state land and that many areas declared state land are not utilized, is that it seeks to retroactively authorize construction on unregistered land seized by Israeli settlers.

In a petition filed by the council heads of the villages of a-Sawiyah, a-Lubban a-Sharqiyah and Qaryut, together with Israeli NGOs Yesh Din and Bimkom, the petitioners argued that classifying land as state land after assessing its status by the blue line team effectively constitutes a declaration of state land without allowing interested parties to raise objections. During the hearings held in the petition, the State said it would make changes to the work of the blue line team, and that it drafted a new operating procedure whereby the results of the team's reviews would be made public and grant individuals claiming they had been wronged a chance to address the head of the Civil Administration. The State also added that the land regulation committee was expected to address the blue line team's operation and mandate.[100]

C. ADOPTING RECOMMENDATIONS REGARDING THE PLANNING STATUS OF STATE LAND

> *With regard to settlements established in Judea and Samaria on state land or on land purchased by Israelis with the assistance of official authorities such as the World Zionist Organization Settlements Division and the Ministry of Housing, and which have been defined as "unauthorized" or "illegal" due to the fact that they were established without any formal government decision, our conclusion is that* ***the establishment of such settlements was carried out with the knowledge, encouragement and tacit agreement of the most senior political level*** *- government ministers and the Prime Minister, and therefore such conduct is to be seen as implied agreement. Therefore, in our view,* ***no further government or ministerial decision is required in order to pursue the formalization of the status of these communities****.*
> (Levy Report, pp. 60-61, emphases added).

As stated, the Levy Committee determined that Israeli settlements are lawful under international law.[101] The Committee also found that outposts built on state land are neither unauthorized nor illegal and their establishment is not, in and of itself, a violation of the law. Therefore, according to the Committee, the only legal difficulty is that no jurisdiction area was assigned for these outposts, which resulted in absence of authorized master plans, pursuant to which building permits may be issued. The Levy Committee recommended these aberrations be corrected by formalizing the missing planning elements retroactively.

The Levy Committee's assertion that the establishment of the outposts is not unlawful under Israeli law in and of itself is based on the **administrative promise doctrine**, according to which, under certain conditions, a promise made by an agent of the government is binding, and the authority is obligated to fulfill it even if it does not wish to

99 HCJ 8395/14 **Head of Turmusaya Village Council, Mr. Ribhi Abd al-Rahman Abu 'Awad et al. v. Minister of Defense et al,** Response on behalf of Respondents 1-4, September 27, 2015**.**

100 HCJ 7986/14 **Bimkom – Planners for Planning Rights et al. v. Head of Civil Administration et al.,** Response to Petitioners' Response to Updating Notice on behalf of the Respondents, October 21, 2015.

101 **Levy Report**, pp. 13, 83.

do so. In order for a promise given by an administrative authority to be considered binding vis-à-vis an individual, it must meet three cumulative conditions: the official who gave the promise had the authority to do so; the promise was made with the intent that it be legally binding; and the official who made it is capable of fulfilling the promise.[102]

Based on this doctrine, the Levy Committee found that although no government decision preceded the establishment of the outposts, the government, through its agencies and agents, gave the settlers an administrative promise by assisting in the establishment of the outposts and continues to encourage and support them. "Even if no official government resolutions preceded the establishment of the new 'neighborhoods' or 'settlements', there is no longer any doubt that they were established with the government's knowledge and tacit consent, attended by a significant monetary investment using state funds".[103] The Levy Committee contended that therefore, the settlers may assume that the government favors and supports settlement expansion.

The Levy Committee further stated that there was no legal justification to release the State from the administrative promise created by government policy on the outposts. This finding is based in part on the Committee's letter of appointment. This letter led the Committee members to conclude that, "not only does the current government not wish to retract promises given to the settlers by its predecessors, but rather, it is seeking a way to help give this an air of legality".[104]

The Committee's finding that government policy toward the settlements is a valid substitute for a government resolution led its members to conclude that no "additional" ministerial-level decision is required to retroactively authorize the status of the outposts. It therefore recommended that they be retroactively authorized immediately without further resolutions by the government or one of its ministers.[105]

Retroactive authorization of the outposts is comprised of three elements that are stages on the way to authorization:

- **Political element** - a government level decision and instructions to examine and advance the retroactive authorization of an outpost.

- **Proprietary element** - the land must not be privately owned by Palestinians. In other words, the land must be registered as state land, or be declared as such in an administrative process.

- **Planning element** - advancement of planning procedures to the final stage of validating a master plan and issuing building permits under it. Plans are reviewed and approved by the Civil Administration's supreme planning committee. Each planning stage requires the Minister of Defense's approval.

With respect to the political element, as stated, the Levy Committee found that a government-level decision to establish the outposts has already been made by way of the administrative promise doctrine and that no further decision is required in order to retroactively authorize them. In terms of the proprietary element, the Levy Committee found that there is no legal impediment to establishing Israeli communities on land declared as state land. As for planning, Levy recommended resolving the administrative obstacles and promoting retroactive authorization through the planning authorities.

102 **Ibid**., pp. 24-59, 83-85. For more on the administrative promise doctrine and for criticism of the position of the Levy Committee, see: **Unprecedented**, pp. 27-30, 39-54.

103 **Levy Report**, p. 59.

104 **Ibid.**, p. 59.

105 **Ibid.**, pp. 60-61.

Outposts are authorized in one of two ways: as an independent settlement with its own jurisdiction area and master plan; or as a neighborhood or extension of an existing settlement. The latter is possible when the outpost was built inside the jurisdiction area of a formally recognized settlement. In some cases, the settlement's jurisdiction area is to be extended in order to include the outpost.

Publically and politically, both at home and abroad, the GOI prefers the second option, as it allows it to avoid declaring a new settlement, which would be a violation of its pledge not to build new settlements. Though both routes ultimately create new settlements, retroactively authorizing an outpost as a neighborhood or extension of an older settlement often goes unnoticed by the Israeli public and the international community, and exacts a much lower political price.

The GOI has gained momentum in retroactively authorizing unauthorized outposts in recent years. Over a quarter of the outposts have been authorized or are undergoing various stages of authorization.[106] Only four of these were retroactively authorized as independent settlements.[107] The rest of the outposts were authorized or are undergoing authorization as neighborhoods or extensions of existing settlements. Authorizing some of these outposts as neighborhoods rather than independent settlements is possible following the Levy Report's interpretation of the notion of contiguity.

The term **contiguity** refers to the requirement that expansion of an existing settlement must be contiguous with existing construction inside it.[108] The planning principle behind this requirement is that any construction that is distant from the older settlement constitutes the establishment of a separate settlement. Given the broad ramifications of building new settlements, the requirement for contiguity is designed to prevent the new settlements being established without a government decision.

The Levy Committee acknowledged the fact that the requirement for contiguity was meant to prevent the establishment of new settlements disguised as neighborhoods, thereby bypassing the need for a government decision to build a new settlement: "The intention was clearly to prevent the establishment of new settlements 'disguised' as neighborhoods without a government decision".[109] However, the Levy Committee stretched the definition of contiguity to the point where it becomes meaningless, and its recommendations allow for authorizing settlements that were built at a significant distance from the parent settlement as neighborhoods or extensions of that settlement, without requiring a resolution to build a new settlement.

The Levy Report acknowledged the illegality of construction in the outposts, but determined that as long as it was inside the "area of allotment" the Civil Administration allocated to the World Zionist Organization's Settlement Division, and within the parent settlement's jurisdiction area and master plan, it may be considered a neighborhood or extension of that settlement. The Levy Committee considered this to be true even in cases in which the structures in question were quite far from the formally recognized or parent settlement and even when there are significant topographical barriers separating the two settlements. "Thus, for instance, where a deep valley, however wide, intersects the settlement, construction on the other side of the valley may meet the requirement for contiguity. We have seen an example of such a case during the site visit we made to the area of Kfar Eldad, located inside the

106 See: **Under the Radar**.

107 The outposts of Rehelim and Nofei Nehemia were joined as one official settlement in 2013. The outpost of Bruchin was retroactively authorized in 2014 and the outpost of Sansana was retroactively authorized in 2013.

108 Government Resolution No. 640 from 1984 stipulated that construction at a significant distance from an older settlement requires a government decision. Government Resolution No. 175 from 1999 replaced the 1984 resolution and determined that both contiguous and non-contiguous construction requires the approval of the Minister of Defense with the consent of the Prime Minister.

109 **Levy Report**, p. 46.

Nokdim's jurisdiction area, though at a rather significant distance from the parent community".[110] This assertion contradicts both planning logic and public interests. Ultimately, authorizing outposts as neighborhoods or extensions of an existing settlement does not create a single community, but rather two independent settlements within a single jurisdiction area.[111] It also contradicts the military orders that define the jurisdiction area of settlements, which stipulate that only one single community may be established inside the jurisdiction area approved by the military commander.[112] In this way, the authorities create the appearance of a single settlement, when in fact there are two separate settlements on the ground.

The importance of the principle of contiguity and the determination whether an outpost is an independent settlement or an extension of an existing one follows from the importance attached to the establishment of a new settlement. The decision to build a new settlement in the OPT (as well as inside Israel) is a weighty matter with far reaching implications, which is why the power to do so has always remained in the hands of the government. Conversely, the power to decide to expand an existing settlement has, since 1999, required the approval of the Minister of Defense only, with the consent of the Prime Minister.[113]

The adoption of the Levy Committee's position on contiguity is manifested in the authorities' change of position regarding retroactive authorization of outposts in different time periods:

In 2009, the government sought to retroactively authorize the outpost of Sansana as a neighborhood of the settlement of Eshkolot. The two settlements are 3 kilometers apart (as the crow flies) and form two separate, independent communities. In January 2012, in a rare and unprecedented decision, the sub-committee for objections in the Civil Administration's supreme planning committee accepted the objections to the plan and rejected it.[114] The sub-committee ruled that there was no planning justification to add Sansana as a neighborhood of Eshkolot, and that the significant distance between the two communities contradicts the planning principle that requires contiguity for expanding an existing community. This principle can be waived only in exceptional circumstances.[115]

Authorizing a number of outposts as neighborhoods of distant settlements reflects the change in the interpretation of contiguity in recent years. Though several outposts were authorized in a similar manner in previous years, there has been an increase in the number of outposts retroactively authorized or undergoing authorization in a process that implies a liberal approach to contiguity in the years since the Levy Report was published. This type of authorization ignores planning considerations such as infrastructure, public institutions, population distribution, access routes and environmental impact, and focuses on one single aspect – expanding and reinforcing Israeli control and settlement in the West Bank.

The position the State presented in High Court petitions in 2015 concerning the status of unauthorized outposts indicates that it seeks to authorize all outposts, or at the very least (at this stage), outposts that were built entirely or partly on state land. The implementation of this policy is made possible through the adoption of the administrative

110 **Ibid.**, p. 47.

111 The outposts that were authorized as neighborhoods in existing settlements continued to function as entirely independent communities with separate institutions from those in the parent settlement. Such was the case in the outpost of Tal Menashe which was approved as a neighborhood of the settlement of Hinanit and the outpost of Kfar Elded, authorized as a neighborhood of Nokdim.

112 Laws relating to local and regional councils in the West Bank are promulgated in the Order regarding the Administration of Regional Councils (Judea and Samaria) (No. 783) 5739 and the Order regarding the Administration of Local Councils (Judea and Samaria) (No. 892) 5739, respectively. These orders establish the authority of the GOC Central Command to determine the jurisdiction area of settlements in an order and on a map.

113 **Unprecedented**, pp. 32-39.

114 The objections were filed in March 2009 and February 2013 by Bimkom – Planners for Human Rights together with the a-Ramadin Village Council, adjacent to the outpost of Sansana.

115 Supreme Planning Committee, Sub-Committee for Objections, Transcripts No. 3/12, January 30, 2012 regarding: Objection to Detailed Plan No. 505/1 Sansana Neighborhood in the Community of Eshkolot.

promise doctrine in combination with the new interpretation the Levy Report granted to the concept of contiguity. **The State has fully adopted a policy of retroactively authorizing outposts as neighborhoods in older, authorized settlements although they continue to function as independent communities for all intents and purposes, with no requirement for government level approval.**

Thus, in early November 2015, the State announced its plan to authorize the outpost of Mitzpeh Danny as a neighborhood of the settlement of Ma'ale Mikhmas[116] as part of a larger master plan for the area. The plan was described by one of the participants in the supreme planning committee session as "truly exceptional" in scope.[117] Mitzpeh Danny is approximately half a kilometer away from the settlement of Ma'ale Mikhmas, as the crow flies. The two settlements function as two entirely separate and independent communities, belonging to two different religious-political streams. The supreme planning committee's hearing indicates that although Ma'ale Mikhmas has lots for which no construction permits have been requested, planning authorities seek to retroactively authorize the outpost of Mitzpeh Danny as a neighborhood of Ma'ale Mikhmas under the planning argument that there is, ostensibly, a shortage of land reserves for construction in Ma'ale Mikhmas.[118]

Tapuah Ma'arav (Tapuah West), another outpost the State is seeking to retroactively authorize through a land survey process as a neighborhood of the settlement of Kfar Tapuah, is also not contiguous with the settlement.[119] In addition, the outpost is mostly built on privately owned Palestinian land and there is no possibility of legally authorizing roads to connect it to the settlement of Kfar Tapuah. A new land survey process initiated by the State is perplexing, given that a blue line team review in 2011 determined that some of the land previously considered state land (following declarations made in the mid-1980s) was in fact not state land.

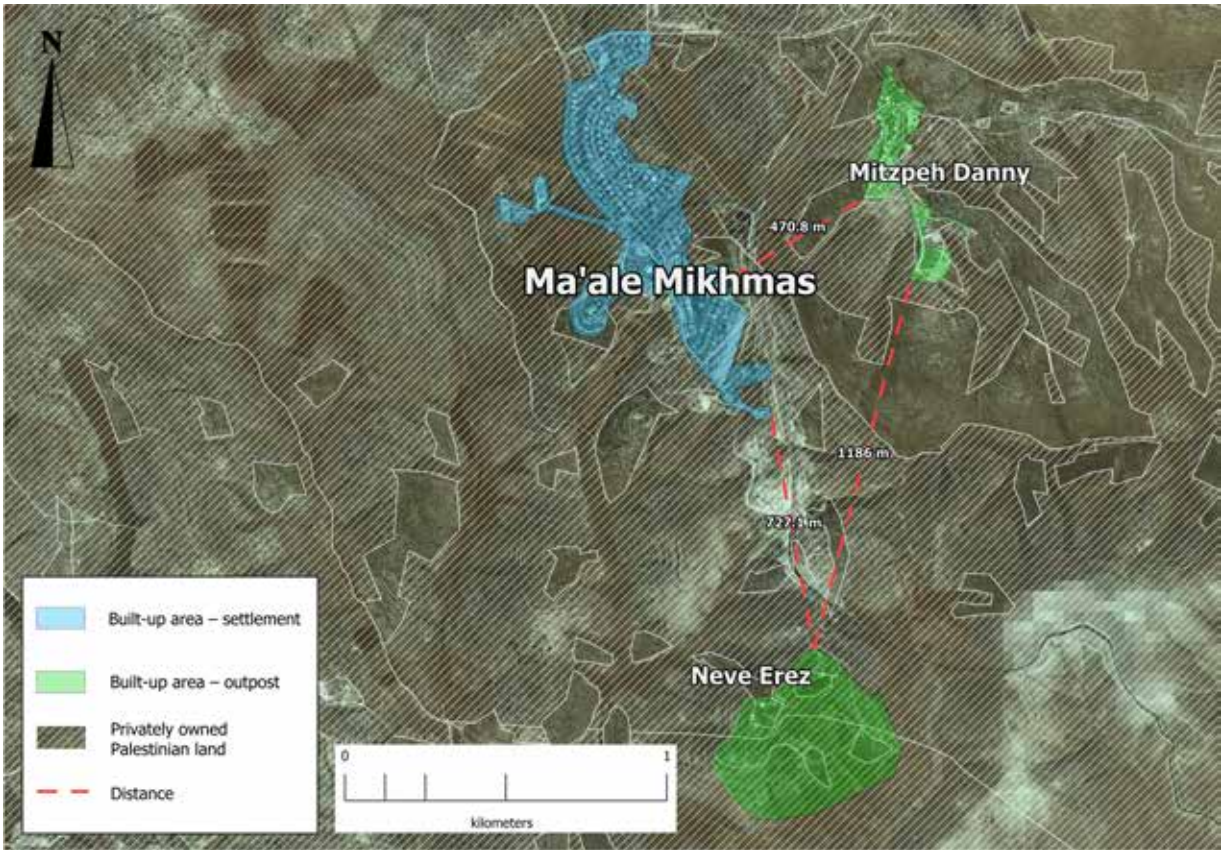
116 HCJ 4621/13, 5383/09 **Abdallah Muhammad Manasra v. Minister of Defense**, State Brief, November 8, 2015. The brief enclosed the transcripts of the Supreme Planning Committee session on an extraordinarily expansive master plan.

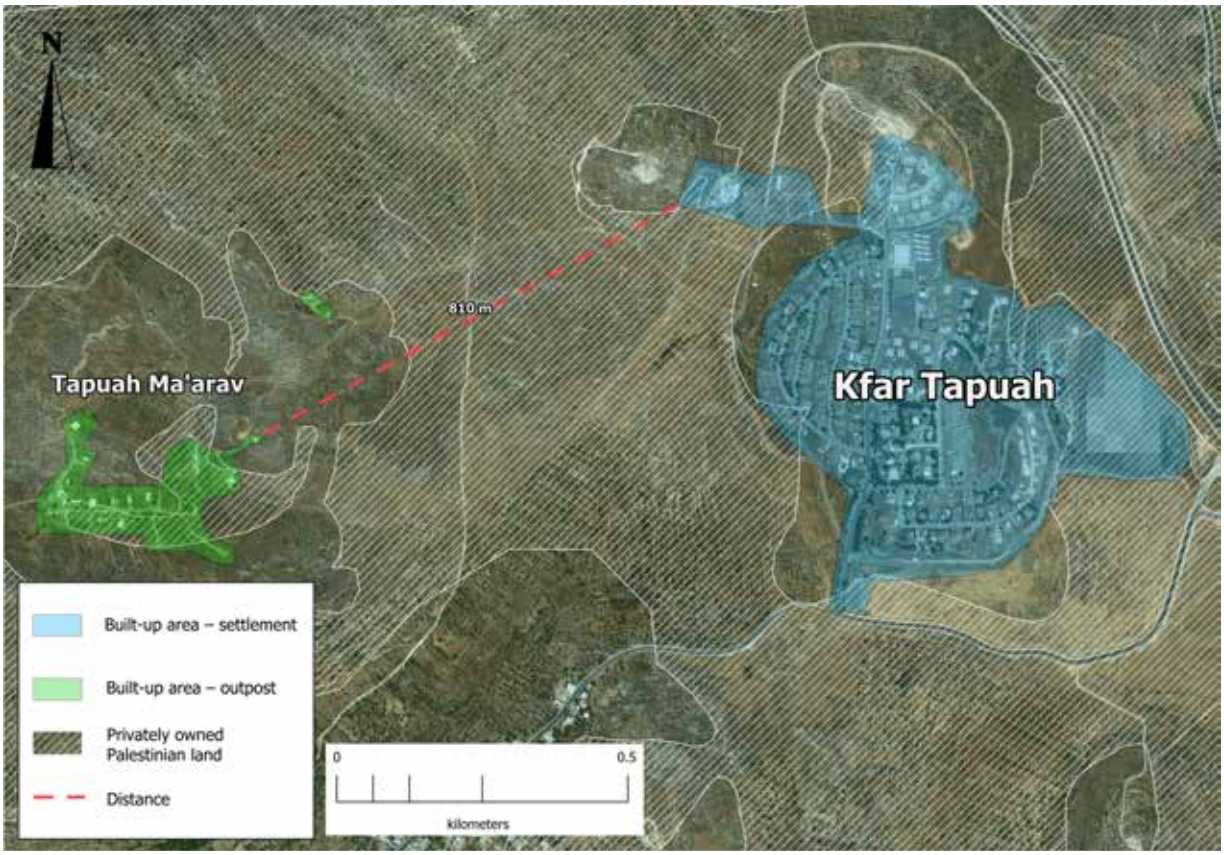
117 Transcript No. 2015013, Supreme Planning Committee, Sub-Committee for Objections, October 21, 2015, p. 9.

118 **Ibid.**, p. 13.

119 HCJ 2297/15 **Hafez Mahmoud Abd al-Halim Ahmad, Head of Yasuf Village Council v. Minister of Defense**, Response on behalf of Respondents 1-4, November 19, 2015.

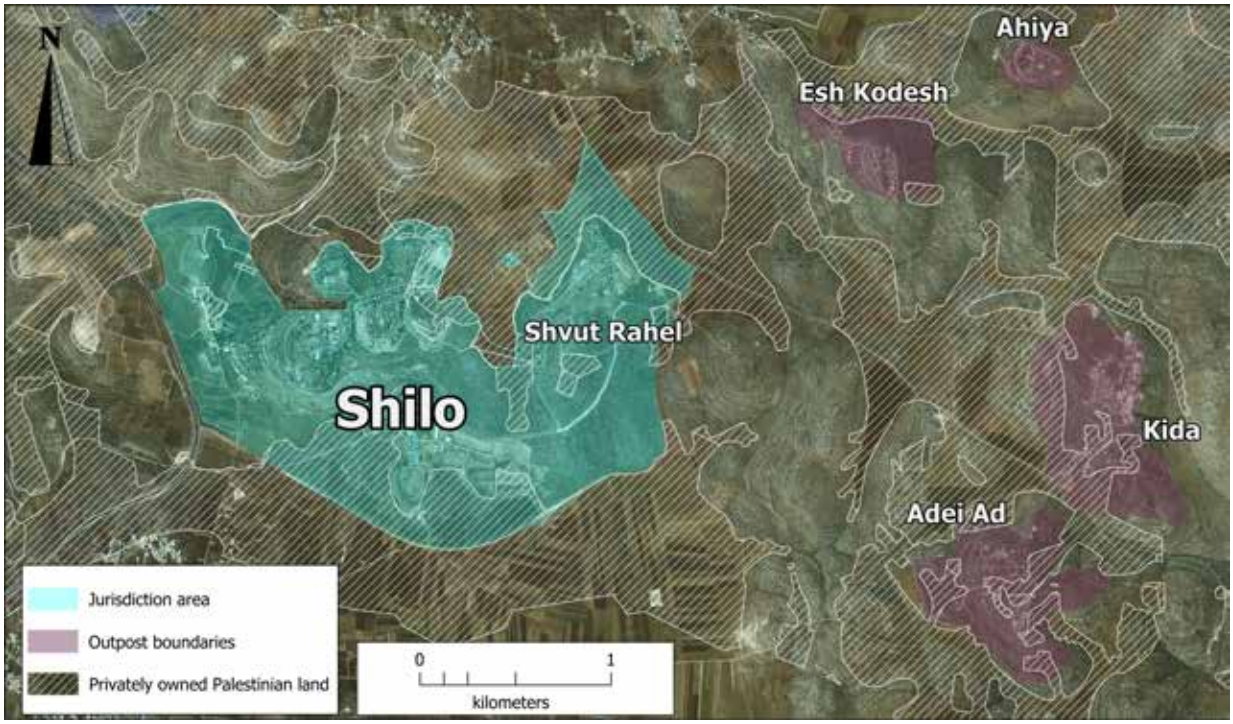
Outposts which the state declared its intention to retroactively authorize as neighborhoods of settlements and their distance from the authorized settlement





Recommendation No. 1 in the Levy Report calls for regulating, or resolving jurisdiction areas, stating that "The area of municipal jurisdiction of each settlement, if not yet determined, must be determined by order, taking into due consideration future natural growth".[120] Some of the unauthorized outposts the government now seeks to authorize were built outside the jurisdiction area of existing settlements. In order to authorize them as neighborhoods or extensions, the State would have to order the GOC Central Command to issue military orders expanding settlement jurisdiction areas so that they include these outposts. (We note here, that many settlements have jurisdiction areas that are much larger than the area they actually use. In 2007, Peace Now reported that only 9% of the total area under the jurisdiction area of settlements is built-up and that in practice, some 79% of it is not used).[121] For instance, the State will be required to pursue this route for its plan to authorize four outposts in the Shilo Valley as neighborhoods of the settlement of Shilo.[122] The four outposts, Adei Ad, Kida, Ahiya and Esh Kodesh, are located outside the jurisdiction area of the parent settlement of Shilo. To authorize them as neighborhoods of Shilo, the settlement's jurisdiction area would have to be significantly extended. If such extension proves to be impossible, the State will have to determine separate jurisdiction areas for these outposts as independent settlements, which would require a government level decision to establish new settlements – a move, which, as stated, Israel would rather avoid.

Four outposts in the Shilo valley, located outside the jurisdiction area of the settlement of Shilo. The State has declared its plan to retroactively authorize these outposts



120 **Levy Report**, Recommendation 1, p. 85.

121 And Thou Shalt Spread: Construction and development of settlements beyond the official, Peace Now, July 2007.

122 The settlement of Shilo is located several kilometers away (as the crow flies) from each of the outposts: approx. 2,433 meters (1.5 miles) from Adei Ad; approx. 2,965 meters (1.84 miles) from Kida; approx. 2,993.61 meters (1.86 miles) from Esh Kodesh and approx. 1,902 meters (1.18 miles) from Ahiya. The distances were measured from the closest point in each of the outposts' built-up area to Shilo.

CONCLUSION

The professed purpose of the Levy Committee's report was to find ways to help the GOI give an air of legality to the expansion of the Israeli settlement enterprise in the West Bank, and to its ambition to retroactively authorize structures and settlements built without authorization and against the law.

Examining the policy practiced by Israel since the Levy Report was published in 2012 reveals that there is a process underway of adopting the controversial legal analysis that not only is the West Bank not occupied territory, but that it is a territory allocated to 'the Jewish state' under international law. Accordingly, **Israel has been gradually absolving itself of the duty to act within the laws of occupation, which are designed to limit its ability to act as full sovereign in the West Bank and make long term changes in the area that serve its own interests.**

In so doing, Israel is in the midst of extricating itself from its duty to protect the property of protected persons, while at the same time, refraining from officially annexing the West Bank to Israel – a move that would require granting Palestinian residents of the West Bank citizenship and equal rights. This state of affairs renders the legal framework in which Israel currently operates in the West Bank a legal limbo.

Israel's steps towards comprehensive regulation of land issues in the West Bank and establishing the Israeli settlements and outposts as permanent contradict specific provisions of international law, most notably the provisions requiring an occupying power to administer the occupied territory in trust for the benefit of the local population and the temporary nature of occupation.[123] According to these provisions, the occupying power is not the sovereign in the occupied territory and serves only as temporary trustee, administering the territory for the benefit of the occupied population. The provisions prohibit long term changes meant to serve the interests of the occupier (other than those warranted by security needs), including exploitation and confiscation of land for non-security purposes and changes to the legal situation.

The laws of occupation and considerations related to foreign relations and domestic politics that have guided Israel's actions until recently, restrained its ability to retroactively authorize all the settlements built in the West Bank. However, the GOI has been working on legislative and institutional changes based on the Levy Committee recommendations, such as the land regulation bill, the land regulation committee and the land tribunal, which are meant to remove any obstacles to retroactively authorizing all hitherto unauthorized settlements and outposts. These measures will also aid the establishment of new settlements and takeover of more land in the future. Recent years have seen a government-ordered upswing in the retroactive authorization of structures and outposts built without authorization and in violation of the law. More than a quarter of the outposts have already been authorized or are undergoing authorization, and more are being added to the list. By retroactively authorizing the outposts, the GOI is seeking to resolve the illegality surrounding their status and secure their future as permanent settlements in the West Bank.

The arrangements the Levy Report proposes in order to allow the authorizing outposts and neighborhoods and resolve land ownership issues - arrangements pursued by the GOI - also signal that Israel is reneging its obligation under international law to safeguard the property of protected persons and refrain from damaging or expropriating it, unless required for imperative military needs.[124] The new arrangements the government is working to implement

123 Regulations annexed to Hague Convention IV (1907), arts. 43 and 55; Fourth Geneva Convention (1949), art. 49(6).

124 The duty to safeguard the property of protected persons is stipulated in the Hague Convention articles mentioned above (footnote 123) and in article 46 of the Regulations annexed to Hague Convention IV (1907) and article 43 of the Fourth Geneva Convention (1949). Hague Convention of private land is prohibited under international law without exception.

on the ground allow for the continuation and intensification of land grab and dispossession practiced against Palestinians under the guise of legally sanctioned actions. So, for example, arrangements that force Palestinians to waive their rights to land they own in return for compensation – in other words, the confiscation of their land - reward the law breakers who invaded the land to begin with and render the theft legal.

This institutionalization of land grab and dispossession reinforces the impression that Israel is planning to reduce the number of Palestinians in Area C, where the settlements and outposts are located, and ultimately force them out of the area. This raises the concern that Israel's ultimate goal is to facilitate the official annexation of Area C to Israel.

RECOMMENDATIONS

The GOI must comply with the provisions of international law which stipulate that the occupation must remain temporary in nature. To that end, the Government of Israel must refrain from making irreversible long-term changes in the occupied territory.

1. The Government of Israel must refrain from supporting or promoting primary legislation that would be applied in the occupied territory. Such legislation would be an indicator of annexation, which is prohibited under international law.

2. The Attorney General must take action to prevent the introduction of an Israeli judicial instance with power to rule on matters pertaining to land in the West Bank.

3. The Attorney General must take action to prevent the promotion of legislation or other arrangements designed for confiscating privately owned land from Palestinians and forcing Palestinian landowners to waive their property rights in order to retroactively authorize illegal construction in Israeli settlements and outposts.

4. The Ministry of Justice and the Ministry of Defense must prevent the establishment of new Israeli settlements and the retroactive authorization of outposts that violate Palestinians' property rights and are in contravention of international law.

5. The Minister of Defense must instruct all official agencies operating in the West Bank to comply with the provisions of international law, which forbid the use of land seized for urgent, imperative military needs for any other purpose.

6. The Ministry of Foreign Affairs must include in its cadet training curriculum on the provisions of international humanitarian law (the law of occupation) and their application in the occupied territory according to both international law and the jurisprudence of Israel's Supreme Court.

7. The military commander in the West Bank and the head of the Civil Administration must safeguard the property of protected persons, including by using the "Interfering Use Order", the importance of which has been recognized by the Israel's Supreme Court.

INTERNATIONAL HUMANITARIAN LAW – THE LAWS OF OCCUPATION

(RELEVANT PROVISIONS)

Article 43 of the Regulations annexed to Hague Convention IV (1907), which is considered a fundamental principle guiding the activities of the occupying power and the relationship between the citizen and the regime in the occupied territory, stipulates that the main considerations that should guide how the occupying army uses its governmental powers and authority for the benefit of the local population and the preservation of the status quo.[125] The accepted interpretation of this regulation is that the occupying power must administer the territory as a trustee, balancing security interests against the civilian life of the local population, which is the beneficiary of the occupying regime. The duty of trusteeship precludes the occupying power from using the territories under its control for its own needs, with the exception of security needs (also, under certain restrictions). Therefore, in terms of land use, the occupying power is under restrictions intended to uphold the principle that the occupation is temporary. The occupying power may not seize private land for its own needs, other than for military purposes and temporarily. Public or state land is also held in trusteeship, and the occupying power may not change its character. The question of whether or not long term changes are permitted under a long term occupation is the subject of debate, but even those who would allow it maintain that such changes should only be made when they are meant to benefit protected persons or serve a clear military need.[126]

Article 55 of the Regulations annexed to Hague Convention IV (1907) stipulates that the occupying power acts as a trustee of public (government) property in the occupied territory, managing it and holding it on a temporary basis only. It prohibits the occupier from making long term changes to the public assets it holds in trust, confining it to the role of administrator and usufructuary and prohibiting it from interfering with the capital of these assets. In other words, as an example, the occupier may not make changes to the ownership of public property, but may lease it, provided that the income is invested in the beneficiaries - the occupied population. The article establishes the occupier's duty to safeguard and maintain public property and stipulates restrictions that prohibit it from any actions with respect to public property and assets that would permanently alter the status quo. This accepted interpretation has been recognized in the jurisprudence of the Supreme Court of Israel, which determines the occupier must run public assets in the occupied territories according to the rules of trusteeship, and is prohibited from exploiting these assets in a manner that fails to preserve them, or permanently alters them.[127]

Article 49(6) of the Fourth Geneva Convention (1949) prohibits an occupying power from deporting or transferring parts of its civilian population into the occupied territory. According to the accepted interpretation, a prohibited population transfer occurs even when the migration is not forced and certainly when it takes place with the state's support or encouragement. While the laws of occupation do acknowledge the legitimate security interests of the occupying power, this recognition does not extend to the settlements. There is no exception to the prohibition on transferring civilians into the occupied territory that allows such transfers for security purposes. Therefore, the settlements are not a valid security measure.[128] According to the official commentary

125 See Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation: The Framing of the Occupied under Palestinian Territory", **Berkeley Journal of International Law**, Vol. 23, p. 551, 2005.

126 See: HCJ 393/82 **Jam'iyat Iskan al-Mu'allimin v. Commander of the IDF Forces in Judea and Samaria**, judgment issued in 1983, para. 13.

127 HCJ 285/81 **al-Nazar v. IDF Commander**, IsrSC 36(1), 701, p. 704; HCJ 2164/09 **Yesh Din – Volunteers for Human Rights v. Commander of IDF Forces in the West Bank et al.**, petition, pp. 26-29 ("the Quarry petition").

128 Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation: The Framing of the Occupied Palestinian Territory", **Berkeley Journal of International Law**, Vol. 23, p. 551, 2005, p. 603.

of the International Committee of the Red Cross (ICRC), the drafters of the convention intended to preserve the demographic status quo in occupied territories.[129]

Successive Israeli governments have interpreted the prohibition on transferring parts of the population into the occupied territory as applying only to forced population transfers, whereas its citizens move to the settlements voluntarily, and therefore there is no violation of international law.[130] In contrast, in its advisory opinion on the separation wall,[131] the International Court of Justice held that the settlements had been built in contravention of article 49(6), as did UN Resolution 446 of March 22, 1979.[132] In the Rome Statue of the International Criminal Court, the prohibition was reframed to criminalize both direct and indirect population transfers into the occupied territory.[133] Given these developments in legal interpretation, there is broad legal consensus that Israel's policy that allows, initiates, encourages and funds settlement activity, can be regarded as a breach of the prohibition on population transfer, both directly and indirectly.[134]

Article 46 of the Regulations annexed to Hague Convention IV (1907) stipulates the occupying power's duty to safeguard the property of protected persons along with an unqualified ban on land confiscation, with no exceptions.

Article 53 of the Fourth Geneva Convention obliges the occupying power to safeguard the property of protected persons and prohibits the destruction of private and public property, except when required for imperative military needs.

129 **Commentary on Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Times Of War** 283 (Jean Pictet ed. 1958).

130 According to this interpretation, Article 49 of the Fourth Geneva Convention (1949), which was drafted after WWII, was meant to protect the local population from deportation, and hence, does not prohibit voluntary relocation. For Israel's position see: "Israeli Settlements and International Law", Israel Ministry of Foreign Affairs.

131 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, International Court of Justice. (July 9, 2004).

132 S/Res/446, U.N. SCOR (March 22, 1979). Additional resolutions passed by the UN Security Council and the UN General Assembly, as well as various committees, have made similar assertions.

133 Rome Statute of the International Criminal Court, U.N. DOC.A/Conf.183/9 (1998), art. 8(2)(b)(viii).

134 Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, "Illegal Occupation: The Framing of the Occupied Palestinian Territory", **Berkeley Journal of International Law**, Vol. 23, p. 551, 2005, pp. 581-582.