Ill-Gotten Gains
Theft of Palestinian land - declaring “state land” where settlement of title was halted when Israel occupied the West Bank
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Research and writing: Miryam Wijler
Editing: Yonatan Kanonich and Ziv Stahl
Legal counsel: Atty. Shlomy Zachary
Maps: Alon Cohen Lifshitz
English translation: Leora Gal
Graphic design: Studio Yuda Dery


Yesh Din volunteers: Dahlia Amit, Maya Bailey, Hanna Barag, Atty. Dr. Assnat Bartor, Osnat Ben-Shachar, Rochale Chayut, Dr. Yehudit Elkana, Rony Gilboa, Hana Gottlieb, Tami Gross, Dina Hecht, Niva Inbar, Daniel A. Kahn, Edna Kaldor, Ruth Kedar, Lilach Klein Dolev, Dr. Joel Klemes, Bentzi Laor, Judy Lots, Aryeh Magal, Sarah Marliss, Amir Pansky, Talia Pecker Berio, Nava Polak, Dr. Nura Resh, Eddie Saar, Idit Schlesinger, Ilana Meki Shapira, Dr. Tzvia Shapira, Dr. Hadas Shintel, Ayala Sussmann, Sara Toledano, Yoram Zeevi.


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Cover image: Al Khader village land, the Israeli settlements and outposts built on this land, and Israel’s declarations of “state land” (for further reading see page 38-44)

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Preface

Israel uses declaration of public land (“state land”) in the West Bank as a significant means to reinforce its settlement enterprise in the occupied Palestinian territories (oPt). This report presents and analyses a specific feature of Israel’s declaration policy: declaring Palestinian land to be “state land” in areas where settlement of title was halted after Israel occupied the West Bank, in order to appropriate this land.¹

Settlement of title to land is a complex, systematic and centralized procedure initiated by the sovereign. It is undertaken in order to identify and then title and register all title to land in the territory subject to the sovereign’s control. In 1928 the British Mandate government began to systematically register title to land for the first time in Palestine, which was subject to its control. Settlement of title in the West Bank continued under Jordanian rule; by 1967, settlement of title was concluded for approximately one third of all West Bank land. After Israel occupied the West Bank, the Israeli military commander issued an order suspending all settlement of title procedures.²

Although settlement of title was never renewed, during the early 1980s the Israeli army began applying the Ottoman Land Code; by way of the Civil Administration,³ it declared hundreds

¹ We will use the term “state land” when referring to land the sovereign holds the right to and is responsible for; in Israel’s occupation regime in the West Bank, the Israeli military commander stands in for the sovereign. Because Israel allocates “state land” land almost exclusively for the benefit of the Israeli settlement enterprise, the term “public land” is legally accurate but misleading from a substantive perspective. The commonplace term “state land” is also misleading because this is not the State of Israel’s land and Israel may not do as it sees fit there. The status of this land is entirely different from state land in Israel, and it is owned by the local Palestinian population living under occupation and administered by the occupier of the West Bank. This term will appear in parenthesis throughout this document as a constant reminder.

² Order Concerning Land and Water Settlement (Judea and Samaria) (No. 291), 1968 (henceforth referred to as the suspending order, or Order Concerning Government Property). This report addresses Israeli policy in the West Bank, excluding the area of East Jerusalem. In the area of East Jerusalem, which was annexed to Israel, settlement of title was not halted by way of official legislation. Instead, Israel chose to abandon settlement of title procedures and did not conclude them, at least until 2018. For further reading see: Ronit Levine-Shnur, “Privatization, Segregation and Discrimination: The Cessation of Land Settlement in East Jerusalem”, (Hebrew) Iyunei Mishpat 34 (1), 2011, pp. 183-238 (henceforth: Levine-Shnur, Privatization, Segregation and Discrimination).

³ The Civil Administration is the military body tasked with administering all civil affairs in the occupied territory. The Civil Administration is responsible, inter alia, for registering and settling title to land in the West Bank. The Israeli military holds exclusive control and administration powers over the land registry, which includes all the information regarding private, registered land in the oPt. The Custodian Staff Officer of the Civil Administration is the representative of the Israeli Land Authority to the West Bank and he also holds the title of Supervisor of Governmental and Abandoned Property in “Judea and Samaria” (the Supervisor). His field of work includes land allocation, declaration of public land (“state land”), planning approval, construction and development, transfer of rights and more. For further reading see Yesh Din, Through the lens of Israel’s interests: The Civil Administration in the West Bank, December 2017 (henceforth: Yesh Din, Through the Lens of Israel’s interests).
of thousands of dunam of West Bank land “state land”. This land, which is administered by the Israeli army, is meant for the use of the local Palestinian population living under occupation, such as for building towns and villages or for necessary infrastructure. In spite of this, Israel allocated the vast majority of this land for expanding Israeli settlements, which were built in the oPt in violation of international law. Over the past decade, this means has been used to retroactively authorize illegal Israeli construction on Palestinian land. 4

Settlement of title procedures were underway and reached an advanced stage in at least 16 Palestinian villages and towns prior to 1967, but these procedures were never concluded because Israel suspended settlement of title. It is highly likely that if Israel had not suspended settlement of title, much of these villages’ land would have been registered as private land belonging to Palestinian individuals and not as land belonging to the sovereign. Despite this, Israel has declared at least 41,000 dunam of land where settlement of title was underway as “state land”. This policy annuls settlement of title proceedings in places where prima facie rights of Palestinians were recognized, and it effectively prevents settlement of title from being concluded – preventing the Palestinian landowners’ rights to title from ever being registered.

Israel’s policy of declaring “state land” in areas where settlement of title was halted is based on selective application of the legal mechanisms that regulate the land regime in the West Bank. Israel does so in violation of the rules of international law that apply to Israel as the occupying power in the West Bank. Such declarations also violate the local law in force in the West Bank and the military order issued by the Israeli military commander (Order Concerning Government Property). Above all, Israel’s policy infringes upon the right to property of Palestinians who took part in settlement of title and allows it to dispossess Palestinian individuals and communities of their land.

In practice, Israel, which is and has been responsible for the land registry in the West Bank for over 53 years, benefits from this policy. Israel does not permit Palestinians who participated in settlement of title to complete the process and register title to their land, but it does declare these very same lands “state land” and transfers them to the exclusive use of the Israeli settlement enterprise in the West Bank.

This report includes two case studies. In the early 1960s, the Jordanian sovereign began settlement of title for Kafr ‘Aqab and Al Khader land in the West Bank. Both procedures were halted when Israel occupied the West Bank. Yet prior to that, settlement of title had reached its advanced stages: title to the villages’ land had been examined and completed,

4 For further reading on Israeli policy for retroactively authorizing illegal Israeli construction see for example: Yesh Din, 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, January 2019; Yesh Din, From Occupation to Annexation: the silent adoption of the Levy report on retroactive authorization of illegal construction in the West Bank, February 2016 (henceforth: Yesh Din, From Occupation to Annexation).
and the plots were marked by owner. Both case studies demonstrate how Israel exploits declaration of “state land” to take over private land and retroactively authorize illegal construction in Israeli settlements and outposts.

On November 29, 2020, the Israeli High Court of Justice (HCJ) rejected the petition filed by Palestinian landowners from Kafr ‘Aqab with the assistance of Yesh Din. The petition addressed the status of village land where settlement of title began but was not concluded, and Israel’s authority to declare “state land” there. The judgement, which accepted the State’s position, endorses Israel’s policy of dispossession. This policy infringes upon Palestinians’ right to property in the West Bank and violates the rules of international law. Moreover, this judgement will allow additional Palestinian individuals and communities who participated in uncompleted settlement of title proceedings to be harmed. After the Court rejected the petition, the landowners and head of the Kafr ‘Aqab village council filed a motion for an additional hearing in an expanded panel of justices. The motion is pending.

Chapter 1 of this report describes Jordanian settlement of title, which was undertaken in the West Bank beginning in the 1950s, and the implications of its suspension. Chapter 2 reviews the available data regarding the scope of Israel’s declarations of “state land” where settlement of title was underway by Jordanian authorities, reached the stage of the schedule of claims and was suspended after Israel occupied the West Bank. This chapter also demonstrates how Israel exploits the implications of suspending settlement of title for the benefit of its colonialist settlement enterprise. Chapter 3 provides a legal analysis that finds that Israel’s declaration policy severely infringes upon the Palestinians’ right to property in the West Bank, violating both the law in force in the oPt and international law. Finally, chapter 4 presents the two case studies referred to throughout this report.

This report depicts a policy of land theft that is inseparable from the broader Israeli effort to increase Israeli control over land in the West Bank and retroactively authorize all illegal Israeli construction in the West Bank.

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6 HCJFH 9068/20, Barkat et al v. the Head of the Civil Administration et al (henceforth: HCJFH 9068/20), Motion for a further hearing, December 24, 2020.

www.yesh-din.org
Sign posted by the Civil Administration (courtesy of Peace Now): The Civil Administration in the West Bank, Supervisor of Governmental Property: 'State land - no trespassing’
Settlement of title in the West Bank and its suspension

Settlement of title

Land law in the West Bank is based on the law in force there prior to Israeli occupation. This includes Ottoman Code, as well as amendments and additions from the British Mandate and then Jordanian rule. There are two additional components to the land regime in the West Bank. First, the rules of international humanitarian law (IHL) – the legal framework of rules that apply to the occupying force and protect the rights of persons living under the occupation regime. Second, the military orders issued by the military commander (GOC Central Command) after Israel conquered the West Bank, based on this authority according to the rules of international law.

The Ottoman empire, which controlled the area until World War I, did not create a structured and systematic land registry. Ottoman Code required land to be registered in the registry offices (tapu or tabu), and land was indeed registered in some cases. However, many residents and farmers refrained from registering title to their land, mainly due to concerns of taxation and military conscription. In 1928 the British Mandate government began settlement of title in Palestine, a territory subject to its rule. The Jordanian kingdom continued this process for West Bank land in the early 1950s. 7

Settlement of title is designed to produce a comprehensive, survey-based registry of rights to title. Ownership of every inch of land in the territory may be identified with certainty in such a registry, and it distinguishes in situ the individual from the sovereign, and neighbor from neighbor. Surveying land and registering title require resources, in order to be able to examine the division of land and title.

Therefore, settlement of title is a systematic, centralized process initiated by the sovereign to identify and subsequently register title to land in the territory under its control. Different to registration of title undertaken in a decentralized manner at the initiative of individuals and

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subject to their will and limited resources (i.e., first registration), settlement of title relies on the ruler’s powers of coercion and financial resources.  

Examination, survey, presentation, registration: Jordanian settlement of title and the role of the schedule of claims

In 1952-1967, Jordanian authorities declared settlement of title complete for 150 of 338 villages and towns in the West Bank. Settlement of title begun in additional parts of the West Bank halted when Israel conquered the West Bank.

This chapter reviews the Jordanian settlement of title procedure, examining its separate stages. Understanding the procedure is vital to comprehending the ramifications of suspending settlement of title on the distribution of rights to land, and Israel’s policy of declaring “state land” where settlement of title began under Jordanian rule. This chapter is based on Jordanian Settlement Law (1952) and the testimony of Mr. Na’im Suliman Taufiq Ayub before the Israeli Military Appeals Committee. Mr. Ayub served as settlement officer and director of surveys in the Jerusalem district office. He played an active role in several settlement of title procedures and served in numerous capacities in the Jordanian Department of Lands and Survey in 1956-1967. He provides firsthand testimony of the various stages and practical application of Jordanian settlement of title.

Settlement of title is designed for assembling a comprehensive registry of all rights to land in a given territory, in this case, the West Bank. Thus, settlement of title is a procedure undertaken before such a registry exists and requires investigating and examining rights.

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8 Individuals may seek to register title to land through an independent procedure called first registration. This is voluntary, and the regime neither encourages, allocate resources or ensures its completion. In the West Bank, first registration is also subject to settlement of title and if settlement of title is renewed, this system of first registration could be revoked or altered. In practice, first registration is a complex, complicated, lengthy and expensive procedure and is therefore reserved for individuals endowed with financial and other resources. Generally speaking, Jordanian land laws give precedence to registering land by way of settlement of title rather than first registration. This preference is reflected, inter alia, in the instruction prohibiting initial registration where settlement of claims has begun (Registration of Previously Unregistered Immovable Property Law, Law No. 6 of 1964). According to this instruction, until 2008 it was allegedly impossible to use the procedure of first legislation to register land which was subject to settlement of title, yet in practice such registration was completed in several cases. In 2008, the Israeli army issued an order changing this law and permitted first registration of land in areas where settlement of title began, but only in limited circumstances (Order Concerning Amendment of the Registration of Previously Unregistered Immovable Property Law (Judea and Samaria) (No. 1621), 2008.


Examinations of rights to title are carried out gradually in one area or community at a time. Therefore, the first stage was to publish an announcement (settlement order) in the official gazette and in the village or town where authorities planned to begin settlement of title.\(^\text{11}\)

At the second stage, claims to title in the settlement area were collected, examined and investigated, and then documented in a detailed report: the schedule of claims. In other words, the regime invited anyone claiming title to a certain plot to come forth; claims were then examined and a decision made whether this interest in the land justified registering title to this individual.\(^\text{12}\)

A team of professionals led by the settlement officer oversaw the second stage. This stage could be lengthy, sometimes taking several years, during which the settlement team lived in the community in the settlement area. This measure was meant to ensure that the team would investigate claims justly, comprehensively and conclusively. Mr. Ayub explained this: “Officers in the settlement team, comprised of the settlement officer and the surveyors, stayed in the village and lived with its residents in order to hear everything and guarantee that justice prevailed.”\(^\text{13}\)

The process of surveying land and gathering the information was contingent on the team being physically present on site and was not a formal procedure undertaken in a remote office. Rather, these procedures were carried out where the land and owners were:

A settlement team would be sent, headed by a settlement officer and several surveyors, to begin work. All residents were informed that boundary-marking would begin in a certain area (a certain block of land). All owners of land in the settlement area were asked to be present on their land and show the settlement officer the boundary markers separating adjacent plots. The settlement officer would draw up a survey map for each plot that was demarcated and marked by boundary markers and then drafted a table that included individual plot numbers and the landowners’ names. After the surveyor (demarcation officer) completes work on the block, he makes a copy of the field ledger [...] recording all the individual plots in the area and the owners’ names.\(^\text{14}\)

\(^{11}\) Jordanian Settlement Law, sections 5-6.

\(^{12}\) Ibid, sections 7, 10.


\(^{14}\) Appeal 50/14 before the Military Appeals Committee, Mussa et al v. the Supervisor of Government and Abandoned
If disputes arose, such as two individuals claiming they owned the same plot, the matter was brought to the settlement officer for him to arbitrate. The settlement officer was authorized to hear witnesses, review evidence and even suggest compromises to settle cases of competing claims.\textsuperscript{15}

If there were objections to the schedule, a claim was submitted to the settlement officer in his office. The objection would be examined, witnesses heard and evidence reviewed. Afterwards, the settlement officer drafted a report about the objection.\textsuperscript{16}

Mr. Ayub emphasized that the settlement officer heard and investigated disputes over claims to title before preparing and sending the schedule of claims to the head office in Amman.

**Question:** And what if there are two claims for the same plot when compiling the schedule of claims, where are competing claims arbitrated?

**Response:** The head settlement officer reviews objections to the schedule of claims before he sends it to Amman. Documents are sent to Amman after full examination.\textsuperscript{17}

Next, the settlement team surveyed the block and drafted a survey map which included roads and individual plots. The map was then cross-checked by a member of the settlement team to prevent errors:

After demarcation, the block is surveyed and a detailed and comprehensive survey map is drafted of all the plots, called the block survey, and boundary posts are erected to mark all plots, paths and roads. Every plot must be accessible by road. After survey work for the block is concluded, another team surveyor reviews the map. A third surveyor on the team reviews

\textsuperscript{15} *Jordanian Settlement Law*, section 7.

\textsuperscript{16} *Appeal 50/14*, Affidavit on behalf of Ayub, March 30, 2016.

\textsuperscript{17} *Appeal 68/13*, Protocol, December 9, 2014.
placement of the boundary markers. After this work is concluded, technical work on the survey is complete.\textsuperscript{18}

Comprehensive registration of title to land in the settlement area requires recording both the rights of individuals and the rights of the sovereign to the land, land that falls under the category of government property ("state land"). The settlement officer was responsible for identifying the latter type of land as the state’s representative and the officer entrusted to protect its interests.

“When settlement is underway for land owned by the government, the settlement officers represent the Hashemite Kingdom of Jordan and are obligated to protect treasury property”, explained Mr. Ayub.\textsuperscript{19} In his testimony for the Military Appeals Committee, he added, “State land, which we were responsible for protecting, […] going back to the schedule of claims, if the plot belonged to the state, Treasury of the Kingdom of Jordan would be noted as the owner’s name.” Responding to the question, “But where is the state, when does it object?”, Mr. Ayub said “The settlement officers are the state. They are responsible and they protect state property.”\textsuperscript{20}

Thus, if the settlement team’s review revealed a plot or certain tract of land to be government property, this right is recorded in the schedule of claims. The Jordanian kingdom’s claims were indeed documented in schedules prepared during settlement of title.\textsuperscript{21} If the state did not appear as a claimant on the schedule of claims, it meant that it had no claims to the settlement area.

Once survey work was finished, the settlement team presented - one of the surveyors showed each landowner their plot in situ and the road leading to it. After that, presentation. All plot owners are asked to go to their land in the block so the plots could be presented to each owner and all boundaries explained in the field.\textsuperscript{22}

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\textsuperscript{18} Appeal 50/14, Affidavit on behalf of Ayub, March 30, 2016.
\textsuperscript{19} Ibid.
\textsuperscript{20} Appeal 68/13, Protocol, December 9, 2014. According to section 8 (4) of Jordanian Settlement Law, any right to land or water that is unproven by a claimant will be registered in the treasury’s name, meaning the Jordanian kingdom.
\textsuperscript{21} The Israel Supreme Court recognized that the State of Jordan submitted objections as part of settlement of title in its capacity as Custodian of Enemy Property, and these objections were documented in the schedule of claims, see CA 602/82, Heirs of Abu-Nia et al v. Mendelbaum et al, Judgement, July 4, 1983. Additionally, the Civil Administration has schedules of claims which include plots registered to the state, see page 18 of this report, footnote 52, as well as HCJ 5426/17, Response on behalf of the petitioners, October 28, 2019, section 20.
\textsuperscript{22} Appeal 50/14, Affidavit on behalf of Ayub, March 30, 2016. Mr. Ayub explained this stage in his testimony before the Military Appeals Committee: “The surveyor arrives and starts at number 1, the owners of the plot are on each plot, he shows him the boundaries of the plot and the markers, where the boundaries are and the road leading to the plot”. Ibid. Protocol, June 20, 2017.
This stage reflects the significance of the investigation before concluding the schedule of claims. Although title was not yet registered in the land registry, in practice, after presentation, an individual knew where his or her and the neighboring plots began and ended.

The complexity and effort involved in compiling the schedule of claims - and the long period that the settlement team had to be physically present in the settlement area - indicate that this was a resource-intensive process and involved gathering claims meticulously and investigating them thoroughly. It involved the villagers’ testimonies, which were even more important in an age of limited technological means. Granting the settlement officer authority to administer public proceedings such as hearing witnesses, reviewing evidence and investigating claims, indicates that the procedure for reviewing claims to title, which under Jordanian rule took place prior to preparation of the schedule of claims, was a substantially investigative and judicial arrangement. This suggests that this second step of settlement of title was the deciding stage under Jordanian rule.

The third stage: after investigating claims to title, the settlement officer prepared a schedule of claims based on these investigations, including detailed survey maps of all the plots in the area and the roads linking them, a detailed description of all claims (by individuals and by the state) and reports of any disputed interests. These documents were sent to the land office in the capital city, Amman.

During the fourth stage of settlement of title, the director of the department of lands and survey in Amman prepared the unfinalized schedule of rights, based on the schedule of claims sent to his office. The schedule of rights was based almost exclusively on the thorough work undertaken to prepare the schedule of claims. The schedule of rights included a technical examination and calculation of the area of the plots, but did not incorporate any new claims or investigation of disputes. Different to the settlement officer and settlement team (who, as mentioned previously, lived among the community whose land was being settled, heard and examined the claims of its residents), the director of lands and survey lacked the means to investigate disputes over claims to title. Therefore, said Mr. Ayub, “The schedule of rights is the son of the schedule of claims, and is based on it.”

In his opinion in the judgement of an appeal which addressed the significance of the schedule of claims, Military Appeals Committee Judge Major Steve Berman found that:

According to the instructions of section 10 of Jordanian law, once the settlement officer concludes the schedule of claims in said fashion, he sends

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23 Jordanian settlement law, section 10.
24 Ibid, section 11.
it, along with reports concerning disputed claims, to the director (in Amman), who, according to section 11 of the law, reviews (in Arabic: conducts a thorough examination of) the schedule of claims. Meaning, a substantially technical examination for errors in documentation, after which he publishes a schedule of rights, which in principle reflects the schedule of claims, unless an error was found and corrected. The director [of the department of lands and survey] does not perform any substantive action (hearing or ruling) [...] In other words, as the Jordanian deputy settlement officer prior to June 1967 testified before me, in essence the director’s role in settlement of title is miniscule, despite being the authority to legally approve the schedule of claims, which subsequently becomes (after review and correction of any errors) the schedule of rights, arranged in the fashion he determines.26

The unfinalized schedule of rights was posted publicly, and residents of the settlement area had 30 days to appeal the distribution of title detailed in the schedule to the court authorized to adjudicate land and settlement claims. After deciding in an appeal (if appeals were submitted), a final schedule of rights was prepared and served as the basis for drawing up the schedule of registration. This concluded settlement of title for the area.27

Examining the stages of settlement of title under Jordanian rule clearly indicates that the central part of the procedure was the settlement team’s work to prepare a schedule of claims. This schedule concluded extensive examinations and was an evidentiary procedure. The schedule of claims includes all claims to title relevant to the final decision on titling land in the settlement area, including any claims put forth by the sovereign, which is represented by the settlement officer during the procedure.

It is important to note that Jordanian settlement of title differs from British Mandate settlement with regards to the status of the schedule of claims (and Israel has opted to adopt the British Mandate’s approach with regards to Israel proper). According to the British Mandate/Israeli approach and different to Jordanian rule, the schedule of claims is an inventory of all the claims submitted; it is compiled prior to any or all investigation or arbitration of the claims it documents.28 While Israeli land law does not apply to the West Bank and is seemingly irrelevant here, identifying this difference in approaches between Jordanian and British Mandate/Israeli land law is crucial because of the erroneous and misleading use Israeli authorities make by likening the two systems of land law to each other. Israeli authorities knowingly and intentionally do so in order to minimize the repercussions

27Jordanian settlement law, section 16.
that unconcluded Jordanian settlement of title has on distribution of title to land in the West Bank. Israel does this to justify its policy of declaring “state land” by ignoring the findings in the schedule of claims, and even fully revoking settlement of title proceedings during which such schedules were compiled, while infringing upon the Palestinians’ rights to property.  

The Ottoman Land Code: miri land

The Ottoman Land Code, compiled in 1858, categorizes five types of land, to which different instructions apply. This review will focus on one of the five: miri land, which was used for agriculture and included, inter alia, cultivated land close to the villages. The majority of the area which is now the State of Israel, the Gaza Strip and the West Bank was miri land during the British Mandate.

Miri land tenure is usufruct, and rights were contingent on use. Section 78 of the Ottoman Land Code states that any person who possessed and cultivated miri land successively for ten years earned the right to transfer it to their name and receive a tapu (or tabu - land registry) deed attesting to title, free of charge.

29 For example, Israeli authorities’ misleading position is reflected in the State’s response to the petition filed by Kafr ‘Aqab landowners. In its response, the State ignored the differences in settlement of title procedures and described the Jordanian schedule of claims as akin to the British Mandate’s schedule of claims to establish that, “It was impossible to infer that a claim documented in the schedule of claims is grounded or proven” (HCJ 5426/17, Affidavit of response on behalf of respondents 1-2, January 23, 2019, section 39). This is clearly an erroneous claim regarding Jordanian settlement of title.

30 Ottoman Land Code (1858), section 3. The Code also addresses the following categories of land, besides miri land: mulk – completely privately owned. Mawat – vacant and uncultivated land that is not being used for any purpose and is not near any village or town. Land located by a village or town would not be considered mawat. If arable, such land would be considered miri. Matrouk – land in public use, such as land allocated to a certain village for public use such as for pasture or a public road. Waqf – land dedicated to a certain purpose such as religious worship or for cultural or welfare needs (Ottoman Land Code [1858], section 1; Moshe Duchan, Land Law in the State of Israel, (Hebrew) 5713-1952 [henceforth: Duchan, Land Law], pp. 39-62).


32 Rights to miri land under Ottoman Code had two components. First, raqaba, which may be described as permanent ownership to the “corpus” of land, or sovereignty over land. Second, tasarruf, which was a usufruct relationship, including rights to use the land and its bounty. In the case of miri land, raqaba refers to the sovereign, and tasarruf can be handed over to individuals. Transferring usufruct rights was achieved by the government granting individuals a kushan, a deed from the land registry (tabu, or tapu in Turkish), and individuals who held these rights were obligated to pay tax for their land (Ottoman Land Code [1858], section 3; Duchan, Land Law, pp. 43-44, 46-47, 78-79).

33 Ottoman Land Code (1858), section 78. Duchan, Land Law, pp. 314-316.
Concurrently, ceasing to cultivate miri land could lead to loss of rights. According to section 68 of the Land Code, if an individual stops cultivating such land for three consecutive years, it could revert - in certain cases - to the sovereign’s full ownership.\textsuperscript{34}

And yet, Ottoman code restricts the possibility of individuals losing their rights to miri land, reflecting the general approach whereby individuals were encouraged to maintain their rights to the land, rather than return land to the possession of the state. And so, when cultivation ceased for a justifiable reason, the landowner did not lose rights. In any case, regardless of why cultivation ceased, before returning the land to the state’s full custody, the sovereign must allow the individual who possessed and cultivated the land in the past to purchase it by paying a tapu (registry) fee.\textsuperscript{35}

Settlement of title, begun during the British Mandate and continued under Jordanian rule, involved changes to the way rights were distributed to miri land. These changes revoked the unique system that distinguished the sovereign’s right to the land (raqaba), which ultimately remained the sovereign’s, from the right to use the land (tasarruf), which was awarded to individuals.\textsuperscript{36}

Individuals who proved title to the land were provided a full and permanent right to the plot they owned once settlement of title was concluded, and this right was registered in the land registry, while the state lost any and all rights it had to the plot. Where land was registered as government property during settlement of title, individuals could no longer secure rights by way of adverse possession. Meaning, once concluded, settlement of title permanently severed the connection between the individual’s right to land and the way an individual used the land.\textsuperscript{37}

**Suspension of settlement of title in the West Bank**

By 1967, settlement of title was completed for just 30-40 percent of West Bank land (excluding East Jerusalem).\textsuperscript{38} After Israel conquered the West Bank, the Israeli military...
commander issued an order suspending all settlement procedures, and as a result, most of the land in the West Bank remains unsettled, meaning it is not registered in the land registry to any owners. Suspension does not mean revoking settlement procedures, only freezing and delaying their completion until a future date, and does not annul previous steps.

According to Israel, the military ordinance that suspended Jordanian settlement of title was issued for reasons pursuant to Israel’s obligations as the occupying power. Among these, notably, is the fact that continuing settlement of title would harm the property rights of landowners who were expelled or fled the occupied territory and are considered “absentee”, and who would therefore be prevented from defending their rights if the process were to continue. These reasons also include the contradiction between settlement of title, which seeks to finalize rights, and an occupation regime’s temporary nature, which dictates the need to avoid making long-term changes. Other reasons were the financial burden and the technical difficulties of completing the process due to the absence of various related documents, some of which were left in Jordan.

Suspending settlement of title created numerous types of private ownership of land, some of which are characterized by strong protections against loss of rights to the land, while others are not:

**Registered private land** – land owned by individuals, whose claims to miri land were recognized during settlement of title, which was concluded. Title is secured by registration in the land registry, and those who claim it no longer have to rely on adverse possession.

**Unregistered private land** – miri land that was not settled (by settlement of title); therefore, title was not registered in the land registry. Ownership relies, inter alia, on substantial and continuous cultivation. Ceasing cultivation for reasons not justified by law could result in loss of rights to the land.

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39 Order Concerning Land and Water Settlement (Judea and Samaria) (No. 291), 1968.
40 The Supervisor explained this decision in a petition submitted in 2008 thus: “Settlement of title was halted following the Six-Day War. This is due to the temporary nature of belligerent occupation, which does not conform with determining absolute rights, transfer of the settlement of title documents to Jordan, the procedure’s high costs, and concerns of harming the rights of many absentees who left the area in 1967 (HCJ 9296/08, Commander of IDF Forces in Judea and Samaria v. the Military Appeals Committee, 5 November 2008 [the petition was deleted]). See also Eyal Zamir, State Land in Judea and Samaria – Legal Survey (Hebrew), Jerusalem: Jerusalem Institute for Israel Studies, 1985 (henceforth: Zamir, State Land), p. 27; Yesh Din, Settlement of title in Area C of the West Bank – Violation of international law and infringement of Palestinians’ rights, February 2021 (henceforth: Yesh Din, Settlement of Title in Area C of the West Bank).
41 Individuals who possess a land deed (kushan) issued during Ottoman rule allegedly enjoy a similar status, although title to their land is not secured by registration in the land registry.
Land for which settlement was not concluded – land claimed during Jordanian settlement of title. However, because Israel suspended settlement of title, title was not registered to its owners in the land registry, in what would be final registration of title.

When Israel suspended settlement of title, it allegedly halted both systematic registration of individuals’ and the sovereign’s rights to title in the West Bank. Yet in practice since the 1980s, Israel has actively pursued a policy of declaring land in the West Bank to be “state land”, funded and fueled by its regime. In addition, Israel seeks to revoke the distinction between land for which claims were documented as part of unconcluded settlement of title, and land for which settlement of title was never initiated.

Halting settlement of title, combined with the policy of declaring “state land”, creates an exclusive and absolute preference for the Israeli military government to take possession of land, rather than registering it as privately-owned.
Exploiting the implications of suspending settlement of title for the benefit of Israel’s settlement enterprise

Declaration of “state land”

Public land, also termed “state land”, is land that is not private and which is entrusted to the sovereign for it to administer. Such land is supposed to be used for public needs, such as building communities or developing infrastructure. According to international law, the occupying power is not authorized to treat such land as its own because such land belongs to the local population and is meant to provide for its needs.

Formally, every inch of West Bank land that is not private land – registered or unregistered – is considered public land, whether it is registered as such or not. Under the Israeli occupation regime such land is defined as “government property”, and the Civil Administration is tasked with its administration.

For instance, a plot of miri land, for which the owner does not have a tabu deed attesting to ownership, and which has not been cultivated for decades, would be considered government property even if it is not registered in the land registry as such. However, in order for the Civil Administration to administer a certain plot or allocate it to other bodies, the Supervisor must actively take possession of it.

The Israeli military government adopted a mechanism of declaring “state land” in order to take possession of land it considers government property. Therefore, although formally speaking, a certain plot is government property whether the Civil Administration declared it “state land” or not, the act of the declaration has a decisive impact on future use of the land and its status.


43 It is noteworthy that Israel’s declaration policy in general, meaning the conditions according to which Israel determines that a certain area is “state land”, is based on an extremely controversial interpretation of the Ottoman Land Code, which differs from the customary interpretation of the Code during Jordanian rule and which facilitates classifying land as government property. For further reading, see B’Tselem: Under the guise of legality: Israel’s declarations of state land in the West Bank, March 2012 (henceforth: B’Tselem, Under the guise of legality); Raja Shehadeh, “The Land Law of Palestine, An Analysis of the Definition of State Lands”, Journal of Palestine Studies 11(2), 1982, pp. 82-99.

44 Individuals are supposedly also able to request their title to the land be registered through an independent procedure
Because the act of declaration is so dramatically significant, Palestinians whose land was declared “state land” may appeal the decision to the Military Appeals Committee. This committee functions as a judicial tribunal, yet its decisions (except those pertaining to issues of first registration) are recommendations subject to head of the Civil Administration’s approval.45

Until 1979, Israel requisitioned private Palestinian land and then allocated it for building Israeli settlements, claiming this was a military need. Following the Supreme Court’s ruling (sitting as the High Court of Justice) in the case of Elon Moreh, which forbade this practice, Israel’s policy shifted to building Israeli settlements on land it declared “state land”.46 The Civil Administration has declared nearly one million dunam of land in the West Bank “state land” since the 1980s. Additionally, at least 527,000 dunam of land were registered as government property by the Jordanian government, or by previous regimes, and transferred to the Israeli army’s trust after it occupied the West Bank.47

The way Israeli military government uses land it declares “state land” is critically important for the act of declaration. Allegedly, land that is government property is supposed to be used for general, public needs (such as roads, public facilities, parks). Yet Israel uses land declared “state land” almost exclusively for the benefit of its settlement enterprise in the oPt and excludes Palestinian individuals and communities from benefiting from this land. Palestinians have been allocated a scant 0.25% of all “state land” in the West Bank allocated for any type of use by the Civil Administration since 1967.48

called first registration (see supra note 8), even land declared “state land” (Ministry of Justice, Report of the Committee Appointed to Investigate the Issue of Land Registration in Judea and Samaria, Jerusalem, 2005, pp. 21-22 [Hebrew]). However, initial registration is clearly more difficult to complete if the land in question was previously declared “state land” - and even harder if it was already allocated to a third party.

45 Zamir, State Lands, p. 33. Order Concerning Government Property, sections 6A, 6B; Order Regarding Appeals Committees (Judea and Samaria) (No. 172), 5727-1967, section 2 of the appendix.

46 HCJ 390/79, Dweikat et al v. Government of Israel et al., Judgement, October 22, 1979. For further reading on this policy, see B’Tselem, Under the guise of legality; B’Tselem, Land Grab: Israel’s Settlement Policy in the West Bank, May 2002.

47 According to the State Comptroller, in 1979-1992 the Civil Administration declared 908,000 dunam of West Bank land “state land”. We do not have precise information regarding declarations made as of 2000, yet according to information the Civil Administration provided to Bimkom – Planners for Planning Rights, 5,114 dunam were declared “state land” in 2003-2009. Additionally, according to analysis of Civil Administration GIS strata, in 2012-2015 approximately 63,777 dunam were declared “state land” (State Comptroller, Annual Report 56A for 2005 [Hebrew], p. 206; B’Tselem, Under the guise of legality, pp. 11-13; Yesh Din, From occupation to annexation, pp. 20-21).

48 Yotam Berger, “Palestinians Have Received 0.25% of State Land Israel Has Allocated in the West Bank Since 1967”, Haaretz, July 18, 2018. See also Yesh Din, “Through the Lens of Israel’s Interests”: The Civil Administration in the West Bank, pp. 16-18; “Re: Inclusion of state land, Jewish-owned land and acquired land in the jurisdiction of regional councils”: Deputy Defense Minister conclusion January 30, 1981, Link to the document on Akevot website.
Declaring “state land” in the context of the occupation regime in the West Bank is in fact a pronouncement regarding land that will be used in future for Israeli settlements or is presently in the service of Israeli settlements. The very establishment of Israeli settlements contradicts international law and systematically infringes upon Palestinians’ right to movement, and additional fundamental rights.

Declaring “state land” where settlement of title was halted after occupation of the West Bank

We do not have complete information regarding the scope of land subject to Jordanian settlement of title before Israel occupied the West Bank, or the stage to which settlement of title progressed before being suspended. It seems that Israeli authorities do not have this information either.\textsuperscript{49} As such, it is impossible to provide a comprehensive review of the scope of declaration of “state land” undertaken by the Civil Administration for this type of land.

Still, information provided by the Civil Administration as part of the residents of Kafr ‘Aqab’s petition indicates that over time Israel declared at least 41,000 dunam of land “state land” – land included in a schedule of claims prepared during Jordanian settlement of title.\textsuperscript{50} De facto, these declarations revoked the process of settlement of title in areas of 16 Palestinian villages and towns in many West Bank districts, from north to south. From the district of Jenin, through Tulkarm, Qalqiliyah and Ramallah, extending to the districts of Jerusalem, Bethlehem and Hebron.\textsuperscript{50}

Without a case by case review it is impossible to determine how title to these 41,000 dunam would be distributed if settlement of title were concluded. Yet, it is highly probable that in many cases, the scope of land registered as belonging to the Jordanian sovereign would have been much more limited compared to the scope of land that Israel declared “state land”. This assessment is based on three arguments:

First, our data suggests that the scope of land the Jordanian government claimed as part of settlement of title was limited in most cases, and certainly much less than the area that Israel declared “state land”. For example, regarding declaration of “state land” in the two case studies presented in this document, the total area of which is 1,208 dunam, there is no evidence to suggest that the Jordanian government made any claims to the land Israel subsequently declared “state land”, and to the best of our knowledge there were

\textsuperscript{49} HCJ 5426/17, Affidavit of response on behalf of respondents 1-2, January 23, 2019, sections 113-116; Ibid, Response on behalf of the respondents to the petitioners’ request for additional details, May 14, 2019, section 23.

\textsuperscript{50} Ibid, Affidavit of response on behalf of respondents 1-2, January 23, 2019, sections 113-116; Ibid, Response on behalf of the respondents to the petitioners’ request for additional details, May 14, 2019, section 23. See maps on page 21 of this report.
no such claims.\textsuperscript{51} Further, had the Jordanian government made claims, these would have undoubtably referred to a much smaller area than Israel declared “state land”.

When the Supervisor, who signs declarations of “state land”, was asked whether he was aware of any claims made by the Jordanian kingdom in the area declared “state land” in Kafr ‘Aqab, he responded simply, “no”. When asked whether he was aware of any claims made by the Jordanian kingdom in the area of settlement in Al Khader, he responded, “I am not aware any”.\textsuperscript{52} Heads of the blue line team and the infrastructure division at the Civil Administration responded similarly.\textsuperscript{53} The Palestinian landowners, however, testified that they cultivated their plots in the areas where Israel declared “state land”, and that these were their private lands.

Although the Civil Administration claimed it did not have comprehensive information regarding the Jordanian schedules of claims prepared during settlement of title in the West Bank, it indubitably does have information concerning the schedule of claims prepared for Al Khader land, specifically the maps drawn up as part of the schedule of claims and the division of plots. Head of the Civil Administration even went so far as to make use of the schedule of claims when it served Israeli interests. This is apparent from the testimony of the head of infrastructure, who referred to the status of a plot in Al Khader land during planning proceedings concerning this plot:

\begin{quote}
This is a plot in an area declared state land. Let’s call it “plot 91”, although this is inaccurate. \textbf{This plot is registered in the state’s name in the schedule of claims for Al Khader land}, and to dispel any doubts, the Supervisor of Governmental Property declared it state land in 2014.\textsuperscript{54}
\end{quote}

Second, Israel’s interpretation of Ottoman Land Code differs from the way the British Mandate government and the Jordanian kingdom applied the Code. Different to the Jordanian approach, according to the Israeli interpretation, the sovereign may easily demand title to land, whereas individuals who seek to protect their rights to title encounter

\textsuperscript{51} Ibid, Petition for an order nisi, an interim order and a temporary injunction, July 5, 2017, section 169-170.
\textsuperscript{52} Appeal 68/13, Protocol, December 9, 2014; Appeal 50/14, Protocol, July 20, 2017.
\textsuperscript{53} Appeal 68/13, Protocol, December 9, 2014; Appeal 50/14, Protocol, November 8, 2017. The blue line team, or task force, was established in 1999. Its formal aim is to examine and adjust or correct the boundaries of “state land” declarations undertaken in the past by the Supervisor by using contemporary digital means (the Civil Administration, Amendment to the procedure for the task force examining the boundaries of state land – The procedure for publication and correspondence, (Hebrew) August 11, 2015). For further information about the team see: Kerem Navot, Blue and White make Black: The Blue Line Team in the West Bank, December 2016.
\textsuperscript{54} The Supreme Planning Committee, subcommittee for settlement, Protocol of hearing number 2017011, p. 27, Plan JS/405/11: Alon Shvut (plot no. 91), October 17, 2017 (our bolding). The subject of this hearing was a plan for a temporary site for residents of the unauthorized outpost Netiv Ha’avot after evacuations mandated by the Supreme Court’s ruling.
obstacles. As a result and as a rule, the Jordanian kingdom made claims for less land under settlement of title, compared to the scope that characterizes Israel’s policy of declaring “state land”.

Third, even if an individual participated in Jordanian settlement of title, claimed title to their land and the claim was documented in the schedule of claims prepared for the village’s lands, according to the Civil Administration’s policy for declaring “state land”, if that individual ceases to cultivate the land, he or she stands to lose rights to title. Such a policy could rob landowners of their rights even when they took part in settlement of title, rights that would have been registered in the land registry had the process been concluded in due time.

Results of the appeal submitted by residents of Kafr ‘Aqab after the Civil Administration declared part of the village’s land “state land” in 1982 demonstrate this danger. Settlement of title was undertaken for Kafr ‘Aqab land during the 1960s and a schedule of claims was prepared as part of the process (this case will be described in full later in this report). Despite this, the Civil Administration declared part of Kafr ‘Aqab’s land “state land” based on cultivation during the late 1970s and early 1980s. After the residents of Kafr ‘Aqab appealed the declaration, the Military Appeals Committee ordered the area of the declaration be re-surveyed according to cultivation when claims to title were submitted during settlement of title (in the 1960s). This led to withdrawing approximately 20 percent of the land declared “state land” by the Civil Administration from the area subject to the declaration. Therefore, even according to Israel’s stringent approach, some 20 percent of the land subject to the declaration would have been registered as private land had settlement of title been concluded.

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55 For example, while British Mandate and Jordanian governments recognized patch cultivation over a long period of time for as acceptable for obtaining title to land in accordance with section 78 of the Ottoman Land Code, Israel adopted a stricter interpretation of the section whereby only patch cultivation for at least 50 percent of the plot area entitles the individual (B’Tselem, Under the Guise of Legality, pp. 28-60).

56 HCJ 5426/17, Affidavit of response on behalf of respondents 1-2, January 23, 2019, sections 100-103.

57 Appeal 15/82 to the Military Appeals Committee, 99 residents of Kafr ‘Aqab v. the Supervisor of Governmental Property (henceforth: Appeal 15/82).
Palestinian village land included in the schedule of claims prepared during Jordanian settlement of title, part of which Israel subsequently declared “state land”

Palestinian village land included in the schedule of claims prepared during Jordanian settlement of title, part of which Israel subsequently declared “state land”

Israeli settlement

Unauthorized Israeli outpost
The goal: retroactive authorization of Israeli settlements and outposts

Nearly all declarations of “state land” were undertaken in areas where Israeli settlements were established or in their vicinity, although a schedule of claims was prepared for these 41,000 dunams during Jordanian settlement of title. Information provided by the Civil Administration indicates that such declarations were for land in the area of or near 22 Israeli settlements. Four of these Israeli settlements – Telem, Adora, Negohot and Givon Hahadasha - were built entirely or almost entirely on land for which a Jordanian schedule of claims was prepared. Seven unauthorized Israeli outposts were built on this land, outposts even Israel claims are illegal.

Israel’s policy contradicts the rights and interests of the local Palestinian population, and this has become fiercely clear over the past decade. In both case studies described later in this report, the Civil Administration declared “state land” in areas included in the Jordanian schedule of claims in order to retroactively authorize illegal Israeli construction on Palestinian land.

Gilad Palmon, head of the blue line team at the Civil Administration, explicitly stated this was the objective of declaring land in Kafr ‘Aqab “state land” in 2013 and in Al Khader – in 2014. For example, when questioned about declaring “state land” in Al Khader, in the area of the illegal outpost Netiv Ha’avot, Palmon testified that:

Question: What was the ultimate goal of this declaration?
Response: Examining the status of the land.

Question: In anticipation of what? For what purpose?
Response: Retroactive authorization of the outpost in terms of planning procedures.

Question: Meaning retroactive authorization of illegal construction?
Response: Yes, to the best of my knowledge and understanding.

Thus, Israel attempted to retroactively authorize illegal Israeli construction on Al Khader and on Kafr ‘Aqab land by declaring “state land” there. Allegedly, wherever settlement of title began, title – whether awarded to the state or to individuals - must be determined through

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58 HCJ 5426/17, Affidavit of response on behalf of respondents 1-2, January 23, 2019, sections 102-103. The state’s response referred to 21 settlements, omitting the settlement Alon Shvut; there are in fact 22 settlements.

settlement of title. Israel halted settlement of title and suspended registration of private land, but when it sought to expand the Israeli settlement enterprise in the West Bank and retroactively authorize illegal Israeli construction there, Israel declared “state land” in areas where settlement of title already began. In doing so, Israel de-facto revoked Jordanian settlement of claims in areas where it had begun but had not been concluded, and trampled the rights of those who sought to settle their claims to title.

These facts lend absurdity to Israeli authorities’ attempts to cite the duties incumbent upon it under international law as the occupying power, in order to justify its policy. The Civil Administration responded to the residents of Kafr ‘Aqab’s petition, claiming that its policy for declaring “state land” throughout the West Bank, including land in settlement areas during Jordanian rule, is grounded in the legal duty to protect public property in the West Bank and is required in order to “protect the property owned by the sovereign and administer it as effectively as possible.”

Indeed, from a legal-formalistic standpoint the Civil Administration is responsible for protecting public property in the occupied territory, pursuant to its obligation to safeguard the rights of the local population. Yet citing this obligation in order to justify the policy described by this report is disingenuous on two counts. First, because Israel exploits such declarations to retroactively authorize construction that even Israel considers illegal, meaning construction that was undertaken while harming the public property the Civil Administration allegedly seeks to protect. Second, because Israel utilizes land declared “state land” to reinforce and expand its settlement enterprise in the West Bank. It does so while all Israeli settlements and unauthorized outposts in the West Bank were built in violation of international law.

To reiterate, as a rule, “state land” is allocated to Israeli settlements or for related infrastructure, and nearly no such land allocated by the Civil Administration for any type of use was assigned to Palestinians or for their needs. The goal of these declarations contradicts the individual and collective interests of Palestinians, who are defined “protected persons” in the occupied territory, and the rules of international law.

60 HCJ 5426/17, Affidavit of response on behalf of respondents 1-2, January 23, 2019, section 110.
61 Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (Fourth Geneva Convention) prohibits the occupying power from transferring parts of its civilian population into the occupied territory. Israel’s Supreme Court has evaded deliberating the issue, claiming it is a non-justiciable, political question (HCJ 4481/91, Bargil et al v. the Government of Israel et al, Judgement, August 25, 1993). The Government of Israel, therefore, regards the establishment of settlements on public land with government approval as legal. In contrast, unauthorized outposts were established without government approval, and Israel too recognizes that they were built in violation of the law. For further reading see Yesh Din, From Occupation to Annexation.
62 See page 21, supra note 48.
The pretense of legality: Israel’s land declarations policy from the perspective of local and international law

Lack of authority: violation of the duty incumbent upon the occupying power to respect the legal framework in force

Israeli military rule in the West Bank is subject to international humanitarian law, which determines, inter alia, the rules that apply to occupying countries. At the heart of these rules is the occupying power’s duty to protect the rights of the population living under occupation and allow daily life to continue, all the while respecting the laws in force in the occupied territory. Altering the legal status quo is permissible only if required for the benefit of the “protected” population (in the West Bank, the local Palestinian population) or for an imperative military need. International law provides explicit rules in order to safeguard the protected population’s right to property; the Israeli Supreme Court too recognized the importance of protecting this right.

As mentioned earlier, the Israeli army issued the order suspending Jordanian settlement of title (Order Concerning Government Property) allegedly because of Israel’s obligations as the occupying power, and the potential resulting harm to Palestinians’ right to property.

Settlement of title was suspended in the West Bank over fifty years ago. In the interim, the order’s wording was left unchanged, along with its legal foundations. The significance of this suspension still means freezing settlement of title procedures rather than revoking or erasing their findings. The military government is still prohibited from using the situation it created to benefit its interests and harm the interests of the local population subject to a

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63 According to Article 43 of the Regulations concerning the Laws and Customs of War on Land annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land (1907): “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” For further reading on Article 43, its interpretation by Israel’s Supreme Court and the repercussions of this interpretation see David Kretzmer, “The Law of Belligerent Occupation in the Supreme Court of Israel”, International Review of the Red Cross, 94(885), Spring 2012.

64 Article 46 of the Regulations concerning the Laws and Customs of War on Land annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land (1907), Article 49 of the Fourth Geneva Convention, section 53. For the Israeli Supreme Court’s position see for example HCJ 7862/04, Abu Dhaher v. IDF Commander in Judea and Samaria, Judgement, February 16, 2005.

65 See page 18, supra note 40.
regime of occupation. The Military Appeals Committee recognized this in a decision in an appeal pertaining -inter alia - to the significance of suspending settlement of title:

The purpose of suspension was not to undo what was already achieved by settlement of title. Such revocation would not only be a waste of the efforts invested in previous stages of settlement of title, it would infringe upon rights already secured in the process. Such harm does not conform to the rules of proper public administration the appellant [the Supervisor of Governmental and Abandoned Property] is subject to, or the obligations it undertook to respect the residents of the Area’s right to property. […]

Suspending settlement of title by way of orders still does not alter the status of registration in the unfinalized schedule of rights, but rather freezes the status as-is when suspension came into force, until the suspending condition materializes - resuming settlement of title procedures. It does not revoke what has been achieved. […] it does not give life to claims that cannot be compared with what is documented in the unfinalized schedule of rights. It is not designed to benefit the appellant [the Supervisor] vis-à-vis circumstances had settlement of title not been suspended. […] the appellant [the Supervisor] may not benefit from suspending settlement of title indefinitely. 66

Even if the order suspending settlement of title (Order Concerning Government Property) was designed to fulfill the occupying power’s obligations in accordance with international law, the Israeli military government uses this situation to its benefit such that it completely contradicts this obligation. Israel’s policy of declaring “state land” where land was subject to the Jordanian schedule of claims means Israel selectively recinds the suspending order in areas where it seeks to reinforce Israeli settlements, erasing in practice the settlement of title procedures that took years to achieve. Israel does so while exploiting the implications of suspending settlement of land for its own benefit and infringing upon the rights of Palestinian landowners and communities. Israel’s policy violates both the local land laws in force in the West Bank and the rules of international law incumbent upon Israel as the occupying power in the occupied territory.

The broader Israeli policy concerning declaration of “state land” in the West Bank is based on an approach whereby these declarations do not alter rights to the land. In legal terms, declaring a certain area “state land” is a declarative act. It notifies the public of a right that exists independently and does not establish a new right or change the division of title to

the land. This differs from a constitutive action (which establishes or enacts), which grants a person or a body a right it did not previously hold.67

And yet, in areas where settlement of title began under Jordanian rule, both the Palestinian landowners and the Jordanian sovereign claimed rights to specific plots. When this process reached the advanced stage of drafting a schedule of claims, title claims were investigated, examined and recorded in full by authorized settlement officers. Declaring “state land” in these areas rejects, de-facto, all those claims brought by individual landowners in the involuntary settlement of title initiated by the sovereign. Therefore, the declaration does not inform the public of a right that already exists, but rather constitutes an action declaring the public (the “state”) holds a right to land to which an individual has already claimed title and established this claim before an authorized representative. In legal terms, declaring “state land” for land included in the Jordanian chart of claims is a constitutive act.

This gives rise to two conclusions: first, these declarations of “state land” constitute a drastic change to the law in force in the occupied territory because they sweepingly revoke settlement of title – a complex legal procedure conducted by the previous sovereign – and its findings. This drastic change is not necessary for maintaining order and public life or for protecting the rights of the local Palestinian population, nor is it designed to serve an imperative military-security need. As such, these declarations contradict the tenets of international law regarding occupation.

Second, these declarations directly infringe upon the property rights of all persons whose claims were documented in the schedule of claims, and on their collective rights. The rights of persons considered “absentee” are especially vulnerable, individuals who left or were forced to leave the West Bank and who therefore are unable to appeal the declaration.

Because Israel's policy alters the status quo in the occupied territory, it is abundantly clear that declaring “state land” in areas where a schedule of claims was prepared ignores the scope and location of claims by the Jordanian sovereign, and is undertaken for land that the Jordanian sovereign never claimed during settlement of title. Israel does so although the Jordanian schedule of claims includes all records of relevant claims, including the sovereign’s, for areas where settlement of title was undertaken. As a result of this policy, as evident in the two case studies in this report, Israeli declaration of state land is far more expansive than the Jordanian kingdom’s claims were in the same areas Israel declared “state land”.

67 This approach was also recognized in the Supreme Court's ruling, see for example CA 4999/06, The Supervisor of Governmental and Abandoned Property v. Kfar Giladi Quarries, Judgement, February 15, 2009; HCJ 2676/09, Abu Kamel et al v. The Supervisor of Governmental and Abandoned Property, Judgement, September 7, 2014.
Legal legitimacy for Israel’s military government’s actions in the West Bank, including declaring “state land”, is grounded in the Israeli army’s role according to international law. It is empowered to administer the occupied territory in the place of the previous sovereign. Yet the case studies demonstrate that the Israeli military government claimed land that the previous sovereign did not make any claims to. In doing so, the military commander clearly exceeded the limited governing powers granted by international law.

A regime, even an occupation regime, seeking to protect public property or private property, could have allocated the resources to renew settlement of title and complete registration of title to the sovereign and to individuals based on the existing, documented claims. Granted the difficulty of renewing settlement of title, unconcluded proceedings should, at the very least, be left where they stopped, rather than be revoked. Yet, as noted, this is not the Israeli military government’s motive. Renewing settlement of title from the point it was suspended or continuing to fully suspend the process would have precluded Israel from declaring “state land” in large areas where it has done so. Therefore, such steps would impede achieving Israeli policy’s true objective: reinforcing Israel’s settlement enterprise and retroactively authorizing illegal Israeli construction in the oPt.

The effective date: submission of claims during settlement of title tolls distribution of rights to the land

A fundamental principle of settlement of title and property laws that apply to the occupied territory (and Israel proper) is that a claimant’s rights must be reviewed according to the date the claim was submitted. In this case, the effective date was during the beginning of the second stage of Jordanian settlement of title. Dr. (Major, res.) Ronit Levine-Schnur, who headed the division of real property at the office of the legal advisor to the West Bank, held that this is the “most fundamental rule of settlement of title laws” in her expert opinion provided during proceedings in the petition submitted by residents of Kafr ‘Aqab.

The principle whereby the time when the claim was submitted is the effective date for freezing distribution of title to the land is a condition necessary for achieving the purpose of settlement of title, which is final and fair registration of all title to the land. Because Jordanian settlement of title was based, inter alia, on proving continuous cultivation in accordance with Ottoman law (a mechanism also termed adverse possession), this principle is especially important.

As noted, according to article 78 of the Ottoman Land Code, the prescriptive period (the length of time land had to be cultivated consecutively) was a minimum of ten years before

68 For further information, see page 10-15 of this report.

69 HCJ 5426/17, Levine-Schnur, Expert opinion, section 11.
title could be claimed. Therefore, an individual who began cultivating a plot just three years prior to the beginning of settlement of title would not be eligible to register the title to their name, even if the settlement officer’s investigation took an additional seven years, during which the farmer were to continuously cultivate the plot. According to this principle, a person who cultivated their plot for 15 consecutive years prior to settlement of title would be entitled to register it in their name even if settlement of title were to continue for many years and during this long period the holder ceased to cultivate this plot.

The British Mandate courts, whose rulings constitute part of the law in force in the West Bank, recognized the validity of this principle and determined that even if settlement of title was delayed and title registration was not concluded for several years, rights to title were determined according to the effective date claims were submitted. 70

The Israeli Supreme Court too determined that disputes over title during settlement of title must be resolved according to the time claims were submitted during settlement of title, even if the procedure took many years. For example, in a judgement pertaining to a dispute over title to land in the village Safuriyya in Israel (where the Israeli community of Tzipori was subsequently built) where settlement of title began in 1964 and was concluded only in 1980, the Court based its judgement on settlement law and fundamental principles of property law and found that:

The photographs relevant to this case are the same photographs taken in 1945. Civil Appeal 62/83 already established that the relevant photographs are those that were taken nearest to submission of claims, as on this date the respondents’ rights were established. In our case, 1946 is the date when the respondents’ prima facie rights were established to the claimed plots, because this is the time they submitted their claim. 71

This indicates that had the Israeli military commander ordered settlement of title to be renewed in a certain area where it had begun under Jordanian rule, title to the land would be determined according to the status of the land at the time claims were submitted. Changes to cultivation of a plot in the interim could not affect titling land. Settlement of title proceedings would resume at the stage of the schedule of claims, with plots marked and claims documented in the schedule, and any appeal of claims would defer to the status of the land at the time claims were submitted. 72

70 For examples and details regarding British Mandate court rulings see: Ibid, sections 15-19.

71 CA 56/82, The State of Israel v. the Estate of Rahal, Judgement, October 16, 1986. This position was reflected in additional judgements, including CA 458/84, Mu’adil v. the State of Israel, Judgement, April 22, 1987; CA 223/81, The Development Authority v. Faiz Hassan ‘Id et al, Judgement, April 3, 1985.

72 In East Jerusalem, which was annexed to Israel in violation of international law, settlement of title was not suspended and therefore continued (or could have formally continued) from where it left off. As a result, Israeli authorities cannot register land in East Jerusalem as “state land” while ignoring settlement of title there. For further reading on settlement of title in
The Israeli military commander in the West Bank not only chose to suspend settlement of title, but further sought to redetermine settlement of title to land by declaring “state land” in areas where settlement of title had been underway. **In both case studies presented in this report, declaring “state land” was based on reviewing cultivation of the land in question decades after settlement of title was suspended.** The declaration in Kafr ‘Aqab was based on cultivation in the early 1980s, approximately 20 years after settlement of title began there; in Al Khader, it was based on interpretation of aerial photographs taken between 1969-2007 and focused only on cultivation during the later years in order to determine ownership, over 40 years after settlement of title began in this area.

Consequentially, these declarations ignored the principle whereby submission of claims tolls titling land and constitutes the effective date rights are established. Israel declared “state land”, although in both cases Jordanian schedules of claims document all relevant claims in the settlement area after having examined and investigated them. It is important to note that had Israel operated according to this principle in places settlement of title had begun, it could have lessened - but not completely prevented - the harm inherent in the very act of the declarations.

In response to the petition submitted by residents of Kafr ‘Aqab, the Head of the Civil Administration stated that this was neither error nor aberration but rather a deliberate policy. He claimed that the policy for the Civil Administration’s operations had always been to determine title to land according to conditions at the time of the declaration of “state land” rather than when claims were submitted during settlement of title, even when there was a schedule of claims:

> The approach is that even after the [Israeli] suspending order was issued, ceasing cultivation of land results in tasarruf [usufruct] rights reverting to the state treasury; this was fundamental in declarations proceedings in the area, and this view was expressed whenever relevant. […]

Examinations conducted by Civil Administration officials show that many declarations of “government property” were undertaken for large tracts of land pursuant to the Supervisor’s authority under Order 59 [Order Concerning Government Property] in the area where settlement of title reached the schedule of claims phase under Jordanian rule. In their review, Civil Administration officials found that the declarations they reviewed were undertaken based on examining rights to title after the schedule of claims was prepared.73

East Jerusalem, see Levine-Schnur, *Privatization, Segregation and Discrimination.*

73 **HCJ 5426/17**, Affidavit of response on behalf of respondents 1-2, January 23, 2019, sections 100-102.
According to the Civil Administration’s stated policy, Israel may declare “state land” even when land was cultivated continuously for decades before settlement of claims began. Israel may do so for land documented in their owners’ name in the schedule of claims, but which were not finally registered in the land registry due to Israel suspending settlement of title. If cultivation ceased for any reason, Israel’s declarations policy permits it to determine - decades later - that the land is “state land”.

Israel’s policy of declaring “state land” for areas that were subject to Jordanian settlement of title proceedings, which were suspended due to the Israeli military commander’s decision, disregards a fundamental principle of settlement law and property law in force in the occupied territory and infringes upon the right to property of persons who participated in the now suspended settlement of title. In doing so, Israel is able to increase the areas declared “state land” for the benefit of its settlement enterprise in the West Bank at the expense of Palestinian individuals and communities.

Further, the Civil Administration’s declared policy denies any distinction between the legal standing of unregistered land that was not subject to settlement of title and that of land that was, and which even reached the schedule of claims stage. This policy contradicts settlement of title laws, the suspending order issued by the military commander himself, which instructed that settlement of title be suspended and not revoked, and even contradicts the decisions of the Military Appeals Committee on this issue.

This committee determined in a series of decisions that in areas where a Jordanian schedule of claims was prepared, rights are established according to the time claims were submitted during settlement of title. Therefore, declaring such land “state land” must be based on the conditions at the time claims were submitted and before, not at the time “state land” was declared.

This position was reflected in the committee’s decision in 1984 in an appeal submitted by residents of Kafr ‘Aqab of the declaration of 1,600 dunam of their land as “state land”,74 and again approximately 30 years later in the decision regarding the declaration of 224 dunam of Kafr ‘Aqab’s land as “state land” in 2013. In this second decision, the committee went so far as to stress that declaration of “state land” that exploits the fact that cultivation ceased in the years after settlement began severely infringes upon the right to property:

The appeals committee repeatedly found – unanimously each time – that the Supervisor of Government and Abandoned Property, which is a governing authority, may not benefit from suspending settlement of title and then claiming that the appellants ceased to cultivate their land. Submitting a claim to title during settlement of title, it was determined, tolls

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74 Appeal 15/82, Decision, April 8, 1984.

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the statute of limitations. Benefiting from claiming that cultivation ceased after settlement of title procedures were suspended severely and unjustifiably infringes upon private property.75

Israel’s declarations policy benefits from suspension of settlement of title

In its decision in the matter of Kehati, the Military Appeals Committee elaborated on the implications the order suspending settlement of title has on distributing title to land where settlement of title was underway. The committee addressed the conflict between the order’s instructions and this policy, which ignores the effective date when determining title to land. The committee also explicitly held that the Israeli military commander, who is responsible for protracting settlement of title proceedings, is prohibited from benefiting from the situation he himself created in order to increase his control over land, noting that this policy leads to infringements of the right to property.

The appellant [the Supervisor of Governmental and Abandoned Property in the West Bank] is forbidden from claiming that cultivation ceased, which is entirely contingent on suspension of settlement of claims. Had settlement of title procedures continued, the appellant could not have raised the claim of ceasing cultivation during proceedings, based on cultivation that was halted after the claim was submitted during settlement of title. […]

This approach is based on the principle that protracted settlement of title procedures cannot mount claims against an individual who already submitted a claim to title. Building on this argument, protracting and suspending settlement of title proceedings cannot undermine a claim already submitted and documented, even if the schedule of rights is not yet final. This is especially relevant when the party who seeks to gain from protraction of the process is responsible for its protraction. […]

Submitting a claim during settlement of title tolls the statute of limitations against claims submitted during settlement of title. This is true when settlement of title has not been concluded, and is especially true when the process has been concluded by registration. The appellant [the

75 Appeal 68/13, Decision, July 27, 2016, section 73 (our bolding). Close to this decision, the Military Appeals Committee accepted two additional decisions that reflect this same approach to the effective date for reviewing rights to title documented in a schedule of claims: Appeal 2/11, Decision, August 3, 2016; Appeal 121/15 heard by the Military Appeals Committee, Salah v. the Supervisor of Governmental and Abandoned Property (henceforth: Appeal 121/15), Decision, February 28, 2017.
Supervisor] may not benefit from indefinite suspension of settlement of title. Although the unfinalized schedule of rights may be challenged, counterclaims may challenge the underlying basis of a claim, but it is improper to argue based entirely on suspension of the process. That was not the purpose of the suspending order. Such a purpose contradicts the State of Israel’s laws and customary law in force in the area, in all its strata. It severely and unjustifiably infringes upon private property, contradicts the public interest in legal committees on property rights and in protecting the rightsholder from unjust seizure of these rights to property without legal justification.76

The Civil Administration accepted the committee’s recommendation in 1984 and did not appeal a series of similar decisions the committee made in recent years.77 And yet, the head of the Civil Administration’s statements in response to the petition submitted by residents of Kafr ‘Aqab suggest that in practice, the declarations policy did not comply with the committee’s recommendations from 1984. Thus, the Civil Administration adopted a duplicitous policy: while it seemed to comply with judicial oversight, in practice it ignored the committee’s criticism and did not implement long-term changes to its mode of operation.

This duplicitous policy shifted in 2017 after the appeals committee recommended repealing the declaration of “state land” in Kafr ‘Aqab. Approximately nine months after the committee’s decision, the head of the Civil Administration announced he rejected the committee’s recommendation to repeal the declaration of “state land” and even claimed that the committee’s recommendation contradicts the “current customary practice”.78

The head of the Civil Administration’s unorthodox decision rejecting the recommendation of a legal-professional tribunal is tainted by political and extraneous considerations that put the rule of law in the West Bank to shame. The Military Appeals Committee’s recommendations were rejected in order to uphold the declaration of “state land”, which is clearly designed to retroactively authorize illegal Israeli construction in the oPt.

Thus, the Israeli military commander does benefit from the circumstances created by its own suspending order. One of the State’s arguments in defense of its contemptuous treatment of settlement of title and its outcomes was, shockingly, that many years had

76 Appeals 9-14/06, Decision, August 6, 2008 (our bolding). The decision in this matter pertains to the argument regarding rights to land documented in the unfinalized schedule of rights. This also pertains to the principled argument on the effective date for establishing rights; in this case, the effective date is disregarded although settlement of title reached the stage of the schedule of rights.

77 For example, in Appeals 9-14/06, Appeal 2/11, and in Appeal 121/15 where the decision was only given in 2017.

78 Letter on behalf of the Head of the Civil Administration, Brigadier General Ahvat Ben Hur, Rejection of the appeals committee’s recommendations to revoke the declaration of state land in Kochav Ya’akov, April 27, 2017.
passed since settlement of title was suspended. Head of the Civil Administration, in his affidavit in the case of the declaration of Kafr ‘Aqab land, noted that although “the principle whereby submitting a claim tolls the statute of limitation” might be applicable under normal circumstances, “because the claim (and in this case, settlement of claims) has been suspended for decades, as the rest of the claims submitted in the Area prior to the suspending order, there is no logic in exercising this principle.” And so, Israel uses its own suspending order to justify robbing Palestinian landowners of their right to property.

Israel’s policy as described here contradicts the land laws in force in the West Bank, as well as the rules of international law concerning protection of the local population living under occupation and their right to property. It seeks to legitimize flagrant seizure of Palestinians’ right to property and approve future infringements of the rights of Palestinian individuals and communities who participated in settlement of title procedures.

Kochav Ya’akov, the majority of the settlement was built on Kafr ‘Aqab’s land, 2015 (photo by Jonathan Caras - Own work, CC BY-SA 4.0)

79 HCJ 5426/17, Affidavit of response on behalf of respondents 1-2, January 23, 2019, section 81.
Case studies

Theft of Kafr ‘Aqab land (endorsed by the Israeli High Court of Justice)

Kafr ‘Aqab (كفر عقب) is a Palestinian village north of Jerusalem; its population until the early 1960s was estimated at several hundred, and 410 in 1961. A survey from 1945 indicates that some 3,750 dunam, approximately 65 percent of the village’s land at the time, was cultivated. After the West Bank was conquered in 1967, approximately 27 percent of the village’s land was annexed to Israel as part of the annexation of Jerusalem and vast surrounding areas, while the rest of the village’s land was subject to Israeli military rule.

On October 15, 1961, the Jordanian government began settlement of title for Kafr ‘Aqab land. During the months that followed, landowners sued title to their land, claims that were based, inter alia, on continuous cultivation according to the instructions of the Ottoman Land Code. Harab Barkat (born in 1938), whose family owned several plots in the village’s north-eastern land, recalls farming his family’s land as a youth, “I farmed the land until I was 18, with my father, brothers, mother, aunts and uncles. We grew seasonal crops, such as wheat, barley and other crops.”

Ali Barkat (born 1945), whose family also held land in the same area, testified that “This is our plot, which I inherited from my father and he from my grandfather, and so on for generations.” He claims he remembers his family cultivating the land, and helping to farm when he was young. He described settlement of title in the village:

In 1960 the Jordanian settlement administration surveyed the area and determined plot boundaries. I recall joining them on one of their field visits. The Jordanian settlement officer heard the landowners’ claims about boundaries and [determined] that the boundaries were fixed. The Jordanian settlement officers finished determining the boundaries and concluded survey work in

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82 Jerusalem Institute for Policy Research, Kufr Aqab, p. 16.
84 Ibid, Affidavit on behalf of appellant number 2, June 2, 2014.
the village. Regarding our land, the [Jordanian] settlement committee [team] confirmed the boundaries of our plot and they were approved.86

During settlement of title for Kafr ‘Aqab’s land, a schedule of claims was prepared,87 concluding, as described above, extensive examination and detailed documentation of all relevant claims to title to the land, as well as any disputes. As stated, in 1969 the Israeli military commander suspended all settlement of title procedures in the West Bank. As a result, the rights of Kafr ‘Aqab landowners were not finally registered in the West Bank land registry, and their land was left in a state of limbo: the Jordanian sovereign took meaningful steps to settle title to their land, yet this process was not concluded because the West Bank was occupied and Israel halted settlement of title.

In any case, some residents of the village continued to cultivate their land in subsequent years. “We plowed with donkeys”, says Ali Barkat, describing farming his family’s land: “We planted wheat, barley, seasonal crops”. He claims that the family’s land continued to be farmed until his father got sick, around 1978.88 Interpretation of aerial photographs taken in 1967-1981 of approximately 200 dunam in the village’s north-eastern land reflects that this land was cultivated during this time, and cultivation was based on terrace farming and rainfed crops, as was the custom.89

In 1982, the Civil Administration declared 1,600 dunam of Kafr ‘Aqab land “state land”. Instead of renewing settlement of title, as the Israeli military government might have done had it sought to settle title to land for the benefit of the local Palestinian population, it unilaterally declared “state land” to create the conditions necessary for building a new Israeli settlement: Kochav Ya’akov. Israel de-facto revoked claims submitted by Kafr ‘Aqab landowners documented during Jordanian settlement of title.99

99 residents of Kafr ‘Aqab appealed the declaration of “state land” before the Military Appeals Committee. The residents argued that their title claims were documented in the schedule of claims prepared during Jordanian settlement of title for their land. Additionally, the residents noted that they cultivated their plots included in the area declared “state land” for years, meaning these are private lands, and title is based on continuous cultivation.

The appeals committee accepted the residents of Kafr ‘Aqab’s arguments in part and determined that where settlement of title began by Jordanian authorities, rights to title are established at the time claims are submitted and are not altered after this time. In light of this finding, the committee reviewed cultivation based on an

86 This part of Barkat’s testimony is quoted in the appeals committee’s decision, Ibid, Decision, July 28, 2016, section 98.
87 Ibid, section 6.
89 Ibid, Protocol, April 16, 2015, Testimony by expert Ehud Lotem. We note that the basis for declaring “state land” in 2013 was the Civil Administration’s claim that most of the area was not cultivated.
aerial photograph taken in 1956 (just under a decade prior to submission of claims during settlement in 1963-1964), as this was the aerial photograph taken closest to the beginning of settlement of title. In 1984 the Military Appeals Committee decided that approximately 20 percent of the land declared “state land” must be retracted from the declaration.  

Several months after the decision in the appeal, the Israeli settlement Kochav Ya’akov was built in the area still subject to the declaration. Since then the residents of Kafr ‘Aqab have been deprived of free access to their land trapped inside the settlement and around it. A barbed-wire fence erected by the area subject to the declaration prevents the landowners from accessing plots that were not declared “state land”, and from cultivating their land. “We were prevented from going to our land and they fenced off the land”, explained Ali Barkat, adding that Palestinians are now prohibited 150 meters from the fence.  

90 Appeal 15/82, Decision, April 8, 1984.  
91 Appeal 68/13, Protocol, December 9, 2014. Regarding the fence and prevention of access, there is no dispute between the landowners and the Civil Administration, as evident in the Military Appeals Committee’s decision: “We concur that in 1980 a fence circling the area of the settlement Kochav Ya’akov was built, including the area subject to the declaration.
In the 2000s, theft of the village’s land resumed. In August 2009, residents of Kafr ‘Aqab discovered that 12 new structures were being built on their private land in the area north of the settlement Kochav Ya’akov, outside the area declared “state land”.

According to Peace Now’s data, in 2016 there were approximately 235 houses built on private Palestinian land in the settlement Kochav Ya’akov and the nearby outposts (Peace Now, The Grand Land Robbery: Another Step toward Annexation: 55 Outposts and 4,000 Structures to Be Legalized Through The Regulation Law (December 2016, p. 3). In 2016, approximately 7,400 Israeli settlers resided in Kochav Ya’akov (Central Bureau of Statistics Website, Regional statistics by locality, population, 2016).
Head of Kafr ‘Aqab council and additional residents petitioned the HCJ, asking the Court to instruct the State to demolish the structures built illegally and prevent them from being occupied. Yet during hearings in the petition, the State announced it had initiated a process to review (survey) rights in the land where the structures were built in order to declare it “state land”. This is the first step towards retroactively authorizing the illegal construction. And so, in May 2013, the Civil Administration declared 224 dunam of Kafr Aqab land, located north of the settlement Kochav Ya’akov, “state land”.

Gilad Palmon, head of the blue line team, who oversaw the land survey, admitted in his testimony in the appeal of the decision that the declaration was designed to retroactively authorize the illegal construction:

**Question:** Was the declaration undertaken in order to consider retroactive authorization of illegal construction?

**Response:** That’s right.

**Question:** Was it for Kochav Ya’akov?

**Response:** For the illegal construction I mentioned earlier. 94

Considering the outcome of the first declaration, Israeli authorities indubitably knew that settlement of title had been undertaken for Kafr ‘Aqab land, and a complete schedule of claims had been compiled. Despite this, authorities chose to operate according to the interests of Israel’s settlement enterprise and declare “state land”. In doing so, authorities de-facto revoked settlement of title for the land and rejected the claims submitted during this process, all the while disregarding Palestinians’ rights to property. Israeli authorities’ decision was based on cultivation after the West Bank was occupied without due consideration of the effective date when claims were submitted during settlement of title in the 1960s, and contrary to the Military Appeals Committee’s decision given in the 1980s addressing the exact area. Yet again, declaration of “state land” was designed for the benefit of the Israeli settlement enterprise.

Landowners from Kafr ‘Aqab were forced, again, to appeal the declaration of their land as “state land” in order to protect their property. And again, the Military Appeals Committee accepted their claims in part and determined that in areas where settlement of title was undertaken and a schedule of claims drafted, title should be examined according to the time when claims were submitted. Therefore, the committee recommended the declaration be revoked and division of rights should be re-examined based on aerial photographs taken during the years prior to submission of claims during settlement of title and based on the division of plots as documented in the Jordanian schedule of claims. 95

However, the head of the Civil Administration decided to reject the Military Appeals Committee’s recommendation and uphold the declaration in an unusual decision tainted by extraneous considerations. 96 The settlement houses, built

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96 Letter on behalf of the Head of the Civil Administration, Brigadier General Ahvat Ben Hur, Rejection of the appeals committee’s recommendations to revoke the declaration of state land in Kochav Ya’akov, April 27, 2017. For
illegally, are still standing. The residents of Kafr ‘Aqab were forced to petition the HCJ, asking it to instruct the Civil Administration to revoke the declaration, which infringes upon their right to property, as well as that of any individual who took part in settlement of title.97

On November 29, 2020 the HCJ Justices accepted the State’s position and rejected the petition.98 The Court held that submitting a claim during settlement of title does not outweigh the requirement for continuous cultivation of land during settlement of title. Therefore, although settlement of title was suspended by Israel and has been suspended for over 50 years, the landowners could lose their rights to their land.

The Court did note that Israel suspended Jordanian settlement of title in order, inter alia, “to refrain from harming the property rights of the many absentee and residents of Jordan who were away from the Area”. But in contradiction of this, the Court decided that “The suspending order never prevented anyone from continuing to cultivate the land they legally possessed. The decision whether to possess and cultivate or abandon and not cultivate was theirs.”

The Justices also determined that the stage when a schedule of claims is prepared is a preliminary, administrative stage, which does not include a “substantive-legal examination of rights and does not separate founded rights from unfounded rights.” This determination contradicts Jordanian law and the experts’ opinions on this matter, and absurdly is grounded in analysis of the British Mandate’s Land Settlement Ordinance, which differs substantively from Jordanian settlement of title.

In practice, the ruling allows Israel to declare “state land” where settlement of title was underway but was not concluded because Israel suspended the procedure. This means Israel may transfer land for the use of Israeli settlements in the oPt while severely infringing upon the rights of Palestinian communities.

On December 24, 2020, the landowners and head of Kafr ‘Aqab council filed a motion for a further hearing in an expanded panel of justices.99 In their request, the petitioners argued that the judgement established several new legal rules, some of which constitute a substantive departure from established rulings that were several decades old, and some constitute new precedents and pose significant difficulty with regard to land laws in the West Bank, the status of suspended settlement of title and the status of absentee property subject to settlement of title.

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97 HCJ 5426/17, Petition for an order nisi, an interim order and a temporary injunction, July 5, 2017.
99 HCJFH 9068/20, Motion for a further hearing, December 24, 2020.
The petitioners argued that the HCJ’s ruling explicitly contradicts the duties incumbent upon Israel by the rules of international law regarding the occupied territory and the rights of protected persons present there, as well as the rights of absenteeees. This new precedent, the petition argues, allows Israel to declare “state land” in areas where settlement of title was underway in a manner that plainly contradicts several rules of international humanitarian law. The motion is pending.

The history of Israel’s policy in Kafr ‘Aqab land – from the declaration in the 1980s, through building the settlement Kochav Ya’akov and the declaration in the 2000s designed to retroactively authorize illegal construction on the village’s land – is not an anomaly. It demonstrates how Israel selectively manipulates the legal means that serve its interests and disregards all impediments (legal or otherwise) that do not. Israel does so to promote and strengthen its illegal settlement enterprise in the West Bank while severely infringing upon the property rights of Palestinians. And now it has the official seal of approval from the High Court of Justice in Jerusalem to do so.
Theft of Al Khader land

Al Khader is a Palestinian town in the Bethlehem district. In 1945, its population was approximately 1,130; some 11,589 dunam of its surrounding land - 57 percent of its land at the time - was cultivated. In 1963, the Jordanian regime began settlement of title for the town's land. The settlement team resided in the town, marked the plots in situ and presented them to the claimants. Ali Musa, a resident of Al Khader, was a boy when settlement of title began for the town’s land:

I was born in 1953. I remember that in 1965-1966 the Jordanian government did settlement work in the municipality of Al Khader. I remember joining my father and measuring, in order to fix the boundaries of our plots and then register them in the settlement ledgers. I remember that settlement of title included setting up metal markers and determining the boundaries between the plots. During settlement, neither the neighbors nor the Jordanian government representatives made any objections. [...]. We grew grapevines on our plots, this went on until the late 1990s.

The schedule of claims prepared for Al Khader’s land was completed and sent to Amman. Na’im Ayub participated in settlement of title in Al Khader as a surveyor, and as such he undertook surveying, division and presentation procedures for the village’s land. Ayub, who examined the documents for the schedule of claims for Al Khader’s land, explained the significance of having completed a schedule of claims regarding progression of settlement of title:

Based on the schedule of claims for Al Khader, settlement of title procedures were completed there because work on the schedule of claims had been concluded and transferred to the director of the land office so that a schedule of rights be prepared based on the schedule of claims. In this way, settlement procedures were complete and conclusive and the settlement officer had no authority over settlement procedures after this stage. [...] Settlement of title procedures were concluded in Al Khader.

The schedule of rights was not posted because war broke out. If the war hadn’t started, the schedule of rights would have been posted, the period for objections would have ended and the schedule of rights would have been finalized and then called the schedule of registration. The schedule of rights

100 Sami Hadawi, Village Statistics 1945, pp. 57, 103.
102 Appeal 50/14, Affidavit on behalf of the appellant, Ali Salim Mohammad Musa, February 3, 2016.
is the daughter of the schedule of claims and is based on it. There is no one who can re-settle title in Al Khader.¹⁰³

Thus, preparation of the schedule of claims for Al Khader land was concluded. The landowners claimed title to the land, their claims were examined and investigated, the plots were presented and the schedule of claims was then dispatched to Amman. But Al Khader’s land was not registered in the land registry because Israel suspended settlement of title after it conquered the West Bank.

As early as the 1970s, the Israeli military government took over part of the village land. In 1973 and 1975, the Israeli military commander signed three military requisition orders for 426 dunam of Al Khader’s land; the settlement Elazar was built on this land.¹⁰⁴ In 1980-1984 Israel declared additional land in Al Khader “state land” and then built the settlements Efrat and Neve Daniel on it.
Al Khader land
Military requisition orders, 1973 and 1975
The first declarations of “state land”, 1980-1984
Al Khader landowners continued to cultivate their land and grow crops even after the Israeli settlements were built and during the subsequent years. When the second intifada broke out, some of the landowners were denied access to their land; in 2001 the unauthorized outpost Netiv Ha’avot (also termed Derech Ha’avot) was built near the settlement Elazar mainly on private Palestinian land. Munir Musa, who owns several plots in the area where the outpost was built, recalls how Israeli settlers took over his land:

We farmed the land consistently until the late 1990s. We participated in a United Nations (UNDP) development project to improve the soil. After the second intifada broke out, the area was closed off to us. After that, settlers went to the area and built the outpost. After that, we had problems accessing the area and farming our land. For example, in 2006 we planted olive saplings. There was an act of aggression and the saplings were uprooted. We filed a police complaint.105

Ali Musa, whose family owns two plots in the same area, said:

We planted grapevines on part of the land and on the rest of it we grew other crops according to the soil. We grew seasonal crops like wheat and barley and more. We grew crops on this land consecutively until 1999. […] We continued to grow crops on the land until about the beginning of the second intifada. After that we didn’t grow anything because of the army and the settlers’ aggression. The settlers brought trailer homes to the land and then transformed them into permanent structures. Since 2000, we’ve filed several police complaints and even a few petitions to the Supreme Court to get rid of these acts of aggression and illegal construction on our land.106

All the structures built in the outpost Netiv Ha’avot, which was established without the approval of Israeli authorities, were constructed illegally. In 2001-2017, the Civil Administration issued approximately 100 demolition orders for the outpost’s structures,107 and in 2010 an internal Civil Administration report noted that about 60 percent of the outpost construction was built on private Palestinian land.108

105 Appeal 50/14, Affidavit on behalf of the appellants, Munir Hussein Hassan Musa, February 2, 2016.
107 Peace Now, Nativ Ha’Avot File: Honoring the Supreme Court Ruling: Saying No to Theft of Private Land, December 2017, p. 6.
Al Khader land

Military requisition orders, 1973 and 1975


Settlement jurisdiction area

Demolition orders issued by the Civil Administration against Israeli settlers’ illegal construction (according to the army’s data)
Al Khader landowners filed police complaints for invasion of their land and even petitioned the HCJ several times demanding that the Civil Administration’s demolition orders be enforced and the outpost be evacuated. But instead of enforcing its own demolition orders, Israeli authorities deferred enforcing the law in order to retroactively authorize the outpost’s illegal construction.

The State’s representatives’ strategy was to declare the intention to examine the distribution of title to the land where the outpost is located, in order to retroactively authorize the structures built on land they claim can be declared “state land”. In practice, for many years authorities did nothing and the outpost remained in place and even expanded.

In April 2014, over a decade after the outpost Netiv Ha’avot was built, the Civil Administration declared approximately 984 dunam of Al Khader and nearby villages’ land “state land”. The declaration, as the head of the blue line team at the Civil Administration admitted, was designed to “settle the outpost’s planning status.”

109 The petitions include: HCJ 5083/02, Musa et al. v. the Civil Administration in the West Bank et al; HCJ 7379/02, Sabih et al v. the Civil Administration in the West Bank et al; and HCJ 7292/14, Ali Musa et al. v. Minister of Defense et al.

110 The first petitions filed by the landowners against construction in the outpost were deleted in 2004 after both parties agreed that a professional government team would examine title to land where the outpost was built. The team was established but never concluded its work. In response to an additional petition submitted in 2018, State representatives announced in April 2010 that they intended to undertake a “land survey that would conclusively determine whether these were state lands”, and that it would enforce demolition orders against Israeli-built structures found to be located on private Palestinian land (HCJ 8225/08, Musa et al. v. Minister of Defense et al, Judgment, September 1, 2010).

111 See page 26 of this report.
Al Khader land


Settlement jurisdiction area

Demolition orders issued by the Civil Administration against Israeli settlers’ illegal construction (according to the army’s data)

Subsequent declarations of “state land”, 2014
Israel indubitably knew that in 1963 settlement of title had begun for the area and reached the advanced stage of compiling a schedule of claims. Representatives of the Civil Administration used this information when it aided the interests of Israel’s settlement enterprise.\textsuperscript{112} Yet the Civil Administration declared Al Khader land “state land” while disregarding settlement of title and the schedule of claims prepared as part of this process. In doing so, the Civil Administration de-facto repealed settlement of title and violated the rights of the Palestinian landowners; it also eliminated any possibility of resuming settlement of title in future.

And if this were not enough, when reviewing distribution of title to land in order to decide which areas may be determined government property, representatives of the Civil Administration based their decision on aerial photographs that documented cultivation of the land decades after claims were submitted during settlement of title and after the entire process was suspended.\textsuperscript{113} Therefore, declaring “state land” violated settlement of title laws, whereby title is determined at the time claims are submitted during settlement. The appeal of the declaration, submitted by the landowners, is currently pending the Military Appeals Committee’s final decision.

In Al Khader, like in Kafr ‘Aqab, the Israeli military government seeks to gain from the situation the Israeli military commander created by suspending settlement of title. The Civil Administration revoked settlement of title proceedings that were in progress for years, while severely infringing upon the property rights of all landowners who participated in settlement of title, as well as the entire community. It did so to retroactively authorize illegal Israeli construction in the occupied territory.

\textsuperscript{112} See page 23 of this report, supra note 54.

\textsuperscript{113} This refers to aerial photographs taken in 1969-2007; therefore even the earliest photograph was taken approximately six years after settlement of title began and claims had been submitted. In practice, the boundaries of the land subject to the declaration were decided based on the cultivation during the latter period rather than the former. \textit{Appeal 50/14}, Affidavit on behalf of the respondent, July 31, 2017.
Summary

This report describes the method by which Israel declares “state land” in areas where settlement of title was suspended as a legal means for expanding its control over West Bank land and dispossessing Palestinians. Over the past decade, this policy has been used for retroactively authorizing illegal Israeli construction in the oPt.

When Israel occupied the West Bank, just one third of West Bank land (excluding East Jerusalem) was settled, meaning title to land was registered in the land registry. Land that was not yet settled included land where settlement of title was underway during Jordanian rule. It was halted when Israel occupied the West Bank and issued a military order suspending the process, and was never completed.

The landowners who participated in unconcluded settlement of title were left in limbo. They claimed title to their land as part of settlement of title imposed by a previous sovereign. These claims were investigated, surveyed and when recognized as founded, plots were marked with posts and then documented in the “schedule of claims” – a conclusive document that incorporates all relevant claims in the settled area. But because Israel suspended settlement of title, their land was not finally registered in the land registry.

Israel exploits this situation by applying a policy that is twofold. First, it leaves settlement of title suspended and thus all but precludes Palestinian residents’ possibility of obtaining title to their land. Second, it declares “state land” while applying selective and erroneous interpretation of Ottoman Land Code, even for land where settlement of title was underway and its main phases completed.

Our data indicates that by 2019, 41,000 dunam of land documented in the Jordanian schedules of claims was declared “state land” by the Civil Administration. Had settlement of title been concluded, title to some - and probably most - of this land would have been registered as privately owned Palestinian land and could not have been declared “state land”.

In practice, declaring “state land” in areas where a Jordanian schedule of claims was completed rejects claims to title submitted by owners of private land during Jordanian settlement of title. It precludes any future possibility of completing settlement of title, even if this process were renewed. Therefore, it contradicts the rules of international law that prohibit the occupying force from altering the legal status quo in the occupied territory. The act of declaring “state land” severely infringes on the right to property of those Palestinian landowners who took part in settlement of title, and especially the rights of “absentees” who do not reside in the West Bank and cannot appeal the decision.
Further, the policy of “state land” declarations described in this report violates the land laws in force in the West Bank. An underlying principle of settlement laws is that title is determined according to conditions at the time claims are submitted. And yet, the Civil Administration chose to apply a policy whereby declaring “state land” for land documented in a Jordanian schedule of claims is based on cultivation at the time of the declaration. The significance of this policy is that changes in cultivation can lead to dispossession of the landowners even though their rights to title would have been registered and recognized had settlement of title been concluded. Thus, Israel exploits changes to land cultivation that occurred decades after claims were submitted during settlement of title because the Israeli military commander chose to suspend settlement of title; Israel claims it may take possession of such land based on changes in cultivation.

What is more, Israel’s declarations of “state land” in the West Bank are designed to reinforce and expand its settlement enterprise in the oPt. In the past decade, this means has been used to retroactively authorize Israeli outposts built in violation of the law, as reflected by the later declarations of “state land” in Kafr ‘Aqab and Al Khader. Israel does so although international law prohibits building settlements in the occupied territory, regardless of whether they are outposts built without the permission of the Government of Israel or settlements built with its permission.

For the past 40 years, the Military Appeals Committee has held that Israel’s policy of “state land” declarations severely infringe upon the right to property and consistently determined that the military commander must not benefit from the situation he created. Despite this, the Israeli military government insists on applying this policy; head of the Civil Administration even rejected the decision of the appeals committee when it contradicted the political echelon’s main objective: retroactive authorization of illegal Israeli construction in the oPt.

The HCJ’s ruling in the petition filed by Kafr ‘Aqab landowners endorsed and legitimized Israel’s declaration of “state land” for land subject to Jordanian settlement of title and documented in a schedule of claims. The Court thus permitted Israel to gravely infringe upon the property rights of Palestinian individuals and communities who participated in settlement of title, in violation of international law. This ruling, yet another example of how the Israeli legal system overwhelmingly refrains from intervening in Israel’s policy of declaring “state land” in the West Bank, could impact thousands of dunam of Palestinian land in the West Bank that will be exploited to benefit Israel’s interest of expanding and establishing its settlements in the West Bank.

114 HCJ 5426/17, Judgement, November 29, 2020. For further details see page 44-45 of this report.
115 For example, see HCJ 285/81, Al-Nazar et al v. the Military Commander of the West Bank, Judgement, February 7, 1982; HCJ 277/84, A’areib v. the Military Appeals Committee pursuant to the Order Concerning Government Property et al, Judgement, March 24, 1986.
Afterword. In November 2020, the Israeli parliament held a hearing on renewing settlement of title in the West Bank. The hearing was based, inter alia, on the Civil Administration’s recommendation to renew settlement of title. Renewing settlement of title constitutes an irreversible act of sovereignty by a permanent regime and not by a temporary occupation regime and therefore violates international law. If Israel undertakes this process according to its ambitions and interests, this will dangerously escalate its land theft policy in the West Bank and irreversibly violate Palestinians’ most fundamental rights.

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117 For further reading see: Yesh Din, Settlement of Title in Area C of the West Bank.