Renewing settlement of title in Area C in the West Bank: A breach of international law and violation of Palestinians' rights

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In November 2020, the Knesset Foreign Affairs and Defense Committee discussed the possibility of renewing settlement of title[1]* in the West Bank, which was halted when Israel occupied the Palestinian Territories in 1967. The discussion was held in part due to the Civil Administration's position that settlement of title should be renewed and that there is no legal impediment to pursuing it. Although the discussion was held in a Knesset committee, whether or not settlement of title is renewed does not hinge on approval from the Knesset or the government, but rather, solely on a decision made by military commanders on the instructions of the relevant government officials (the Prime Minister's Office or the Minister of Defense). This document addresses the meaning and implications of renewing settlement of title given the reasons for its suspension and examines whether pursuing it falls in line with the restrictions imposed by international law.

The document in brief:

- Settlement of title is a sovereign act carried out by a permanent regime. Pursuing it reflects sovereign will and serves as an indirect tool for asserting sovereignty, due to its irreversible nature. Occupation, however, is a temporary state during which irreversible, permanent acts are prohibited. Applying Israeli sovereignty in the occupied territory, whether directly or indirectly, such as by pursuing settlement of title, constitutes annexation, which is a violation of international law.

- Settlement of title was suspended by a military order issued by the Military Commander of the West Bank shortly after the occupation began, and it can be renewed pursuant to a similar order. In practical terms, the decision would be made by government officials (namely the Prime Minister and the Minister of Defense) and executed by their subordinates - the Military Commander of the West Bank and the Head of the Civil Administration. There is no legal requirement to renew settlement of title by Knesset resolution or legislation, or by government resolution. The military commander, who follows the orders and directives of the Minister of Defense and the Prime Minister, has full authority to do so.

- The Civil Administration acknowledges that its databases on land registration so far are incomplete. This effectively precludes renewing settlement of title in the current state

1 *Settlement of title is a comprehensive process of registering ownership of all land in a given area.

of affairs. Such renewal would be a breach of international law, which prohibits making changes to the occupied territory and requires safeguarding private property.

- The Civil Administration and the State of Israel take the position that a sizeable portion of the procedures undertaken as part of settlement of title under Jordanian rule should not be recognized. This position, formulated recently after more than five decades of occupation, invalidates a large number of settlement of title cases pursued in the past, hurting individuals whose rights have already been recognized.

- Settlement of title was suspended partly because hundreds of thousands of West Bank residents became absentees following the 1967 war and in light of the prohibition the international law of occupation place on curtailing their rights. Renewing settlement of title will inevitably and irreversibly violate absentees' rights.

- Israel's interest in building settlements and dispossessing Palestinians precludes it from being an honest and impartial party to the proceedings. The process is implemented unilaterally. The procedural stages are shaped without participation by the local Palestinian population, and the actions taken by the Civil Administration are politically tainted.

- All of this is added to the long history of Israeli presence in the area, which has been marked by extreme discrimination in the allocation of purportedly public land to the Palestinian public, which has been allocated only 0.7% of public land by the Civil Administration, compared to Israelis and Israeli interests, which have been allocated vast areas over the years.

- As part of the Civil Administration's efforts to renew settlement of title, in April 2019, the office of the Legal Advisor – Judea & Samaria (LA-JS) issued a legal memorandum addressing an obstacle resulting from the fact that local laws in the West Bank preclude anyone who is not of Arab descent from acquiring rights to land in the West Bank. The LA-JS notes the preclusion can be removed as it discriminates against Israelis as compared to Palestinians. Lifting restrictions and changing local laws, in defiance of the obligations imposed on an occupying power under international law, lines up with the push to promote settlement of title and allow Israelis to acquire rights in the occupied territory in a manner that would perpetuate Israeli presence in an area under Israel's temporary control.[2]

2 Palestinians would obviously be precluded from acquiring rights to land inside Israel, other than in exceptional cases, under the Israel Land Law 5720-1960.

1. Historical background: Settlement of title and its suspension by Israel immediately following the occupation of the West Bank

Settlement of title is a process designed to make definitive, decisive and conclusive findings with respect to land title in every unit of land in order to settle title claims and determine state ownership in the remaining land. Ownership is established following complex examinations and inquiries into the history of title in the unit.

Settlement of title procedures in the West Bank began during the British Mandate and continued under Jordanian rule in the area. By the time Israel occupied the West Bank in 1967, settlement of title had concluded with regards to approximately one-third of all West Bank land.

On the instructions of the Military Advocate General (MAG) at the time, Meir Shamgar (who later served as the Attorney General and Supreme Court Chief Justice), one of the first acts carried out by Israel's Military Commander of the Area was the suspension of settlement of title using the Order Concerning Land and Water Settlement (Judea and Samaria) (No. 291), 1968. The MAG's decision to suspend settlement of title was based on four key reasons:

a. Settlement of title is an **act of a permanent sovereign**. It creates, determines and entrenches absolute rights in perpetuity, since its pronouncement on who has title and what type of title they have is conclusive and final.

   Therefore, a temporary regime of occupation, such as the one in the West Bank, must refrain from engaging in acts that are characteristic of a permanent regime. **Continued settlement of title was seen as a subversion of the principle that occupation is temporary**.

b. After the 1967 war, hundreds of thousands of West Bank residents fled the area and never returned. The property they left behind has been considered "abandoned property" or "absentee property" ever since (even though the absence in question does not meet the definition included in the Absentees' Property Law – 1950).[3]

3 Under the Absentees' Property Law, the term absentee refers to a person who had resided in the area of the State of Israel (including annexed East Jerusalem) and is now outside the country. Absentee property is expropriated from such persons and transferred to the state, which, in turn, hands it over to various entities (such as the Development Authority or other governmental agencies). In the West Bank where the Absentees' Property Law does not apply, absentee property is governed by the Order regarding Abandoned Property (Judea and Samaria Area) (No. 58) (1967). This order provides that ownership is not expropriated, but rather managed in trust by the Civil Administration until the absentees return to the West Bank.

These absentees are not physically present in the area and cannot protect their property or ask to have it registered in the land registry (over the many years since the occupation began, they have also been prevented from cultivating their lands, which plays a key role in securing rights). Any irreversible act affecting their lands will hurt them and their property rights and constitute a breach of the duties imposed by international law with respect to private land.

c. **The absence of exhaustive information about settlement of title procedures the Jordanian authorities had not completed or completed partially hampered the ability to carry on with settlement of title**. Incomplete or missing information on the process so far and the fact that if settlement of title were to continue properly, it would have to begin at the point at which it ended led to the conclusion that it was, in fact, not fully practicable to complete the process.

   The combination of missing information about procedures completed prior to 1967, the obligation to rely on such information and the actions taken in light thereof rather than cavalierly discarding it, and the duty to refrain from violating the rights of anyone who had filed an objection and/or secured their title, led to the decision not to have the occupying power, which functions as a temporary sovereign, complete the land settlement process.

   It is important to stress that the language chosen for the order that halted the process used the term "suspension" rather than revocation. Inasmuch as settlement of title is renewed, it must continue from the point at which it was stopped, based on the information created and recorded until then.

d. **The prohibitive cost of settlement of title**. As settlement of title is an involuntary, binding process addressing all land in a given territory, it is time-consuming and requires the employment of a large complement of experts. Additionally, past experience both in the West Bank during British and Jordanian rule and inside the State of Israel has shown that the duty to make pronouncements on title with respect to each and every unit of land often leads to complex legal proceedings. Undertaking such a process in large areas covering thousands of dunams could take years.

   While settlement of title has not been completed since the occupation began, the Civil Administration has allowed private entities to register lands sporadically, using a different track known as 'first registration',[4] which was not suspended. With few

4 Settlement of title is a process that is dictated by the central government and enforced upon all residents of a village or title holders. It is also a complex, extremely lengthy and costly process. The Jordanian authorities offered, in addition to settlement of title, a private registration track called **first registration**. It allowed to register a specific and separate plot or plots in the name of a private individual on an individual basis, outside settlement of title. This was also a costly process most of which had to be covered by the individual applying. While the evidentiary value of such registration was

exceptions (Yesh Din is aware of two only), in which the Civil Administration requested to register land in the name of the sovereign (the Custodian of Government Property, who operates under the Civil Administration), no West Bank land has been registered in the name of the "sovereign" or the state, but only in the name of private individuals or entities. Plots registered in this track are scattered throughout the West Bank and do not cover the entire area.

Just as settlement of title was suspended by virtue of an order issued by the military commander, who is the competent authority with respect to legislation in the occupied territory, its renewal can be provided for in a similar military order. There is no legal requirement for a government resolution on this matter, nor does the law require Knesset legislation or any action on the part of Knesset committees. The military commander is subordinate to the relevant government-level officials, i.e., the Minister of Defense or the Prime Minister, and receives their instructions via the Coordinator of Government Activities in the Territories.

2 . The repercussions of renewed settlement of title for the protected Palestinian population, and its status with respect to restrictions imposed under public international law

Lifting the settlement of title suspension would be a breach of international law. The 1968 decision to suspend the process had several grounds, which have largely remained intact:

Settlement of title should be carried out by a permanent sovereign regime exclusively

Settlement of title is a comprehensive, binding and all-encompassing process, and as such, it is distinctively a mark of sovereignty characteristic of a permanent government rather than a temporary regime that holds the territory in trust. It is no coincidence that renewing settlement of title in the West Bank was presented in Knesset debates as a counter to activities the Palestinian Authority is alleged to be taking to advance settlement of title in areas under its control. However, the Knesset discussion was rooted in error. All security and civilian powers in Area C, which makes up roughly 60% of the West Bank, remain in the hands of the Civil Administration, an Israeli executive arm that serves Israeliinterests

high, it remained subject to the findings of a general settlement of title process once such occurred with respect to the particular plot.

alone.[5] The Palestinian Authority has neither the power nor the ability to undertake legally valid settlement of title in Area C, since the Palestinian Authority receives all its powers from the Civil Administration. Undertaking settlement of title was presented in the Knesset as a "response to" or "reprisal against" non-existent or legally invalid acts by the Palestinian Authority as part of what has been referred to as "the battle for Area C," and described as a territorial dispute between Israel and the Palestinian Authority. Framing the issue in this manner, which has been done not only by members of Knesset, but also by Civil Administration personnel, clearly indicates expansionist aspirations with respect to these areas. **As such, the first and main reason for the decision to suspend settlement of title remains in place, and any decision to renew the process would be a breach of the duties imposed on an occupying power with respect to occupied territory**.

Hundreds of thousands of Palestinians turned refugees by the 1967 war would be excluded from the settlement of title process

Absentees who are away from the territory have been in the same predicament since 1968, when settlement of title was suspended. If anything, the number of Palestinian residents who exited the West Bank for various purposes and denied reentry and whose rights in a settlement of title process might be jeopardized as a result, has only grown over the years. The absence of so many Palestinians from the territory and their lack of access to it in the years following the occupation or, should settlement of title resume, in the years leading up to its completion, will surely result in the curtailment of their property rights. This would be a clear breach of the occupying power's duties in relation to property rights and their protection during the occupation. **Therefore, the second reason for the decision to suspend settlement of title, which directly concerns Palestinians' individual rights, remains in place**.

Lack of information on land status could result in mass landgrab

Despite the fact that it has been 53 years since the occupation of the West Bank, the information the Civil Administration has on the status of settlement of title conducted by the Jordanian authorities prior to the occupation has not changed significantly. The state has recently admitted as much during legal proceedings concerning settlement of title, noting it was not in possession of complete information about which villages and districts had been included in the settlement of title process and which had not. The state also admitted that where settlement of title had begun, it was not always known what phase the process was in or what records exist.[6] The lack of information on land status could lead to an

5 Research conducted by Yesh Din shows the Civil Administration consistently and systemically operates in a manner that conforms to Israel's objectives and interests, rather than the interests of the area in general. In most cases, this is done due to political pressure and as a tool for effecting Israeli political power and favoring it over the interests of the Palestinian population, which is not represented in decision-making and implementation processes. See: Yesh Din, **Through the Lens of Israel's Interests The Civil Administration in the West Bank** (December 2017), available on the Yesh Din website.

6 HCJ 5426/17 **Barkat et al. v. Head of Civil Administration et al**., Affidavit of Response on behalf of the Head of the

infringement on rights secured prior to the occupation, both in the case of persons present in the West Bank and in the case of absentees. Advancing settlement of title without this information is guaranteed to violate these persons' rights. It should be noted that the Israeli authorities have made no attempts to obtain the missing information over the years, even after the peace treaty with Jordan was signed. Israel has a vested interest in maintaining obscurity in order to stop Palestinians from acquiring land rights. T**herefore, the third reason for suspending settlement of title - incomplete information - remains in place more than five decades after the occupation began**.

The proposed settlement of title process annuls prior settlement of title processes in violation of international law

In the aforesaid context and given the number of absentees – whether by choice or by force - renewing settlement of title procedures without the full information gathered before 1967 effectively constitutes the revocation of any incomplete settlement of title cases up to 1967. The position which effectively seeks to undo everything that has been done so far, espoused by the Civil Administration, has been openly argued recently both in the Knesset committee discussion and in various legal proceedings. As noted, when the order to suspend settlement of title was issued, the MAG took the view that the military order had suspended or delayed settlement of title rather than revoked it. Now, Israeli officials, led by the Civil Administration, are seeking to revoke settlement of title procedures that have already taken place, or erase any evidentiary-proprietary meaning they might have had. This is added to the fact that some absentees have been denied access to the West Bank in recent decades and have been unable to make their case as a result. **Revoking settlement of title procedures that have already taken place defies international law and may violate the rights of Palestinian residents who have thus far been barred from registering the land in their name (in East Jerusalem, for instance, this was avoided as settlement of title continued from the point at which it ended)**.

Unlike ordinary settlement of title, in which the state or the sovereign presumably has no agenda with respect to the land, Israel strives to build settlements. In this context, pursuing settlement of title is a political act of de facto annexation that will inevitably result in massive landgrab in Area C.

During a meeting of the Knesset Foreign Affairs and Defense Committee, settlement of title was presented as one of the tools for achieving the overarching goal of prevailing in the "battle for Area C" against the Palestinian Authority. Statements to that effect were made by both MKs present at the session and by some of the professional experts in attendance, first and foremost, the Head of the Civil Administration himself. These statements suggest renewing settlement of title is meant to block moves attributed to the Palestinian Authority

Civil Administration, January 2019, and Response to Request for Further Details, June 2019.

(there is no indication that such moves are actually taking place, and, if they were, they would have no practical meaning or validity). Framing settlement of title in this manner paints the entire plan in political colors and demonstrates clear annexationist aspirations on Israel's part.

The authorities performing settlement of title have a tremendous advantage, both with respect to information, knowledge, data and interpretation, and in terms of actual control of the land, given that the sovereign is the title holder to any land regarding which there is no proof of ownership or where no such proof has been requested. Whoever executes settlement of title on behalf of the Israeli authorities has a clear interest in rejecting any title claims by Palestinians, as evidenced over the years in relation to declarations of state land and the manipulative way in which they were made. In addition to these, anyone in possession of real property at the time settlement of title takes place usually has an inherent advantage, a significant fact given the prevalence of illegal Israeli presence on West Bank lands (whether through illegal construction or agricultural invasions on a massive scale). **Advancing policies and doctrines whose ultimate goal is the annexation of the area to Israel is a breach of international law, which prohibits the annexation of territories occupied during or as a result of armed conflict**.

In practice, forcing settlement of title has all the appearance of application of sovereignty by the Government of Israel, as it seeks to register land included in such a process (all of it in Area C) in the name of the "sovereign" in the area. This ambition is designed to advance three goals: (a) Creating a biased, manipulative and erroneous database that will minimize options for registering land in the name of Palestinian title holders. The idea behind this is that reducing the overall area of land under Palestinian ownership in Area C will smooth the path towards annexation or towards the dismissal of any claims by Palestinians to these lands. (b) Cementing a distinctly sovereign act by the power purporting to be the permanent sovereign in the area. (c) Continuing the policy practiced by Israeli authorities for decades - allocating land to Israelis almost exclusively.[7]

Over the years, this policy has been pursued through state land declarations, which were intended primarily to take over as much West Bank land as possible and allocate it to Israeli individuals and entities (often retroactively, after illegal outposts and settlements had been built). There is no reason to believe this policy and the manner in which it was pursued

7 Since 1967, only about 1,625 dunams of state land have been allocated to Palestinians. For the sake of comparison, from the 1970s to the mid-aughts, the Civil Administration allocated about 450,000 dunams of state land in Area C to the World Zionist Organization Settlement Division for the purpose of housing Israelis. Roughly 3,500 more dunams were allocated to the Ministry of Defense for use by the IDF, and still more land was allocated to Israeli farmers and Israeli-run industrial zones and gas stations (see: State Comptroller, **Annual Report 63B** (2103), pp. 165-174 (in Hebrew), **Annual Report 56A**, p. 218 (in Hebrew). For more on this, see, HCJ 2055/17 **Head of Ein Yabrud Council et al. v. the Knesset** (judgment dated June 9, 2020, paragraph 49 of the opinion of Chief Justice Esther Hayut). The petition challenged the Regularization Law, designed to retroactively approve illegal construction on privately owned land. See also, Roni Pelli, "The Paradox Judgment: In the wake of HCJFH 9367/17 Ziada et al. v. Head of IDF forces in the West Bank", **Law Online: Human Rights**, Jurisprudence Commentary No. 84 (2018) (in Hebrew).

would change if settlement of title were carried out, specifically given the political goals of such an endeavor.

For all intents and purposes, all acts that effectively apply sovereignty seek to advance annexationist measures in defiance of international law and will, without a doubt, violate the rights of many Palestinians, primarily absentees who are not physically present in the West Bank.

The position taken by the Civil Administration on settlement of title renewal is inseparable from other developments regarding land registration in the West Bank in recent years. Under existing laws, as a rule, only Palestinians may register as private landowners in the West Bank. While Israelis are officially banned from doing so, they get around this limitation by setting up companies, registering them in the Civil Administration's Registrar of Companies and putting land under the company name. These companies are considered Palestinian entities for legal purposes but are controlled by Israelis. Several years ago, the LA-JS issued a legal analysis calling for the removal of the impediment to private registration of land by Israelis on the grounds that it is "discriminatory". Allowing Israelis to register land privately in conjunction with settlement of title could result in a situation where the state encourages Israelis to register land in their name, which would function as a way to "privatize" the perpetuation of Israeli presence in the West Bank. This would also create a false symmetry between the rights of Israelis and Palestinians in the West Bank.

Another issue of note is the exclusion of Palestinians from the entire settlement of title renewal process, including the design of its implementation procedures. Considering the law governing settlement of title and the procedures used to carry it out have been frozen in time since 1968 (partly because the laws of occupation prohibit changes to local laws unless absolutely necessary and in order to serve the interests of the protected persons and the occupied territory only), it is reasonable to assume that should settlement of title resume, the legal arrangements and implementation procedures would undergo many modifications, some warranted by the legal and geographic changes that have taken place over the years, others needed in order to make procedural adaptations (for instance to accommodate the fact that there are no civil courts in Area C of the West Bank).

International human rights law sets out to establish people's right to participate in determining the norms that apply to them and protect their rights, including the right to property. Settling land title has many implications for the public at large and for each of the individuals who take part in it. For this reason, it should be undertaken in a manner that allows those affected to have a say both on the principles and on how they are implemented.

The regime in the West Bank is not a democratic one. Palestinians living under occupation are not part of legislative and decision-making processes (unlike Israelis living in the West Bank who participate via their elected officials in the Knesset - who have debated the matter and reached a decision to pursue it). Nevertheless, any changes made to laws (for instance, the law barring non-Palestinians from acquiring title to land and registering as title

holders) or to the settlement of title mechanism would be a violation of international human rights law with respect to the duty to include the relevant public in the establishment of norms and procedures that apply to it.

Conclusion

Israel suspended settlement of title in the occupied territories shortly after the occupation and has refrained from renewing it in the 53 years since for a variety of reasons stemming from limitations prescribed in international law: Whereas international law prohibits annexation or actions tantamount to annexation in areas captured during armed conflict, settlement of title is a distinct mark of sovereignty. Additionally, as many absentees remain outside the West Bank and have been unable to take part in the procedure, measures must be taken to safeguard their rights so long as the occupation remains in place. Furthermore, absence of complete information about previous settlement of title procedures, particularly those that were launched but not completed, along with the Civil Administration's dismissal and denial of steps taken by the Jordanian authorities up to 1967, will inevitably result in an impingement on Palestinian residents' property rights.

None of these constraints have disappeared or weakened over the years. If anything, the passage of time has only further complicated ascertaining the state of land registration prior to the Israeli military's invasion of the West Bank and hinders finding the absentees who have since scattered all over the world and whose relatives might have no knowledge of land to which they have title.

Israel's policy throughout the occupation has been oriented towards transferring as much land as possible to Israeli possession and denying, to the greatest extent possible, Palestinians' rights to lands with undetermined status. Israel has employed a variety of methods and measures to achieve this. Pursuing and advancing settlement of title while ignoring developments from the past decades along with everything that came before the occupation of the West Bank is designed to serve Israel's political interests in the West Bank. These interests lie at the core of the attempts to advance a decision on renewing settlement of title in Area C in the West Bank. Settlement of title is pursued as a way of solidifying Israel's takeover of this area as part of an assertion of sovereignty and de-facto annexation or in preparation for future annexation. Since there is no oversight and no public involvement in the decision to renew settlement of title, decisions on this matter are made by an extremely narrow government forum composed of the Prime Minister and Minister of Defense alone and are based on narrow political considerations and nothing more.

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