

# The Age of Regularization

The Zandberg Committee Expropriation Report for  
Retroactive Authorization of Israeli Outposts and  
Illegal Construction in the Settlements:  
Analysis, Ramifications and Implementation



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Founders for human rights  
Position paper  
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Cover photo: the Israeli settlement of Kochav Hashachar, August 2017  
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## Glossary

**Private Palestinian Land** - Land privately owned by Palestinians. Israel halted the land registration process in the land registry (known as the Tabu) in the West Bank in 1967. Up to that time, only 30% of the land in the West Bank had been recorded as privately owned, and registered under the name of the Palestinian owners.

**Public Land (State Land)** - Land registered in the land registry as government property on behalf of the Jordanian Kingdom, as well as land the Israeli military administration declared - in a controversial procedure - as not privately owned. This land is managed by the military administration and is meant to serve the public. The Israeli military has allocated the vast majority of public land to serve Israeli settlements in the West Bank.

**Settlements** - Throughout the occupation, successive Israeli governments have initiated, approved, planned and funded the establishment of Israeli settlements in the West Bank, and have encouraged Israeli citizens to move to these settlements through a variety of benefits and financial incentives.<sup>1</sup> There are currently 128 settlements in the West Bank located within the jurisdiction areas of 24 different Israeli municipalities, local councils and regional councils, with a total population of 413,000 Israeli civilians.<sup>2</sup> Although international law prohibits the establishment of Israeli settlements in the occupied territory, Israel's Supreme Court has avoided deliberating the issue, claiming it is political and therefore non-justiciable.<sup>3</sup> For this reason, the Government of Israel treats the government-approved establishment of settlements on public (state) land as legal.

**Unauthorized Outposts** - In response to international pressure and diplomatic undertakings, in 1992, the Government of Israel passed a resolution to desist from establishing new settlements in the Occupied Palestinian Territories.<sup>4</sup> Four years later, in 1996, the government determined that the establishment of a new settlement would require the approval of the entire government, and that of the minister of defense at several planning stages.<sup>5</sup> To circumvent these decisions, beginning in the mid 1990s, Israeli settlements were established without official government approval, but with direct and indirect involvement and support from various

- 1 For more on this, see, e.g.: B'Tselem, **By Hook and by Crook: Israeli Settlement Policy in the West Bank**, July 2010; Peace Now, **National Priority Zones and the Settlements**, 2009 (updated in 2011) (Hebrew); Lilach Weisman, "Government Approves: 90 Settlements on the National Priority Zones Map", **Globes**, August 4, 2013 (Hebrew).
- 2 Ministry of Interior, Population and Immigration Authority, **List of Israeli Localities** (updated on October 3, 2018) (Hebrew); Central Bureau of Statistics, "Localities and Population by District, Sub-District and Type of Locality", **Statistical Abstract of Israel 2017** (Hebrew).
- 3 HCJ 4481/91 **Gavriel Bargil et al. v. Government of Israel**, IsrLR 158, 1992-4, judgment delivered August 25, 1993.
- 4 [Government Resolution No. 360](#), November 22, 1992 (Hebrew).
- 5 Government Resolution No. 150, August 2, 1996 (Hebrew).



public authorities and institutions on behalf of the state. These settlements were termed “unauthorized outposts”. The Sasson Report<sup>6</sup> defines unauthorized outposts as communities which do not fulfill at least one of the following four conditions: (1) The government officially decided to establish the community; (2) The land is public (state) land or owned by Jews; (3) The community was established according to a detailed master plan, pursuant to which a building permit may be issued; (4) The community’s jurisdiction area is determined in an order issued by the commander of the Area.<sup>7</sup> There are currently over 100 unauthorized Israeli outposts in the West Bank.

**Jurisdiction Area** - The municipal borders of a local or regional authority, as stipulated in the order issued by the military commander of the Area (GOC Central Command). The jurisdiction area assigned to Israeli settlements includes most of the land Israel defines as “public land”. The area of jurisdiction of many settlements cover a much larger area than they use in practice.<sup>8</sup>

**Master Plan (Zoning)** - A legal document that regulates permitted use of an area. Master plans designate land use (construction for residential, public, commercial, and other purposes), and serve as the basis for issuing building permits. Master plans in the West Bank are authorized by the Supreme Planning Council and its subcommittees. This is a Civil Administration body whose members are relevant experts and military lawyers; Palestinians have no representation in the committee. Construction without or in breach of a master plan, as well as use of land in contravention of the zoning designations of a valid master plan are illegal.

**The Blue Line Team** - The name given to a team established in 1999 by the Civil Administration and tasked with examining past Israeli declarations of public land in the occupied territories during the 1970s and 1980s, when hundreds of thousands of dunams were declared public land (1 dunam is 1000m<sup>2</sup> or roughly a quarter acre). The purpose of the examination is to ensure that planning and land allocation proceedings are advanced strictly on public land, where, according to Israel’s position, Israeli settlements are permitted.

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- 6 The **Sasson Report** is the opinion authored by Adv. Talya Sasson at the request of then Prime Minister Ariel Sharon. The report was submitted to the prime minister in February 2005. The government endorsed the report’s findings and recommendations in Government Resolution No. 3376 of March 13, 2005. Attorney General Meni Mazuz acknowledged the four conditions Adv. Sasson set for defining an unauthorized outpost. The report includes a detailed review of the involvement of Israeli authorities and public figures in the establishment of outposts.
- 7 Adv. Talya Sasson, **Opinion Concerning Unauthorized Outposts, Jerusalem**, February 2005, pp. 20-21 (Hebrew) (hereinafter: Sasson Report). [A summary of the report in English](#).
- 8 Peace Now, **Ufaratzta - The building and development of settlements outside official jurisdiction**, July 2007 (Hebrew).

**Land seized for military purposes** - Private Palestinian land seized by military order issued by the military commander of the Area (GOC Central Command) for necessary, urgent military purposes. Seizure does affect ownership of the land but rather temporarily expropriates the right to use it, transferring it to the military until there is no longer a necessary and urgent military need.

## Foreword

The Zandberg Committee was appointed to provide the Government of Israel with legal tools for retroactively authorizing (also referred to as ‘regularizing’) illegal Israeli construction undertaken in the West Bank with the support of Israeli authorities.

The report concluding the work of the Zandberg Committee<sup>9</sup> suggests unprecedented solutions for approving unauthorized Israeli construction undertaken in breach of the law, ostensibly legalizing it by **changing the legal reality** that has been the norm in the West Bank. The committee’s recommendations brazenly bend legal interpretation to the will of the Israeli government, which seeks to change the status of Israeli structures, neighborhoods and outposts, such that it retroactively provides them legal status.

An analysis of the report in conjunction with implementation measures already put into place and statements made by the top Israeli officials responsible for implementation signals that we are in the midst of a new reality, which may be called **“the age of regularization”**, spearheaded by the Government of Israel. **Over the course of two to three years, the Government of Israel is expected to retroactively authorize 99% of the unauthorized Israeli outposts<sup>10</sup> and thousands of structures in illegal neighborhoods inside settlements. Additionally, the government is also expected to approve the establishment of 20 new Israeli settlements in the occupied territory as part of the ‘regularization’ process.**

The outposts and neighborhoods covered by the retroactive approval pathways suggested in the Zandberg Report were established years ago as a tool for illegal takeover of Palestinian land, infringing on Palestinian landowners’ property rights. The Government of Israel now seeks to launder these offenses and reward the offenders. In ‘regularizing’ the vast majority of the unauthorized outposts and the illegal construction in the Occupied Palestinian Territories (OPT), Israel is institutionalizing and normalizing the landgrab, and granting it legal status. **The implementation of the Zandberg Committee recommendations, which mean expropriating the private property of one party and handing it over to another on the basis of ethnicity, is the adoption of an openly racist policy.**

9 Expert Committee for the Regularization of Construction in the Judea and Samaria Area, [Concluding Report](#), February 15, 2018 (Hebrew) (hereinafter: Zandberg Committee Report).

10 A total of 70 unauthorized outposts that have not yet been retroactively authorized. The Sasson Report and the Spiegel Report, both official state reports, published in 2005 and 2007 respectively, counted some 100 unauthorized outposts throughout the West Bank. In the last few years, about 30 of these have been retroactively authorized or are at advanced stages of retroactive authorization. See: Yesh Din report, [Under the Radar: Israel's silent policy of transforming illegal outposts into official settlements](#), March 2015 (hereinafter: Yesh Din Report: [Under the Radar](#)). (The following outposts were retroactively approved after the report was published: Tapuach Ma'arav, Mitzpe Danny, Adei Ad, Mitzpe Kramim and Reim. There may be others).



While the Zandberg Report concerns the West Bank, home to nearly three million Palestinians, Palestinians themselves are, astonishingly, almost entirely absent from the report. The word Palestinian appears in the report only three times, and only in reference to citations from the state comptroller's report and High Court jurisprudence. When the authors of the report had no choice but to face the fact that Palestinians do, in fact, live in the West Bank, they opted for the term "protected persons", which originates in international law. This is merely lip service. The entire report is dedicated to finding ways to provide a semblance of legality to landgrab, dispossession of Palestinians on a large scale and blatant violation of their rights and protected status, all in the service of Israeli settlements.

This position paper presents and analyzes the main findings of the Zandberg Report regarding the obstacles to 'regularizing' illegal construction and its recommendations on how to overcome them. The position paper also reviews implementation measures that have already been put in place and estimates regarding the number of Israeli outposts and structures the Zandberg Report refers to but refrains from listing. This review is followed by a discussion of some of the implications of implementing the committee's recommendations, and the differences between the Zandberg Committee report and the Regularization Law.

International law prohibits the establishment of settlements in the occupied territory.<sup>11</sup> Israel's Supreme Court has avoided deliberating on the issue, claiming it is political and therefore non-justiciable.<sup>12</sup> For this reason, the Government of Israel treats establishing Israeli settlements with government level approval on public (state) land in the West Bank as legal. The analysis in this position paper follows the state's line of argument that settlements can be built legally, a position Yesh Din rejects.

The term 'regularization' (hasdara in Hebrew) appears throughout this position paper for the sake of convenience and clarity, but it is important to remember that 'regularization' is a euphemism for whitewashing landgrab and lawlessness. 'Regularization' means violating

11 **Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949)**, Art. 49(6). This article prohibits the occupying power from deporting or transferring parts of its own civilian population into the occupied territory. According to accepted interpretation, this prohibition is violated even if the population migrating into the occupied territories is not coerced to do so and certainly when the migration is supported or encouraged by the state. According to ICRC commentary, the drafters of the convention sought to preserve a demographic status quo in occupied territories. Successive Israeli governments have [interpreted](#) the prohibition on transferring population into the occupied territory as applying to coerced transfers only and claimed that since Israeli civilians move to the settlements voluntarily, international law is not violated. In contrast, in its [advisory opinion on the separation fence](#), the International Court of Justice in The Hague ruled that the settlements were established in contravention of Art. 49(6), and [Resolution No. 446](#) of the UN Security Council from 1979. [The Rome Statute](#), the constitution of the International Criminal Court frames the prohibition in a manner that criminalizes both direct and indirect population transfers into an occupied territory. Given these interpretive developments, there is broad legal consensus that Israel's policy of enabling, encouraging and funding settlement activity is a violation of the prohibition on both direct and indirect population transfers into the occupied territory.

12 HCJ 4481/91 **Gavriel Bargil et al. v. Government of Israel**, IsrLR 158, 1992-4, judgment delivered August 25, 1993.

Palestinians' right to property and subordinating this right to the interests of Israeli settlers. In addition, the term is often used to obfuscate the establishment of new Israeli settlements in violation of both international law which prohibits the establishment of settlements in occupied territories and Israel's own international undertaking not to build more settlements in the OPT.<sup>13</sup>

## Background on the establishment of the Zandberg Committee ('Regularization Committee')

In 2011, Israel's position on the legal status of the unauthorized outposts began shifting. Alongside the known, official track of promoting and approving plans for construction in the Israeli settlements, the government began quietly pursuing the retroactive approval of unauthorized outposts.

The publication of the Levy Committee<sup>14</sup> report in 2012 was part of this shift. The Levy Committee report presented a legal doctrine whereby the laws of occupation do not apply to the West Bank and there is no impediment to or prohibition on building Israeli settlements there. Based on this position, the Levy Committee recommended several concrete steps for the approval of all construction previously deemed unlawful under Israeli law and the further entrenchment and expansion of Israel's settlement enterprise in the West Bank. The Government of Israel never officially adopted the Levy Report, but in the years since its publication, the government has pursued many of its recommendations, relying on them to promote the retroactive approval of dozens of unauthorized outposts.<sup>15</sup> Some of the measures taken toward retroactive approval encountered legal and planning obstacles that impeded their completion.

To find solutions for these legal and planning obstacles, in July 2015, the government appointed a team for outpost 'regularization' headed by Dr. Avichai Mandelblit, then the

- 13 Israel's most notable undertakings to refrain from building new settlements were given during the Rabin government in 1992 (expressed in [Government Resolution No. 360](#) (Hebrew), November 22, 1992 and in Military Order [No. 1385](#) (Hebrew) concerning a moratorium on planning procedures); as well as during the Sharon government in 2003, when the Government of Israel accepted US President George W. Bush's [Road Map](#). In 1996, the government passed a resolution that the establishment of a new settlement would require the approval of the entire government, and each phase of planning would require the approval of the minister of defense. Government Resolution No. 150, August 2, 1996.
- 14 **Report on the Status of Building in Judea and Samaria** (hereinafter: Levy Report) Jerusalem, June 21, 2012 (Hebrew). [English translation of the conclusions is available on the website of the UN.](#)
- 15 See, Yesh Din report: **From Occupation to Annexation: the silent adoption of the Levy report on retroactive authorization of illegal construction in the West Bank**, February 2016. (hereinafter: Yesh Din report, [From Occupation to Annexation](#)).

government secretary and currently the attorney general.<sup>16</sup> The establishment of the team was part of the coalition agreement between the governing Likud party and the Jewish Home party.<sup>17</sup> The Zandberg Committee continued the work started by the Mandelblit team.<sup>18</sup>

## About the Zandberg Committee

The Zandberg Committee was appointed in February 2016 by Israeli Prime Minister Benjamin Netanyahu. According to the Letter of Appointment, the committee was established as “a professional team for the purpose of drafting a plan for regularizing structures and neighborhoods in Jewish settlements in Judea and Samaria constructed with assistance from the authorities”.<sup>19</sup>

The committee was headed by Dr. Haya Zandberg, former director of the State Attorney's Office Department for Civil Matters. In March 2018, Zandberg was appointed to the District Court.<sup>20</sup> The other members of the committee were Adv. Ahaz Ben Ari, then legal counsel to the Ministry of Defense, Adv. Ronen Peretz of the government secretariat, Binat Schwartz, then the director of the Planning Administration and Dr. Chagai Vinizky, of The Academic Center for Law and Science School of Law.<sup>21</sup> Other participants in committee discussions were Adv. Amir Fischer, an external consultant on settlement affairs at the Ministry of Justice with close ties to right wing organizations who was appointed by Minister of Justice Ayelet Shaked,<sup>22</sup> as well as Kobi Eliraz, settlement advisor to the minister of defense.

16 Shlomo Pyutrevovsky, “Let Judea and Samaria Residents Stop Worrying”, **Arutz 7**, July 21, 2015. (Hebrew).

17 Coalition Agreement for the Establishment of the 34th Government of Israel between the Likud Faction and the Jewish Home Faction, May 7, 2015, (Hebrew), Section 84.

18 **Zandberg Committee Report**, Annex A: Letter of Appointment.

19 **Ibid.**

20 Justice Zandberg's appointment to head the 'regularization committee' was publicly criticized since the Judicial Appointments Committee, headed by Justice Minister Ayelet Shaked was considering her for the District Court at the time. See: Revital Hovel, “Israeli Justice Minister's Pick for Judge: A Lawyer Who Backed West Bank Settlements”, **Haaretz English website**, July 18, 2018; Revital Hovel, “Who Really Wrote the New Outpost Report?”, **Haaretz**, May 23, 2018 (Hebrew).

21 Adv. Ahaz Ben Ari and Binat Schwartz retired from public service before the committee released its report and recommendations. According to media reports, the two did not take part in the writing process and the report was not provided to them prior to its conclusion, even though they had participated in the committee's work until their retirement about a year ago. Revital Hovel, “Who Really Wrote the New Outpost Report?”, **Haaretz**, May 23, 2018 (Hebrew).

22 Until recently Adv. Amir Fischer served as legal counsel for right wing organization Regavim. He has also represented Israeli settler bodies such as the Susiya Cooperative Association, Hebron Hills Regional Council, Sansana Settlement Committee, and residents of the outposts of Amona and Migron and others.

## The status of the Zandberg Report and steps for its implementation

The Zandberg Committee submitted its concluding report to the prime minister on February 15, 2018. Unlike previous reports concerning illegal construction by Jews in the West Bank, such as the Sasson Report and the Levy Report,<sup>23</sup> the Zandberg Report was not submitted to the government in an official ceremony and was never officially published.<sup>24</sup>

Some of the recommendations included in the report were already being implemented before the committee concluded its work. According to Minister Shaked: “We have been relying heavily on the solutions recommended by the regularization committee during the past two years [...]”.<sup>25</sup>

According to the Zandberg Committee’s letter of appointment, signed by the prime minister, implementation of its report does not require it to be adopted by government resolution, and the Government of Israel would pursue implementation of the recommendations after they are reviewed by Attorney General (AG) Dr. Avichai Mandelblit.<sup>26</sup> As noted, Mandelblit headed the first ‘Regularization Committee’ which was succeeded by the current committee. In his current role as AG, Mandelblit adopted two opinions authored by committee members,<sup>27</sup> and, as a result, they were presented as the state’s position in High Court hearings. Given the conflict of interests arising from Mandelblit having served as head of the first ‘Regularization Committee’, Yesh Din asked the AG to recuse himself from reviewing the report and its recommendations.<sup>28</sup> In response, the legal advisor to the Ministry of Justice stated: “[...] I have not found that this case presents special circumstances giving rise to concerns over a conflict of interests that would justify the attorney general’s refraining from addressing it”.<sup>29</sup>

23 For the Sasson Report and the Levy Report, see supra notes 6 and 14 respectively.

24 News that the committee had completed its work and submitted its report to the prime minister reached the public only in May 2018 thanks to media reports. Nadav Shragai, “Legal team recommends retroactively approving thousands of West Bank homes”, **Israel Hayom English website**, May 4, 2018.

25 Akiva Novik, “Confiscation of land and Digging Tunnels: This is how Judea and Samaria Settlements Will be Approved”, **Channel 10 News**, May 5, 2018 (Hebrew).

26 **Zandberg Committee Report**, p. 125. Annex A: Letter of Appointment.

27 The opinion of Dr. Chagai Vinizky regarding Section 5 of the Order regarding Governmental Property and the opinion of Adv. Ahaz Ben Ari regarding consolidation and subdivision attached as Annexes C and E to the Zandberg Committee Report.

28 Atty. Shlomy Zachary of Yesh Din’s legal team to Attorney General Adv. Dr. Avichai Mandelblit, **Report of the Expert Committee for the Regularization of Construction in the Judea and Samaria Area of February 2018**, May 13, 2018.

29 Adv. Leah Rakover, Legal Advisor to the Ministry of Justice to Atty. Shlomy Zachary of Yesh Din’s Legal Team, **Report of Expert Committee for the Regularization of Construction in the Judea and Samaria Area**, December 24, 2018.

The government officials in charge of implementing the report are the minister of defense, a portfolio held until recently by Avigdor Lieberman and now by Prime Minister Benjamin Netanyahu, Minister of Justice Ayelet Shaked and Minister of Agriculture Uri Ariel, whose offices were all involved in the committee's work.

## The implementation task force at the Prime Minister's Office (PMO)

The Security Cabinet appointed a "Task Force for the Regularization of Structures and Neighborhoods in Judea and Samaria" to implement the Zandberg Committee recommendations within three years. A May 2017 government resolution establishes the team, allocates it a 5 million NIS annual operating budget as well as ten positions reporting directly to the PMO.<sup>30</sup> The chair of the implementation task force is Pinchas Wallerstein,<sup>31</sup> a prominent member of Gush Emunim and the Yesha Council who served as the Head of Binyamin Regional Council in the West Bank for 29 years.<sup>32</sup>

The Knesset Internal Affairs and Environment Committee oversees the implementation task force's work and periodically reviews the progress of 'regularization' measures. During the committee's first discussion of the issue in July 2018, it was argued that other than Wallerstein no additional team members had been appointed and the promised budget had not been delivered.<sup>33</sup> Nevertheless, Wallerstein was reportedly working with the Civil Administration and the Ministry of Defense to establish a comprehensive database of all illegal structures and unauthorized outposts in the West Bank which the government was seeking to 'regularize' and the expected 'regularization method', in accordance with the Zandberg recommendations.<sup>34</sup>

During the second Internal Affairs Committee discussion in October 2018, Wallerstein reported that five task force positions had been filled - four by Civil Administration staff members and one by a member of the Office of the Legal Advisor for the West Bank, and that the

30 [Security Cabinet Resolution No. 206/B](#) May 21, 2017. (Hebrew).

31 PMO, Press Release, "Pinchas Wallerstein Appointed to Chair Outpost and Home Regularization Team in the Judea and Samaria Area", October 26, 2017 (Hebrew).

32 As part of his past activities, Wallerstein was implicated in the illegal construction of a sewage treatment facility on privately owned Palestinian land in the settlement of Ofra. In a petition filed with Yesh Din's assistance challenging the attorney general's decision to reach a conditional arrangement with Wallerstein rather than indict him, the High Court of Justice ruled in a judgment authored by Supreme Court President Esther Hayut that Mr. Wallerstein and Avi Roeh (who replaced him as head of the regional council in 2008, and was also involved) had "Disrespected and disregarded the fundamental tenets of the rule of law" and that their conduct was, "therefore, severely morally flawed". [HCJ 8088/14 **Najah Mubarak Farhat v. Attorney General** (Ofra Sewage Treatment Facility), judgment September 27, 2017 (Hebrew). para, 15.].

33 Transcripts of Session No. 679 of the Internal Affairs and Environment Committee, 20th Knesset, July 2, 2018 (Hebrew).

34 Ibid.

team would be filling more positions shortly.<sup>35</sup> In addition, a representative of the Ministry of Justice had also joined the team a short while previously; this is likely Adv. Amir Fischer, who participated in the Zandberg Committee discussions and in drafting its recommendations.<sup>36</sup>

In addition to Wallerstein's task force, Kobi Eliraz, Defense Minister's Advisor for Settlement Affairs, who took part in the Zandberg Committee sessions and senior Civil Administration officials are also involved in implementing the Zandberg Committee recommendations and establishing the database.

## The main points of the Zandberg Report, its recommendations, and their significance and impact

The Zandberg Report provides the government with legal tools for retroactively approving unauthorized Israeli outposts and neighborhoods in the West Bank. The committee classified the outposts and neighborhoods whose status is difficult to 'regularize' according to three "archetypes": **"flaws uncovered retrospectively"**, **"suspended islands"** and **"existing settlement expansions"**.

The report does not list the outposts and neighborhoods slated for 'regularization', nor does it name the specific neighborhoods or outposts that fall under each of the archetypes. The authors of the report also refrained from providing examples to illustrate what type of localities fall under each archetype as a way of elucidating their suggestions. As stated, the implementation task force led by Wallerstein is working with the Ministry of Defense and the Civil Administration on preparing a database listing each of the localities Israel seeks to 'regularize' and its matching 'regularization track'.

The report explicitly states that it does not address the retroactive authorization of unauthorized outposts built without a government decision.<sup>37</sup> Contrary to this statement, many of the issues the report seeks to resolve are characteristic of unauthorized outposts, which are independent communities established without a government decision and in

35 Transcripts of Session No. 714 of the Internal Affairs and Environment Committee, 20th Knesset, October 15, 2018 (Hebrew), p. 13.

36 Nitsan Keidar, "Shaked to lead outpost regularization", Arutz 7, October 18, 2018 (Hebrew). The report mentions that the Ministry of Justice employs a "minister expert aide on settlement matters", which is Adv. Fischer's job description.

37 **Zandberg Committee Report**, p. 102, para. 479: "Note: **we do not address new communities or communities that have come to be called 'outposts'**. We do not address communities or neighborhoods established without a government decision. As stated, we address longstanding communities established by **official** government decision and with the **official** support of the government" (emphases in original). For more on unauthorized outposts see, Yesh Din Report: [Under the Radar](#), pp. 8-10.



breach of the law. In statements she made after the publication of the report, Minister of Justice Ayelet Shaked, who watched the committee's work closely, confirmed that the report enables retroactive authorization of dozens of unauthorized outposts.<sup>38</sup>

**Everyone involved in the implementation of the Zandberg Report - politicians and professionals alike - talk about retroactive authorization of outposts.** The Defense Minister's Aide for Settlement Matters, Kobi Eliraz, who was instrumental in preparing the report and now shares responsibilities for its implementation said during a session of the Knesset Internal Affairs Committee that **99% of the 70 outposts that have yet to be retroactively authorized - can be.**<sup>39</sup>

The Zandberg Committee stipulated four conditions that must be met for an Israeli settlement or neighborhood in the West Bank to be legally 'regularized':<sup>40</sup>

**Ownership:** The settlement or neighborhood must be located on public land (land registered or declared as state land), land lawfully in the possession of the state or land lawfully purchased by an Israeli citizen.

**Planning:** The settlement or neighborhood complies with planning and building laws. In other words, construction in the settlement is in keeping with building permits issued pursuant to a valid plan approved by the planning institutions.

**Municipal:** The settlement or neighborhood either belongs to a regional council or the settlement is a local council by its own right.

**Government approval:** The settlement was established by government resolution.

The next section presents the main findings in the report with respect to the challenges to approving each of the archetypes of illegal construction and the committee's recommendations on how to overcome these respective challenges and 'regularize' such construction.

38 Nadav Shragai, "Legal team recommends retroactively approving thousands of West Bank homes", **Israel Hayom English website**, May 4, 2018.

39 Transcripts of Session No. 679 of the Internal Affairs and Environment Committee, 20th Knesset, July 2, 2018, pp. 21-22 (Hebrew). Eliraz said during this session that about 30 of the 100 outposts mentioned in the Sasson Report had already been 'regularized'. For more information about these retroactive authorizations see: Yesh Din Report: [Under the Radar](#).

40 The four conditions were established in High Court rulings and in the **Sasson Report**. HCJ 5853/04, **Amana v. Prime Minister**, IsrSC, September 20, 2004 (Hebrew).

## “FLAWS UNCOVERED RETROSPECTIVELY” | ARCHETYPE 1

Structures and neighborhoods built on land believed to be public land (state land), but in time, the Civil administration Blue Line Team<sup>41</sup> examination revealed that was not the case and the land was deleted from the roster of public land. In other words, these are structures on land that had been erroneously considered public land and later revealed to be privately owned Palestinian land.

**This archetype spans some 2,700 to 3,000 structures**,<sup>42</sup> located in expansions or neighborhoods of approved Israeli settlements, where construction was pursued under a planning institution-approved plan, on land previously considered public and **retroactively** found not to be such. **The lack of knowledge** that construction was pursued on private Palestinian land and was therefore illegal is a pivotal feature.

**Impediments to ‘regularization’:** Construction of this type cannot be ‘regularized’ on the proprietary level, as it was carried out on land that is not public.

The reason land allocated to settlements must be certified as public land stems from the centrality of the right to property in both Israeli and international law. The right to property is considered a fundamental right that also impacts the ability to exercise other rights, such as the freedom to choose an occupation, the right to housing and others. Because of its centrality, the right to property is enshrined in all three normative systems applicable to occupied territory - international humanitarian law (IHL, the laws of occupation), international human rights law as it applies in areas under belligerent occupation and Israeli administrative and constitutional law. All three systems require the occupying power to respect and protect the public and private property of the protected persons in the occupied territory. The state’s duty to uphold the right to property imposes both a negative obligation to refrain from infringing the property rights of protected persons and a positive duty to actively ensure they are able to exercise these rights and enjoy their property.

41 The Civil Administration Blue Line Team was established in 1999 for the purpose of examining Israeli declarations of public land in the 1970s and 1980s, when hundreds of thousands of dunams of land in the West Bank were declared public land. The simple methods and the scale used at the time made it impossible to know exactly where the borders of public land lay, partly due to the thickness of the line drawn on the maps (a marking referred to as the ‘blue line’). The Blue Line Team was set up to produce more accurate records of land declarations using advanced equipment that was not available at the time of the original declarations. See also: Glossary of terms, page 6 of this report.

42 Transcripts of Session No. 714 of the Internal Affairs and Environment Committee, 20th Knesset, October 15, 2018 (Hebrew). See, in particular, the statements of Pinchas Wallerstein on pp. 3 and 6, and the statements of Committee Chair Yoav Kisch on p. 30.

The obligation IHL imposes on the military forces on the ground to safeguard the property of protected persons in the occupied territory<sup>43</sup> has also been expressed in the jurisprudence of Israel's High Court of Justice,<sup>44</sup> and translated into a 1979 government resolution that the establishment and expansion of settlements in the West Bank would be pursued only on public land (state land).<sup>45</sup>

## THE COMMITTEE'S RECOMMENDATIONS:

The committee made two recommendations with respect to Israeli structures erected on private Palestinian land previously considered public land:

### 1 | USE OF THE *MARKET OUVERT* DOCTRINE

The committee's first recommendation addresses cases in which a Blue Line Team review found that Israeli structures were built on land allocated to Israeli settlements by the Supervisor of Governmental and Abandoned Property because it was considered public land. In these cases, the committee recommends to **leave the allocation intact and 'regularize' the status of these Israeli structures through the *market ouvert* doctrine.**

*Market ouvert* (or *marché ouvert*) is a legal arrangement that provides protection to parties who had purchased land based on erroneous records, or in cases land was sold by a party other than the owners. It is used in Israel as well, and is intended in part to preserve the authority of the land registry. Section 5 of The Military Order regarding Governmental Property stipulates that *market ouvert* applies in the case of parties who had entered into transactions with the Supervisor of Governmental and Abandoned Property in good faith: "Any **transaction entered into in good faith** between the Supervisor and any other party with regards to any property the Supervisor held to be governmental property at the time of the transaction shall not

43 [Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land](#) (The Hague, 1907), Art. 46 of the Regulations). (hereinafter: **Hague Convention (1907)**).

44 See e.g.: HCJ 7862/04 **Abu Daher v. IDF Commander in Judea and Samaria** (Hebrew), judgment, February 16, 2005.

45 Government Resolution No. 145, November 11, 1979 (Hebrew). This resolution was passed following the Elon Moreh judgment (HCJ 390/79 **Duweikat et al. v. Government of Israel et al.** ([unofficial English translation](#)), in response to which Israel stopped seizing private land and allocating it to settlements on the premise this was required for military needs.

be disqualified and shall remain valid even if it is proven that the property was not, at the time, governmental property”.<sup>46</sup>

Applying *market ouvert* means that **title to the land would be expropriated from the Palestinian owners** and transferred to the parties to whom the state allocated said land (i.e., Israeli settlers), whilst the original Palestinian owners would receive compensation from the state. The party in receipt of the allocation would retain all rights that would have ensued under the allocation agreement if the land had been public land.<sup>47</sup>

The committee maintains that *market ouvert* can be applied only with respect to structures built in **good faith**, meaning that the fact that the land is privately owned was unknown at the time of construction; and **lawfully**, meaning pursuant to a valid plan and with building permits. Additionally, *market ouvert* can only be invoked with respect to structures that are located within a built-up residential section of a settlement and where construction began prior to the discovery that the land in question is not public land. In other words, *market ouvert* cannot be used to retroactively authorize structures built outside built-up areas, or in areas that were not in use, even if they are located within the boundaries of a valid urban master plan.<sup>48</sup>

## APPLICATION AND MEANING

**Market ouvert** has been part of military-enacted legislation in the OPT since 1967. However, with rare exceptions, occupation authorities have refrained from invoking it. The search for a way around evacuating Israelis prompted the suggestion to depart from existing policy and utilize the doctrine. This refers to cases where Blue Line Team reviews revealed Israeli structures built on private Palestinian land that had been allocated to Israeli settlements because it was mistaken for public land.

*Market ouvert* can only be invoked under several conditions: First, there has to have been a transaction between the Supervisor and a settling body (normally the Settlement Division<sup>49</sup>), or between the Supervisor and an individual settler. This condition includes two terms: The transaction must have involved an exchange, and a

46 Order regarding Government Property (Judea and Samaria) (No. 59) 1967, Section 5 (Hebrew).

47 HCJ 1308/17, HCJ 2055/17, **Silwad Municipality et al. v. Knesset et al.**, Response on behalf of the Attorney General, November 22, 2017 (Hebrew) ('The Regularization Law').

48 **Zandberg Committee Report**, pp. 87-88, paras. 402-407.

49 The Settlement Division is the institution in charge of establishing and supporting Israeli communities on behalf of the Government of Israel. It is part of the World Zionist Organization, and its public activity is fully state-funded and subject to review by the State Comptroller.

land allocation agreement between the Supervisor and the other party must exist. The second condition is that all parties entered the transaction in good faith.

The AG released (an initial) opinion on the possible use of *market ouvert* in December 2016.<sup>50</sup> The Zandberg Committee recommendations on this issue relied in part on this opinion, as well as on a separate opinion authored by Dr. Chagai Vinizky and attached as an annex to the Zandberg Committee report.<sup>51</sup>

The Zandberg Committee recommendation on the *market ouvert* doctrine limits application to cases where both conditions are met: an actual transaction and good faith. It stands to reason that for cases where construction was pursued without building permits or an approved, valid master plan do not meet the good faith condition, as construction without a permit is an offense. The same holds true for structures built after Blue Line Team review results became known. This means that according to the committee's recommendations, *market ouvert* cannot be used to retroactively approve unauthorized outposts, because they were built without approved plans and in violation of the law.

Despite the committee's clear remarks, the *market ouvert* doctrine has already found its way into the position presented by the state regarding retroactive authorization in cases that do not involve errors in past public land declaration later discovered by the Blue Line Team. These include unauthorized outposts and locales on land that was never considered government property.

So, for instance, in summations filed with the District Court in a claim brought by residents of Mitzpe Kramim in July 2018, the state argued the AG's position was that *market ouvert* could also be applied to privately owned Palestinian land seized for military needs.<sup>52</sup> However, the land in question was never considered public land, a fact known to the relevant Israeli authorities at the time the seizure order was issued (otherwise, there would have been no need for a seizure order). According to the AG's position at the time, the *market ouvert* doctrine could apply if a finding was made that the Civil Administration had allocated the land to the Settlement Division in good faith (i.e., that the Supervisor of Governmental and Abandoned Property at the Civil

50 Attorney General's Office, **Summary of Discussion, Section 5 of the Order regarding Government Property** (Judea and Samaria), December 7, 2016 (Hebrew). This opinion served as the basis for the position presented by the State in a High Court petition concerning the plan to expropriate privately owned Palestinian land in the settlement of Ofra in order to retroactively approve parts of the settlement. HCJ 419/14 **Silwad Municipality, Ramallah District et al. v. Minister of Defense**, Response on behalf of Respondents 1-4, November 19, 2017 (Hebrew); the petition is still pending.

51 Dr. Chagai Vinizky, **Section 5 of the Order regarding Government Property**, Opinion (Zandberg Committee Report, Annex C).

52 See: Glossary of terms, page 7 of this report.

Administration believed, in good faith, that he was allocating government rather than private property); and if the residents of the outpost themselves also acted in good faith.<sup>53</sup> Nevertheless, despite this newly expansive approach to the *market ouvert* doctrine and the State's willingness to apply it in the West Bank, in the case of Mitzpe Kramim, the State held it was not possible to determine the conditions pertaining to *market ouvert* had been met.<sup>54</sup>

In the judgment, delivered in August 2018, the District Court accepted the State's arguments regarding the relevancy of good faith to the application of *market ouvert* in principle, but ruled *market ouvert* could be applied to the specific case of Mitzpe Kramim. The court ruled that in the case brought before it, Civil Administration officials believed the property was under their management, and, although they knew the land was privately owned, it must still be considered government property for all intents and purposes. The court further ruled that the tapestry of relations, promises and undertakings given by various officials to the residents of the outpost consolidates the residents' compliance with the good faith condition. Having made these findings, the District Court held that residents of the outposts of Mitzpe Kramim had earned a right not to have enforcement and eviction proceedings taken against them.<sup>55</sup> An appeal against this ruling is pending before the Supreme Court.

The AG's willingness to accept the idea in principle of applying the *market ouvert* rule to Mitzpe Kramim was part of the state's defense response to a suit filed against the state by the outpost residents. And yet, not long after the judgment in that action was delivered and before the Supreme Court ruled in the appeal, the AG released another opinion regarding *market ouvert*. The December 2018 opinion<sup>56</sup> states that utilizing *market ouvert* is a **"significant element of Government of Israel policy for the regularization of illegal construction in Judea and Samaria erected in good faith and with the involvement of state authorities"**. This opinion calls for **active application** of *market ouvert* by the government in order to secure proprietary rights for Israelis living on privately owned land in homes built unlawfully.

The opinion suggests a far wider application than the Zandberg Committee recommendations and employs a **broader interpretation of the requirements for a transaction and for good faith**. The opinion holds that *market ouvert* could be

53 CC 29754-11-13 **Angel et al. v. al-Fatah Salahah et al.** (Mitzpe Kramim), Summations on behalf of Defendant 4 (Civil Administration), July 3, 2018 (Hebrew).

54 Ibid.

55 CC 29754-11-13 **Angel et al. v. al-Fatah Salahah et al.** (Mitzpe Kramim), judgment, August 28, 2018 (Hebrew).

56 Attorney General's Office, **Application of Attorney General's Summary regarding Section 5 of the Order regarding Government Property (Judea and Samaria) - Supplementary Opinion**, December 13, 2018 (Hebrew).



applied even in cases of Israeli structures built without or in defiance of a master plan, and that investments in the form of development and construction of an area provide sufficient proof that construction was pursued in good faith. The opinion goes beyond approving existing construction, seeking to promote new planning procedures in the relevant areas in addition to retroactively securing the rights of persons occupying structures built illegally in the past.

Creating a government system that initiates and promotes recognition of numerous sites as public land lawfully allocated to those now occupying them, despite being privately owned property, constitutes a **proactive government measure with ramifications equal to those of expropriation** - i.e. the seizure of title and its transfer to other parties. The transformation of *market ouvert* from a “defense” argument into proactive government policy constitutes a substantive change in the manner in which this regulation is employed, and shifts the burden of proof to Palestinian landowners. The opinion also alters the bar of required proof and allows Israeli authorities in the West Bank to utilize *market ouvert* with few, if any, limitations.

The opinion also addresses the issue of the suitable legal mechanism for determining whether the conditions for *market ouvert* have been met and formulates the steps in such a procedure.

The *market ouvert* principle is incorporated in Israeli law (which does not apply to the West Bank), enabling recognizing a real estate transaction even when it is grounded in error.<sup>57</sup> This protection extends to the buyer of real estate in a transaction based on an error recorded in the land registry and is designed to preserve the authority of the land registry, among other reasons. However, the government does not have protection for a real estate transaction in the case of property it considers to be public land but is not. Legal scholar Dr. Ronit Levine-Schnur claims that the arrangement that anchors *market ouvert* in the military-enacted legislation in the OPT is unusual, problematic and flawed because it “infringes the private right to property and establishes a biased decision over competing rights without taking into account its influence on the parties involved, and their incentive to act with the appropriate caution from the onset.”<sup>58</sup>

57 Land Law – 1969, section 1. The Israeli Ministry of Foreign Affairs website <https://mfa.gov.il/MFA/PressRoom/1998/Pages/Land%20Law-%201969.aspx>

58 Dr. Ronit Levine-Schnur, **The Good, the Bad and the Ugly in the Mitzpeh Kramim Affair**. Jerusalem Juris – Hebrew University Law Professors Blog, August 30, 2018 (Hebrew). Dr. Levine-Schnur served as Legal Advisor at the Military Advocate General for Real Estate in the West Bank, and is now a lecturer at the Interdisciplinary Center (IDC) Herzliya with an expertise in property, planning and construction.

## 2 | HALTING BLUE LINE TEAM REVIEWS

The committee's second recommendation is forward looking and addresses localities where land status has not been reassessed by the Blue Line Team. The committee recommends the Blue Line Team cease its work in localities where structures were built in accordance to a valid plan approved by the planning institutions.<sup>59</sup>

### APPLICATION AND MEANING

The Zandberg Committee noted in its report that this recommendation was already being implemented: **the Blue Line Team no longer examines old public land declarations** or conducts work to accurately mark their boundaries in localities where structures were built within the boundaries of a valid master plan.<sup>60</sup> In other words, the Civil Administration has halted reviews that could reveal additional sites in which privately owned Palestinian land was erroneously allocated to Israeli settlements. With no more assessments, wrongful allocation of privately owned Palestinian land to settlements will remain unknown, and the Palestinian owners will not be entitled to compensation.

## “SUSPENDED ISLANDS” | ARCHETYPE 2

“Suspended islands” is the rather poetic title the committee gave to unauthorized Israeli outposts built on public land at a considerable distance from an approved Israeli settlement. In many cases, any access road to such communities runs through privately owned Palestinian land. Thus, access roads currently used by the Israeli residents were built unlawfully and take over private Palestinian property. In addition to being significantly removed from approved settlements, such communities were built without government approval, and without an approved and valid master plan.

Though the Zandberg Report explicitly states its recommendations do not extend to unauthorized outposts built without a government resolution, **the vast majority of the outposts in the West Bank, likely scores of outposts**,<sup>61</sup> fit this archetype. Many of these

<sup>59</sup> A similar directive was issued in February 2011 by the attorney general at the time, Mike Blass, but never implemented.

<sup>60</sup> In response to a petition regarding Blue Line Team operating procedures, the state related that following a discussion held in 2011 by then Deputy Attorney General Mike Blass, a list of issues that do not merit assessment by the Blue Line Team was compiled. HCJ 2911/17 **Peace Now v. Head of the Civil Administration**, Response on behalf of the Respondents, January 2, 2018 (Hebrew).

<sup>61</sup> This assessment is based on the remarks of Kobi Eliraz, Defense Minister's Aide for Settlement Matters at a Knesset Internal Affairs Committee session. Transcripts of Session No. 679 of the Internal Affairs and Environment Committee, 20th Knesset, July 2, 2018. pp. 21-23 (Hebrew).

outposts were built at considerable distance from an approved settlement and, in some cases, access roads were paved on privately owned Palestinian land.

According to a report in Haaretz daily newspaper, at least **13 outposts** have access roads that are built on privately owned Palestinian land, which presents an obstacle to retroactive authorization.<sup>62</sup> For instance, Haresha and Tapuach Ma'arav, are both outposts Israel seeks to but cannot retroactively authorize, as the proprietary status of their access roads, which pass through Palestinian land, cannot be resolved or 'regularized'. In addition to these, Yesh Din estimates **40 to 50 additional outposts** were built far from any approved settlement.

**Impediments to 'regularization':** Construction in "suspended islands" outposts currently precludes 'regularization' for two reasons. **Firstly**, in terms of planning, the distance of these localities from approved settlements is a violation of the contiguity principle in planning. This principle of modern planning requires that new neighborhoods be built in immediate proximity to existing neighborhoods, preserving urban continuity. **Second**, in terms of property rights, it is impossible to build access roads to these outposts without harming Palestinian property. This second impediment is a threat to 'regularization' because planning institutions will only approve master plans for communities if they include an access road.

## THE COMMITTEE'S RECOMMENDATIONS:

The Zandberg Committee made three recommendations regarding "suspended islands":

### 1 | DISMISSING THE PRINCIPLE OF CONTIGUITY

To overcome the planning difficulty, the committee recommended **applying the contiguity principle flexibly in the West Bank**. The committee states that: "a dogmatic, rigid application of this Israeli planning principle in Judea and Samaria might present difficulties to the feasibility of planning 'regularization' of 'suspended islands'..."<sup>63</sup>

62 Yotam Berger, "Israel's Attorney General Paves Way for Legalization of at Least 13 West Bank Outposts" **Haaretz English website**, November 18, 2017.

63 Zandberg Committee Report, p. 118.

## APPLICATION AND MEANING

As stated, **contiguity** is a central planning principle (applied inside Israel as well), according to which new neighborhoods are to be built in immediate proximity to existing neighborhoods, maintaining urban continuity. It is designed to serve public interests such as protecting the environment and reducing costs. "Applying the contiguity principle flexibly" strips the principle of contiguity - which is central to planning - of its meaning and compromises the public interests it is designed to protect.

Furthermore, given the far-reaching implications of building a new community (in Israel too, let alone in the West Bank), the establishment of a new community requires a decision to that effect be made by the competent authorities, and that this decision be accessible to the public and subject to public scrutiny.<sup>64</sup> These requirements are in place partly to prevent the establishment of de facto new communities disguised as neighborhoods in older, approved settlements. A "flexible" application of contiguity subverts these policies as well.

Retroactive authorization as proposed by the committee effectively creates two independent communities in a single area of jurisdiction. It contravenes the Israeli military orders that define Israeli settlement municipal areas of jurisdiction and stipulate that only one community may be established within an area of jurisdiction signed by the military commander.<sup>65</sup> The committee does not make such approvals contingent on necessary changes in plans, or any adjustments that would stop outposts from being run independently, with separate local governance institutions, and bring them under approved settlements as neighborhoods within them. It also ignores planning considerations such as infrastructure, public institutions, population distribution and environmental impacts and focuses on a single consideration - the drive to expand Israeli control and perpetuate Israeli settlements in the West Bank.

The committee blatantly ignores the duplicity of creating two communities disguised as one, as well as the implications this has in terms of planning and other aspects. In so doing, it lends a hand to false planning 'regularization' and abets in furthering the misrepresentation of independent outposts as neighborhoods, when, in reality,

64 According to the law applicable in the West Bank, the decision to establish **a new community will be made** by government resolution. (Government Resolution No. 150, August 2, 1996 (Hebrew)). **Expansions of West Bank settlements** require a decision by the Minister of Defense with the approval of the Prime Minister (Government Resolution No. 175, March 17, 1990 (Hebrew)).

65 The jurisdiction area of a settlement is determined by order signed by the OC Central Command. Only one community may be established within a jurisdiction area signed by the military commander. Local and regional councils in the West Bank are regulated under the Order regarding the Administration of Regional Councils (Judea and Samaria) (No. 783) 5739 (Hebrew) and Order regarding the Administration of Local Councils (Judea and Samaria) (No. 892) 5739 (Hebrew) respectively. These orders grant the OC Central Command the power to determine community jurisdiction areas in an order and on a map.

they are new distinct settlements. Scores of outposts are currently in the process of 'regularization' as "neighborhoods" within settlements, ignoring the fact that they operate as separate entities from the settlements, with separate institutions, and that, in some cases, the communities of the outpost and the settlement are entirely disparate.<sup>66</sup>

In suggesting this route, the Zandberg Committee effectively helps the government establish new settlements without paying the political and diplomatic price associated with such measures. Most of the "suspended islands" were established as independent communities (rather than as settlement neighborhoods) and still function as such. Misrepresenting outposts as neighborhoods is simply a way of circumventing the requirement to obtain government approval for a new community. The Government of Israel prefers to avoid a possible public outcry over the official establishment of new Israeli settlements in breach of Israel's undertaking to stop building settlements in the West Bank.<sup>67</sup> The solution the committee gives the government allows it to approve new settlements in practice, and yet evade domestic and international criticism.

Retroactive authorization through a flexible application of the principle of contiguity was discussed in detail in the Levy Report as well,<sup>68</sup> and, as noted, is already being implemented by the state in several outposts, including ones partly built on private Palestinian land.<sup>69</sup> For instance, in November 2015, the state announced its plan to retroactively authorize the outpost of Tapuach Ma'arav as a neighborhood of the settlement Tapuach,<sup>70</sup> as well as the plan to authorize the outpost of Mitzpeh Danny as a neighborhood of Ma'ale Mikhmas.<sup>71</sup> In August 2015, the state announced its plan to authorize the outpost of Adei Ad as a neighborhood of the settlement of Amihai;<sup>72</sup>

66 For instance, the state is advancing the 'regularization' of the outpost Mitzpeh Danny as a neighborhood in the settlement of Ma'ale Mikhmas, despite the significant geographic distance between the outpost and the settlement and the fact that these are two distinct, independent communities that belong to different Jewish streams: one ultra orthodox nationalist and one religious nationalist.

67 See supra note 13.

68 **Levy Report**, p. 45. See also: Yesh Din report: [Unprecedented: A legal analysis of the report of the Committee to Examine the Status of Building in Judea and Samaria \(The Levy Committee\)](#), January 2014.

69 For more on the retroactive authorization of outposts and the implementation of the Levy Report, see: Yesh Din Report: [Under the Radar](#); Yesh Din report: [From Occupation to Annexation](#).

70 HCJ 2297/15 **Hafez Mahmoud Abd al-Halim Ahmad, Head of Yasuf Village Council v. Minister of Defense** (Tapuach Ma'arav), Response on behalf of Respondents 1-4, November 19, 2015 (Hebrew).

71 HCJ 4621/13, 5383/09 **'Abdallah Muhammad v. Minister of Defense** ('Mitzpeh Danny'), Notice regarding Argument Brief on behalf of the State, November 8, 2015 (Hebrew).

72 Lieutenant Colonel Mali Meiri, Head of Civil Administration Infrastructure Field to Atty. Shlomy Zachary of Yesh Din's legal team, **Notice of Plan to Amend the Jurisdiction of the Settlement of Amihai**, August 1, 2015.

(note that Amihai was built after the outpost of Amona was evacuated, and did not exist when the outpost of Adei Ad was established, leaving no doubt that the outpost is not a neighborhood of a settlement established 19 years later).

The recommendation to apply contiguity flexibly, or ignore this guiding principle altogether, is reflected in the National Priority Map prepared by the Ministry of Housing and approved by the government in November 2018.<sup>73</sup> The National Priority Map is designed to encourage Israelis to move to certain communities that are included in the map by offering benefits and financial assistance, such as subsidies for land development and preferential loans provided by the state. The map approved by the government includes a criteria tailored for “neighborhoods” that are technically part of another community but, in practice, operate independently. According to the housing ministry’s own announcement, this measure was intended to extend benefits to remote settlements such as Migron, Kerem Reim and Shvut Rachel - three settlements that are technically considered neighborhoods of Kochav Ya’akov, Talmon and Shilo respectively.<sup>74</sup> According to the Ministry of Housing, this criterion applies to “new neighborhoods that are included in valid master plans, are not contiguous with existing neighborhoods in the same community and located at least one kilometer away from the parent settlement’s infrastructure such that they are unable to use most of the infrastructure servicing the parent settlement”.<sup>75</sup> Shortly after the government passed the resolution, AG Mandelblit halted its implementation pending his review. The AG charged that the housing minister had not obtained legal approval for the resolution, despite the AG’s express demand that he do so, and that the government passed the resolution despite being aware of this situation prior to voting.<sup>76</sup>

73 Government Resolution No. 4302, “Establishing National Priority Zones for the purpose of Construction and Housing Benefits”, November 25, 2018 (Hebrew).

74 Yotam Berger, “Isolated Israeli Settlements Get Favored Under New Funding List Approved by the Government”, **Haaretz English website**, November 25, 2018.

75 Ibid.

76 Yotam Berger, “Attorney General Accuses Minister of Mishandling Resolution That Favors Settlements for Funding”, **Haaretz English website**, November 29, 2018. It was later reported that Housing Minister Galant urged the AG to approve settlements after an attack in Ofra in December 2018. (Yotam Berger, “Galant to AG: Approve Benefits for Settlers after Ofra Attack”, **Haaretz**, December 11, 2018 (Hebrew)).



## 2 | DECIDING TO ESTABLISH A NEW SETTLEMENT

The second recommendation made by the committee was that in certain cases, “suspended islands” may be ‘regularized’ through a **government resolution to establish a new settlement**.<sup>77</sup>

### APPLICATION AND MEANING

According to Kobi Eliraz’s briefing to the Knesset Internal Affairs Committee, there are roughly 20 outposts that cannot be retroactively authorized as neighborhoods in existing settlements and their ‘regularization’ would require **government resolutions to build 20 new settlements**. Eliraz said this was a political move that would require “coordination overseas as well”.<sup>78</sup>

The need to “coordinate” the move “overseas” arises from the fact that establishing 20 new settlements throughout the West Bank would be a conspicuous departure from Israel’s international undertakings and from the official government resolution not to build new settlements in the West Bank, passed in the 1990s.<sup>79</sup> Israel has stood by this policy and successive Israeli governments avoided establishing new settlements over the years. Since 2011, however, this position has changed and Israel has been taking action to retroactively approve unauthorized outposts.<sup>80</sup> Most of the retroactive authorizations were pursued as quietly as possible, by declaring the outpost a neighborhood of an existing settlement, even though this was merely pretense. A very small number of outposts were approved by means of a resolution to establish a new settlement.<sup>81</sup> So far, the sharpest departure from the policy instituted in the 1990s was the establishment of the settlement of Amihai for residents of the unauthorized outpost of Amona who were evacuated in March of 2017.

In addition to the obvious political ramifications of establishing 20 new settlements, this recommendation provides a loophole for ignoring every legal and planning limitation, as well as violations of Palestinians’ rights. The recommendation enables ‘regularizing’

<sup>77</sup> Zandberg Committee Report, pp. 94, 100.

<sup>78</sup> Transcripts of Session No. 679 of the Internal Affairs and Environment Committee, 20th Knesset, July 2, 2018, p. 22 (Hebrew).

<sup>79</sup> See supra note 13.

<sup>80</sup> See Yesh Din Report: [Under the Radar](#).

<sup>81</sup> The outposts of Sansana, Rehelim (together with Nofei Nehemia) and Bruchin, were retroactively authorized through a resolution of the Settlement Cabinet from April 23, 2012, and became official settlements. The government established this special cabinet the day before. Government Resolution No. 4560, April 22, 2012 (Hebrew).

outposts even in cases the committee sees no appropriate solution, by its standards, for the impediment to 'regularization'.

### 3 | EXPROPRIATING LAND FOR ACCESS ROADS

The third recommendation made by the Zandberg Committee addresses the proprietary impediment, namely, **expropriating land for access roads** to these outposts. This recommendation is in line with the position expressed by AG Avichai Mandelblit regarding 'regularization' of an access road to the outpost of Haresha, which he provided at the request of Minister of Justice Ayelet Shaked.<sup>82</sup> The AG's position relies on a recent High Court ruling given in Ziada (the Amona Plan). This judgment included determinations that the military commander has the power and the obligation to see to the welfare of Israeli citizens residing in the West Bank and that he **may** interfere with the property of Palestinian landowners - who are protected persons - to ensure the welfare of Israeli residents.<sup>83</sup>

### APPLICATION AND MEANING

The position of the AG marks a dramatic shift in the accepted legal position, which until recently had been that the military commander **may not** take action that benefits only Israeli settlers and may not expropriate land for purposes that exclusively serve Israeli settlers. While in the past, the AG held that expropriating land for an access road to the outpost raised legal difficulties on the proprietary plain, roughly a week after the Ziada judgment was delivered, he released an updated position, which, relying on the new judgment, stated:

*[...] There is no longer room to find a general legal impediment to advancing the recommendation of the regularization team on the issue of regularizing the access road to the community of Haresha by way of expropriation for public needs, at least with respect to the expropriation of title to the land, which would carry an obligation to compensate the right holders, all with attention to the special circumstances of the case in reference.*<sup>84</sup>

82 Attorney General's Office, "Regularization of an Access Road to the Community of Haresha", November 8, 2017 (Hebrew).

83 HCJ 794/17 **Ziada et al. v. Commander of Military Forces in the West Bank** (the Amona Plan), [judgment \(reasoning\)](#), October 30, 2017 (Hebrew), paras. 27, 33. For more on the implications of the Ziada judgment, see Yesh Din position paper: [Infringement of Palestinians' property rights for the benefit of Israeli Settlers in the West Bank: Judgment Analysis](#), July 2018.

84 Attorney General's Office, "Regularization of an Access Road to the Community of Haresha", November 8, 2017.

Following the far-reaching determinations of the Ziada judgment, the Palestinian landowners, with Yesh Din's assistance, filed a petition for a further hearing by an extended panel to determine whether these determinations constitute new, binding case law. Yesh Din argued that the determinations established in the Ziada judgment contravene international law and the Supreme Court's previous jurisprudence, and that a ruling in the further hearing was necessary due to concern that the determinations of the judgment would be relied upon as new binding case law, and the fact that the AG had already authored an opinion relying on it.<sup>85</sup>

In May 2018, Supreme Court President Justice Esther Hayut dismissed the petition for further hearing. She held that the remarks had been made as *obiter dictum* and were not required for the judgment on the Amona Plan, and therefore do not constitute new case law or a binding precedent. Justice Hayut also stated the Ziada judgment remarks in question did contradict previous jurisprudence and raise legal difficulties.<sup>86</sup>

Land expropriation in the exclusive service of the Israeli population is incongruent with and may constitute a breach of international law, which prohibits expropriation of this nature. Justice Hayut delivered her decision on the Ziada determinations after the Zandberg Report was published. Her ruling and could have prompted the AG to retract his position on the outpost of Haresha and withdraw the opinion he had released and prevented the implementation of the Zandberg Committee recommendation to expropriate Palestinian land for access roads to outposts, in order to make retroactive authorization of such outposts possible. Yesh Din therefore contacted the AG's office, asking he withdraw the opinion on land expropriation for an access road to the outpost of Haresha.<sup>87</sup> In his response, Assistant to the General Attorney, Adv. Gil Limon, revealed no intention to retract the legal opinion following Justice Hayut's ruling. Adv. Limon stated, "The fact that the remarks do not constitute 'case law' that mandates a further hearing does nothing to detract from the fact that the aforementioned legal determination, which was, as stated, unanimously made in the Ziada judgment, exists, nor does it detract from its possible use as a normative source for the position of the Attorney General on the issue, as expressed in the opinion".<sup>88</sup>

85 HCJFH 9367/17 **Ziada et al. v. Commander of Military Forces in the West Bank et al.** (the Amona Plan), ([Petition for Further Hearing](#)), November 30, 2017 (Hebrew).

86 HCJFH 9367/17 **Ziada et al. v. Commander of Military Forces in the West Bank et al.** (the Amona Plan), ([Decision](#)), May 30, 2018 (Hebrew).

87 Atty. Shlomy Zachary of Yesh Din's legal team to Senior Assistant to the Attorney General, Adv. Gil Limon, **Demand for Retraction of Opinion issued by your Office on November 8, 2017 titled "Regularization of an Access Road to the Community of 'Haresha'"**, June 7, 2018.

88 Senior Assistant to the Attorney General, Adv. Gil Limon to Atty. Shlomy Zachary of Yesh Din's legal team, **Response to your Letter regarding Demand for Retraction of Opinion issued by your Office on November 8, 2017 under the title Regularization of an Access Road to the Community of 'Haresha'**, August 9, 2018.

#### 4 | BUILDING BRIDGES AND DIGGING TUNNELS, OR USE OF ANCIENT ROADS

The Zandberg Committee suggests two additional ways to overcome the proprietary difficulties in ‘regularizing’ access roads to outposts, in addition to expropriation. One is to **dig tunnels or build bridges** to provide access to the outposts. This solution relies on the legal interpretation of the land laws applicable in the West Bank, whereby “the state permanently retains air and underground rights” with respect to farmland.<sup>89</sup> The committee did, however, note this solution has a significant disadvantage due to the high costs associated with building bridges and digging tunnels.

The second alternative recommended by the committee is **use of ancient roads** (*matruka*) which are publicly owned. *Matruka* is an Ottoman land law term that applies mostly to farming roads, owned by the sovereign. The Zandberg Committee stated that in appropriate cases, such roads could be used as access roads to outposts by including them in plans seeking retroactive authorization of a “community or neighborhood”.<sup>90</sup>

### APPLICATION AND MEANING

These two recommendations are another manifestation of how members of the Zandberg Committee blatantly ignore Palestinian landowners and their status as protected persons, as well as the reality on the ground in the localities their report addresses. Given common practice in the West Bank, it is extremely likely that the security arrangements for the Israeli settlers who would be using these roads (or tunnels, or bridges), would include a wide buffer zone which would be off limits to Palestinians. Additionally, *matrukas* were designed for agricultural use and are much narrower than the accepted standards for modern roads meant for car traffic. Transforming these roads into access roads will require significant expansions that would involve expropriation of privately owned Palestinian land.

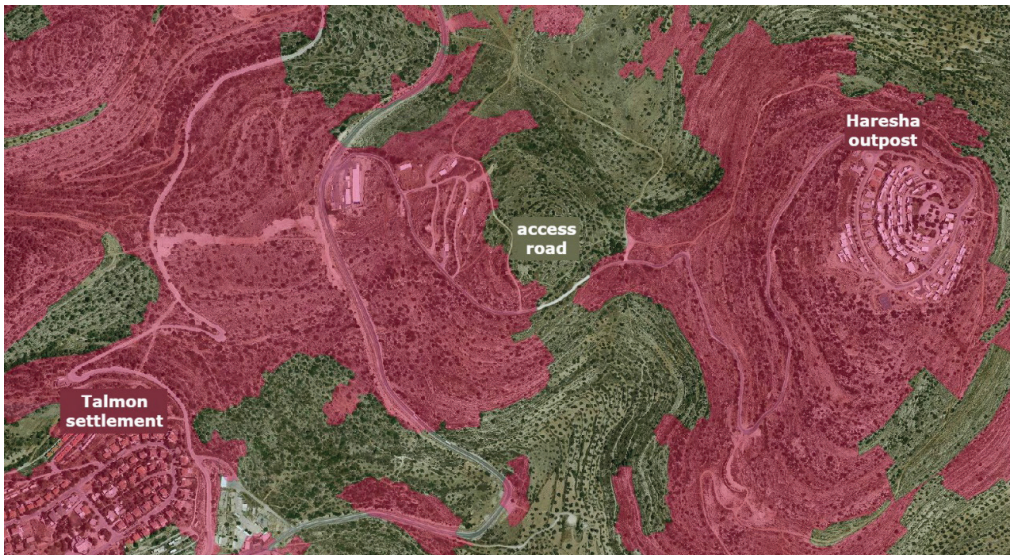
The committee presents these solutions as commensurate with the “desire to protect private property”, deliberately ignoring the fact that in practice, implementation of these solutions would result in loss of access to farmland on a large scale, and impede the ability to exercise title by cultivation.

On December 5, 2018, Adv. Karmit Yulis, who heads the Real Estate Cluster at the Ministry of Justice Counseling and Legislation Department submitted a memo to the AG on the possibility of permanent expropriation of private Palestinian land on

<sup>89</sup> Zandberg Committee Report, pp. 95-96, para. 450.

<sup>90</sup> Zandberg Committee Report, p. 98.

the route of the Haresha access road. The memo was prepared at the request of government officials who clarified that “this issue needs to be addressed urgently in order to advance planning procedures and expedite regularization of the site”.<sup>91</sup> In the memo, Adv. Yulis, with the AG’s approval, recommended pursuing “a course of **expropriation of the right to possession and temporary use of land** using the ‘**cut-and-cover**’ method in order to expedite the road as requested by government officials”. Yulis recommends the construction of a tunnel underneath privately owned Palestinian land. Rights to possession and use of the land would be expropriated from the owners temporarily only, to accommodate excavation and construction. At the same time, the memo notes that there is no legal impediment to permanently expropriating the right to possession and use in other cases.<sup>92</sup>



The unauthorized outpost of Haresha, built on public land (in red), at a significant distance from the settlement of Talmon. The outpost is surrounded by privately owned Palestinian land; its access road runs through this land.

91 Adv. Karmit Yulis, Head of Real Estate Cluster, Ministry of Justice Counseling and Legislation Department, **Haresha Access Road - Review of Options for Land Expropriation**, December 5, 2018.

92 Ibid.

## “EXISTING SETTLEMENT EXPANSION” (“DEVIATING EXPANSIONS”) | ARCHETYPE 3

This archetype refers to sites located somewhat near older Israeli settlements that were established with government approval; the exact distance is unspecified in the report. The authors of the report refer to these localities as “deviating expansions” of approved settlements that invade privately owned Palestinian land. In some cases, the structures were also built outside the municipal jurisdiction of the nearest local or regional council, meaning some of the “deviating expansions” are not under the jurisdiction of any municipality.

While the core of the original parent settlement was built on public land, private Palestinian land seized by military order or land expropriated by the Jordanian regime prior to 1967, over the years, expansions and neighborhoods were built outside this land, invading private Palestinian land.

As the Committee chose not to include a list of localities addressed in its report, it is difficult to ascertain which sites it considers as fitting this archetype. Yesh Din estimates **some 1,000 structures are included in this archetype**, some of which Israel considers neighborhoods in approved settlements rather than unauthorized outposts. However, the Zandberg Committee does refer to the unauthorized outpost of Netiv Ha'Avot<sup>93</sup> as “the neighborhood of Netiv Ha'Avot”,<sup>94</sup> and discusses it in the section on “deviating expansions”, contradictory to its declaration that its work does not address new settlements or outposts established without approval.

**Impediments to ‘regularization’:** “Deviating expansions” are located on privately owned land, impeding both proprietary and planning ‘regularization’.

93 The outpost of Netiv Ha'Avot was listed in the **Spiegel Report** - a comprehensive database compiled by a Ministry of Defense team headed by Brigadier General Baruch Spiegel. Work on the report began in 2004 and most likely ended in 2007. The full report was published only in 2009, in Haaretz newspaper. (Uri Blau, “We Came, We Saw, We Conquered,” **Haaretz English website**, February 2, 2009).

94 **Zandberg Committee Report**, p. 111, para. 534.



## THE COMMITTEE'S RECOMMENDATIONS:

The Zandberg Committee made three recommendations regarding “deviating expansions”:

### 1 | REFRAINING FROM EVACUATING DESPITE THERE BEING NO WAY TO ‘REGULARIZE’

The first recommendation is to **come to terms with the presence of “deviating expansions” on land that is not public land** and refrain from evacuation. This is despite the fact that it is impossible to ‘regularize’ such sites both in proprietary and planning terms, and despite the obvious illegality of their establishment and residence on land that does not belong to them.

The Committee held that the long time that elapsed since their establishment “seems to present a legal impediment to evacuation”.<sup>95</sup>

## APPLICATION AND MEANING

As a matter of fact, there is no legal impediment stopping the state from initiating and executing such an evacuation. The structures within these “deviating expansions” were built without building permits, and many are under Civil Administration demolition orders that the state is entitled to enforce.

The long time that has elapsed since some of the structures were built might, in some cases, serve as an impediment to seeking relief from the court in petitions to have them evacuated, as the court may dismiss such petitions due to laches. However, this difficulty affects the claims Palestinian landowners could raise against the state, not the state’s capacity to take action against the intruders. Contrary to the committee’s claim, the state may take enforcement action against unlawful construction. In fact, according to international law, the state has a duty to actively enforce the law and protect the property of protected persons in the West Bank.<sup>96</sup> In other words, the committee suggests that the state use the passage of time, which it estimates would make it difficult for Palestinian landowners to obtain relief through the court, as a shield while it perpetuates the interference with landowners’ property instead of upholding its obligation as the executive power and the occupying force to protect those whose property has been stolen.

<sup>95</sup> Zandberg Committee Report, pp. 104-106.

<sup>96</sup> Hague Convention (1907), Regulations: Arts. 43, 46.

Furthermore, the issue of laches is examined on a case by case basis, according to circumstances. A blanket determination that all expansions benefit from laches is morally and legally wrong. Just recently, the Supreme Court dismissed a laches argument in a petition against the Administrator General and Official Receiver's decision to release land in the village of Silwan in East Jerusalem, where dozens of Palestinian families live, from absentee status and transfer the title to an Israeli settler-controlled religious organization, despite the fact that the release document was issued fifteen years ago.<sup>97</sup>

## 2 | MUNICIPAL 'REGULARIZATION'

Because it is impossible to 'regularize' "deviating expansions" in terms of proprietary or planning, the committee suggests settling for '**municipal regularization**', which would ensure Israeli residents receive municipal services from the closest Israeli regional or local council. Such services include waste collection, water and sewer infrastructure, business licensing, cultural events, educational services and more.

This arrangement is already in place for "deviating expansions" that are not in the jurisdiction area of a local council, by a military commander order from 1997.<sup>98</sup> The powers in question are given to the local council with respect to persons rather than the geographical location of their residence. The committee recommends a similar military order be issued with respect to regional councils, such that residents of "deviating expansions" receive municipal services from regional councils in sites located outside the jurisdiction of the councils.

## 3 | CONSOLIDATION AND SUBDIVISION (REPARCELLATION)

Though the committee found that "deviating expansions" cannot be 'regularized' in terms of proprietary and planning, it still saw fit to include a proposed solution

97 HCJ 7446/17 **Sarhan and 103 al. v. Administrator General and Official Receiver et al.**, judgment, November 21, 2018 (Hebrew).

98 Order regarding the Administration of Local Councils (Judea and Samaria) (No. 892) (Amendment to Order No. 1453, No. 4) 5751-1997 (Hebrew). Section 2a (a): "The Commander of IDF Forces in the Area may instruct, through notice, that all or some of the provisions of the by-law shall apply through a decision of a local council to exercise its powers under the by-law with respect to persons in an area adjacent to its area of jurisdiction. The notice shall stipulate the types of persons and/or the area with respect to whom/which the provisions of the by-law shall apply".

“requiring further review” in its report.<sup>99</sup> The proposition, which was considered by the previous version of the committee, chaired by Avichai Mandelblit (then the government secretary, now the attorney general),<sup>100</sup> relies on a process of **‘consolidation and subdivision’**, or **reparcellation**, whereby plots in a certain area are merged into one single plot and then divided among all right holders in a manner that suits a particular planning need.

## APPLICATION AND MEANING

The Zandberg Committee opted not to recommend **reparcellation**, but leave it as an “open question”. And yet, the authors of the report mention that the current AG, Avichai Mandelblit, supported this proposition while serving as government secretary and chair of the first ‘regularization team’, whereas his predecessor as AG, Yehuda Weinstein, rejected it in the context of ‘regularizing’ the outpost of Netiv Ha’avot.<sup>101</sup>

The Supreme Court also expressed reservations about a plan involving re-parcellation, which was presented in the state’s position in the petition involving the outpost of Netiv Ha’avot. The judgment states: “I shall remark, without making conclusive findings, that reparcellation that alters the array of proprietary rights in the land may raise difficulties when it comes to privately owned Palestinian land in the Area [the West Bank]”.<sup>102</sup> Though members of the Zandberg Committee were aware of this judgment, and it is quoted in their report, they also cited the judgment of Justice Salim Joubran in Ziada as bearing positive implications for the legal feasibility of reparcellation for proprietary ‘regularization’. In this context, the Ziada judgment implies that privately owned Palestinian land may be used, including where such use is exclusively for the Israeli population, and the Supervisor of Governmental and Abandoned Property at the Civil Administration can initiate dissolution of partnership in Palestinian plots, despite serving merely as a temporary trustee of said land.<sup>103</sup>

Supreme Court President Esther Hayut’s ruling in Yesh Din’s petition for a further hearing in Ziada (which, as stated, was delivered after the publication of the Zandberg

99 Zandberg Committee Report, p. 110.

100 Ahaz Ben Ari, Legal Advisor to the Ministry of Defense, “consolidation and subdivision in the Judea and Samaria Area”, July 15, 2015. (Zandberg Committee Report, Annex E).

101 HCJ 7292/14 ‘Ali Muhammad ‘Isa v. Minister of Defense (Netiv Ha’avot), Affidavit of Response on behalf of Respondents 1-4 and Motion for Leave to File Supplementary Affidavit, December 31, 2015 (Hebrew).

102 HCJ 7292/14 ‘Ali Muhammad ‘Isa v. Minister of Defense (Netiv Ha’avot), judgment, September 1, 2016, Para. 32 (Hebrew).

103 HCJ 794/17 Ziada et al. v. Commander of Military Forces in the West Bank (the Amona Plan), [judgment \(reasoning\)](#), October 30, 2017 (Hebrew).

Report and held that the remarks in Ziada implying Palestinians' property rights may be infringed for the sole benefit of the settler population constitute obiter dictum, defy previous case law and raise legal difficulties<sup>104</sup>) does cast doubt as to whether reparcellation can in fact be used to retroactively approve illegal construction. Justice Hayut's ruling may well preclude future reliance on the Ziada judgment and the legal opinion authored in its wake.

Another possible solution for planning and proprietary issues that the committee discussed briefly, but ultimately chose not to voice a final opinion on and left out of its recommendations, was **expropriation under Jordanian law**. This type of expropriation is also based on the opinion AG Mandelblit released following the Ziada judgment. As noted, the opinion provides for expropriation of Palestinian land under Jordanian law for the purpose of 'regularizing' an access road to the unauthorized outpost of Haresha.<sup>105</sup> The authors of the Zandberg Report found this course of action should be considered as a way to 'regularize' the proprietary status of structures located in "deviating expansions", whereby the land on which these structures have been built would be expropriated and the owners would be compensated. The committee notes this solution is only possible if the requirement for good faith is fulfilled.<sup>106</sup>

In this case too, President Hayut's ruling regarding the remarks made in Ziada does considerably challenge the feasibility of expropriation under Jordanian law for the purpose of 'regularization'.

104 HCJFH 9367/17 **Ziada et al. v. Commander of Military Forces in the West Bank et al.** (the Amona Plan), ([Decision](#)), May 30, 2017 (Hebrew).

105 Attorney General's Office, "Regularization of an Access Road to the Community of Haresha", November 8, 2017.

106 **Zandberg Committee Report**, p. 112.

## The Zandberg Report versus The Regularization Law ("The Expropriation Law")

The Knesset passed the Regularization of Settlement in Judea and Samaria Law in February 2018.<sup>107</sup> This law is termed 'The Regularization Law'. The Zandberg Report provides a number of recommendations as an alternative to 'The Regularization Law' in the event that the High Court strikes down the law in the petitions filed against it.<sup>108</sup>

The Regularization Law provides for wholesale expropriation of Palestinian land and transfer of title to the Israelis who invaded it unlawfully through construction or farming. The law makes no distinction among different circumstances under which construction or illegal intrusion was undertaken, and provides for wholesale, de facto, expropriation in all cases of intrusion (with very few exceptions), along with compensation for the landowners. The brazenness of this law has won it the epithet 'The Expropriation Law'.

The Zandberg Committee seemingly offers a more restrained framework for 'regularization' or retroactive authorization that purports to be less injurious than the 'Regularization Law' and relies on legal doctrines. In truth, however, **the report cloaks landgrab, dispossession and expropriation on an extremely large scale - approaching that of the Regularization Law - in a shroud of legality.**

Given just how brazen and sweeping the law is, the Supreme Court may well accept the petitions filed against it and repeal it. This is where the importance of the Zandberg Report lies: providing the government with tools for retroactive approval of outposts and neighborhoods even in the absence of an explicit law, in case the Regularization Law is repealed. About a month after the report was published, Minister of Justice Ayelet Shaked said: "We are promoting the law and we believe in it, but at the same time, we are developing other legal tools to help us regularize settlement".<sup>109</sup>

107 [Regularization of Settlement in Judea and Samaria Law](#) 5787-2017 (Hebrew). The law was passed by the Knesset and published in Israel's gazette.

108 The council heads of 23 Palestinian villages filed a petition against the law together with Yesh Din, the Association for Civil Rights in Israel, Peace Now and 11 other human rights organizations, demanding the law be repealed as it is unconstitutional and a breach of international law which prohibits the expropriation of protected persons' property for anything other than imperative military needs. In addition, the law is ultra vires since the Knesset is not competent to legislate in an area outside Israel's sovereign borders. HCJ 2055/17 Head of 'Ein Yabrud Village Council v. Knesset et al., [petition](#), March 5, 2017 (Hebrew). Human rights organization Adalah filed a separate petition against the law. They petitions are being heard jointly.

109 Orly Goldklang, "Unlike Past, HCJ Now Used for Regularization", [Makor Rishon](#), June 8, 2018 (Hebrew).

AG Avichai Mandelblit refused to defend the Regularization Law in the High Court, stating it was unconstitutional.<sup>110</sup> The AG's position stems from its bold, expansive nature, and Mandelblit's concerns over the legal implications of such a blatant breach of prohibitions set in international law. Mandelblit, however, is an ardent supporter of other 'regularization' solutions that would arouse less international criticism and reduce the chances of action against Israel in the International Criminal Court in The Hague. As noted, Mandelblit was a member of the first 'regularization team'; and in his current position, he is to review and approve the Zandberg Report.

Compared to the draconian 'Regularization Law', the Zandberg Committee's recommendations do appear to be more moderate, but relativity is not the only standard by which their impact should be reviewed. The Zandberg Committee recommendations are designed to provide the government with administrative tools for authorizing a large number of outposts and structures and increasing the number of approved settlements significantly. Officials entrusted with implementing the recommendations have already declared it would lead to the approval of 99% of the outposts, and additional structures and neighborhoods inside settlements.<sup>111</sup> These retroactive authorizations involve violations of the property rights of many Palestinian landowners and overt discrimination of the Palestinian public.

The committee's recommendations are incongruent with its statements about striving to minimize harm to Palestinian property and safeguard the status of the right to property. The solutions the committee suggests involve expropriation and violation of the property rights of many Palestinian landowners. Even recommendations that do not involve direct violation of Palestinian landowners' property rights ignore the reality in the West Bank. This reality involves security arrangements that are put in place at the expense of Palestinians and infringe on their property rights and freedom of movement, widespread settler violence without proper law enforcement responses and the continued expansion of the Israeli settlement enterprise through landgrab. All of these, jointly and separately, result in an inability to exercise property rights, even without expropriation.

As this document was being completed, the Ministerial Committee for Legislation approved the **"Communities and Neighborhoods Undergoing Regularization Bill"**,<sup>112</sup> which has been termed **"Regularization Law II"** and **"Fabric of Life in Settlements Law"**. The bill seeks to legislate the implementation of the Zandberg Committee recommendations by the task force headed by Pinchas Wallerstein and sets a two-year deadline for completion

110 HCJ 1308/17, HCJ 2055/17, **Silwad Municipality et al. v. Knesset et al.**, ('The Regularization Law'), Response on behalf of the Attorney General, November 22, 2017 (Hebrew).

111 See supra note 39.

112 Communities and Neighborhoods Undergoing Regularization Bill 5778-2018, P/20/564 (Hebrew). Presented to Knesset on July 18, 2018.

of 'Regularization'. The bill also states that in the interim period pending completion of the 'Regularization' process, the relevant outposts and neighborhoods would be considered formally recognized communities for all intents and purposes. This would include budgeting, assistance in laying infrastructure and construction of public buildings, as well as full municipal services to the residents such as connections to the water system and electrical grid. The bill also proposes a moratorium on all enforcement measures against illegal construction during the interim period. A list attached to the bill names 66 outposts to which it would apply.

The AG objects to this legislative step as well, and his office has issued a statement that the law is unconstitutional.<sup>113</sup> Like the 'Regularization Law', this new bill is also unnecessary, since, as stated in this paper, 'regularization' and retroactive authorization is already underway with respect to 99% of the outposts, most of which are already connected to water, the electricity grid and other services (sometimes through nearby settlements) and benefit from generous budgets.

## The age of regularization - conclusion, analysis, implications

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The Zandberg Committee report is designed to retroactively authorize scores of Israeli outposts and neighborhoods built in the West Bank illegally and without Israeli government approval.

'Regularization' is a euphemism for violating Palestinians' property rights and condoning landgrab (even if in a minority of cases landgrab was perpetrated unknowingly) and dispossessing the Palestinian landowners. The Zandberg Committee report provides pathways for retroactively authorizing Israeli outposts and neighborhoods established years ago, through illegal takeover of Palestinian land and violation of Palestinian landowners' property rights. Until recently, Israel had maintained the semblance of a legal reality in which Israeli communities built without approval, in violation of the law and through landgrab were considered illegal and the Palestinian landowners' de jure rights in the land were preserved, even if their de facto rights were severely violated or entirely denied. The state now seeks to institutionalize and normalize landgrab and give it legal status. In 'regularization', state authorities are rewarding those who stole land from others in brazen breach of the law.

The Government of Israel has set the 'regularization' of unauthorized outposts and illegal construction by Jews in the West Bank as a key objective, and is pursuing it vigorously. The

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113 Jonathan Lis and Yotam Berger, "Israeli Ministers Approve Bill That Would Legalize 66 West Bank Outposts", **Haaretz English website**, December 16, 2018.



AG has put his weight behind efforts to cloak dispossession and expropriation in a shroud of legality and has been providing the government with an action plan that have a semblance of legality.

Despite appearing practical, the Zandberg Report does not name the places expected to be retroactively authorized following its recommendations, making it difficult to ascertain how many outposts and structures will be retroactively approved through its implementation. However, according to the media and statements made by public figures, it is estimated that the state is already pursuing the retroactive authorization of some 7,000 illegal structures.<sup>114</sup> In addition to these, there are currently about 100 outposts in the West Bank, 30 of which the state considers as having already been 'regularized'. The officials appointed by the government to implement the Zandberg Report speak of the anticipated retroactive authorization of 99% of the outposts that have yet to be regularized (about 70 outposts), 20 of these by way of government resolution to establish a new settlement.<sup>115</sup> **This means we are already in the midst of a new era in which nearly all of the unauthorized outposts will very soon be legalized and acknowledged by the Government of Israel as officially approved settlements.**

In the introduction to the Zandberg Report, its authors note they looked to the provisions of customary and international law as guiding principles.<sup>116</sup> This statement is meaningless and inconsistent with the implications of their recommendations. The wide scale 'regularization' of illegally built Israeli outposts and neighborhoods perpetuates and expands the ongoing violation of international law, which prohibits the transfer of parts of the occupying power's civilian population into the occupied territory.<sup>117</sup> It is also a violation of the prohibition on interfering with the property of protected persons in an occupied territory, which includes an unequivocal, absolute ban on expropriating privately owned land.<sup>118</sup> The violation of these prohibitions was listed in the Rome Statute of the International Criminal Court as a war crime.<sup>119</sup> The policy of 'regularization' is also a violation of the occupying power's obligation to administer

114 Nadav Shragai, "Legal team recommends retroactively approving thousands of West Bank homes", **Israel Hayom English website**, May 4, 2018. See also, Yotam Berger, "Israel Presents: How to Legalize West Bank Settlements Built on Private Palestinian Land", **Haaretz English website**, May 4, 2018.

115 Transcripts of Session No. 679 of the Internal Affairs and Environment Committee, 20th Knesset, July 2, 2018, statements of Kobi Eliraz on pp. 21-22 (Hebrew). For information about outposts that have already been retroactively authorized see: Yesh Din Report: [Under the Radar](#).

116 **Zandberg Committee Report**, p. 10.

117 **Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War** (1949), Art. 49(6).

118 **Hague Convention** (1907), Regulations: Art. 46.

119 The Rome Statute of the International Criminal Court in The Hague criminalizes both direct and indirect transfer of the population of the occupying power into the occupied territory and widespread expropriation of private property. **Rome Statute** (1998) Arts. 8(2)(b)(viii) and 8(2)(a)(iv) respectively.

the occupied territory in trust and the prohibition on exploiting the areas under its control for its own needs and the needs of its population, unless absolutely necessary for security reasons.<sup>120</sup> Unfortunately, Supreme Court President Hayut's ruling on the status of the remarks made in the Ziada judgment has not changed the AG's position on the plausibility of implementing some of the Zandberg Committee recommendations.<sup>121</sup> It does however raise doubt as to whether the Zandberg Committee had in fact given appropriate weight to international law and the jurisprudence of Israel's Supreme Court in the process of writing its report.

The 'regularization' efforts led by the Government of Israel do not include retroactive authorization of all structures built illegally in the West Bank. They address Israeli construction only, thus adding a new dimension to the already egregious **discrimination against Palestinian** residents of the West Bank with respect to land allocation, planning and construction. Israeli planning authorities in the West Bank rarely approve updated building plans that are required for issuing building permits for Palestinians,<sup>122</sup> even when the land is privately owned by Palestinians. In addition, only a fraction of public land in Area C is allocated to Palestinians, whereas the vast majority of public land allocations are for the Israeli settlement enterprise.<sup>123</sup> It is also important to note that the circumstances of illegal Palestinian construction are also distinct from Israeli outposts in that it generally does not involve invading another person's private property, but is rather carried out on privately owned Palestinian land or on public land. The increasingly entrenched discrimination of Palestinians in this context reflects the overt policy aimed at reinforcing Israeli control over as much West Bank land as possible.

The impetus to 'regularize' the unauthorized Israeli outposts and neighborhoods derives from the desire to secure their permanency and lift the threat of a possible evacuation in future. To achieve this goal, these communities must be given equal status to that of approved settlements, hence the need to find creative solutions for legalizing communities and structures built illegally. While Israel does not initiate action to evacuate these sites, their illegal status

<sup>120</sup> **Hague Convention** (1907), Regulations: Art. 43.

<sup>121</sup> Senior Assistant to the Attorney General, Adv. Gil Limon to Atty. Shlomy Zachary of Yesh Din's legal team, **Response to your Letter regarding Demand for Retraction of Opinion entitled Regularization of an Access Road to the Community of 'Haresha'**, August 9, 2018.

<sup>122</sup> See, e.g.: Bimkom - Planners for Planning Rights report: [The Prohibited Zone: Israeli planning policy in the Palestinian villages in Area C](#), June 2008.

<sup>123</sup> Figures provided by the state indicate that between 1967 and 2011, only 0.7% of public land in Area C had been allocated to Palestinians, as opposed to 51% allocated to the Israeli settlement enterprise (31% of it to the Settlement Division). The figures were provided in the course of an administrative petition under the Freedom of Information Act filed by The Association for Civil Rights in Israel and Bimkom - Planners for Planning Rights. For more see: [Association for Civil Rights in Israel website](#) (AP 40223-03-10 **Bimkom - Planners for Planning Rights (Registered Association) et al. v. Civil Administration et al.**).

does - theoretically - put them in danger of evacuation, whether as a result of legal action by Palestinian landowners and other parties, or due to a potential change in government policy.

As noted, the Zandberg Report was preceded by the Levy Report, which was published in the summer of 2012 and also addressed the status of illegal Israeli construction in the West Bank and possible avenues for its retroactive approval.<sup>124</sup> Though the government never officially adopted the Levy Report, the silent implementation of many of its recommendations has led to retroactive authorization proceedings for dozens of unauthorized outposts.<sup>125</sup> Some of these proceedings have not been completed, as they encountered legal and planning obstacles. As the successor of the Levy Report, the Zandberg Report offers more practical and more specific methods for the retroactive approval of unauthorized Israeli outposts and neighborhoods. The Zandberg Report also suggests transforming the legal reality such that it would allow for their authorization despite the difficulties. In his briefing to the Knesset Internal Affairs Committee, Kobi Eliraz, advisor to the Defense Minister for settlements matters, referred to the Levy Report as the “Ten Commandments”, and to the Zandberg Committee report as a “more detailed codex”. He added that work on implementation with the Civil Administration is underway and that “it is wisely being pursued quietly”.<sup>126</sup>

The far-reaching conclusions of the Levy Report also led the way in terms of the legal status of the West Bank and the legality of the Israeli settlements.<sup>127</sup> The Levy Report included many recommendations for measures that are characteristic of an annexation-oriented regime and depart from a regime of occupation regulated by the international laws of occupation. The Zandberg Report followed the path laid out by the Levy Report in this sense too. After the publication of the Zandberg Report, Minister of Justice Ayelet Shaked, who was heavily involved in the committee’s work reportedly said it was an important step “in normalizing life for residents of Judea and Samaria” and that “the committee has provided excellent legal tools to the government, allowing it to regularize dozens of outposts, communities and neighborhoods”.<sup>128</sup>

The ‘regularization’ efforts led by the Government of Israel must also be considered in the context of other measures pursued by the government towards **the incremental annexation of Area C of the West Bank to Israel**. When Justice Minister Shaked speaks of “normalizing life for residents of Judea and Samaria”, she is referring to the Israeli

124 **Levy Report**. See supra note 14.

125 See: Yesh Din report, [From Occupation to Annexation](#).

126 Transcripts of Session No. 679 of the Internal Affairs and Environment Committee, 20th Knesset, July 2, 2018, p. 22 (Hebrew).

127 See also: Yesh Din report: [Unprecedented: A legal analysis of the report of the Committee to Examine the Status of Building in Judea and Samaria \(The Levy Committee\)](#), January 2014.

128 Nadav Shragai, “Legal team recommends retroactively approving thousands of West Bank homes”, **Israel Hayom English website**, May 4, 2018.

settlers only, not Palestinian residents of the West Bank. In other words, Shaked views retroactive authorization of illegal construction by Israelis as one of many measures taken by the government towards gradually applying Israeli sovereignty to Area C, in breach of international law which prohibits the annexation of occupied land, and without granting the Palestinian residents of the West Bank citizenship and equal rights.

**The Zandberg Committee aids a racist endeavor whose essence is the dispossession of Palestinians from their land on the basis of ethnicity. The euphemisms used in the report and the legal terminology it employs do nothing to hide the fact that the 'Regularization Committee' report is, in fact, an expropriation report which provides the government more methods for normalizing and deepening the iniquity of Israel's settlement policy: one area, the West Bank, with two populations - privileged Israeli citizens and Palestinians living under military rule, dispossessed and oppressed.**

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Through the Zandberg Report, **99% of unauthorized Israeli outposts are expected to be retroactively approved within two to three years.** This figure includes 70 unauthorized outposts that have not yet been retroactively approved (in addition to 30 outposts that have already been approved) and **some 7,000 illegal structures** in Israeli settlements and outposts.

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An implementation task force headed by Pinchas Wallerstein collaborating with the Ministry of Defense, the Ministry of Justice and the Civil Administration is already taking action to implement the recommendations included in the report and advance 'regularization' measures. As part of this work, the task force has compiled a detailed, **comprehensive database** of all illegal Israeli structures and outposts the government seeks to 'regularize' and the expected 'regularization' method.

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The first 'regularization' act is likely to be the retroactive authorization of some **2,700 to 3,000 structures** built on privately owned Palestinian land allocated by the state to Israeli settlers as a result of errors that led it to believe the land was public land. Such 'regularization' will be undertaken using the *market ouvert* doctrine whether or not the structures were built in compliance with master plans and building permits, and whether or not the land had been paid for.

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The state is expected to declare the establishment of **some 20 new Israeli settlements** in the West Bank as part of the 'regularization' policy and the implementation of the report. These are unauthorized outposts that cannot be 'regularized' as neighborhoods in approved settlements and which the state was unable to find any other way to retroactively authorize.

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The unauthorized outpost of Adei Ad, 18 November, 2018  
(photo: Ahmad Al-Bazz/ActiveStills)