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A Guide to Housing, Land and Property Law in Area C of the West Bank

February 2012

**A Guide to Housing, Land and Property
Law in Area C of the West Bank**

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FOREWARD

Israel's occupation of the West Bank, including East Jerusalem, and the Gaza Strip has presented some of the most considerable challenges to the international legal system in the post-1945 era. The advent of the UN Charter was meant to herald a new world order based on peaceful resolution of disputes, suppression of acts of aggression, and development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Nevertheless, whether in breach of the general prohibition on the use of force, the unlawful acquisition of territory through the use of force, the prolonged violation of a peoples' right to self-determination, systematic civilian settlement of occupied territory, deprivation of the right of a fair and regular trial, and extensive destruction and appropriation of property, the illegality of Israeli practices in the occupied Palestinian territory (oPt) under international law – of which these are but a representative sample – have been notable for their sheer breadth across the international normative spectrum.

Given this record, outside observers are usually surprised to find that another feature of Israel's prolonged occupation has been what one might call its hyper-legality, by which is meant its extensive use of legislative and regulatory instruments to give effect to its policies in the oPt, accompanied by a conviction that doing so is proof positive of its general commitment to the rule of law. But there is a marked difference between rule *of* law, and rule *by* law. Whether through Israeli civilian legislation and military orders, or the selective and distorted application of Ottoman, British or Jordanian codes, there is no shortage of local rules and regulations that Israel has relied upon to fortify its hold on Palestinian lands, even in the face of overwhelming opinion among international lawyers regarding the illegality of the great majority of its actions. What belies this attempt to project a commitment to equity and fairness is, once again, the historical record. However local rules have been used and abused to alienate Palestinians from their property, annex their territory, frustrate their land use planning or impede their freedom of movement, they serve a useful reminder that laws bereft of justice risk becoming the unadorned instruments of oppression.

It is in this context that this *Guide to Housing, Land and Property Law in Area C of the West Bank* should be placed. Thoroughly researched and well written, it is at once a practical tool for lawyers charged with the formidable task of navigating the system of local laws on behalf of Palestinian clients in Area C, and an eye-opening monograph that surveys the range of Israel's actions as an Occupying Power.

Ardi Imseis

Editor-in-Chief

Palestine Yearbook of International Law

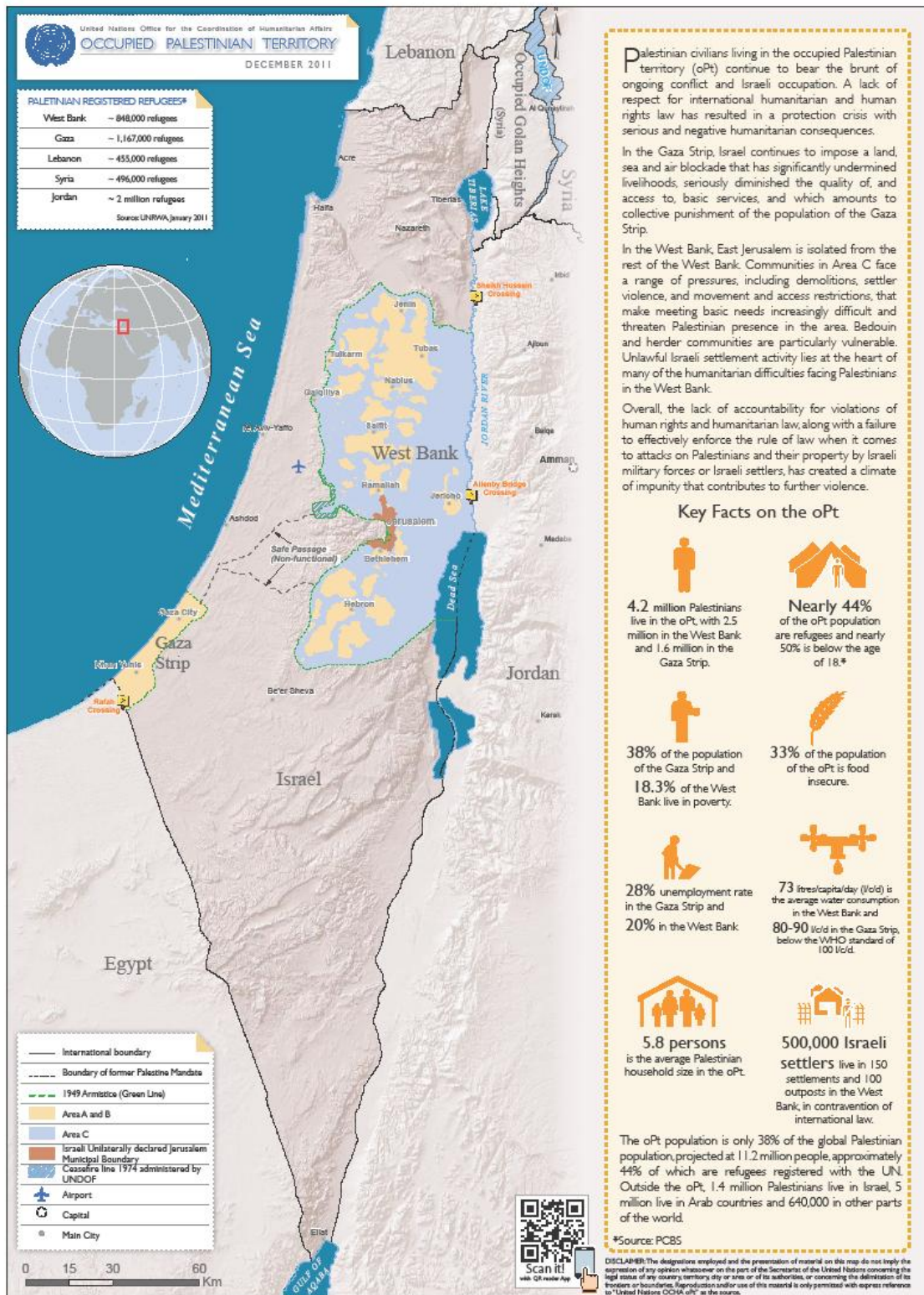
TABLE OF CONTENTS

Foreword.....	3
Map of the West Bank	7
Acronyms.....	8
Introduction.....	9
PART ONE: THE STRUCTURE WEST BANK LEGISLATION.....	12
1.1 Land Issues in the Israeli-Palestinian Conflict	12
1.2 The Administrative Division of the West Bank	12
1.3 Layers of Legislation.....	14
1.3.1 The Law	14
1.3.2 Military Legislation	14
1.4 Restrictions on Legislative Changes in an Occupied Territory	15
1.4.1 Does Israeli Military Legislation Meet the Criteria Set Forth in International Law?.....	16
1.4.2 The Position of the Israeli Supreme Court.....	17
1.4.3 The Dual Legislation System.....	19
PART TWO: LAND OWNERSHIP	22
2.1 The Ottoman Land Code.....	22
2.1.1 Categories of Land.....	23
2.1.2 The Structure of the Village.....	24
2.2 Acquiring Rights to Land by an Individual.....	25
2.2.1 What Constitutes “Cultivation”?.....	26
2.2.2 The Conditions for Maintaining Individual Rights to Land.....	28
2.3 The Later Land Laws	28
2.3.1 Annulling the Prohibition on Cessation of Agricultural Cultivation	28
2.3.2 Demand for Legal Source of Possession.....	29
2.3.3 Legislation on Abandoned Land (<i>Mahlul</i>)	30
2.3.4 Restricting the Possibility to Acquire Rights to <i>Mewat</i> Land.....	31
2.4 The Takeover of Private <i>Miri</i> Land by Squatters	32
2.5 Land Registration	33
2.5.1 Land Settlement	34
2.5.2 First Registration.....	36
2.6 Ways of Taking Over Land in the Years 1967-1979	38
2.6.1 Requisition or Land Seizure Orders.....	38
2.6.2 Expropriation Orders	39
2.6.3 Absentee Land	40
2.6.4 Closed Military Zones	40
2.7 The <i>Elon Moreh</i> Judgment.....	41

2.8 Declarations of State Land	43
2.8.1 Order Concerning Government Property	44
2.8.2 The Declaration Procedure	46
2.8.3 Objections against Declarations of State Land	47
PART THREE: LAND USE	49
3.1 Planning and Building	49
3.1.1 The Jordanian Planning Law	49
3.1.1.1 <i>Basic Principles</i>	49
3.1.1.2 <i>Planning Schemes</i>	50
3.1.1.3 <i>Preparing and Approving Plans</i>	52
3.1.1.4 <i>The Structure of the Planning System</i>	53
3.1.2 Changes to the Jordanian Planning Law by Israeli Military Legislation	55
3.1.2.1 <i>Military Order No. 418</i>	55
3.1.3 Land Use: Allocating State Land	58
3.1.3.1 <i>The Boundaries of the Settlements as a Closed Military Zone for Palestinians</i>	60
3.1.4 Planning in Palestinian Communities	60
3.1.4.1 <i>The Mandatory Regional Outline Plans</i>	60
3.1.4.2 <i>The Special Outline Plans</i>	64
3.1.5 Planning in the Settlements	66
3.1.5.1 <i>Planning and Construction in Requisitioned Land</i>	67
3.1.6 Other Plans and Additional Restrictions	68
3.1.6.1 <i>Roads</i>	68
3.1.6.2 <i>Nature Reserves</i>	69
3.1.6.3 <i>National Parks</i>	70
3.1.6.4 <i>Archaeological Sites</i>	71
3.1.6.5 <i>Restrictions on Agricultural Use of the Land</i>	71
PART FOUR: THE JURIDICAL SYSTEM	73
4.1 The Military Appeals Committees	73
4.1.1 Matters Under the Jurisdiction of the Military Appeals Committees	75
4.1.2 Procedures	76
4.1.3 Commentary on the Military Appeals Committees	77
4.2 Appeals Concerning Planning and Construction	78
4.2.1 Objections to Planning Schemes	80
4.3 Petitions to the High Court of Justice	83
4.4 Ownership and Dispossession Cases in Israeli Civil Courts	84
PART FIVE: INTERNATIONAL LAW	85
5.1 Protection of Land and Property Rights in Areas Under Belligerent Occupation	85
5.1.1 International Humanitarian Law: Laws of Belligerent Occupation	85
5.1.1.1 <i>Protection of Private Immovable Property</i>	86

5.1.1.2 <i>Protection of Public Immovable Property</i>	90
5.1.1.3 <i>A Note on Israeli Settlements in the occupied Palestinian territory</i>	91
5.1.2 International Human Rights Law	92
5.1.2.1 <i>Protection of Private Immovable Property</i>	92
5.1.2.2 <i>Protection of Public Immovable Property</i>	93
5.2 Right to Housing and Land Use in Areas Under Belligerent Occupation	94
5.2.1 Right to Housing and Land Use Under International Humanitarian Law	94
5.2.2 Right to Housing and Land Use Under International Human Rights Law	94
5.2.2.1 <i>Housing Rights</i>	95
5.2.2.2 <i>Land Use Rights</i>	95
5.3 Relevancy of International Law to West Bank Land Litigation in Israeli Courts and Tribunals	97
5.3.1 Relevant Israeli Jurisprudence Regarding the Application of International Humanitarian Law to Land and Property Rights in the West Bank	98
5.3.1.1 <i>Settlements</i>	98
5.3.1.2 <i>The Barrier</i>	98
5.3.2 Relevant Israeli Jurisprudence Regarding International Human Rights Law Principles on Land and Property Rights	100
Glossary	102

MAP OF THE WEST BANK



Source: UN Office for the Coordination of Humanitarian Affairs, December 2011

ACRONYMS

CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DCO	District Coordination Office
FAO	Food and Agriculture Organization of the United Nations
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	Israel Land Administration
ILS	Israeli New Shekel
oPt	occupied Palestinian territory
NGO	Non-governmental organisation
NOP 3	National Outline Plan for Roads
PA	Palestinian Authority
ROP 50	Regional (Partial) Outline Plan 50
UDHR	Universal Declaration of Human Rights

INTRODUCTION

Land issues, namely control of land, ownership of land and land use, are at the very heart of the Palestinian-Israeli conflict. In the West Bank,¹ which Israel has occupied since 1967, the ongoing struggle over control of the land has resulted in many of the more conspicuous characteristics of the conflict. Israeli-ordered demolitions of houses built without a permit, the building and expansion of Israeli settlements² and the construction of the Barrier³ within the West Bank are just a few of the more visible land-related actions seen during this occupation. Less overt, however, are the mechanisms in place that facilitate these actions and which purport to “legalise” them. Developing a procedure for declaring hundreds of thousands of dunums of occupied land as “state land” and then providing that land for primary use by Jewish settlers; amending the pre-1967 planning and building legislation so that Palestinian development is under full Israeli control – these are just two examples of means used by the Israeli authorities to increase their control of land in the West Bank. These mechanisms, and others, remain largely unknown to the general public.

This guide aims to explain these procedures and provide the legal tools needed to understand Israeli land-related policies in Area C of the West Bank – i.e., those parts of the West Bank, excluding East Jerusalem, which are under full Israeli control, with respect to both security related issues and to land issues.⁴

In addition, this guide provides a comprehensive description of the complex system of laws and practices that controls land ownership, land registration, land usage and building in Area C. The guide elaborates on the relevant aspects of the juridical system in place in Area C and

¹ The West Bank, lying west of the Jordan River, is Palestinian territory that was occupied by Israel in 1967 (along with the Gaza Strip, also Palestinian, the Syrian Golan Heights and the Egyptian Sinai Peninsula). From 1948 to 1967, the West Bank was under the rule of the Hashemite Kingdom of Jordan. Since 1967, most of the West Bank has been under Israeli military occupation. A smaller part of the West Bank known as “East Jerusalem” was annexed to Israel shortly after the Israeli takeover. The international community have repeatedly stressed that the annexation of East Jerusalem is in contravention to the rules of international law. To the west, north, and south, the West Bank shares borders with the state of Israel. To the east, across the Jordan River and the Dead Sea, lies the Kingdom of Jordan. For the purposes of this guide, the term “West Bank” will not include East Jerusalem, as separate legal issues apply to this area that go beyond the scope of this guide.

² An Israeli settlement is a Jewish civilian community built on land that was captured by Israel during the 1967 War and that is considered occupied territory by the international community. In addition to the 121 official settlements recognized by the Israeli Ministry of the Interior, there are currently some 100 unauthorised outposts which the Israeli government does not officially recognize as separate communities, even though various government agencies have been involved in the establishment of these outposts as well. Settlements are legitimate under Israeli law if they meet certain criteria; outposts by definition are considered illegal under Israeli law. Both settlements and outposts are considered illegal under international law, which prohibits the transfer of civilians from an occupying power into occupied territory (See Article 49 of the Fourth Geneva Convention, *infra* note 23).

³ The term “Barrier” is used throughout this guide to denote the physical barrier constructed by Israel in the occupied West Bank since 2002, though, in places, this barricade takes different forms, including an electric fence, fencing with barbed wire, trenches and a concrete wall, six to eight metres high. ‘Barrier’ is the term employed by a number of UN agencies as well as by the UN Secretary General in the ICJ proceedings on this matter. Also referred to as the Wall, the Separation Barrier, the West Bank Barrier and the Security Fence, among other terms. The UN General Assembly and the International Court of Justice (ICJ, Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. 131, 9 July 2004) use the term “Wall”. See p. 61, para. 67: “...the ‘wall’ in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (‘fence’) or by the Secretary-General (‘barrier’), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.”

⁴ The administrative divisions of the West Bank, as stipulated in the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (also referred to as the “Oslo II Agreement”) into Areas A, B and C, are explained in Part One of the guide. In 1967, Israel occupied and unilaterally annexed East Jerusalem, including what was then 64 square kilometres of West Bank territory. Since then, Israel, contrary to international law and consensus, has applied Israeli domestic law to East Jerusalem. Discussion of the Israeli legal treatment of land and property rights in East Jerusalem is therefore beyond the scope of in this manual, which will focus only on Area C of the West Bank.

Israel, and the tools Palestinian residents may use when opposing decisions in land issues, from the Military Appeals Committee to the Israeli Supreme Court. Moreover, the guide indicates the scope of intervention by the Israeli courts in land issues in the West Bank and scrutinises significant rulings by the Israeli Supreme Court. In concluding the legal analysis, the guide specifies the general tools under international law which pertain to the protection of land, housing and property rights, in the context of occupation.

Insecurity of land tenure increases wherever there is a dispute over land, and particularly in a long and complicated conflict such as that of the Israelis and Palestinians. Wherever property rights are not respected, landholders are in danger of losing their land. Wherever discriminatory planning policies exist, people may be forced to build without a permit, placing them in perpetual fear of displacement. With this in mind, this guide aims not only to explain Israeli land policies and provide the factual and legal aspects behind them, but also to serve as an indispensable tool for all those seeking to better understand and assist individual Palestinians seeking to secure their land rights in Area C.

Who is this Guide For?

This guide is intended to be an accessible and comprehensive resource for local and international lawyers, policy makers, researchers and other practitioners in the field of housing, land and property in the West Bank.

Legal practitioners, whether they are taking their first steps into the realm of land issues in Area C or are already well versed in the subject, will find the guide particularly useful for its comprehensive description of the legal framework in the West Bank and the analysis of the relevant domestic and international law and case law. Of course, in any particular legal case/petition, the legislation in force should be studied in depth, and this Guide is no substitute for this.

The guide also provides a broad overview of the practices related to land, planning and property implemented by the Israeli authorities in the West Bank, excluding East Jerusalem, throughout the years. These include measures to take over land and discriminatory planning practices between Palestinian and settler communities. Anyone who is interested in studying or conducting in-depth research about such measures and other related Israeli policies and practices in the West Bank, will be able to use this guide as a reference and as a resource for further study.

Structure of the Guide

Part One: The Structure of West Bank Legislation

The guide begins with a brief discussion of the importance of land issues within the Israeli-Palestinian conflict, elaborating on the administrative division of the West Bank as stipulated in the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (also known as the “Oslo II Agreement”). Part One further provides a detailed examination of the multilayered legislative system currently in place in Area C.

Part Two: Land Ownership

The second part examines the complex system of laws that determine land ownership in Area

C, as well as the procedures under which land registration takes place. It describes the different methods by which Israeli authorities have taken over land since 1967 and examines the problematic process whereby land is declared to be “state land”. The review in this section incorporates a discussion of the multilayered nature of the laws and military orders applicable in the area, from the Ottoman period to the present day.

Part Three: Land Use

The third section of the guide discusses planning and building laws as they pertain to the West Bank and examines the way in which they are currently applied by the Israeli Civil Administration, the military governing body that has full authority on land-related issues in Area C of the West Bank. This section begins with a description of the main provisions of the Jordanian planning law and continues with an examination of the amendments that were made to this law by Israeli military legislation. It proceeds with a comparison between planning in the Palestinian communities and planning in the Jewish settlements built in Area C of the West Bank, and reviews other legislation that places restrictions on the use of land in the area.

Part Four: The Juridical System

The fourth section describes the Israeli-run juridical system that exists today in Area C, before explaining the options available to Palestinian residents of the area to initiate legal proceedings in certain cases to Israeli courts, including to the Supreme Court of Israel sitting as the High Court of Justice.

Part Five: International Law

The final section of the guide discusses the obligations and rights enshrined in international humanitarian and human rights law as they relate to housing, land and property issues in the West Bank, and examines the ways in which Israeli courts and tribunals have thus far interpreted these laws and the extent to which they have or have not been willing to apply them.

PART ONE: THE STRUCTURE OF WEST BANK LEGISLATION

Since the Israeli occupation of the West Bank in 1967, Israel has put into place a complex legal system. Israel's legal embedding of the occupation is reflected not only through the introduction of extensive military legislation, which covers a variety of subjects directly affecting the daily life of Palestinians, but also by the key role the office of the Legal Adviser for Judea and Samaria⁵ plays in the branches of the Israeli regime responsible for civilian aspects of the Occupation, such as land, planning and construction.⁶

This section describes the various layers of legislation currently valid in the parts of the West Bank that are under Israeli control, as well as the manner in which various legal organs are related to each other.

1.1 Land Issues in the Israeli-Palestinian Conflict

In the last few years the Israeli-Palestinian conflict has been increasingly characterised as an interreligious conflict between Islam and Judaism. But even today the conflict is essentially a territorial struggle over control of land.

In the specific context of the West Bank, which has been under Israeli occupation since 1967, land issues play a central role. Indeed, the ongoing struggle between the two sides for control of land resources in the West Bank is the underlying factor behind the more publicised elements of the conflict: the Israeli settlements, whose existence largely relies on the boundaries of the areas declared by Israel as state land; the use of the system of main roads which is partially prohibited for Palestinians; and even the Barrier, which Israel claims was built on purely security grounds, even though its route was adjusted in many places to accommodate plans for the expansion of Israeli settlements. All of these issues, important as they are to the daily lives of the Palestinian residents of the West Bank, are only the visible symptoms of the conflict, which is over who controls the land.

1.2 The Administrative Division of the West Bank

In 1995, the government of Israel and the Palestine Liberation Organization signed the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (also known as the "Oslo II Agreement"), in which the West Bank was divided into three administrative areas:⁷

⁵ The expression "Judea and Samaria" is the term used by Israeli government officials to denote the West Bank area.

⁶ See Part 3.1.2.1.

⁷ The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Washington, D.C., 28 September 1995 (Interim Agreement). The Interim Agreement between the Palestinian Liberation Organisation and Israel was signed on 28 September 1995, and followed the 1993 Declaration of Principles on Interim Self-Government Arrangements (together referred to as the Oslo Accords). The 1995 Interim Agreement divided the occupied West Bank into three areas: Area A consists of all major Palestinian urban centres, where the Palestinian Authority (PA) has full jurisdiction over both civilian and security matters, including land administration and planning. Area B includes most rural centres. Here, the PA is in charge of civilian affairs, including land administration and planning, with security falling under the joint responsibility of the PA and Israeli military forces. In reality, security is, for the most part, controlled exclusively by the Israeli military forces. Area C is under the full control of the Israeli military for both security and land-related affairs.

- **Area A:** Under full Palestinian military and civilian control by the Palestinian Authority (PA). Currently,⁸ Area A comprises approximately 18 percent of the West Bank. It includes the main Palestinian cities, such as Jenin, Nablus and Ramallah, as well as large Palestinian towns like Salfit.
- **Area B:** Under Palestinian civilian control and Israeli military control. Today Area B comprises about 22 percent of the West Bank. It includes most of the built-up area of the small Palestinian towns and of the Palestinian villages. In Area B, as in Area A, the Palestinian Authority is responsible for land, planning and construction issues.
- **Area C:** Under Israeli military control, with all powers concerning land (land registration, land administration, nature reserves, archaeological sites, planning and construction and so on) held by the Israeli Civil Administration. The Civil Administration, established in 1981, is the government agency responsible for all civilian aspects of life in those parts of the West Bank under full Israeli control.⁹ Area C presently comprises approximately 60 percent of the West Bank. It includes all of the Israeli settlements, most of the main roads in the West Bank and some 150 Palestinian villages, most of them small, whose entire built-up area is in Area C. Area C also includes hundreds of thousands of dunums (tens of thousands of hectares) of the agricultural land of villages whose built-up area is in Area B, as well as some houses of villages most of whose built-up areas are in Area B.¹⁰

From the figures alone, it is clear that most of the land mass of the West Bank (at least 60 percent) is under full Israeli control. As we shall see, from a spatial perspective, effective Israeli control of the West Bank is even greater and exceeds the boundaries of those parts of the West Bank officially defined as Area C.

In most parts of the West Bank, the territorial space of Areas A and B is not contiguous. Indeed, the most salient characteristic of Area C is its relative contiguity, compared to the fragmented nature of Areas A and B.¹¹ For example, large stretches of land extending on either side of Road 5, which leads from Tel Aviv to the settlement of Ariel, in the north-central West Bank, are defined as Area C. Within these large stretches of land are isolated islands of land classified as Area B, that cover the built-up area of the Palestinian villages of Qarawat Bani Hassan, Biddya, Mas-ha, Az-Zawiya, Sarta, Rafat and Deir Ballut. Functionally, these islands of land are almost meaningless, as they are surrounded on all sides by Area C and, therefore, almost completely dependent on the decisions of the Israeli Civil Administration with respect to land, planning and construction. For example, paving a new road to connect the Area B villages of Deir Ballut and Az-Zawiya requires a permit from the Israeli Civil Administration, because it is impossible to route it anywhere but through Area C. A similar situation prevails in many other parts of the West Bank.

Many think, erroneously, that the Israeli authorities have full responsibility for all aspects of life for the residents in Area C, whether they are Palestinian or Israeli. In fact, the Interim

⁸ In 1995, the amount of land defined as Areas A and B was much smaller than at the time of writing (April 2011); it was expanded in later agreements, the last of which was the Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, 4 September 1999.

⁹ The Civil Administration was established in 1981 by virtue of Military Order No. 947: "We hereby establish a Civil Administration in the region [West Bank]. The Civil Administration shall run all regional civil matters, correspondingly to this [Military] decree, for the wellbeing and for the sake of [local] population, and with the purpose of providing and operating the public services, considering the need to maintain a proper governance and public order."

¹⁰ For an elaboration on this subject, see Bimkom, *The Prohibited Zone: Israeli Planning Policy in the Palestinian Villages in Area C*, June 2008, pp. 15-17, 20-22, 159-164.

¹¹ *Ibid.*, p. 16.

Agreement gave Israel full control only over all military and civilian aspects concerning land in Area C. Responsibility for all other civilian aspects of life for Palestinians resident in Area C, as well as the obligation to see to their well-being—for example, to provide them with education, health and public administration services—were given to the Palestinian Authority. This dual responsibility for Area C has created a highly problematic situation, with the Palestinian Authority’s ability to provide such services to Area C wholly dependent on the formal building approvals of the Israeli Civil Administration for the development of the required physical infrastructure (public and educational buildings, etc.) in the area.

1.3 Layers of Legislation

The activities of the Israeli Civil Administration in Area C are governed by a complex system of multilayered legislation, including the Law (the legislation that was valid in the West Bank on the eve of its occupation by Israel in 1967) and Israeli military legislation.

1.3.1 The Law

The Law that applies to the West Bank land has several levels. With respect to land legislation, the basic level is the Ottoman Land Code of 1858, which is based on Muslim law (see Part 2.1). In addition, the Law that applies to Area C lands includes a number of later Ottoman land laws, which changed and amended the 1858 Land Code.

During the British Mandate period (1920-1948), some of the provisions of the Ottoman Land Code were amended by Mandatory legislation. For example, under certain conditions, the Ottoman Land Code allows private persons to acquire rights in *mewat* land¹² without government approval and eventually receive a title deed (see Part 2.1.1).¹³ During the British Mandate period that option was annulled by a new law that completely forbade cultivation of *mewat* land without government permission.¹⁴ As far as is known, this Mandatory law is still valid in the West Bank today, because it was never annulled under either Jordanian or Israeli rule.

During the years of Jordanian rule (1949-1967), various Jordanian laws were applied to the West Bank, among them extensive land, planning and construction legislation. These laws changed many of the previous land laws, and introduced amendments to certain provisions of the Ottoman Land Code.

In addition to primary legislation (laws), the legal framework also includes secondary legislation (regulations) and other types of legislative acts, such as planning schemes. For example, the Regional Outline Plans approved under the British Mandate still apply to most of the land included in Area C (see Part 3.1.5.1).

1.3.2 Military Legislation

From 1967 onwards Israel has introduced extensive legislation to govern the West Bank in

¹² Under the Ottoman Land Code, land that was not allocated to anyone and which is situated far away from any inhabited place.

¹³ Ottoman Land Code of 1858, Article 103.

¹⁴ Mewat Land Ordinance, 16 February 1921, cited in Moses Doukhan (ed.), *Laws of Palestine 1918-1925*, Vol. II, L.M. Rotenberg Law Publisher, Tel Aviv 1934, p. 304.

the form of Military Orders issued by the Military Commander¹⁵ of the West Bank. Israeli military legislation encompasses all areas of life and includes not only orders covering the fields of security and military authority, but also orders regulating purely civilian aspects of life, such as land, taxes, planning and construction.

Alongside the Military Orders, military legislation also includes secondary legislation in the form of regulations, planning schemes and more.

The main feature of the military legislation in the West Bank, whether primary or secondary, is that it is conceived and undertaken by a non-democratic government system that does not represent the local Palestinian population and is not elected by it. This is distinct from the situation within the Green Line,¹⁶ where legislation is enacted by the Israeli parliament (the Knesset), whose members are elected in democratic elections, by the citizens to whom this legislation applies.

1.4 Restrictions on Legislative Changes in an Occupied Territory

The official position of the Government of Israel, as presented repeatedly in the context of various petitions filed before the High Court of Justice¹⁷, is that the West Bank is under Israeli belligerent occupation.¹⁸ That is as opposed to the territory annexed to Israel after 1967, and included in the expanded jurisdiction area of the city of Jerusalem, to which Israeli law is applied and which, according to Israel's official position, is not under belligerent occupation.

The Israeli Supreme Court, sitting as a High Court of Justice,¹⁹ has agreed with this analysis. It emphasised this point in a judgment given in 2005:

The areas of Judea and Samaria are held by Israel under belligerent occupation. The long arm of the state in this area is the military commander. He is not the sovereign in the territory under belligerent occupation. His power is derived from public international law concerning belligerent occupation. The legal significance of this occupation is twofold: first, the law, the jurisdiction and the administration of the state of Israel do not apply to these areas. They were not "annexed" to Israel; second, the legal regime that applies to these areas is governed by public international law concerning belligerent occupation.²⁰

The authority of the occupying power to introduce new legislation in an area under belligerent occupation is restricted by the very fact that it is not the sovereign in the area.

¹⁵ The head of the Israeli military and Civil Administration of the West Bank.

¹⁶ The demarcation lines set out in the 1949 Armistice Agreements between Israel and its neighbours after the 1948 War. The Green Line is also used to mark the line between Israel and the territories captured in the 1967 War, among them the West Bank. The name derives from the green ink used to draw the line on the map while the armistice talks were being conducted. The land within the Green Line is internationally recognized as sovereign Israeli territory.

¹⁷ See Part 1.4.2.

¹⁸ "Belligerent occupation is the exercise of authority over territory by military rule without the consent of the deposed regime...By contrast, non-belligerent occupation is the military administration of foreign territory with the consent of the government of a state, or the various parties exercising control over its territory." B. Clarke, "Military Occupation and the Rule of Law; The Legal Obligations of Occupying Forces in Iraq", Murdoch University Electronic Journal of Law, 2005, available at: <http://www.austlii.edu.au/au/journals/MurUEJL/2005/8.html#What> [last accessed 10 January 2012].

¹⁹ *Ibid.*

²⁰ HCJ 7957/04 *Zahran Younis Mara'abe et al. v. Prime Minister of Israel et al.*, 60(2) PD 477, 492. See the Israeli Supreme Court website for an official translation of the judgment, http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf [last accessed on 14 June 2011].

International law views belligerent occupation as a temporary event and the occupying power as the party holding the occupied area as a trustee, until the end of the conflict²¹ (see Part 5.1). This fundamental principle of belligerent occupation is reflected in the regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 (Hague Regulations), which are part of customary international law. According to Israeli High Court rulings, customary international law, including the Hague Convention and the regulations annexed therein, apply to the West Bank, even in the absence of local legislation that explicitly applies it.²² Article 43 of the Hague Regulations says:

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.²³

The customary interpretation of this Article is that the occupying power is obligated to respect the legislation that was valid in the occupied area at the time of its occupation, to follow it and enforce it. The only two exceptions that allow the occupying power to introduce a change in existing legislation are: (a) a military need of the occupying power in the occupied area itself; or, (b) the humanitarian needs of the population subject to occupation.²⁴ International law therefore recognises that the Israeli military has the authority to introduce amendments to the Law that was valid in the West Bank on the eve of its occupation in 1967, but restricts such changes to two purposes only: legitimate military needs on the one hand and the needs of the occupied population on the other hand.

1.4.1 Does Israeli Military Legislation Meet the Criteria Set Forth in International Law?

As stated in Part 1.3.2, over its decades of rule in the area Israel made many amendments to the Law through military legislation. In certain cases those amendments were necessary given the fact that the West Bank was subject to Israeli military rule, and therefore conform to the restrictions set forth by international law. Thus, the Jordanian Planning Law applied to the West Bank in 1966, which is part of the valid legislation in the area, provides that representatives of the Jordanian government sit on some of the planning and building committees. Obviously, that provision of the Jordanian Planning Law cannot be implemented under Israeli occupation. Under these circumstances, following Jordanian law and respecting it to the letter would completely prevent the implementation of the planning law, prevent development and construction in the area and harm the occupied Palestinian population. In this case, there was a genuine need for a legislative change, to allow planning committees to be established with a different composition than that set out in the 1966 law (see Part 3.1.2.1).

But in many other cases, Israeli military legislation exceeds the limits set forth by Article 43 of the Hague Regulations. For example, in the same Military Order that changed the composition of the planning institutions, the Israeli Military Commander also annulled those provisions of the Law that allowed Palestinian village councils to serve as Local Planning

²¹ See H CJ 393/82 *Jam'iyyat Iskan al-Mu'alimoun al-Mahdduda al-Mas'uliyah v. Commander of IDF Forces in Judea and Samaria*, 37(4) PD 785, 794.

²² H CJ 69/81 *Bassel Abu Ayt a v. Commander of the Judea and Samaria area et al.*, 37(2) PD 197, 232-237.

²³ Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907 (Fourth Geneva Convention), Article 43.

²⁴ Prof. Yoram Dinstein, "Judgment Review: The Power of Legislation in the Occupied Territories", *Iyunei Mishpat* [Tel Aviv University Law Review], Vol. 2, 1972, pp. 502-512.

Committees. In addition, the Military Order annulled the District Planning Committees in the West Bank. At the same time, the military order facilitated the establishment of Special Planning Committees in the Israeli settlements (see Part 3.1.4). It is difficult to see how the annulment of Local and District Planning Committees could be justified by military necessity or by the humanitarian needs of the occupied population. Certainly the establishment of the Special Planning Committees in Israeli settlements serves neither a military need nor the interests of the Palestinian population under occupation.

Similarly, one of the Jordanian land laws that apply to the West Bank imposes certain restrictions on real estate activities of non-Jordanian companies. Among other things, the law stipulates that a foreign real estate company may, with special approval of the Jordanian ministerial council, purchase land for non-commercial purposes only.²⁵ In the Israeli military legislation, all powers given by the Jordanian law to the ministerial council to grant permission were transferred to a “director” appointed by the area commander.²⁶ This amendment meets the conditions of international law, because it is clear that under Israeli military rule, the Jordanian law could not be implemented while maintaining the powers of the Jordanian ministerial council.

But, in addition, the Military Order also changed some of the Jordanian law’s substantive provisions. It empowered the Head of the Civil Administration to allow non-Jordanian (i.e., Israeli) companies purchase land even for commercial purposes,²⁷ such as building settlements, whereas the original Jordanian law explicitly forbade that. This provision of the military legislation exceeds both of the legitimate grounds for legislative changes in occupied territory – military necessity on the one hand and the humanitarian needs of the occupied local population on the other hand – and does not comply with the restrictions set forth in Article 43 of the Hague Regulations.

1.4.2 The Position of the Israeli Supreme Court

The Supreme Court (sitting as the High Court of Justice)²⁸ has based many of its rulings concerning the occupied Palestinian territory (oPt) on customary international law in general, and the regulations annexed to the Hague Convention in particular. Thus, in recent years the High Court of Justice has rejected many petitions by Palestinians against the route of the Barrier, which runs deep into the West Bank, ruling that Article 43 of the Hague Regulations – which stipulates that the occupying power must maintain public order and safety in the occupied territory – empowers the Israeli Military Commander to build such a barricade.²⁹

²⁵ Law of the Use and Possession of Real Estate by a Legal Entity (Law no. 61), 1953, Article 5.

²⁶ Order concerning the Law of Use and Possession of Real Estate by a Legal Entity (Judea and Samaria) (no. 419), 1971.

²⁷ *Ibid.*, Article 3.

²⁸ The Supreme Court is the highest instance court in Israel, and sits as an appellate court and as the High Court of Justice. As the High Court of Justice, the Supreme Court rules as a court of first instance, primarily in matters regarding the legality of decisions of State authorities, government decisions, those of local authorities and other bodies and persons performing public functions under the law. It rules on matters in which it considers it necessary to grant relief in the interests of justice, and which are not within the jurisdiction of another court or tribunal. For more information, see Israel Basic Law: The Judiciary (1984). English full text of the law is available at http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm [last accessed May 2011]. See also website of the Judicial Authority, the State of Israel, available at <http://elyon1.court.gov.il/eng/home/index.html> [last accessed 19 April 2011].

²⁹ See for instance, H CJ 2645/04 *Fares Ibrahim Nasser v. The Prime Minister et al.*, Dinim-Elyon 2007 (20) 1063 (route of the Barrier in Deir Qadis); H CJ 4289/05 *Local Council of Bir Naballah and 149 Others v. Israeli Government et al.*, Dinim-Elyon 1249 (66) 2006 (route of the Barrier in Bir Naballah).

Nonetheless, the High Court of Justice has only rarely considered the question of the restrictions international law imposes on the legislative powers of the Israeli military commander in the West Bank. As a rule, the court has tended to focus more on the first half of Article 43 of the Hague Regulations – concerning the duty of the occupying power to maintain public order in the area – and less on the second half, which discusses the need to respect as much as possible the original laws in place.

The High Court's first reference to the issue was in 1972, when a Palestinian Christian association petitioned the court against the decision of the Israeli Military Commander to change the Jordanian labour law that applied in the West Bank. In this case, the court ruled that when the motive behind the change in the Jordanian Law made by the Military Commander is the well-being of the civilian population, then it meets the conditions of Article 43 of the Hague Regulations.³⁰

In 1983 the High Court of Justice addressed the issue again, this time conducting a comprehensive and extensive discussion of the Israeli Military Commander's legislative powers in the occupied West Bank. In this case the court rejected a petition by residents of the West Bank against a Military Order that subjected them to value added tax payments. The petitioners and the state were not in disagreement that it was a new tax imposed on the area by a military order; nor that the Israeli Commander had changed the Jordanian tax laws that were valid in the area before 1967. In its judgment the High Court ruled that imposing value added tax on the residents of the West Bank subject to Israeli belligerent occupation does fall within the permitted exceptions according to Article 43 of the Hague Regulations, since collecting the tax was meant to allow the proper fiscal functioning of the West Bank economy, which had developed close ties with the Israeli economy since it had been occupied by Israel. Without the new tax, the court added, the occupied Palestinian population would be among those harmed.³¹ In reference to the two grounds which, according to international law, justify amending the prevailing Law – military necessity and the humanitarian needs of the occupied population – the court used language that applied only to the Palestinian population of the West Bank: “Even though the legislative power of the military occupier is theoretically limited, it actually encompasses all aspects of the civilian life of the enemy population, if the occupation persists for a considerable length of time” (emphasis added).³²

The High Court of Justice used similar arguments to reject a petition against the Military Order that amended the Jordanian Planning Law and annulled the Local Planning Committees in the Palestinian villages of the West Bank. The court ruled that the annulment of these committees was necessary in order to allow the implementation of the law, and that without cancelling them the Palestinian residents of the area could not have received any building permits and would have been unable to build legally at all.³³ Despite this argument, it is still not clear why the annulment of the local committees in the Palestinian villages was necessary and why the Jordanian Planning Law could not have been implemented had they been maintained.

³⁰ H CJ 337/71 *Al-Jam'iyya al'Masihyya lil-Aradhi al-Muqaddassa (The Christian Association of Holy Sites) v. The Minister of Defense et al.*, 26(1) PD 574, 580-584.

³¹ H CJ 69/81 etc., *supra* note 22, p. 272.

³² *Ibid.*, p. 312, citing H CJ 202/81 *Sa'id Mahmud Tabib et al. v. the Minister of Defense et al.* 36(2) PD 622, p. 630, citing E.H. Schwenk, “Legislative Power of the Military Occupant Under Article 43, Hague Regulations”, 54 *Yale Law Journal*, 1945, p. 393.

³³ H CJ 4154/91 *Azmi Doudin et al v. Commander of IDF Forces in West Bank Area*, 46(1) PD 89, 92.

In recent years the Israeli High Court appears to endorse an expanding interpretation of Article 43 of the Hague Regulations. Within this framework the Israeli settlers – even though they are not an occupied population – are considered by the Court to be part of the local civilian population, whose interests provide justification for legislative amendments, as well as for other governmental actions in the occupied territory.

In 2005 the High Court of Justice discussed the issue as part of a landmark ruling concerning the Barrier surrounding the settlement of Alfei Menashe in the Seam Zone³⁴ on the western edge of the north-central West Bank. The court ruled that the Military Commander had the authority to build the Barrier not only with the goal of protecting the army itself, but also to ensure the safety of the Israeli settlers living in the area. The court based its ruling on the first half of Article 43 of the Hague Regulations, obligating the occupying power to maintain public order and safety in the area under belligerent occupation. According to the High Court of Justice, “this power is not limited only to the people protected by international humanitarian law [i.e., the Palestinians]. It is a general power, extending to any person living in an area under belligerent occupation...Within the context of this conclusion, it is not relevant whether the settlement complies with international law or violates it”.³⁵

These comments did not relate to the Military Commander’s authority to amend the Law valid in the area under belligerent occupation, but yet they serve as a good reflection of the High Court’s position in recent years: the settlers are part of the civilian population of the occupied territory, and therefore – at least implicitly, if not explicitly – new legislation that changes the Law can be introduced, insofar as it serves the settlers’ civilian needs.

1.4.3 The Dual Legislation System

There is an increasing phenomenon whereby Israeli laws, valid within the Green Line, are being applied to the settlements ex-territorially and to the settlers personally. A parallel and equally significant phenomenon is the application of different military laws to Israelis on the one hand and to Palestinians on the other hand. This issue is beyond the scope of this guide, given the fact that with respect to land laws, the same legislation still applies to both settlers and Palestinians (although, as aforementioned, many amendments were made to the West Bank Law in order to serve the interests of the Israeli settlers). However, due to its clear relevance to any discussion of West Bank legislation, here is a brief description of the dual legislation system, whereby settlers are subject to different laws from Palestinians.

Over the years the Israeli military regime in the West Bank and the Israeli parliament have used three techniques in order to apply different legislation to Israelis and to Palestinians in the area. First, the military legislation applied Israeli administrative laws, valid within the Green Line, to the municipal authorities (the local and regional councils) that administer the settlements in the West Bank. This created a separate legal system for the Israeli local government in the West Bank, while maintaining the municipal system set forth by the Jordanian Law for the Palestinian population alone. Furthermore, the Israeli laws applied ex-

³⁴ The land area of the West Bank between the Barrier and the Green Line.

³⁵ H CJ 7957/04 etc., *supra* note 20, pp. 496-498. Today, following the ruling regarding Road 443, the beneficiaries of Regulation 43 include, according to the Supreme Court, all other Israelis (not settlers) and foreign citizens who enter for limited periods of time the occupied area. See Guy Harpaz and Yuval Shany, “The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law”, *Israel Law Review*, Vol. 43, p. 514, available at <http://law.huji.ac.il/upload/Shany.Harpaz.pdf> [last accessed 4 November 2011].

territorially only to the local and regional councils of the settlements³⁶ granted them powers³⁷ exceeding those which were granted to the equivalent Palestinian municipal authorities in Jordanian legislation.

Second, the Israeli parliament applied various laws personally to the Israeli citizens living in the West Bank, especially in the field of criminal law.³⁸ It would appear that the military legislation, including its criminal provisions, should apply to any person living in the West Bank, whether Palestinian or Israeli. In practice, because Israeli criminal law was applied personally to the settlers, Palestinians suspected of criminal offences are tried by military law in military courts, whereas settlers charged with similar offences are tried by Israeli law in Israeli civilian courts.

Third, military legislation itself sometimes applies certain norms only to Israelis or only to Palestinians. One of the salient examples is the declaration of the Seam Zone as a closed military zone, entry into which requires a permit from the Military Commander. The declaration concerning the closure of the Seam Zone states explicitly that it does not apply to the citizens of Israel, its residents, those eligible to immigrate to Israel under the law of return and tourists with valid visas.³⁹ Put simply, the declaration was worded so as to make the Seam Zone a closed military zone almost exclusively for Palestinians, allowing free access to it for all other “types” of people.

In a rare statement made a few years ago by Justice Dorner of the Supreme Court of Israel, she emphasised the substantial differences, in terms of the legislation applying to them, between the Palestinian residents on the one hand and the settlers on the other hand:

The main thing to me is the different status in the areas of Judea and Samaria of Israeli citizens and the local population...Israeli legislation has distinguished between the status of Israeli citizens and the status of the local population by applying to the Israelis personally the laws of the state of Israel, except for legislation concerning land. Even the gap concerning land was narrowed down by the Military Commander, who granted the Israeli settlements in Judea and Samaria the powers of a local government...without giving the local [Palestinian] communities in the same area equivalent powers or making them part of the Israeli councils...under these circumstances, the different treatment of the two populations does not constitute discrimination, but a permissible distinction, based on the relevant difference between them.⁴⁰

The court reached this conclusion in light of legislative amendments made by the Military Commander to the local Law, first and foremost for the benefit of the Israeli settler population. And yet, in this ruling, the court did not refer to the question of whether these amendments are legal under international law, but rather accepted them as *faits accomplis*. As noted in Part 1.4, a fundamental principle of international law is the temporary nature of belligerent occupation. This principle bans the establishment of permanent facts in the occupied territory. Construction of settlements for the civilian population of the occupying

³⁶ Order concerning the Administration of Regional Councils (Judea and Samaria) (no. 783), 1979; Order concerning the Administration of Local Councils (Judea and Samaria) (no. 892), 1981.

³⁷ B'Tselem, *Land Grab: Israel's Settlement Policy in the West Bank*, May 2002, pp. 56-58.

³⁸ The Law Amending and Extending the Validity of the Defense Emergency Regulations (Judea and Samaria) – Jurisdiction of Offences and Legal Aid, 2007.

³⁹ See for instance, Declaration of Closure of Area no. S/2/03 (Seam Zone), 2 October 2003. In more recent similar declarations, the provision that the closure does not apply to Israelis was deleted and instead Israelis were granted a “general permit” to enter the Seam Zone and reside therein.

⁴⁰ HCI 548/04 *Amana v. Commander of IDF Forces in the Judea and Samaria Area*, 58(3) PD 373, 380.

power in the occupied territory stands in clear violation of this principle, as also anchored in an explicit provision of the Fourth Geneva Convention.⁴¹ Therefore, it is highly doubtful that amending the local Law in an area subject to belligerent occupation through military legislation could be considered legal, when its dominant purpose is to address the needs of Israeli settlers, whose very presence in the area is contrary to international law.

⁴¹ Fourth Geneva Convention, Article 49, para. 6: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

PART TWO: LAND OWNERSHIP

Since Israel's occupation of the West Bank in 1967 there has been an ongoing struggle for control of its land resources. On the surface the struggle is a national conflict which often takes a violent form. But looming in the background is a struggle between the occupying power, Israel, and individuals, Palestinian residents, and, at its centre, the issue is the definition of the land ownership as public or private. Israel's position is that public land – also known as state land – in the West Bank is a resource designated for the almost exclusive use of Israelis; both for Israeli military needs and to build settlements. By contrast, on private Palestinian land, at least officially, settlement construction is forbidden.

This chapter examines the complex system of laws that determines land ownership in Area C of the West Bank, which is under full Israeli control. It also describes land registration procedures and the process whereby land is declared as state land. Because of the multi-layered nature of the legislation valid in the West Bank, this review covers a long list of laws and Military Orders, from the Ottoman period to the present.

2.1 The Ottoman Land Code

The most basic level of the land laws that apply to the West Bank today is the Ottoman Land Code of 1858. The Code underwent many changes as part of later Ottoman, British Mandatory and Jordanian laws, but its basic definitions have remained intact to this day. Even though it is an archaic law from a different era, and an unsuitable mechanism for use in the conditions prevailing in the West Bank today, Israel claims it is obligated to enforce it. This, the argument goes, is because of the provision in international humanitarian law (Article 43 of the Hague Regulations)⁴² which stipulates that the occupying power must respect the laws that were in force in the occupied territory before its occupation.⁴³ However, Israel has not hesitated, in practice, to change the local land laws when it has served its interests (for example regarding “First Registration” of land⁴⁴), as laid out in Part 2.5.1.

The theoretical basis of the Ottoman Land Code is the *shari'a* or Islamic law, which considers God to be the supreme sovereign who owns all the land in the world. According to this concept, the ruler who heads the Muslim polity and leads his country is God's representative. As God's trustee, the sovereign government also holds ownership rights over most of the land.⁴⁵

Accordingly, the Ottoman Land Code distinguishes between two kinds of land rights: the abstract right of ownership of the land itself, the *raqaba*, which is held by the sovereign ruler; and, the *tessaruf*, the right to use the land, which is given to the individual.⁴⁶ This distinction between the *raqaba* and the *tessaruf* parallels the common situation within the Green Line, where the Israel Land Administration (ILA), which administers state land and owns the land itself, leases it to private parties for a variety of uses (agriculture, residential and more).

⁴² See Part 5.1.1.

⁴³ Eyal Zamir, *State Lands in Judea and Samaria: A Legal Review*, Institute for Israel Studies, Jerusalem, 1985, pp. 3, 7 [Hebrew].

⁴⁴ See Part 2.5.2.

⁴⁵ A. Ben-Shemesh, *Land Law in the State of Israel*, Massada, Tel Aviv, 1953, p. 8 [Hebrew].

⁴⁶ Avraham Suchovolsky, Ely Cohen and Avi Erlich, *Land Law in Judea and Samaria*, self-published, 1986, p. 23 [Hebrew].

Leasing state land to residents is commonplace in many countries in the world. A key difference between the legal situation that applies to Israel and the philosophy embodied in the Ottoman Land Code is that the leases signed with the ILA are restricted in time, whereas usage rights given to the individual under the Ottoman Land Code constitute “a sort of lease of unlimited time, which the state grants to its citizens in exchange for dual land leasing fees: on the one hand, registry fees and inheritance taxes, and on the other hand tithes and other annual taxes and payments”.⁴⁷

2.1.1 Categories of Land

The Ottoman Land Code defines three main types of land.⁴⁸ The definition of each category is based on two parameters: the spatial location of the land and the uses for which it is designated.

Mulk land is the only category of land in the Ottoman Land Code where full ownership – both the *raqaba* and the *tessaruf* – belongs to the individual. *Mulk* land is therefore by definition private property, in which the state has no right. From the spatial perspective, the law defines *mulk* as plots in cities and villages that are considered to be connected to homes, whose area does not exceed half a dunum (500 square metres). From the functional perspective, *mulk* land is the built-up area of the community.⁴⁹

Miri land is land designated for agricultural cultivation. From a spatial perspective it is a wide strip with a radius of 2.5 kilometres surrounding the built-up area of the village, or *mulk* land. It should be emphasised that the definition of *miri* land, as set forth in the Ottoman Land Code, is not a cumulative definition: both uncultivated land and land that cannot be cultivated at all are *miri*, as long as they are within the range of 2.5 kilometres from the edge of the built-up area of the village. At the same time, cultivated land that is beyond the 2.5 kilometres strip is also *miri*, even though its spatial location exceeds the boundary defined by the law for *miri* land.⁵⁰ In *miri* land the ownership of the *raqaba* is held by the sovereign, but the right of use is given to the individual.⁵¹

Mewat land (“dead land”) is land that was not allotted to anyone, which is not cultivated, and is 2.5 kilometres or more away from the built-up area of the nearest village.⁵² In *mewat* land, all aspects of ownership are held by the state. The individual is allowed to acquire rights to *mewat* land only if he/she revived it (agriculturally speaking) and turned it into fertile land,⁵³ thus changing the category of land, at least functionally, from *mewat* to *miri*.

The classification of lands in the Ottoman Land Code is therefore based on the spatial distribution of the land in relation to the built-up area of the village, as well as on the uses for which it is designated. This system of definitions raises an important question of interpretation. *Mulk* land is defined as the built-up area of the village. Construction and

⁴⁷ *Ibid.*

⁴⁸ Two other categories of land mentioned in the Ottoman Land Code which will not be discussed herein are *waqf* – land dedicated by its owner to a public cause, such as building religious institutions; and, *metrouke* – public land designated for the use of the public as a whole (such as roads) or for the exclusive use of the residents of a specific village (such as grazing land that has served the same village for many generations).

⁴⁹ Ottoman Land Code, Article 1.

⁵⁰ Plia Albeck and Ron Fleischer, *Land Law in Israel*, self-published, Jerusalem, 2005, pp. 54-55 [Hebrew].

⁵¹ Ottoman Land Code, Article 3.

⁵² Ottoman Land Code, Article 6; Albeck and Fleischer, *Land Law in Israel*, *supra* note 50, p. 54.

⁵³ Ottoman Land Code, Article 103. The possibility of acquiring rights to *mewat* land by agricultural cultivation was greatly restricted by British Mandatory legislation.

development are dynamic processes. In the West Bank itself, the built-up area of Palestinian villages grew by hundreds of percent during the 20th century,⁵⁴ and this process of expansion continues today, albeit at a slower pace.⁵⁵ Is the correct interpretation of the Ottoman Land Code that every parcel of land on which a building is erected automatically becomes *mulk*? If such an interpretation is accepted, it will have far-reaching implications: first, according to this approach, individuals can acquire absolute ownership rights (including the *raqaba*) of land simply by building residences on it, even when the construction is undertaken without the approval of the authorities and without building permits. This would be an unreasonable outcome. Second, since the boundaries of *miri* and *mewat* lands are determined in relation to the built-up area of the village (which is *mulk*), the dynamic interpretation outlined would lead to a state of affairs in which there would be a constant erosion of the land (*miri*, *mewat*) to which the state has rights.

The accepted interpretation of the Ottoman Land Code rejects the dynamic outline presented here. Most experts argue that the spatial definition of *mulk* land applies to the boundaries of the built-up area of the village as they were in 1858, when the law came into force.⁵⁶ Construction on *miri* land beyond the boundaries of the built-up area of the village as it was in 1858 does not change its classification from *miri* to *mulk*.⁵⁷ It should be mentioned in this context that a law was passed under Jordanian rule that automatically changed the category of lands within the municipal boundaries of cities of the Hashemite kingdom, including the West Bank, from *miri* to *mulk*.⁵⁸ But this law did not apply to *miri* land in the rural areas. It is in these rural areas that the main focus of conflict between the Israeli administration and Palestinian residents is felt.

2.1.2 The Structure of the Village

According to the Ottoman Land Code, the village therefore consists of three main parts or strips. At its centre is a narrow strip, which in most cases covers a few tens of dunums (a few hectares), which is *mulk*. Its limits are the boundaries of the village's built-up area in 1858 (that is if we do not accept the dynamic outline thesis). Around that strip is a wide belt with a radius of 2.5 kilometres, which is *miri*. The village land that extends beyond the *miri* strip is generally *mewat*, although cultivated land situated more than 2.5 kilometres from the boundary of the built-up area is *miri*, not *mewat*.

When it comes to the West Bank, these definitions mean that in large parts of the area there is no *mewat* land whatsoever. That is because in the main concentrations of rural Palestinian communities (the mountain ridge, as well as its western and eastern slopes), the distance between the edges of the built-up areas of the Palestinian villages, as they were in 1858, does not usually exceed five kilometres. Consequently, the *miri* land of one village (in a radius of 2.5 kilometres from its built-up area) borders on the *miri* land of the neighbouring village (with the same radius). Whether the land is cultivated or not, according to the spatial definitions in the Ottoman Land Code, this land is all *miri*: "In areas where the distance between the built-up areas of villages or cities from each other in every direction does not exceed 5 km – 2.5 km times two – there is no *mewat* land at all, and all of the land between

⁵⁴ Moshe Brawer, "Seepage and Dispersion of Villages in Judea and Samaria", in Avshalom Shmueli, David Grossman and Rechavam Ze'evi (eds.), *Judea and Samaria: Chapters of a Settlement Geography*, Cana'an, Jerusalem, 1974, pp. 367-382 [Hebrew].

⁵⁵ Bimkom, *The Prohibited Zone*, supra note 10, pp. 47-53.

⁵⁶ Moses Doukhan, *Land Law in the State of Israel*, Jerusalem, 1953, pp. 40-41 [Hebrew].

⁵⁷ Albeck and Fleischer, *Land Law in Israel*, supra note 50, p. 53.

⁵⁸ Changing Miri Land to Mulk Land Law (Law No. 41), 1953.

the villages is *miri*”.⁵⁹ Indeed, the only areas in the West Bank where there is a substantial amount of *mewat* land are the Jordan Valley and the Judean Desert, where the establishment of villages was already thin in the 19th century, and remains so today.

The fact that most of the rural parts of the West Bank are *miri* and not *mewat* is highly significant: As described later, the law allows individuals to acquire ownership rights in *miri* land, while considerably restricting such an option with respect to *mewat* land.

2.2 Acquiring Rights to Land by an Individual

The Ottoman Land Code designates *miri* land for agricultural purposes. The underlying reason is that “the main interest of the [Ottoman] sultan in developing the land laws was...to enrich as much as possible his treasury by collecting high taxes. Therefore the interest is in increasing the utilization of the land [i.e., its agricultural cultivation], so that there is something to collect taxes from”.⁶⁰ Indeed, during the Ottoman period, taxes were collected in the form of a tithe of the agricultural crops produced from the land. In the absence of agricultural cultivation, the state could not collect the tithe.⁶¹

In general, the law states that possession of land by an individual must be by direct allocation from the government, through a title deed (*kushan*). It should be stressed that under the Ottoman Land Code, the *kushan* is proof that the individual was given the right to use the land (the *tessaruf*), but not of actual ownership of the land itself (the *raqaba*). Over the years that approach was changed. Since the British Mandate period, the *kushan* – as well as more accurate registration in the Land Registry – is perceived as proof of full ownership of the land, both of the *tessaruf* and of the *raqaba*.

But the state’s clear interest in guaranteeing the cultivation of the land is reflected by an exception provision that appears in Article 78 of the Ottoman Land Code:

Everyone who has possessed and cultivated *miri*...land for ten years without dispute acquires a right by prescription and whether he has a valid title deed or not, the land cannot be regarded as abandoned (*mahlul*), and he shall be given a new title deed free of charge.⁶²

It should be noted that such rights may be acquired on condition that the individual’s possession of the land “without dispute”, and furthermore that he/she cultivated it for 10 years or more. In this case the law provides that the possessor may receive from the state a *kushan* for the land he cultivated, free of charge.⁶³ According to court rulings, the phrase “without dispute” that appears in Article 78 of the Ottoman Land Code refers to a situation in which the state did not take legal action against the possessor of the land within 10 years from when he started possessing and cultivating it.⁶⁴ Therefore, if the state is interested in preventing the farmer from acquiring rights to *miri* land, which he took possession of without advance allocation by the government, it must take active action to prevent him from

⁵⁹ Albeck and Fleischer, *Land Law in Israel*, *supra* note 50, p. 54.

⁶⁰ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 14.

⁶¹ Ben-Shemesh, *Land Law in the State of Israel*, *supra* note 45, pp. 32, 126. During the British Mandate period the tithe was replaced by land tax. *Ibid.*, p. 126.

⁶² The translation is based on R.C. Tute, *The Ottoman Land Laws*, Jerusalem, 1927, p. 75.

⁶³ Ottoman Land Code, Article 78.

⁶⁴ Doukhan, *Land Law in the State of Israel*, *supra* note 56, p. 316.

continuing to possess and cultivate it, and must do this within 10 years.⁶⁵ In the case of continuous possession and cultivation for 10 years, this constitutes not only a statute of limitation that prevents the state from dispossessing the farmer of the land, but also a limitation that creates rights to the land for the individual.⁶⁶

Therefore, when it comes to *miri* land, the law allows the individual to acquire rights to it in two different ways. One is by direct allocation from the government through a *kushan*.⁶⁷ The allocation is made by payment in advance and is a sort of unlimited lease. The second way is by taking possession of *miri* land without prior allocation and cultivating it for at least 10 years, as long as the state has not objected within this period. Cultivating the land for 10 years thereby equalises the status of its occupant to the status of one who received *miri* land in advance by government allocation.⁶⁸

For historical reasons, most of the Palestinians who lived in the area under the rule of the British Mandate, including the West Bank, did not have *kushans*. But, it can be presumed, that those areas of the West Bank which are *miri* were, for the most part, allocated to its residents for agricultural cultivation.⁶⁹ Many *kushans* seem to have been lost with the crumbling of the Ottoman Empire in the early 20th century and during World War I. Therefore, it is only in rare cases that Palestinians are able to prove their ownership of land through *kushans*. Furthermore, even in such cases, identifying the boundaries of the piece of land described in the *kushan* is no simple matter. The *kushans* do not include maps, the area of the plot stated in them is often much smaller than in reality, and the spatial description of each plot reflects the situation on the ground when the *kushan* was issued (for example, the *kushan* may mention trees marking the boundaries of the plot, but these have since been cut down).⁷⁰

Given the absence of *kushans* in most parts of the West Bank, the only way for the individual to acquire rights to *miri* land in the area is through continuous cultivation and possession for at least 10 years, according to article 78 of the Ottoman Land Code.

2.2.1 What Constitutes “Cultivation”?

The Ottoman Land Code does not specify the level of agricultural cultivation required to impart land rights to an individual, under Article 78. Because of its importance, this issue has been discussed extensively in court rulings.

During the British Mandate period, the courts established the doctrine of “reasonable cultivation”. According to this approach, the level of cultivation required to give the individual rights to *miri* land depended on the quality of the land and its physical attributes. As the Mandatory Supreme Court stated, “cultivation in this sense means... such regular cultivation as is reasonably possible, having regard to the nature of the land and the crops for which it is suitable”.⁷¹ Consequently, the individual cannot acquire rights under Article 78 of

⁶⁵ Ben-Shemesh, *Land Law in the State of Israel*, *supra* note 45, p. 132.

⁶⁶ Doukhan, *Land Law in the State of Israel*, *supra* note 56, pp. 314-315.

⁶⁷ Ottoman Land Code, Article 3.

⁶⁸ Albeck and Fleischer, *Land Law in Israel*, *supra* note 50, pp. 56-60.

⁶⁹ The Government of Palestine, *A Survey of Palestine*, 1945-1946, p. 229.

⁷⁰ Plia Albeck, “Land in Judea and Samaria”, lecture at the Tel Aviv-Jaffa District Committee of the Israel Bar Association, 28 May 1985.

⁷¹ CA 65/40 *Habib and Rashid Yusef Habiby v. Government of Palestine*, Law Reports of Palestine (LRP), vol. 7, 1940, pp. 288-291.

the Ottoman Land Code to *miri* land which cannot be cultivated at all.⁷² In accordance with this approach, the Mandatory Court ruled that planting seasonal crops constitutes possession and cultivation sufficient to give the individual rights to *miri* land. Conversely, using the land for grazing and lumbering is not agricultural cultivation that meets the requirements of article 78 of the Ottoman Land Code, and is not sufficient to give the individual rights to the land.⁷³

The Mandatory Court held that the agricultural cultivation under Article 78 of the Ottoman Land Code had to correspond with the physical features of the plot in question. Hence, “if the nature of the land was mountainous or rocky and the individual cultivated between the rocks in sporadic patch cultivation”,⁷⁴ such sporadic cultivation would be sufficient to give the individual ownership of the whole area of the plot.⁷⁵

The Israeli Civil Administration uses a different and much stricter interpretation of the Ottoman Land Code than the doctrine of reasonable cultivation, which was established during the British Mandate period and also applied under Jordanian rule in the West Bank. Instead, the Civil Administration has adopted the rule established by the Israeli courts in verdicts given in the 1960s concerning land settlements⁷⁶ conducted inside the Green Line.⁷⁷ The Israeli Supreme Court interpretation was also applied explicitly to the West Bank, in later rulings by the High Court of Justice.⁷⁸ According to this interpretation, a farmer who cultivates a plot of land by sporadic cultivation must prove that the combined cultivated area covers more than fifty percent of the total area of the plot, in order to acquire rights to it under Article 78 of the Ottoman Land Code. If the combined size of the sporadically cultivated area is less than fifty percent, the entire plot will be considered state land and not private property.⁷⁹ If the cultivated area is contiguous and can be separated from the areas that are not cultivated, the plot in question must be divided and only the cultivated area should be registered in the name of the farmer, while the rest of the plot will be registered as state land.⁸⁰

It is doubtful whether applying this strict interpretation adopted by the Israeli Supreme Court to the West Bank, which is under belligerent occupation, is legal. As the occupying power, Israel is obligated to respect the legislation that was valid in the area before its occupation. Arguably, that obligation includes also respecting the rulings given by the courts of the countries that governed the West Bank before it was occupied by Israel.⁸¹ This conclusion is further reinforced by the fact that, in this case, the interpretation applied by the Israeli Civil Administration regarding the requirements of agricultural cultivation under Article 78 of the Ottoman Land Code is so far-reaching in comparison with the doctrine of reasonable cultivation established by the Mandatory Court and adopted by the Jordanians, that it can be viewed as being, in effect, a change to the law itself.

⁷² CA 230/45 *Mahmoud Nayef v. Government of Palestine*, LRP, vol. 12, 1946, pp. 37-39.

⁷³ CA 125/40 *Village Settlement Committee of Arab en Nufei'at v. Aharon Samsonov and 73 others*, LRP₁ vol. 8, 1941, pp. 165-167.

⁷⁴ Suchovolsky, Cohen and Erlich, *Land Law in the State of Israel*, *supra* note 46, p. 29.

⁷⁵ CA 65/40, *supra* note 71, vol. 7, 1940, pp. 288-291.

⁷⁶ The term “land settlement” refers to the systematic registration of land in the Land Registry, and should not be confused with Israeli settlements established in the West Bank.

⁷⁷ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 237.

⁷⁸ See for example HCY 277/84 *Sabri Mahmoud Aghreib v. Appeals Committee pursuant to the Order concerning Government Property, Judea and Samaria Area*, 40(2) PD 57.

⁷⁹ CA 148/62 *State of Israel v. Said Saleh*, 16 PD 1446.

⁸⁰ CA 423/61 *Muhammad Saleh Omar al-Omar and three others v. State of Israel* 15 PD 2552, 2554.

⁸¹ Jeremy Forman, “A Tale of Two Regions: Diffusion of the Israeli ‘50 Percent Rule’ from the Galilee to the Occupied West Bank”, *Law and Social Inquiry*, Vol. 34, Issue 3, Summer 2009, pp. 671-711.

2.2.2 The Conditions for Maintaining Individual Rights to Land

The Ottoman Land Code specifies in Article 68 the conditions the individual must meet in order to maintain his rights in the land after obtaining a *kushan*. The basic purpose of the law is to encourage cultivation of the land to guarantee tax revenues for the central government. In order to achieve that goal, the law provides that anyone who received *miri* land by allocation (*kushan*) from the government must cultivate it, and a cessation of agricultural cultivation for three years or more changes the legal status of the land and makes it abandoned (*mahlul*). Subject to certain conditions, cessation of cultivation allows the state to annul the individual's rights to the land and to allocate it to others for them to cultivate.

According to the Ottoman Land Code, there are a few reasons which justify cessation of cultivation: natural disasters (such as floods), agricultural needs (in order to improve the land) or military necessity (e.g., the farmer was taken prisoner). In such cases the state shall not deny the occupant of the land his/her rights, as long as the cultivation resumes at the earliest time possible after the obstacle ends (for example, when the water that flooded the plot recedes, or when the farmer is released from captivity and returned to his/her village).⁸²

But the cessation of cultivation in other circumstances is perceived by the Ottoman Land Code as a violation of the contract between the individual and the state, which grants him rights to the land, subject to its agricultural cultivation. In this case the law provides that anyone who occupied the land and stopped cultivating it may reacquire the rights to it for payment equal to its gross value (*badal al-mithl*), namely a price lower than the auction value, and which does not reflect the betterment of the land during the time its occupant cultivated it.⁸³ By this payment, the occupant renews his contract with the state, but the demand to continue to cultivate it remains intact. In other words, even after paying *badal al-mithl*, the farmer must cultivate the land in order to maintain his rights therein. If the occupant rejects the offer to repurchase his/her rights to the land whose cultivation stopped in exchange for *badal al-mithl*, the Ottoman Land Code says the state must put the land up for public auction, and it should be handed to the highest bidder for him/her to cultivate it and thereby guarantee tax revenues for the government.⁸⁴

2.3 The Later Land Laws

Various provisions of the Ottoman Land Code were amended in later Ottoman, Mandatory and Jordanian legislation. That legislation today constitutes part of the valid Law in the West Bank. Therefore the Land Code does not stand by itself and must be viewed in light of the changes made to it over the years. This section addresses briefly the main changes that have implications for the individual's rights and obligations regarding the possession and cultivation of land.

2.3.1 Annuling the Prohibition on Cessation of Agricultural Cultivation

In 1913 the Ottoman legislature passed the Provisional Law regulating the Right to Dispose of Immovable Property, which introduced substantial changes compared to the previous

⁸² Ottoman Land Code, Article 68.

⁸³ Ottoman Land Code, Article 68; Regulations as to the Tabo Law 1869, Article 6.

⁸⁴ Ben-Shemesh, *Land Law in the State of Israel*, *supra* note 45, p. 126.

situation, as defined in the 1858 Land Code. The Provisional Law annuls the requirement in the Ottoman Land Code of continuous agricultural cultivation of *miri* land as a condition for maintaining the rights of its occupant. Whereas Article 68 of the Land Code says that cessation of cultivation for three years or more could lead to loss of individual rights to the land, the Provisional Law regulating the Right to Dispose of Immovable Property stipulates that “whoever owns by virtue of a formal title deed [*kushan*] *miri* land...may transfer it absolutely or subject to redemption and may lease it and lend it and mortgage it...he is also entitled to cultivate the fields, to graze his livestock there, to cut down the timber or vines on it, and if there are buildings on it, to demolish them or pull them down and convert the land on which they are erected into cultivated land. .. He may erect on the land houses or shops or any buildings for industrial or agricultural use, provided that the buildings do not form a new village or quarter” (emphasis added).⁸⁵

The legislation change in 1913 therefore allows the occupant of *miri* land who has a *kushan* to make various uses of it, including construction, and not only agricultural cultivation, as set out by the Ottoman Land Code. The result of the 1913 law is a change in the status of the possessor of *miri* land from a tenant to an owner. According to R. C. Tute, who served as President of the Jerusalem Land Court during the Mandate period, the Provisional Law regulating the Right to Dispose of Immovable Property did not completely annul the requirements the occupant has to meet in order to retain his rights to the land. In his opinion, even according to the 1913 law, the occupant of the land must make some use of it or else he would lose his rights to it, but he does not have to cultivate it.⁸⁶ While the 1913 law still upholds the distinction between the *raqaba* and the *tessaruf*, stating that in *miri* land the *raqaba* is the property of the state, in actual terms this distinction became almost meaningless, given the almost complete freedom by the holder to do with the land as he likes.

It should be stressed that, according to the interpretation of the Israeli administration, which follows the literal wording of the Provisional Law regulating the Right to Dispose of Immovable Property, its provisions apply only to cases where the occupant of the *miri* land has a *kushan*: “Article 68 of the [Ottoman] Land Code was not implemented in Palestine at least since the British Mandate, and to the contrary, the allocation of *miri* land by a *kushan* was viewed as a permanent allocation, without the possessor having the duty to cultivate the land”.⁸⁷ As mentioned in part 2.2, in most areas of the West Bank the Palestinian residents do not have *kushans*. According to Zamir, the Civil Administration opines that, in the absence of a *kushan* or registration in the Land Registry, the requirement set forth by the Ottoman Land Code of continuous agricultural cultivation remains in force; cessation of cultivation will, by its logic, lead to the absolute negation of the individual's rights to the land and turn it into state land, even if it was previously cultivated for many years.⁸⁸

2.3.2 Demand for Legal Source of Possession

The Ottoman Land Code allows the individual to acquire rights to *miri* land even if he occupied it without permission to do so from the authorities, as long as he possessed it and cultivated it for 10 years without objection by the state. In 1860 an Ottoman law went into

⁸⁵ Provisional Law regulating the Right to Dispose of Immovable Property, 1913, Article 5. Translation is based on Tute, *The Ottoman Land Laws*, *supra* note 62, pp. 169-170. This Ottoman law was integrated almost word for word in the Possession of Immovable Property (*Tessaruf*) Law, Law No. 49, 1953, applied to the West Bank during the Jordanian rule.

⁸⁶ Tute, *The Ottoman Land Laws*, *supra* note 62, p. 68.

⁸⁷ Albeck and Fleischer, *Land Law in Israel*, *supra* note 50, p. 50.

⁸⁸ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 20.

effect that cancelled that possibility and stipulated that, in addition to at least 10 years of cultivation, a condition for acquiring rights to *miri* land is a legal source of possession, “such as inheritance, transfer or receipt from a person authorized to hand over the land”.⁸⁹ According to the Israeli Civil Administration’s interpretation, in the reality prevailing in the West Bank, a legal source of possession is allocation by the state or transfer (inheritance, sale) from someone registered at the Property Tax Registry as the person charged with paying the taxes for the land.⁹⁰

Opinions differ as to the practical significance of this requirement for a legal source of possession. It appears that the demand to prove a legal source of possession becomes effective when an individual applies to the Land Registry to register in his name *miri* land he/she possessed and cultivated for 10 years. According to the literature,⁹¹ the requirement for a legal source of possession does not apply when the individual demands that the land be registered in his name in court, including in the Land Court, which existed prior to 1967.⁹² Zamir has argued that “Israeli rulings have [also] put the emphasis on the elements of possession and cultivation based on article 78 of the Ottoman Land Code, and did not insist on the need to prove a legal source of possession”.⁹³

2.3.3 Legislation on Abandoned Land (*Mahlul*)

According to the Ottoman Land Code, *miri* land whose cultivation stopped for three years or more, without the existence of circumstances that justify it by law, becomes *mahlul*, or abandoned and the government is allowed in certain circumstances to put it up for public auction so that whoever acquires the rights to it, resumes its cultivation.

During the British Mandate period, two laws were passed that changed those provisions of the Ottoman Land Code. In 1920 the *Mahlul* Land Ordinance was enacted, requiring anyone who possessed such land before the ordinance went into effect to inform the Mandate authorities within three months. The ordinance places a similar obligation on the village *mukhtars*.⁹⁴ It allows the state to lease *mahlul* land (but not to impart ownership of it) to whoever possessed it prior to the time when the ordinance came into force and reported it to the authorities. At the same time, the ordinance imposes a criminal penalty (fine or imprisonment) on anyone who did not report possession of *mahlul* land in 1920, when the ordinance went into effect.⁹⁵

The *Mahlul* Land Ordinance would appear to be a substantial change to the Ottoman Land Code. In fact, in the conditions prevailing in the West Bank, it hardly has any relevance, for two main reasons. First, because the *Mahlul* Land Ordinance applies only to *mahlul* land the individual possessed before the ordinance went into effect in 1920, it therefore does not apply

⁸⁹ Regulations as to Title Deeds, 1860, Article 8.

⁹⁰ The petition in HCJ 9296/08, sections 57, 83. This exceptional petition was filed against a decision by the Military Appeals Committee (more on the Military Appeals Committees *infra* Part 4.1) to approve a request by settlers to register *miri* land in their name, based on their claim that they possessed it and cultivated it for 10 years, even though they presented no legal source (purchase) of their possession of it. On June 2011, the petition was dismissed after the parties informed the Court they reached an agreement according to which the Military Appeals Committee decision, according to which no legal source is required in the West Bank, is cancelled without prejudice.

⁹¹ Tute, *The Ottoman Land Laws*, *supra* note 62, p. 316.

⁹² Suchovolksy, Cohen and Erlich, *Land Law in the State of Israel*, *supra* note 46, pp. 25, 28.

⁹³ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 19.

⁹⁴ A *mukhtar* is the head of the village or village council.

⁹⁵ *Mahlul* Land Ordinance, 1920.

to *miri* land whose cultivation ceased at a later date.⁹⁶ Second, the ordinance does not change the provisions of the Ottoman Land Code concerning the circumstances that give the individual rights to the land. Therefore, a person who cultivated *mahlul* land for 10 years acquires rights to it under article 78 of the Ottoman Land Code, even if he contravened the provisions of the *Mahlul* Land Ordinance. Anyone who took over *mahlul* land before 1920 and refrained from reporting it to the authorities may be committing a criminal offence according to the ordinance, but in those circumstances, if he cultivated the land for at least 10 years, he still maintains all of his rights to it, according to the Ottoman Land Code. Conversely, if he decided to report to the authorities as required by the ordinance, the farmer will avoid committing a criminal offence, but will lose his rights to the land and at the very best be able only to lease it from the state. This paradox in the wording of the ordinance made it difficult to enforce even during the Mandate period,⁹⁷ and today the *Mahlul* Land Ordinance has no real significance in the West Bank, even though it is part of the Law in force in the area.

In 1933 the Land Law (Amendment) Ordinance was passed, authorising the High Commissioner of Palestine – the highest official in the Mandate administration – to declare *mahlul* land as public land, subject to giving the right to whoever possessed the land previously to repurchase the rights to it for its gross price (*badal al-mithl*).⁹⁸ Whereas the Ottoman Land Code instructs the authorities to sell *mahlul* land by auction to guarantee its agricultural cultivation by its buyers, the Land Law (Amendment) Ordinance says explicitly that the state does not have to put the land up for auction or to allocate it to an individual.⁹⁹

The Ordinance apparently creates a procedure not unlike the declarations on state land, which Israel has applied in the West Bank in the years of its rule there (see Part 2.8). But the Land Law (Amendment) Ordinance was annulled in 1958 by one of the Jordanian land laws. Therefore it no longer constitutes part of the Law in force in the West Bank.¹⁰⁰

2.3.4 Restricting the Possibility to Acquire Rights to *Mewat* Land

As shown, the Ottoman Land Code allows the individual to acquire rights not just to *miri* land, but also to *mewat* land, if he made it fertile. If the cultivation has been undertaken with government permission, the possessor is entitled to receive a free *kushan* for the land, but if he/she took the land without state permission he will have to pay its gross value (*badal al-mithl*) in order to receive a *kushan*.¹⁰¹

The individual's ability to acquire rights to *mewat* land was greatly limited by the *Mewat* Land Ordinance passed by the Mandatory government in 1921. The ordinance says that cultivating *mewat* land without advance permission from the government does not give the individual any rights to the land, and whoever did so would furthermore be subject to criminal charges for encroachment.¹⁰² Therefore, since 1921 the only way for the individual to acquire rights to *mewat* land in the West Bank was by reviving it and cultivating it with advance permission from the government. That is as opposed to the situation for *miri* land,

⁹⁶ Frederic M. Goadby and Moses J. Doukhan, *The Land Law of Palestine*, Tel Aviv, 1935, p. 26.

⁹⁷ Tute, *The Ottoman Land Laws*, *supra* note 62, p. 78.

⁹⁸ Land Law (Amendment) Ordinance, No. 25 of 1933.

⁹⁹ *Ibid.*, Article 3.

¹⁰⁰ Law (Amendment) of the Provisions concerning Immovable Property, Law No. 51, 1958.

¹⁰¹ Ottoman Land Code, Article 103.

¹⁰² *Mewat* Land Ordinance, 1921.

where possession and cultivation even without advance permission from the state (as long as it does not object) create rights for the individual.

In practice, the *Mewat* Land Ordinance of 1921 has little significance in the West Bank. Its provisions were never fully enforced even during the Mandate period, and the professed position of the Israeli authorities in the area is that continuous cultivation of *mewat* land will prevent its declaration as state land.¹⁰³ Furthermore, as noted in part 2.1.2, in most parts of the West Bank there is little *mewat* land and therefore the restrictions imposed by the ordinance have no relevance.

2.4 The Takeover of Private *Miri* Land by Squatters

Article 78 of the Ottoman Land Code deals with the relations between the individual and the state. The prescription defined by the Article (10 years of possession and cultivation without contest) gives the individual rights to the land; this constitutes a defence against a dispossession claim by the state.¹⁰⁴ Other provisions of the Land Code address disputes between individuals over rights to land.

Article 20 of the law discusses a situation of an individual person encroaching *miri* land that belongs to another person, taking it over and cultivating it for 10 years or more.¹⁰⁵ According to Article 20, the landowner must initiate action to remove the squatter from his/her land within 10 years from the time he/she invaded the land and began to cultivate it. If the landowner refrains from submitting a claim to remove the squatter from his land within that time period, he/she is considered to have waived his right to make such a claim and he/she is precluded from doing so in the future.¹⁰⁶

Article 20 of the Ottoman Land Code makes several exceptions to this rule. The first and most important one is when the squatter admits he took over the land without the owners' permission. In that case, the owners' right to demand the removal of the squatter remains intact, even if more than 10 years have passed from the time of encroachment. The clock of limitation also stops in cases where the landowner was unable, for objective reasons, to demand the removal of the squatter. For example, if the land passed into his/her ownership by inheritance and he was a minor at the time of the encroachment, or if he/she was out of the country during or after the squatter took over the land. In such cases the landowner is required to submit the claim to remove the squatter from his/her land at the earliest time possible, namely, when he/she comes of age or returns from his/her trip abroad.

Even if the landowner took no measures at all to remove the squatter, the latter does not acquire rights to the land by virtue of his occupation of it, but only enjoys protection from legal action to remove him/her from the land. Therefore, anyone who invades *miri* land that belonged to another private person, occupied it for 10 years and cultivated it throughout that time is not entitled to register the land under his/her name at the Land Registry.¹⁰⁷ The Ottoman Land Code thereby makes a clear distinction between an individual's takeover of *miri* land that was not allotted to someone else (and the rights to which were at the time of the

¹⁰³ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 18.

¹⁰⁴ Doukhan, *Land Law in the State of Israel*, *supra* note 56, p. 305.

¹⁰⁵ This section relates to squatters in general. However in principle it can also relate to Israeli settlers in the West Bank.

¹⁰⁶ Ben-Shemesh, *Land Law in the State of Israel*, *supra* note 45, pp. 54, 60.

¹⁰⁷ Doukhan, *Land Law in the State of Israel*, *supra* note 56, pp. 305-306.

encroachment held by the state) and the takeover by an individual of *miri* land that was owned by someone else. In the first case, addressed in article 78 of the law, possession and cultivation of the land for 10 years constitute a prescription that creates rights. In the second case, addressed in article 20 of the law, possession and cultivation for 10 years only constitutes a period of limitation against action to dispossess the squatter, but does not annul the rights of the original private owner and does not give the squatter the right to register the land in his/her name.

The language of article 20 discusses invasion of *miri* land registered in the name of an individual (namely, allotted by a *kushan*). But the accepted interpretation of this article is that its application is much broader and it also applies to cases when the land was not allotted by a *kushan*.¹⁰⁸ In these cases the accepted procedure is to consider that the original owner is the one whose name appears in the Property Tax Registry, while viewing the farmer who took over the land as the squatter. This is also the position of the Israeli Civil Administration.¹⁰⁹

These provisions of the Ottoman Land Code were amended by later Ottoman¹¹⁰ and Jordanian¹¹¹ legislation. According to the Law extant today in the West Bank, encroachment of *miri* land owned by another person not only does not grant the invader any rights, but is also defined as a crime. Inasmuch as the squatter caused damage to the owners' property, he must indemnify him.¹¹² If the invader planted trees on the land or erected buildings therein, the owner may demand that he/she uproot the trees and demolish the buildings. Conversely, the owner may pay the invader for the trees or the buildings their value as if they were designated for uprooting or demolition, respectively.¹¹³ Furthermore, the invader is required to pay the land owner "appropriate rent for the time" the land was in the possession and use of the squatter.¹¹⁴

2.5 Land Registration

As we have seen, the position of the Israeli Civil Administration is that *miri* land registered in the Land Registry in the name of private owners is their exclusive property, even if they don't cultivate it. Conversely, *miri* land that is not registered in the local Land Registry is considered by the Civil Administration to be private property only on condition its owner cultivated it in the past and continues to do so in the present.

Therefore, registration in the Land Registry or the absence thereof is of decisive importance in determining land ownership in the West Bank. The Civil Administration also recognises Ottoman *kushans* as documents that prove an individual's ownership of *miri* land even if it is not cultivated, but only rarely do Palestinians in the West Bank have *kushans*. Even when they do possess *kushans*, extensive investigations are often required to determine the exact boundaries of the plot to which a given *kushan* refers. Conversely, registry in the Land Registry is accompanied by a map that clearly delineates the boundaries of the plot.

¹⁰⁸ Tute, *The Ottoman Land Laws*, *supra* note 62, p. 24.

¹⁰⁹ The petition in HCJ 9296/08, *supra* note 90.

¹¹⁰ Provisional Law regulating the Right to Dispose of Immovable Property, 1913.

¹¹¹ Possession of Immovable Property (*Tessaruf*) Law, Law No. 49, 1953.

¹¹² *Ibid.*, Article 11.

¹¹³ *Ibid.*, Article 12.

¹¹⁴ *Ibid.*, Article 15.

According to the Law extant in the area, registration in the Land Registry constitutes proof of ownership of the highest order, which can only be contested in exceptional circumstances (for example: if at the time of registration in the Land Registry a person claiming ownership of the land was abroad and was not aware of the registration procedures occurring concerning it).¹¹⁵ Indeed, the principle of the finality of registration in the Land Registry is one of the fundamental principles of the land legislation in the West Bank. Its purpose is to guarantee certainty regarding land ownership and create a credible system to administer land.¹¹⁶

2.5.1 Land Settlement

Land registration in the West Bank began during the British Mandate (1920-1948) and continued at a quicker pace under Jordanian rule (1949-1967). As opposed to registration by *kushan*, registration in the Land Registry refers not only to land use rights (the *tessaruf*) but also to ownership of the land itself (the *raqaba*). Land registration under British and Jordanian rule was done within the framework of land settlement (not to be confused with Israeli settlements), a complicated and lengthy process by which the land of an entire village (or at least a large registration bloc) was registered in the Land Registry after a comprehensive investigation to clarify who held the ownership rights to it. These rights were determined on the basis of Ottoman legislation, which constitutes the material law. As part of the land settlement procedure, the boundaries of plots were defined, a schedule of claims of their ownership was prepared and finally they were registered in the Land Registry on the basis of thorough investigation. This process was carried out at the initiative of the central government and funded mainly by the state.

With respect to the West Bank, during the British mandate land settlement procedures were undertaken mainly in the Jenin sub-district, which lies in the northern West Bank. Under Jordanian rule, land settlements were made in other areas of the West Bank, especially in the Nablus and Ramallah sub-districts and in the Jordan Valley.¹¹⁷ By 1967, approximately thirty percent of the total area of the West Bank was registered in the Land Registry following land settlements.¹¹⁸

In 1968, the Israeli military commander issued an order freezing all land settlement procedures in the area.¹¹⁹ The order not only forbade carrying out new land settlements but also cut short land settlement procedures that had begun under the Jordanian government but had not been completed. As a result, nearly 70 percent of the area of the West Bank remains to this day unregistered in the Land Registry. Only a small portion of the unregistered land is documented in Ottoman *kushans*.

In most cases the land which hasn't undergone the land settlement investigative procedure is registered only in property tax ledgers. The Jordanian Property Tax Registry denotes the general location of the plot, but does not specify its exact location and does not include a map. As opposed to Ottoman *kushans*, in most cases there is a high correlation between the area of the plot as denoted in the property tax ledger and its area in reality, but sometimes

¹¹⁵ The Land and Water Settlement Law, Law No. 40, 1952.

¹¹⁶ Suchovol'sky, Cohen and Erlich, *Land Law in the State of Israel*, *supra* note 46, p. 36.

¹¹⁷ Plia Albeck, "The Use of Land in Judea and Samaria for the Purpose of Jewish Settlement: Legal Aspects and the Test of Reality", in Avraham Shvut (ed.), *Ascending the Mountain: Renewed Jewish Settlement in Judea and Samaria*, Beit El Library and the Judea and Samaria Academic College, Jerusalem, 2002, pp. 223-224.

¹¹⁸ Talia Sasson, *(Interim) Opinion concerning Unauthorized Outposts*, Jerusalem, 2005, p. 61.

¹¹⁹ Order concerning Land and Water Settlement (Judea and Samaria) (No. 291), 1968.

certain gaps are found between the two figures.¹²⁰ Tax property ledgers also denote the type of land (*miri*, *mulk* and so on) as well as the tax category to which it belongs. In the Jordanian taxation system there are 11 categories that refer to the land use in the plot, as documented in surveys undertaken in the 1960s: from residential through the various kinds of agricultural uses to forests and abandoned and uncultivated land (category 11), which is considered state land.¹²¹ It should be stressed that property tax registration does not constitute proof of ownership in its own right, only prima facie evidence of ownership of the land, which may be used to support a claim. According to Ottoman Legislation, what determines ownership is the use of the land (e.g., its cultivation and possession under Article 78 of the Ottoman Land Code) and not its registration in the property tax ledgers.¹²²

The official reason given by the Israeli authorities for stopping the land settlement process in the West Bank following its occupation in 1967 was its duty to protect the rights of absentees; those Palestinians who fled the West Bank in 1967 and left much property behind them, including hundreds of thousands of dunums (tens of thousands of hectares) of land. Carrying out land settlement investigations under such circumstances, Israel argued, would lead to much of the land belonging to absentees being registered in the Land Registry in the names of local residents who had not fled the area, thus seriously harming the absentees' property rights.¹²³

There are considerable holes in this argument. First, as described in Part 2.5.2, even after 1967, registration in the Land Registry continued in the West Bank as part of a procedure known as "First Registration", undertaken by private initiative, rather than by the state. If the Israeli administration believed, as it claimed, that any registration in the Land Registry of land that had never before been registered could violate the rights of absentees, it should not have allowed even the First Registration procedure. And yet, it appears that since 1967, tens of thousands of dunums (thousands of hectares) of West Bank land have been registered through the procedure of First Registration. Second, during the years of its rule in the area, Israel implemented a practice that did not exist before in which hundreds of thousands of dunums (tens of thousands of hectares) were declared as state land. As part of the declaration process, any person claiming ownership of the land in question officially had the right to object to the declaration. But obviously, this right was denied to absentees. It is hard to understand how the policy of such declarations is consistent with the professed concern for the absentees' property rights. Furthermore, and as is discussed in part 2.6.3, the Israeli authorities did not hesitate to allocate absentee-owned land – fully registered in the Land Registry before 1967 – for the construction of Israeli settlements, even though that is not legal, even by their own standards.

Another reason the Israeli authorities gave for stopping the land settlement process in the West Bank was the fact that the area is under belligerent occupation.¹²⁴ In an occupation regime, which is temporary by definition, it was argued that the occupying power must avoid making permanent changes in the occupied territories. Since the land settlement procedure leading to registration and ownership of land constitutes a permanent and irreversible legal change, it was incumbent to stop this procedure in the West Bank.¹²⁵ This explanation is also

¹²⁰ *Report of the Committee to Examine the Issue of Land Registration in Judea and Samaria*, Jerusalem, 2005, p. 17.

¹²¹ Meir Shagar, "Industrial Zone in Jerusalem", 'Anatot-Ma'ale Adumim File, Vol. 3, Israel State Archives, ISA/77/A/7314/10, 12 September 1974.

¹²² Suchovolsky, Cohen and Erlich, *Land Law in the State of Israel*, *supra* note 46, p. 45.

¹²³ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 27.

¹²⁴ See Part Five.

¹²⁵ The petition in HCJ 9296/08, *supra* note 90, section 10.

flawed, taking into account the practical realities outlined here concerning the declaration of state land and individual registration procedures from 1967 to this day.

One theory is that the decision made in 1968 to stop the land settlement procedure in the West Bank stemmed mainly from budgetary considerations. The investigation procedures for land settlement are very expensive and are funded mainly by the government. Carrying out this procedure in the West Bank would have placed a substantial budgetary burden on the Israeli military government in the West Bank, and it appears that this was the main reason leading to the decision to stop them.

In any case, the result of the halt of the land settlement investigative procedure is that most of the land in the West Bank remained unregistered in the Land Registry. Even though it cannot be assumed that this was the authorities' intention in their decision to stop the land settlement process, the lack of registration in the Land Registry constituted a decisive factor that eventually allowed Israel to declare hundreds of thousands of dunums (tens of thousands of hectares) of land in the West Bank as state land in the 1980s and 1990s. As mentioned, Israel's official position is that land registered in the Land Registry in the name of private parties is the absolute property of the individual and the state cannot declare it to be government property, even if it is not cultivated. The lack of registration in the Land Registry in most parts of the West Bank therefore constituted a precondition to the very feasibility of declaring substantial parts of the West Bank as state land.

2.5.2 First Registration

After the land settlement investigation process was halted, the only course of action that remained open in the West Bank to anyone wishing to register previously unregistered land in the Land Registry was "First Registration". This procedure is, in fact, similar to a land settlement process, but with two major differences: First Registration is initiated and funded privately rather than by the state; furthermore, it applies to a limited area (usually one plot or a few plots) rather than to the land of an entire village or a large registration bloc, as was the case of the land settlements carried out by the British and the Jordanians.¹²⁶

First Registration is a complex and long procedure based on a Jordanian law¹²⁷ and a series of Orders and Regulations issued by the Israeli Military Commander.¹²⁸ The registration applicant is required to prove that the land belongs to him by the material land laws, namely: in the case of *miri* land, he must prove continuous cultivation and possession according to article 78 of the Ottoman Land Code as well as a legal source of possession (inheritance or purchase). Alternatively he must produce a *kushan* and prove that this refers to the parcel in question. Various documents must be attached to the application, including property tax ledgers belonging to the applicant or to the person from whom the land was purchased, and an updated surveyors' map of the plot in question. In addition, the applicant is required to

¹²⁶ Suchovolksy, Cohen and Erlich, *Land Law in the State of Israel*, *supra* note 46, p. 47.

¹²⁷ Law of Registration of Immovable Property Not Previously Registered, Law No. 6, 1964.

¹²⁸ Order concerning the Amendment of the Law of Registration of Immovable Property Not Previously Registered (Judea and Samaria) (No. 1621), 2008; Regulations of Registration of Immovable Property Not Previously Registered (Applications for Registration) (Judea and Samaria), 2008; Regulations of Registration of Immovable Property Not Previously Registered (Legal Procedures at Registration Committees) (Judea and Samaria), 2008; Order concerning the Amendment of the Law of Registration of Immovable Property Not Previously Registered (Amendment) (Judea and Samaria) (No. 1642), 2009; Regulations of Registration of Immovable Property Not Previously Registered (Applications for Registration) (Amendment) (Judea and Samaria), 2009; Regulations of Registration of Immovable Property Not Previously Registered (Legal Procedures at Registration Committees) (Amendment) (Judea and Samaria), 2009.

publish a notice in two newspapers in Arabic widely circulated in the area, and on a sign in the village in whose land the plot is located,¹²⁹ to allow anyone claiming ownership of the plot to object to the application for registration. The registration applicant bears the cost of all of these expenses, as well as the fees for the lawyer who represents him at the Civil Administration's First Registration Committee. He is also subject to various levies at a total rate of 5 percent of the value of the land.¹³⁰

When objections are submitted to applications for First Registration the procedure can last a few years until a final decision is made. Because of the substantial costs involved, and the long amount of time required, and also because of the natural suspicion Palestinians feel about legal procedures concerning land that are conducted by the Israeli Civil Administration, First Registration does not constitute a realistic avenue for most of the Palestinian residents of the rural areas of the West Bank. Indeed, many of the applications for First Registration submitted to the Civil Administration are initiated by settlers and Israeli companies who purchased, or claim to have purchased, land from Palestinians and wish to secure their rights to it by registration in the Land Registry.

Settlers and Israeli companies who purchase land in the West Bank for settlement purposes have benefitted from a change the Military Commander has made to some of the provisions of the law regarding First Registration. Thus, one of the Jordanian land laws provides that irrevocable powers of attorney given by land owners as part of sale transactions are valid for five years, and at the end of that period become void and cannot be used for land registration in the name of the buyers.¹³¹ A military order was issued that extended the validity of the powers of attorney to 15 years, which makes things easier for settlers who purchase land in the area from Palestinians.¹³² Since selling land to Israelis is considered by Palestinian society to be an act of treason, extension of the powers of attorney in many cases allows registration of the land in the name of the settlers who bought it, at a later date, after the seller had died.¹³³

Likewise, Jordanian law forbids foreign companies to trade in land in the boundaries of the Hashemite kingdom, which included the West Bank, and allows them to possess land in the area only "according to the necessary needs" of their activities.¹³⁴ These provisions of the law would have prevented Israeli companies from purchasing land in the West Bank for settlement purposes. To circumvent that difficulty, the Israeli Military Commander issued an order that authorised the head of the Civil Administration to allow companies that are not Jordanian to buy land in the West Bank for commercial purposes.¹³⁵

¹²⁹ Order concerning the Amendment of the Law of Registration of Immovable Property Not Previously Registered (Judea and Samaria) (No. 1621), 2008, Article 4.

¹³⁰ Regulations concerning Land Registration Fees [Combined Version] (Judea and Samaria), 2009.

¹³¹ Law Amending the Law Amending the Provisions concerning Immovable Property, Law No. 98, 1966. The amending law extended the validity of the powers of attorney from one year, as provided by the Law Amending the Provisions concerning Immovable Property, Law No. 51, 1958, to five years.

¹³² Order concerning the Law Amending Provisions concerning Immovable Property (Judea and Samaria) (No. 811), 1979.

¹³³ Eyal Zamir and Eyal Benbenisti, *Private Property and the Israeli-Palestinian Settlement*, The Jerusalem Institute for Israel Studies, 1998, p. 37 [Hebrew].

¹³⁴ Law of Use and Possession of Immovable Property by a Legal Entity, Law No. 61, 1953, Article 5.

¹³⁵ Order concerning the Law of Use and Possession (*Tessaruf*) of Immovable Property by a Legal Entity (Judea and Samaria) (No. 419), 1971.

2.6 Ways of Taking Over Land in the Years 1967-1979

In 1967, when Israel occupied the West Bank, some 530,000 dunums (53,000 hectares) of its land was registered in the Land Registry as state land, as a result of the land settlement procedures made by the Mandatory government and later by the Jordanian government. It should be remembered that the total area of the West Bank, not including East Jerusalem, is 5.7 million dunums (570,000 hectares). Almost all of the registered state land was in the Jordan Valley. Other areas registered as state land were in Mandatory forest reserves, mainly in the Jenin sub-district, such as the Reihan forest reserve on the village lands of Ya'bad and Barta'a.¹³⁶

An examination by the Israeli administration of property tax ledgers found that of the rest of the West Bank that did not undergo land settlements, some 170,000 dunums (17,000 hectares) could be viewed as government property.¹³⁷ This conclusion was reached in light of the categorisation method on which Jordanian land taxation was based, according to which certain kinds of land (woods, public roads and uncultivated deserted lands) are considered state land.¹³⁸

Therefore, in 1967 there was a total of 700,000 dunums (70,000 hectares) of state land in the area, which constituted twelve percent of the total land area of the West Bank. Of this figure, the final status of 170,000 dunums (17,000 hectares) was not determined in land settlements, and therefore remained uncertain.

2.6.1 Requisition or Land Seizure Orders

In the first years of the Israeli occupation of the West Bank, the authorities accepted the status quo in relation to the state land in the area: whatever had been defined as state land by the British and the Jordanians was considered government property, and the rest of the area was considered the private property of the Palestinian residents of the area, or at the very least land whose ownership status had yet to be clarified. That position was demonstrated among other things by the fact that for all of those years the Israeli government never claimed that any particular parcel of land, that had not been registered by the previous governments as state land or defined by them in that category, was now considered government property.

On the contrary: to allow the establishment of military facilities (such as army camps) and even civilian settlements, the Israeli Military Commander at the time would issue requisition orders (also referred to as land seizure orders). Requisition orders are essentially the forced leasing of the land to the government, forcing its private owners to give over possession of it for a limited amount of time as stipulated in the order (but which can be extended).¹³⁹ The government even offers the land owners payment for its use, similar to rent, but in most cases Palestinians refuse to take it. The very issuing of requisition orders is recognition by the government that the land is under private Palestinian ownership. If it were state land there would be no need for such orders as the government does not need to requisition land that it already owns.

¹³⁶ Unit for Coordination of Operations in the Territories, Ministry of Defense, *The Administered Territories 1973/1974: Statistics on Civilian Activities in Judea and Samaria, the Gaza Strip and Northern Sinai*, 1976, p. 76.

¹³⁷ Aryeh Shalev, *The Autonomy – Problems and Possible Solutions*, The Center for Strategic Studies, Tel Aviv University, August 1979, p. 117 [Hebrew].

¹³⁸ Land Tax Law, Law No. 30, 1955.

¹³⁹ It should be noted that in the early requisition orders issued in the 1970s, the order's expiration date is often not stated.

2.6.2 Expropriation Orders

Another procedure the Israeli government utilised over the years is the use of expropriation orders. As opposed to requisition orders, which do not change the land ownership but only wrest away the right to use it for a limited time, expropriation is the forced purchase of the land from its owners and permanent transfer of all of the rights in it to the state. Because of the permanent nature of the expropriation procedure, it is perceived by the Israeli government as an extreme measure that can be taken only with the purpose of serving the needs of the local population living in the West Bank, such as clear public needs like roads and construction of public buildings.¹⁴⁰ The Israeli Supreme Court also ruled in a number of judgments that the expropriation of private Palestinian land to build settlements contradicts international law.¹⁴¹

However, Israel's position concerning the expropriation of Palestinian land for the public needs of an existing Israeli settlement is not sufficiently clear. In the past the Israeli military authorities in the West Bank held the opinion that even though it may be forbidden under international humanitarian law to expropriate Palestinian land to build a new settlement,¹⁴² once it was built, its Israeli residents became part of the local population. Therefore, after building a settlement it is permissible according to this approach to expropriate private Palestinian land for the public needs of the settlers, for instance for roads.¹⁴³ However, from the State Attorney's Office's¹⁴⁴ responses to various petitions to the High Court of Justice filed in recent years it has emerged, at least declaratively, that the state's position is that expropriating private Palestinian land is legal only if the expropriated land is meant to serve Palestinians as well.¹⁴⁵ According to this approach it may be permissible to expropriate Palestinian land for a road that will serve settlers, but only on condition that the road also serves Palestinians.

In practice, it appears that despite the State's professed position, Israel frequently initiates expropriation procedures when their exclusive purpose is to serve the interests of the settlers. Thus, many of the bypass roads built for the settlements, after the 1995 interim agreement, were paved on private Palestinian land expropriated from its owners.¹⁴⁶ These roads are by definition designated for the settlers and, in many cases, the Palestinians do not have access to them.

Despite the official Israeli position according to which it would be illegal to expropriate Palestinian land to build settlements, in the case of Ma'ale Adummim, near Jerusalem, more than 30,000 dunums (3,000 hectares) were expropriated to allow the construction of the settlement itself.¹⁴⁷ Another place where expropriation was undertaken to allow the

¹⁴⁰ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 36.

¹⁴¹ HCJ 302/72 *Sheikh Suleiman Hussein Oudah Abu Hilu et al. v. Government of Israel et al.*, 27(2) PD 169; HCJ 606/78 *Suleiman Tawfik Ayoub and 11 others v. Minister of Defense et al.*, 33(2) PD 113.

¹⁴² See Part Five.

¹⁴³ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 62.

¹⁴⁴ The part of the Ministry of Justice that represents the state in court.

¹⁴⁵ See for instance, the State Response in HCJ 10611/08, *Municipality of Ma'ale Adummim v. Commander of IDF Forces in Judea and Samaria*, 22 February 2009. In its response to this petition, concerning collection of burial fees from Palestinian local authorities for dumping waste at the Abu Dis facility, the state argued that if the burial of Palestinian waste at the site ceases, the justification for its very existence will be denied, because it is doubtful whether it is possible legally to build a waste disposal site in the West Bank to serve only the Israeli population. The land for the Abu Dis dump was expropriated from its Palestinian owners in the 1970s. As of September 2011, the petition is pending.

¹⁴⁶ State Comptroller, *Annual Report No. 48 for 1997*, p. 1036.

¹⁴⁷ Bimkom and B'Tselem, *The Hidden Agenda: The Establishment and Expansion Plans of Ma'ale Adummim and their Human Rights Ramifications*, December 2009.

construction of a settlement is Ofra, north-east of Ramallah, but in this case the Military Commander based the expropriation order on an expropriation procedure that began under Jordanian rule and was not completed.¹⁴⁸

As in the case of requisition orders, the State offers to pay for land it expropriates, but in the vast majority of cases, Palestinians reject this offer.

2.6.3 Absentee Land

Throughout the West Bank there are 430,000 dunums (43,000 hectares) of absentee land registered in the Land Registry – mainly land owned by Palestinians who fled the area during the 1967 war.¹⁴⁹ According to the Order concerning Absentee Property, administration of the absentees' land is under the responsibility of the Custodian of Government and Abandoned Property at the Civil Administration, and he/she is allowed to rent and lease it.¹⁵⁰

In theory, the Custodian is expected to administer the absentees' property in order to hold it in trust for its legal owners, while guaranteeing the owners' financial interests. Therefore he/she is not allowed to lease absentees' land or rent it to Israeli settlers. Nonetheless, the State Comptroller discussed at least one case in the 1980s when a neighbourhood of 56 housing units was built in a settlement in the northern West Bank on absentee land. According to the State Comptroller, in this case the Custodian allocated the land by mistake because he thought it was not absentees' land.¹⁵¹

This case is in addition to a much broader phenomenon in the Jordan Valley, where the State Comptroller found that in the 1960s and 1970s thousands of dunums (hundreds of hectares) of absentee land were allocated for the construction of Israeli settlements.¹⁵² To prevent the land owners from being able to demand it back, their names were included on a black list of people whose entry into the West Bank was forbidden by the Israeli authorities.¹⁵³

2.6.4 Closed Military Zones

Another procedure the Israeli army uses extensively in the West Bank is to close an area. According to military legislation, "a military commander may declare any area or place closed", and thus forbid the entrance of people who were not present in it before the time of its closure into its boundaries, as well as forbidding their presence therein.¹⁵⁴ The maximum penalty for violating a declaration of a closed military zone and entering it without a special permit from the Military Commander is five years in prison¹⁵⁵ or a fine, whose maximum rate

¹⁴⁸ B'Tselem, *The Ofra Settlement: An Unauthorized Outpost*, December 2008.

¹⁴⁹ Unit for Coordination of Operations in the Territories, Ministry of Defense, *The Administered Territories 1973/1974*, *supra* note 136, p. 76.

¹⁵⁰ Order concerning Abandoned Property (Private Property) (Judea and Samaria) (No. 58), 1967.

¹⁵¹ State Comptroller, *State Comptroller's Annual Report 56a*, 2005, pp. 220-221.

¹⁵² *Ibid.*, p. 222.

¹⁵³ Akiva Eldar, "The Valley's Black List", *Ha'aretz*, 14 March 2006. This article is based on an interview with Ilan Paz, the former head of the Israeli Civil Administration. The Ministry of Defence admitted this list existed. See Akiva Eldar, "Ministry admits 'blacklist' of Palestinians who left W. Bank", *Ha'aretz*, 5 July 2006, available at <http://www.haaretz.com/news/ministry-admits-blacklist-of-palestinians-who-left-w-bank-1.192198> [last accessed 11 November 2011]. See also B'Tselem, *Dispossession and Exploitation: Israel's policy in the Jordan Valley and Northern Dead Sea*, May 2011, p.17.

¹⁵⁴ Order concerning Security Provisions (Judea and Samaria) (No. 378), 1970, Article 90.

¹⁵⁵ *Ibid.*, Article 92.

at the time of writing (April 2011) is ILS 202,000 (approximately \$60,000 USD).¹⁵⁶ As opposed to expropriation or requisition orders, at the time of whose issue the authorities must offer the owners payment for the land or its use, whichever is the case, closure of an area does not entail the right to compensation or rent for its owners.

Based on these provisions of military legislation, hundreds of thousands of dunums (tens of thousands of hectares) in the West Bank – mainly in the Jordan Valley but also in the southern Hebron hills and other areas – have been declared a “closed military zone”. Some of these areas serve for military training. In addition to training areas, there are two other main kinds of closed zones in the West Bank. The first are Special Security Areas (SSA), a term referring to a 400-1,000 metre wide strip around some settlements (not all settlements have SSAs). The SSA is a closed military zone, entry into which by Palestinian landowners is permitted only with permits issued for that purpose. The other kind is the Seam Zone, which is the area between the Barrier and the Green Line. The Seam Zone was also declared a closed military zone for Palestinians (see Part One), entry into which requires a special permit from the Military Commander.

Closure of areas has not served, as far as is known, as a direct means of taking over land to build settlements. But because of the vast extent of the closed zones, their very existence imposes many restrictions on the Palestinian population. For example, in Jiftlik, a rural community in the Jordan Valley, the boundaries of the area included in the outline plans the Israeli Civil Administration prepared for the village were, to a large extent, determined by the regional deployment of the adjacent closed military zones. Sweeping construction bans are imposed in the closed zones, which are only tens of metres away from some existing houses in Jiftlik.¹⁵⁷

2.7 The *Elon Moreh* Judgment

Until the late 1970s, almost all of the settlements in the West Bank were built on the basis of requisition orders for military purposes. This practice was discussed by the High Court of Justice several times during that period, within the framework of petitions by Palestinians who claimed that issuing requisition orders to build civilian settlements violates international law (the petitioners did not argue against requisition orders that were issued to allow construction of military facilities). In three different cases – Yamit in the Rafah Salient, Beit El near Ramallah and Matityahu in the central West Bank – the Court approved the requisition orders issued to build settlements, claiming that these civilian settlements played an important military role. The Court ruled that the security aspect was the dominant consideration that led to the decision to issue the requisition orders.¹⁵⁸

The use of requisition orders to build settlements stopped in 1979, following the judgment the High Court of Justice gave in the *Elon Moreh* case.¹⁵⁹ Seemingly, the circumstances of the case were similar to those of the three previous petitions: the Military Commander issued a requisition order (in this case for private land registered in the Land Registry) to allow

¹⁵⁶ Order concerning Raising Fines Set Forth by the Law or Military Legislation (Judea and Samaria) (No. 845), 1980, Article 1(4).

¹⁵⁷ Bimkom, *The Prohibited Zone*, *supra* note 10, pp. 120-121, 151-155.

¹⁵⁸ HCJ 302/72 etc., *supra* note 141; HCJ 606/78 etc., *supra* note 141; HCJ 258/79 *Falah Hussein Ibrahim Amira and 9 others v. Minister of Defense*, 34(1) PD 90.

¹⁵⁹ HCJ 390/79 *Izzat Muhammad Mustafa Dweikat and 16 others v. Government of Israel et al.*, 34(1) PD 1.

construction of the settlement of Elon Moreh. The landowners petitioned the Court. But, unlike the three previous cases, in the *Elon Moreh* case there was an internal dispute amongst the heads of the Israeli security establishment over whether a settlement at the suggested location had military advantages or, on the contrary, posed a military burden. Furthermore, the settlers who, at their own request, were admitted as respondents to the petition, told the court openly that their goals were political-ideological and not military at all.

At the end of the day the Court ruled that the requisition order issued for Elon Moreh was illegal because the motive for it was not military but rather the wish to build a civilian settlement. The Court did not categorically negate issuing requisition orders to build settlements in the West Bank, but ruled that it would be legal only if the dominant purpose of building the settlement was military, rather than political or ideological, as was in the case of Elon Moreh.¹⁶⁰

The ruling in the *Elon Moreh* case presented the settlement enterprise with a substantial legal obstacle for the first time. Two years before the ruling, the Likud government came to power in Israel and, unlike its predecessor, the Labor Alignment, viewed the West Bank as an inseparable part of the state of Israel (even though the Likud did not annex the area), and made one of its main goals building settlements on the mountain ridge, densely populated by Palestinians. But, almost all the land on the West Bank mountain ridge was registered in property tax documents (or at the Land Registry, in the villages where land settlement had been made) as private Palestinian land.¹⁶¹

After the ruling in the *Elon Moreh* case was given, the government decided to stop using requisition orders to build settlements and decided that, from now on, they would be built only on “state-owned land”.¹⁶² It appears that this decision was a direct result of the ruling and stemmed from the fear of repeated failures in court, if and when new requisition orders were issued.¹⁶³ Senior Israeli government officials offered a completely different explanation for the decision to stop issuing requisition orders to build new settlements. They said the decision was not in reaction to the *Elon Moreh* ruling but was motivated instead by the Likud government’s ideology of sanctifying private property, as well as by its philosophy that “the settlements are not built because of military needs but because of a political view of settling the Land of Israel”. According to that position, it was only a coincidence that the change in Israel’s policy was publicised shortly after the *Elon Moreh* ruling.¹⁶⁴

That explanation is not convincing. The Likud government was established in 1977, whereas the government decision to stop issuing requisition orders to build settlements was made only in 1979, after the *Elon Moreh* ruling was given. Furthermore, before the *Elon Moreh* ruling, the Likud government itself had used requisition orders to facilitate the establishment of the settlements of Beit El and Matityahu, and even defended those requisition orders in court. Even after the *Elon Moreh* ruling was given, the Likud government continued to rely on requisition orders issued prior to the ruling to build new settlements or to expand existing ones. Therefore it does not appear that an ideological obstacle or sanctification of private property was at the basis of the decision to stop issuing new requisition orders, but rather the real fear of another failure in court.

¹⁶⁰ *Ibid.*

¹⁶¹ Elyakim Haetzni, “The Land Trap: The Legal Situation”, *Nekuda*, No. 6, 17 March 1980, pp. 4-6.

¹⁶² Israeli Government Decision No. 145 of 11 November 1979.

¹⁶³ Shlomo Gazit, *Trapped Fools: Thirty Years of Israeli Policy in the Territories*, Frank Cass, London, 2003, p. 278.

¹⁶⁴ Albeck, “Land in Judea and Samaria” lecture, *supra* note 70.

In any case, the government faced a dead end: following the *Elon Moreh* ruling, no new requisition orders could be issued to allow for the building of settlements; and state land, which according to a government decision was designated for settlement construction, was located mainly in the Jordan Valley and the Judean Desert, whereas on the mountain ridge – where the government wanted to build most of the settlements – there was hardly any land that was government property.¹⁶⁵

2.8 Declarations of State Land

The way out of the dead end was found by changing the definition of state land and replacing the relative acceptance of the status quo that had guided the Israeli administration in the West Bank until 1979 with a new, dynamic approach. Under this new approach, even land that had not been defined by the British or the Jordanians as government property could, under certain conditions, become state land. Those conditions were defined by Attorney Plia Albeck, an expert on land law who served at the time as head of the civilian department of the State Attorney's Office.¹⁶⁶

The approach that Albeck developed is based on a stringent interpretation of the 1858 Ottoman Land Code. According to Albeck, for a certain piece of land to be declared state land the following conditions must be fulfilled:

- The land must not be registered in the Land Registry; declarations cannot be made on land that had undergone land settlement and had been registered in the name of private owners, even if it is not cultivated. That requirement stemmed from the principle of finality of registration in the Land Registry.
- Under the definitions of the Ottoman Land Code, the land concerned is either *miri* or *mewat* (in the West Bank many of the declarations were made on *miri* land).
- The land is not being cultivated at present and has not been cultivated in the last years preceding the declaration; alternatively, the land is being cultivated at present but was not cultivated continuously during the last 10 years.¹⁶⁷

Furthermore, according to Albeck's method, land allocated by the government to an individual, or in other words, land for which a *kushan* was issued, even if it was not cultivated, could not be declared to be government property.¹⁶⁸ As a rule, this condition was not very problematic for the Israeli authorities because, as mentioned, in most parts of the West Bank, Palestinian residents do not have *kushans*.

Albeck herself noted that the immediate motive for declaring state land was a government decision to build a settlement at the relevant site.¹⁶⁹ Based on the criteria formulated by Albeck, in the years 1979-1992 Israel declared 908,000 dunums (90,800 hectares) in the West Bank as state land. The declaration process, which will be described in detail in part 2.8.2, is

¹⁶⁵ Danny Rubenstein, "Findings of Land Survey in the West Bank: Most State Land in West Bank – in the Judea Desert", *Davar*, 2 May 1980.

¹⁶⁶ Albeck, "The Use of Land in Judea and Samaria for the Purpose of Jewish Settlement", *supra* note 117, pp. 221-231.

¹⁶⁷ Based on Article 78 of the Ottoman Land Code that requires at least 10 years of cultivation as a condition for acquiring rights to *miri* land. Even though the Ottoman Land Code allows the state to take possession of *miri* land whose cultivation stopped for three years and therefore became *mahlul*, the professed position of the Civil Administration is that unregistered land can be declared government property only if its cultivation stopped for at least 10 years. See Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 20.

¹⁶⁸ Albeck, "Land in Judea and Samaria", *supra* note 70; Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 22.

¹⁶⁹ *Ibid.*

unique not only in the sense that it had not been undertaken by the states that controlled the West Bank before 1967, but also from the fact that state land defined by the powers that governed the area before Israel occupied the West Bank had almost always been the result of land settlement procedures, in which property rights in large areas (usually the land of an entire village, containing thousands or even tens of thousands of dunums) were determined. In contrast, the Israeli declaration procedure did not even pretend to resemble land settlement and did not try to determine individual property rights. Instead of the complex, expensive and prolonged land settlement investigation, this declaration procedure aimed at defining quickly and simply only a single kind of land: namely state land. Whereas the result of earlier land settlements was always accurate registration in the Land Registry, both of private and state land, in almost all cases Israel did not bother to register in the Land Registry the declared state land, but merely entered it in a separate registration system administered by the Custodian of Government and Abandoned Property at the Civil Administration.

The land declared by Israel as state land was added to the land defined as government property by the British and the Jordanians. Thus, within 13 years (1979-1992), Israel increased the amount of land defined as state land from some 530,000 dunums (53,000 hectares) in 1967 to more than 1.4 million dunums (140,000 hectares), which constitutes almost 25 percent of the total land area of the West Bank. Furthermore, much of this newly-declared state land is on the mountain ridge, not far from the built-up areas of hundreds of Palestinian communities. This contrasts with the state land registered in the Land Registry during the Mandatory and Jordanian regimes, which is mainly in the Jordan Valley. The declaration of hundreds of thousands of dunums as state land allowed the establishment of the vast majority of the 121 official Israeli settlements,¹⁷⁰ which have dramatically changed the landscape of the West Bank.

The declarations stopped in 1992 at the beginning of the Oslo process, but resumed again after the Likud electoral victory of 1996, although to a limited extent.¹⁷¹ Even in recent years there have been some declarations on a small scale.

In addition to declared state land, there are more than 500,000 dunums (50,000 hectares) in the West Bank of so-called “survey land”, namely land to which the government is claiming ownership.¹⁷² The survey land procedure is a preliminary procedure before declaring state land, and its purpose is to guarantee that the land slated for declaration meets the criteria set by Albeck. Even though the ownership status of the survey land is not certain – because, at least theoretically, objections submitted against the declaration on government property may be accepted – in many cases in the past the Civil Administration allocated to settlements land that was defined as survey land. Only in 1998 did the Attorney General forbid allocating survey land to Israeli settlements.¹⁷³

2.8.1 Order Concerning Government Property

The declarations of state land are based on the Order concerning Government Property, enacted as early as 1967¹⁷⁴ and amended many times over the years. In its original version the Order reflected the Israeli administration’s view regarding state land in the West Bank. It

¹⁷⁰ See note 1, *supra*.

¹⁷¹ State Comptroller, *State Comptroller’s Annual Report 56a*, *supra* note 151, p. 206.

¹⁷² Israel Land Administration website, <http://www.mmi.gov.il/static/agapim.asp> [Hebrew] [last accessed April 2011].

¹⁷³ Sasson, *supra* note 118, pp. 81, 179.

¹⁷⁴ Order concerning Government Property (West Bank Area) (No. 59), 1967.

defined the term “government property” (including immovable property) as property that on the “relevant date” (7 June 1967, the day Israel occupied the West Bank) belonged to an enemy state and/or a corporation of which an enemy state had control or rights or that was registered at that time in its name.¹⁷⁵ The Order charged administration of the state land and other government property in the area to the Custodian, appointed for that purpose by the Israeli Military Commander. Today the Custodian is an employee of the Israel Land Administration. The Order empowers the Custodian “to take possession of government property and to take any measure he deems necessary to that end”.¹⁷⁶ The Order goes on to say that any transaction the Custodian makes with land he thought in good faith was government property is valid, even if it emerges retroactively that it is not state land.¹⁷⁷ This provision eventually allowed construction of buildings in settlements on lands that the Custodian thought at the time of their allocation to be state land, but actually and even according to the Custodian, were private Palestinian property.

The Order concerning Government Property underwent many changes over the years. In 1969 a provision was added to the original Order saying “if the Custodian confirms in a written document with his signature that a given property is government property, that property will be considered government property unless proven otherwise”.¹⁷⁸ This provision transfers the burden of proof from the state to the individual; in the 1980s, at the time of the major declarations on state land, this provision was very helpful for the Custodian’s takeover of hundreds of thousands of dunums (tens of thousands of hectares) in the West Bank.

An even more significant change was made to the Order in 1984, when the definition of government property was expanded. As we have seen, the original order defined the term “government property” as property that belonged to an enemy state (Jordan) on or before 7 June 1967. Instead of that perception, the amended order defined government property as “property that on the relevant date or thereafter belongs, is registered in the name of or is imparted” to an enemy state or a corporation in which an enemy state has rights (emphasis added).¹⁷⁹ From there on, not only land that was government property at the time of the occupation of the West Bank in 1967 was considered state land. Land whose agricultural cultivation had stopped after that date or near it – even though it had been cultivated for 10 years or more earlier – could also be declared government property.¹⁸⁰

The 1984 amendment to the Order added to the definition of government property “property whose owners asked the Custodian to administer for them”. This provision was designed to allow declarations of state land in places where Israeli corporations claimed to have purchased land from its Palestinian owners for the purpose of settlement, but for various reasons (the desire to save the heavy cost of First Registration, the need to protect the lives of the Palestinian sellers and, in certain cases, also attempts to cover up problematic land transactions that involved fraud) had refrained from registering it in their names in the Land Registry. In those cases the Custodian declared the land government property and, at the end

¹⁷⁵ Definitions article in the original version of the Order concerning Government Property, as published in *Collection of Proclamations, Orders and Appointments No. 5*, 15 November 1967, pp. 162-165.

¹⁷⁶ Original version of the Order concerning Government Property, Article 2.

¹⁷⁷ *Ibid.*, Article 5. This article is in effect to this day as part of the amended order.

¹⁷⁸ Order concerning Government Property (Amendment No. 4) (Judea and Samaria) (No. 364) 1969, Article 2c, as published in *Collection of Proclamations, Orders and Appointments No. 22*, 21 June 1970, pp. 772-773.

¹⁷⁹ Order concerning Government Property (Amendment No. 7) (Judea and Samaria) (No. 1091) 1984, published in *Collection of Proclamations, Orders and Appointments No. 66*, 17 September 1984, p. 4 (emphasis added).

¹⁸⁰ Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 20.

of the declaration procedures, allocated it without tender and for reduced fee to the corporations who claimed to have purchased it.¹⁸¹

2.8.2 The Declaration Procedure

The official position of the Israeli administration in the West Bank is that “the definition of a given property as government property is not contingent on any action” on its part.¹⁸² Nonetheless, in most of the cases when the Custodian of government property in the Civil Administration claims ownership of a certain piece of land, he declares so publicly – by signing a document, a copy of which is supposed to be handed over to the council head of the village on whose land the area slated for declaration is located. According to Israel, the declaration is meant to defend the rights of the Palestinians, because in most parts of the West Bank that did not undergo the land settlement, “there are doubts which land is state land and which is privately owned...in order to avoid as much as possible infringement on private property, the Custodian prefaces any use of state land in areas that have not undergone land settlement with a complicated process of ‘declaration’”.¹⁸³

The declaration process is not anchored in the law or in military legislation, but only in internal procedures of the Civil Administration. According to these procedures the Custodian must sign a certificate that specifies the location of the land declared as state land and its total area. A map must be attached to that certificate showing the boundaries of the declared area. A copy of the certificate must be sent to the *mukhtars* of the villages on whose land the declared area is situated, and they are required to inform the residents of the villages to allow them to submit objections to the declaration.¹⁸⁴ Objections must be submitted within 45 days of publication of the declaration.¹⁸⁵ If no objection is made until that date, the declaration is considered final and the Custodian may take possession of the land, administer it and lease it to others (for instance, to settlers).

In certain cases in the past, residents of the relevant village were not informed, as required, of declarations of state land. Sometimes it stemmed from the fact that the village *mukhtars*, some of whom acted as collaborators with the Israeli administration, did not spread the information in their villages,¹⁸⁶ and therefore their residents did not know of the declaration in time and, naturally, did not submit objections to it. In other cases it appears that even the *mukhtars* were not informed of the declaration. Thus, in 1990 the Custodian declared 125 dunums (12.5 hectares) of the village land of Bil’in in the central West Bank as state land. But the certificate of declaration, recently revealed as part of a Freedom of Information Law petition, does not carry the signature of the village *mukhtar* confirming a copy of it was delivered to him.¹⁸⁷

As mentioned earlier, the Order concerning Government Property provides that transactions with state land, carried out by the Custodian in good faith, are valid even if it emerges retroactively that the land in question was private Palestinian land. This provision applies,

¹⁸¹ Bimkom, *The Prohibited Zone*, *supra* note 10, pp. 31-32.

¹⁸² Zamir, *State Lands in Judea and Samaria*, *supra* note 43, p. 31.

¹⁸³ *Ibid.*, p. 32.

¹⁸⁴ *Ibid.*, p. 33.

¹⁸⁵ Provisions concerning Procedures at Appeals Committees (Judea and Samaria), 1987, Article 28(a).

¹⁸⁶ B’Tselem, *Land Grab: Israel’s Settlement Policy in the West Bank*, *supra* note 37, p. 48.

¹⁸⁷ Custodian of Government Property, Declaration of Land as State Property 20/90, 25 November 1990. The document was provided to the petitioners on 23 November 2006 as part of Administrative Petition (Jerusalem) 658/06 *Mahmoud Salim Abd Hamouda et al. v. Civil Administration Judea and Samaria*.

among other things, to cases where the land owners did not even know it was declared state land and obviously did not file an objection against such a declaration.

2.8.3 Objections against Declarations of State Land

Even when residents of the relevant village know about the declaration in time, many avoid submitting an objection to it because of the heavy costs and great difficulties involved. According to military legislation, before filing an objection to a declaration on state land, the person objecting to the declaration must pay an administrative fee. The objection itself must include a receipt showing that the fee was paid, as well as a surveyor's map prepared by an authorised surveyor showing the boundaries of the plot to which the plaintiff claims ownership. If the ownership claim is based on continuous agricultural cultivation according to article 78 of the Ottoman Land Code (which it is in most cases), an expert opinion on the agricultural cultivation of the land in question (for example, by an expert on aerial photos) must also be attached to the objection.¹⁸⁸ Even though theoretically anyone who claims to be harmed by a declaration of state land is allowed to submit an objection to it by himself/herself, there is actually no practical way to make an objection without hiring the services of a lawyer familiar with the procedures of the Civil Administration. Therefore, submitting an objection against a declaration of state land involves considerable financial expense, which many of the residents of the Palestinian villages in the area cannot afford. Furthermore, it is extremely difficult to fulfil all the requirements (find the relevant documents, hire a surveyor to prepare a map of the plot, hire an expert on agricultural cultivation and have him write an opinion and more) within 45 days, after which it is no longer possible to submit an objection.

The objection itself is heard by a Military Appeals Committee with three members, of whom at least one has a legal education (more about the Military Appeals Committees in Part Four).¹⁸⁹ The chances of Palestinians' succeeding in appeals against declarations of state land are very small for several reasons. First, as mentioned, the Order concerning Government Property, as amended in 1969, places the burden of proof on the individual and provides that when the Custodian signs a certificate (declaration) saying certain land is government property, it is considered government property unless proven otherwise.

Second, the Military Appeals Committees uphold the stringent interpretation of the Ottoman Land Code introduced by Albeck. For example, to impart ownership of one plot or another to an individual, the Military Appeals Committees require continuous cultivation of at least 50 percent of its total area. This is, in spite of the doctrine of reasonable cultivation, mentioned in part 2.2.1, established by the court during the Mandate period, according to which cultivation appropriate to the conditions of the soil and the place is sufficient to define the plot as private property and not state land.

Despite all this, it is not to be assumed that all the land declared by the Custodian to be government property was actually private Palestinian land. Declarations in some areas – notably in the Judean Desert – involved *mewat* land, which would probably be defined as state land by the Mandate or Jordanian government, within the framework of land settlement.

¹⁸⁸ Provisions concerning Procedures at Appeals Committees (Judea and Samaria 1987), Article 28(b).

¹⁸⁹ Order concerning Appeals Committees (Judea and Samaria) (No. 172), 1967, Article 3.

In practice, it appears that the empowerment of the Military Appeals Committees to hear land issues was meant primarily to create the semblance of due process and, thereby, to largely neutralise Supreme Court criticism of the declaration procedure.¹⁹⁰ Indeed, the High Court of Justice avoided for years interfering in the decisions of the Military Appeals Committees that heard appeals against declarations on state land. The Israeli High Court of Justice justified its approach with the argument that the Military Appeals Committees are judiciary bodies and that “there is no grounds for any appellate court [in this case, the Supreme Court] to interfere in the factual conclusions” of the Military Appeals Committee.¹⁹¹

Paradoxically, the High Court of Justice ruling in the *Elon Moreh* case led to a considerable expansion of the amount of West Bank land that came under Israeli control. The declarations of state land, since the judgment was released, dramatically changed the spatial reality in the West Bank. Most of the declared state land was included in the jurisdiction area of the regional and local councils – the Israeli settlements’ municipal authorities. The declarations created expansive areas that Palestinians are not allowed to use and, in the last years, have even been banned from accessing, after the boundaries of the settlements were declared as closed military zones to Palestinians (see Part Three). This fact, along with the spatial deployment of much of the declared state land on the mountain ridge where there are hundreds of Palestinian villages is one of the fundamental reasons for the fragmentation of the West Bank and its division into Bantustans.

In addition, almost all the land declared as state land was ultimately included in Area C. In other words, the declarations on state land have dictated not only the location of the settlements, but also the administrative division of the West Bank as part of the 1995 Interim Agreement and the division of powers in the area between the Civil Administration and the Palestine Authority.¹⁹²

¹⁹⁰ B’Tselem, *Land Grab: Israel’s Settlement Policy in the West Bank*, *supra* note 37, p. 50.

¹⁹¹ HCJ 277/84, *supra* note 78, p. 64.

¹⁹² Bimkom, *The Prohibited Zone*, *supra* note 10, p. 34.

PART THREE: LAND USE

The land laws discussed in Part Two define the conditions under which ownership rights over land may be acquired. However, even when ownership of a plot of land is not in dispute, the owner cannot do with it as he or she wishes. Land is a contiguous resource and constitutes a main component of the collective environment in which people live. Therefore, the use of a certain plot – e.g., for industrial buildings – could restrict or even completely prevent the use to which adjacent plots of land could be put – e.g., for housing.

Therefore, in most countries, planning and building laws have been enacted that limit the individual's right to use his or her land. These laws stipulate that various uses of land are allowed by permit, which may be given only after an extensive planning review, during which considerations of land ownership play only a marginal role, if any at all. Since those laws determine the uses to which the land may be put, they have far-reaching implications and play a major role in shaping the landscape and setting the commercial value of the land.

This section will discuss the planning and building laws that apply to the West Bank and will examine the way that they are implemented by the Israeli Civil Administration. In this part we will also briefly review other legislation that places certain restrictions on the use of land in the West Bank.

3.1 Planning and Building

Planning and building legislation is not a new phenomenon in the West Bank. In fact, it was one of the first areas in the world where such legislation was enacted.¹⁹³ The legislation of the British Mandate formed the basis of the planning and building laws under Jordanian rule. The Towns, Villages and Buildings Planning Law (No. 79) of 1966 (the Jordanian Planning Law)¹⁹⁴ came into effect approximately nine months before Israel occupied the West Bank. This law underwent various amendments – mainly with respect to the structure of the planning system – under Israeli military legislation, but nevertheless still remains the primary legislation that regulates land uses in the West Bank today.

3.1.1 The Jordanian Planning Law

3.1.1.1 Basic Principles

The basic approach of the Jordanian Planning Law is expressed in Section 34(1), which states:

It is prohibited to commence work – within the declared planning areas – that requires a license, and it is prohibited to plan or build on any land or to put it to any use that requires a license; until a license for the work or the planning or the building or the use is granted; and it is forbidden to grant such a license unless it meets the provisions of this law and the regulations issued under this law and the outline and detailed planning

¹⁹³ Town Planning Ordinance, 1921, in Doukhan, *Laws of Palestine 1918-1925*, *supra* note 14, pp. 746-757; Town Planning Ordinance No. 28 of 1936, *Palestine Gazette Extraordinary No. 589*, Supplement No. 1, 4 May 1936, pp. 157-178.

¹⁹⁴ The Jordanian Planning Law was published in issue number 1952 of the official gazette of the Jordanian government on 25 September 1966.

scheme or the subdivision scheme and all the provisions and directives that constitute an inseparable part thereof.

Section 34(4) of the Jordanian Planning Law specifies the types of construction work that require a permit (a license): almost every type of construction – from establishing a new residential building, through digging and paving new roads to adding a sink or bathtub to an existing building – requires a permit.

These sections define the lands to which the law applies; the scope is limited to those areas declared as planning areas: the provisions of the Jordanian Planning Law do not apply to land that falls outside the boundaries of the declared planning areas. However, in the context of the West Bank, that exception is meaningless, since during the British Mandate all of the West Bank was included within local and regional planning areas. Section 13(3)(1) of the Jordanian Planning Law stipulates that all of the declared planning areas in existence at the time the law came into force would remain valid. By virtue of that provision, the Mandatory regional planning areas (see Part 3.1.5.1), declared in the late 1930s and early 1940s,¹⁹⁵ continue to exist to this day, insofar as they were not amended by the Jordanian government or later, under Israeli rule.

According to the Jordanian Planning Law, the administrative procedure at the end of which a building permit is given comprises two main phases. The first is the planning phase, which consists of preparing a planning scheme (outline plans and detailed plans) and its approval by the planning institutions. Only once an approved planning scheme exists may the second phase be undertaken, namely the licensing phase, when a building permit is issued. Such a permit can be issued only on condition that the planned building is compatible with the provisions of the valid planning scheme, which must include sufficient detailed instructions to allow building permits to be issued, without the need for any further plan.

3.1.1.2 Planning Schemes

The Jordanian Planning Law defines three kinds of planning schemes: a regional plan, an outline plan and a detailed plan. In addition, the law establishes procedures for the approval of subdivision plans, which are not planning schemes, since they do not define permissible land uses and do not include provisions with respect to construction.

Regional Plans

According to the law, the regional plans are intended to shape the landscape at the most general level: to determine the location of new towns and villages, establish the limits for the expansion of existing communities, designate open areas and zones for industry, commerce and so on. However, regional plans must also refer to detailed aspects such as the maximum height of buildings and the number of housing units in each building.¹⁹⁶ The Higher Planning Council (see Part 3.1.1.3) is authorised to approve regional plans.¹⁹⁷

¹⁹⁵ Two of the four Mandatory regional planning areas (the Jerusalem district and the Samaria district planning areas) are cited specifically in the addendum to the Jordanian Planning Law, as part of a “list of existing planning areas when this law went into effect”. In addition, the law also left in effect, by virtue of its transitional provisions, the regional planning area of the Mandatory district of Lydda and the regional planning area of the Mandatory district of Gaza, small parts of which are in the West Bank.

¹⁹⁶ Jordanian Planning Law, Section 15.

¹⁹⁷ *Ibid.*, Section 18.

Outline Plans

Section 19(1) of the Jordanian Planning Law stipulates that outline plans must be prepared for cities and large towns. The role of the outline plans is to define land zoning in more detail than the regional plans. Outline plans are therefore required to address issues such as paving roads, designating land for public uses (public buildings, public parks and so on), industry and commerce, residential buildings and so on – all at the level of the individual city or town in its entirety. However, outline plans as defined by the law are not detailed enough to allow building permits to be issued on their basis. The authority to approve outline plans is vested in the Higher Planning Council.¹⁹⁸

Detailed Plans

In order to issue a building permit, a detailed plan is required. The Jordanian Planning Law views the detailed plan as means to translate the general directives in the outline plan into practical instructions that allow the outline plan to be realised. Indeed, according to the law, a detailed plan must address subjects like the exact location of public and commercial buildings, the exact location of the residential buildings, the setbacks or building lines (i.e., the space between the building and the boundaries of the plot, where construction is prohibited) and more.¹⁹⁹

The law defines two main types of detailed plans: in the case of cities and large towns, an outline plan must be prepared first. The outline plan is to zone the various land uses at the spatial level of the city/town in its entirety. Once an outline plan is approved, detailed plans must be drawn for the various neighbourhoods which compromise the city/town, and these detailed plans are to be consistent with the general directives of the outline plan.²⁰⁰ In this case the detailed plan is a means to realise the outline plan.

In the case of small towns and villages, whose total area is much smaller than the area of cities and large towns, there is no need to prepare a separate outline plan. Instead the Jordanian Planning Law states that “a detailed outline planning scheme”²⁰¹ must be prepared, namely, an outline plan with sufficient detailed provisions to allow building permits to be issued on its basis. The District Planning Committee (see Part 3.1.1.3) has the power to approve detailed plans.²⁰²

Subdivision Schemes

The immediate point of reference in any application for a building permit is the lot on which the building is to be built. That is why the law treats subdivision very seriously, as dividing up land without planning oversight can lead to development that is not consistent with the approved planning schemes. For example, uncontrolled subdivision may lead to overly dense construction if land was subdivided into smaller lots than allowed for in the valid planning scheme.

¹⁹⁸ *Ibid.*, Section 21(4).

¹⁹⁹ *Ibid.*, Section 23(5).

²⁰⁰ *Ibid.*, Section 23(1).

²⁰¹ *Ibid.*, Section 23(2).

²⁰² *Ibid.*, Section 24(4).

As a rule, land is subdivided for two purposes: for planning and construction (defining building lots) and for registration in the Land Registry. The Jordanian Planning Law stipulates that whatever the purpose of subdividing land may be, it must meet the following conditions:

No person is allowed to subdivide any land, or to register with the Land Registry the subdivision of any land in a planning area, into lots of less than 10 dunums [one hectare] each, except by an approved subdivision scheme...every subdivision scheme concerning land situated within a planning area must be consistent with the approved detailed planning scheme applying for that area, without dispute.²⁰³

Whether the purpose of the subdivision is registration or development, the request to subdivide land is considered according to planning standards: subdivision can be undertaken only in accordance with a detailed plan that establishes the minimum area of building lots after dividing them up. The only exception to that rule is subdivision to lots, each one of which is larger than 10 dunums. Such subdivision is not subject to planning oversight and can be carried out even without a detailed plan or an approved scheme. The Local Planning Committee (see Part 3.1.1.3) has the power to approve subdivision schemes.²⁰⁴

3.1.1.3 Preparing and Approving Plans

Planning Survey

Before a planning scheme is prepared, extensive information must be collected concerning the land to which it will apply. The law stipulates that the collection of this data be done within the framework of a comprehensive planning survey that addresses subjects such as the physical condition at the site, climate, the existing land uses and the division of the land concerned between different owners. The law establishes that a planning survey must be undertaken “prior to the preparation of any planning scheme”.²⁰⁵

But in practice, the planning institutions at the Israeli Civil Administration do not carry out planning surveys as defined by law. They claim “there is no legal obligation to carry out a planning survey” and that in every individual case the “necessary relevant examinations” are undertaken instead.²⁰⁶ Recently the Israeli High Court of Justice approved this position, ruling that “it appears that a planning survey is not obligatory”²⁰⁷ in the case of detailed plans. The ruling was based on Section 23(4) of the Jordanian Planning Law which states that “a detailed planning scheme will include, whenever needed, a planning survey” (emphasis added).

Deposit and Objections

The Jordanian Planning Law stipulates that plans must be “deposited” to allow the public to review its documents free of charge and submit objections if desired.²⁰⁸ This requires

²⁰³ *Ibid.*, Section 28(1), (2).

²⁰⁴ *Ibid.*, Section 28(1).

²⁰⁵ *Ibid.*, Section 14(1).

²⁰⁶ State response in H CJ 1526/07 *Ahmad I'ssa Abdullah Yassin and 16 others v. Head of the Civil Administration in the Judea and Samaria Area et al.*, 7 March 2007, Sections 78 and 80.

²⁰⁷ Ruling in H CJ 1526/07 *Ahmad I'ssa Abdullah Yassin and 16 others v. Head of the Civil Administration in the Judea and Samaria Area et al.*, Dinim-Elyon 2007 (45) 1054, paragraph 19 of the ruling (given together with the ruling in H CJ 143/06 *The Peace Now movement et al. v. The Defense Minister et al.*).

²⁰⁸ Jordanian Planning Law, Section 16.

publication in the official gazette of the government and in two local newspapers.²⁰⁹ The public must submit objections to the plan within two months of publication in the official gazette.²¹⁰ The right to submit an objection is very broad and is vested in “any person, authority or official or private institution that has an interest to do so”.²¹¹

Any objections made during the two month time frame will be reviewed by the planning institutions who shall decide whether to accept them – in part or in full – or to reject them. In the case of a decision to approve the plan, a notice to that effect must be placed both in the official gazette and in two local newspapers.²¹² The approved planning scheme becomes valid 15 days from publishing the notice in the official gazette.²¹³

As opposed to planning schemes, subdivision schemes are not deposited and the public is not allowed to submit objections to such schemes. That is because subdivision schemes do not include any building provisions, do not allow in their own right construction or other land uses, and are nothing more than the realisation of the instructions in the approved detailed plan concerning the subdivision of the land into lots.

3.1.1.4 The Structure of the Planning System

The Jordanian Planning Law establishes a three-tier, hierarchical planning system: Local Planning Committees, District Planning Committees and the Higher Planning Council at the national level. Following is a description of the structure of the planning system according to the law; however, it should be emphasised that many of the features presented here do not exist today due to changes made to the Jordanian Planning Law by Israeli military legislation (see Part 3.1.2).

The Local Planning Committee

The Local Committee’s powers include granting building permits on the basis of plans approved by other planning institutions, approving subdivision schemes, preparing detailed plans and outline plans (but not the power to approve them) and inspection and enforcement against illegal construction.²¹⁴ The Local Committee also discusses objections to detailed plans and submits recommendations with respect to these objections to the District Committee.²¹⁵ The jurisdiction of the Local Committee relates only to the planning area of which it is in charge.²¹⁶

The law details several options for the establishment of Local Planning Committees. In an urban planning area, the City Council may serve as a Local Planning Committee.²¹⁷ Alternatively, the Minister of Interior may order the establishment of a Local Planning Committee that includes government representatives alongside members of the

²⁰⁹ *Ibid.*, Section 20.

²¹⁰ *Ibid.*, Section 21(1).

²¹¹ *Ibid.*, Section 21(1), referring to the deposit of an outline plan. Similar wording appears in Section 24(2) of the law, regulating the deposit of a detailed plan: “All those having an interest in the land, the buildings or the other properties included in any plan... whether as owners of the properties or in any other way – may submit their objections”.

²¹² *Ibid.*, Sections 21(4) and 24(5).

²¹³ *Ibid.*, Sections 21(4) and 24(6).

²¹⁴ *Ibid.*, Section 9(2).

²¹⁵ *Ibid.*, Section 24(3).

²¹⁶ *Ibid.*, Section 9(1).

²¹⁷ *Ibid.*, Sections 9(1)(a) and (b).

municipality.²¹⁸ In a rural planning area, the Village Council may be appointed as a Local Planning Committee.²¹⁹ Alternatively, the Minister may appoint a Local Planning Committee that includes representatives of the central government and the relevant Village Council.²²⁰

The District Planning Committee

According to the law, every administrative district must have a District Planning Committee,²²¹ which serves as a liaison between the planning institutions on the local level – the Local Planning Committees – and the planning institution on the national level – the Higher Planning Council. When it was under Jordanian rule, the West Bank was part of the Hashemite Kingdom, which, at the time, was composed of 15 administrative districts.²²² The West Bank itself was divided into three administrative districts: the Nablus district, the Jerusalem district and the Hebron district, each one of which had a District Planning Committee.²²³ The powers of the District Planning Committee include approving detailed plans, hearing objections submitted to regional plans and outline plans and giving recommendations with respect to these objections to the Higher Planning Council. In addition, the District Committee hears appeals against decisions by the Local Committee (for example: against a decision to refuse to grant a building permit). In addition, the District Committee has all of the powers of the Local Committee.²²⁴

The District Committee has six members: the District Governor, the Attorney General in Amman, a representative of the Office of Public Works in the district, a representative of the Central Planning Bureau, the Director of the District Health Bureau and a representative of one of the Local Planning Committees in the district.²²⁵

The Higher Planning Council

The supreme planning institution under Jordanian law is the Higher Planning Council. Its powers include making recommendations on the declaration of planning areas, expanding them or changing their boundaries; approving regional and outline plans; and hearing appeals against the decisions of the District Committees.²²⁶ The Higher Planning Council is also in charge of preparing regulations on planning and building and passing them to the government for approval.²²⁷

The Higher Planning Council has nine members: the Minister of Interior, the mayor of the capital city, the Director General of the Ministry of Public Works, the Secretary-General of the Jordanian Building Council, the Director of the Housing Authority, the Director of the Planning Bureau, the Attorney General, the Chairman of the Engineering Association and the Director General of the Ministry of Health.²²⁸

²¹⁸ *Ibid.*, Section 9(1)(d)(a).

²¹⁹ *Ibid.*, Section 9(1)(c).

²²⁰ *Ibid.*, Section 9(1)(d)(b).

²²¹ *Ibid.*, Section 8(1).

²²² Administrative division regulations (no. 125) for 1965.

²²³ Aharon Mishnayot, "Planning and Building in Judea and Samaria – A Legal Survey", in Aharon Mishnayot (ed.), *The Planning, Building and Land Laws in Judea and Samaria: The Law, the Military Legislation and the Court Rulings*, Beit El: The Civil Administration for the Judea and Samaria Area, 1996, pp. 22-23 [Hebrew].

²²⁴ Jordanian Planning Law, Section 8(3).

²²⁵ *Ibid.*, Section 8(1).

²²⁶ *Ibid.*, Section 6.

²²⁷ *Ibid.*, Section 67.

²²⁸ *Ibid.*, Section 5(1).

The Central Planning Bureau

Another important planning body established by the law is the Central Planning Bureau – a professional body that operates within the Jordanian Ministry of Interior.²²⁹ The director of the Planning Bureau is a planning expert,²³⁰ who also serves as a member of the Higher Planning Council. The responsibilities of the Planning Bureau include carrying out planning surveys, preparing regional and outline plans, and providing professional assistance to Local and District Committees.²³¹

3.1.2 Changes to the Jordanian Planning Law by Israeli Military Legislation

The composition of the Higher Planning Council and the District Committees includes representatives of the government of Jordan. The law explicitly lists specific officeholders, such as the Jordanian Minister of the Interior and the Secretary-General of the Jordanian Building Council (members of the Higher Planning Council) and the Attorney General in Amman (a member of the District Committee). Obviously, under Israeli rule, it is not possible to operate those planning institutions with the composition set out in law, therefore legislative changes were needed regarding the composition of the planning institutions.²³²

In 1971 the Israeli Military Commander issued the *Order concerning Towns, Villages and Buildings Planning Law* (Order No. 418).²³³ The professed aim of Order No. 418 was to allow planning and building activity in the West Bank by changing the composition of the planning institutions. However, the order went far further and, in fact, constitutes a comprehensive revision of the entire structure of the planning system, as set out in the Jordanian law.

3.1.2.1 Military Order No. 418

Instead of changing the composition of the District Committees, Military Order No. 418, Section 2, eliminated them altogether and transferred their powers to the Higher Planning Council. No explanation was given for this drastic change.

According to the Jordanian law, the Village Council – which includes elected representatives of its Palestinian residents – would normally serve as a Local Planning Committee. Order No. 418, whilst maintaining the Local Committees in Palestinian cities (now in Area A and under Palestinian planning responsibility), removed the possibility of appointing Village Councils as Local Planning Committees. The order transferred the powers of the Local Planning Committees in villages to a new planning institution – the “Village Planning Committees”²³⁴ – whose members are appointed by the Israeli Military Commander. According to the order, the Higher Planning Council is also appointed by the Military Commander.²³⁵

These provisions of Order No. 418 led to the removal of Palestinian local representation in the planning institutions. Instead, now the Israeli Area Commander should appoint a Village

²²⁹ *Ibid.*, Section 7.

²³⁰ *Ibid.*, Section 7(2).

²³¹ *Ibid.*, Section 7.

²³² Ruling in HCJ 4154/91, *supra* note 33.

²³³ Order concerning Towns, Villages and Buildings Planning Law (Judea and Samaria) (No. 418), 1971. The original order has been amended many times and in this guide we refer to its current version (as of 2010).

²³⁴ Order no. 418, Section 2(4).

²³⁵ *Ibid.*, Section 4.

Planning Committee, to replace the Village Council acting as the Local Planning Committee. The Order says nothing about local Palestinian representation on the Village Planning Committees – or in any of the other planning institutions, for that matter. Indeed, before the Interim Agreement (1995), Palestinian employees of the Civil Administration (who are not elected officials, nor do they necessarily represent the interests of the Palestinian population in the area) sat on the Village Planning Committees, but even during those years, all the important planning decisions were made by Israelis. At present, Palestinians have no representation in the planning institutions that operate within the Civil Administration. In fact, the Civil Administration does not presently have any “Village Planning Committees”. The latter’s role is played by the Planning and Licensing Subcommittee of the Higher Planning Council. This subcommittee includes six officers of the Civil Administration, all Israeli, including: the Head of the Planning Bureau or his/her representative, the Legal Adviser for Judea and Samaria or his/her representative, the Head of the Infrastructure Department or his/her representative, the Director of Government and Abandoned Property or his/her representative, the Officer of the Environmental Protection Department or his/her representative, and the Officer of the Surveying Department or his/her representative.²³⁶

Planning Subcommittees

The District Committees played a central role in the Jordanian Planning Law because they mediated between the planning on the local level and the planning on the national level. When they were cancelled it became difficult to implement the Planning Law. For example, the law provides that the District Committee hear objections to regional plans and outline plans and submit its recommendations to the Higher Planning Council, which is authorised to approve such plans.²³⁷ Once the District Committees were cancelled and all their powers were given to the Higher Planning Council, the latter would have to hear objections submitted against regional and outline plans and then both make the recommendations and decide on those recommendations.

In an attempt to avoid such absurd situations, Order No. 418 authorised the Higher Planning Council to appoint subcommittees “for certain matters and establish their powers and roles” as well as delegating powers to those subcommittees.²³⁸ The order allows the subcommittees to be staffed not only by members of the Higher Planning Council, but also by external parties, as long as at least half of the members of each subcommittee are from the Higher Planning Council.²³⁹ This provision allowed some of the subcommittees – for example, the Settlement Subcommittee, responsible for planning settlements – to be staffed for many years by representatives of Israeli settlers.

In 2009 the Higher Planning Council appointed new subcommittees which do not include any external representatives. Thus, all members of the subcommittees are employees of the Civil Administration and the Israeli military. Today there are seven subcommittees operating in Area C:

1. **The Planning and Licensing Subcommittee**, responsible for discussing and approving plans for the Palestinian communities in Area C and for providing building permits to Palestinians there. This subcommittee is also authorised to issue building

²³⁶ Appointment and Delegation of Powers by the Higher Planning Council (Judea and Samaria), 2009, Section 2.

²³⁷ Jordanian Planning Law, Section 8(3)(b).

²³⁸ Order no. 418, Section 7a.

²³⁹ *Ibid.*, Section 7a(a)(1).

permits for Israelis in areas that were not included in approved detailed plans for settlements;

2. **The Settlement Subcommittee**, responsible for discussing and approving plans in settlements;
3. **The Roads, Railways and Airports Subcommittee**, responsible for discussing and approving plans for roads, railways, etc.;
4. **The Environmental Protection Subcommittee**, responsible for discussing and approving plans for nature reserves, sewage treatment facilities, waste disposal sites, etc.;
5. **The Mining and Quarrying Subcommittee**, responsible for discussing and approving plans for quarries and similar facilities;
6. **The Objections Subcommittee**, authorised to hear objections submitted against all planning schemes and to make recommendations about them to the Higher Planning Council or to the subcommittee that deposited them; and,
7. **The Inspection Subcommittee**, whose main function is to enforce the law against illegal construction.²⁴⁰

The powers of most of the subcommittees are parallel to the powers the Jordanian Planning Law grants the District Committees. Indeed, according to the Civil Administration itself, these subcommittees are meant to replace the District Committees cancelled by Order No. 418.²⁴¹ However, the subcommittees are not independent and are therefore not adequate substitutes for the District Committees which, under the law, were supposed to be independent planning institutions, and not an organ of the Higher Planning Council. The current subcommittees do not constitute separate bodies from the supreme planning institution in full constitution, but rather are an executive arm for carrying out certain capacities. They are appointed by the Higher Planning Council, and all their members are employees of the Civil Administration and therefore cannot constitute or appear to constitute a separate and independent planning institution.

The Special Planning Committees

While cancelling the Local Planning Committees in the Palestinian villages, Order No. 418 established a new kind of local committee, called “Special Planning Committees”. According to the order, the Israeli Military Commander may appoint such committees for new planning areas that did not exist under Jordanian rule, as long as they do not include “the area of a municipality or Village Council”. The Special Planning Committees are granted all of the powers of the Local Planning Committee as defined by the Jordanian Planning Law.²⁴²

In practice, the possibility of appointing Special Planning Committees applies almost exclusively to Israeli settlements. In more than 40 years of Israeli rule in the West Bank, and with the exception of one single case, no new planning areas were declared for Palestinian communities and the possibility of appointing Special Planning Committees for Palestinian localities therefore almost never arose. On the other hand, virtually all of the official settlements recognised by the Israeli government are situated within new planning areas that

²⁴⁰ Appointment and Delegation of Powers by the Higher Planning Council (Judea and Samaria), 2009.

²⁴¹ Mishnayot, “Planning and Building in Judea and Samaria – A Legal Survey”, *supra* note 223, p. 23 [Hebrew].

²⁴² Order no. 418, Section 2a.

were declared by the Israeli Military Commander. Special Planning Committees were therefore appointed for these new planning areas on the basis of Order No. 418. These committees have the power to prepare planning schemes,²⁴³ to issue building permits based on plans approved by the Higher Planning Council or its subcommittees, to approve subdivision schemes in some circumstances and to carry out inspection and enforcement. Each one of the settlements' Local Councils, i.e., the municipal authorities appointed for the large and medium settlements in Area C (for example, Ma'ale Adummim, Ariel, Elkana) was designated as a Special Planning Committee, as was each of the Regional Councils, i.e., the municipal authorities that incorporate the small settlements (for example, the Mate Binyamin Regional Council, which incorporates dozens of settlements including Kfar Adummim and Kfar Ha'Oranim).²⁴⁴

The establishment of the Special Planning Committees reflects a structural discrimination against the Palestinian population in the rural West Bank. The municipal bodies of the settlements (the local and regional councils), comprised of elected representatives of the settlers, were appointed as Special Planning Committees and empowered to prepare plans and issue building permits. At the same time, Order No. 418 removed the possibility of appointing the Palestinian Village Councils as Local Planning Committees, and thereby denied representatives of the Palestinian public in the rural area the powers set forth by the Jordanian Planning Law to initiate planning for their villages and issue building permits in them.

The only Palestinian community for which a new planning area was declared, and for which a Special Planning Committee was appointed, is the Jahalin village. This is a new community established by Israel in order to expel members of the Jahalin tribe from areas designated for the expansion of the Ma'ale Adummim settlement, thereby allowing the construction of new residential neighbourhoods there. The Jahalin village was built on declared state land situated in the village land of Abu Dis. It is presently populated by hundreds of Jahalin Bedouins transferred there from the Ma'ale Adummim area.

In 1999, an order was issued declaring the area covered by all of the detailed plans approved and/or to be approved in the future for the Jahalin village as a new planning area.²⁴⁵ The same year a Special Planning Committee was appointed for the planning area of the Jahalin village. Whereas the Special Planning Committees appointed for the settlements have elected representatives of the settlers, the Special Planning Committee for the Jahalin village consists of five employees of the Israeli Civil Administration, and includes no representation of the Jahalin or any other Palestinian community.²⁴⁶

3.1.3 Land Use: Allocating State Land

In Part Two it was shown that during the years of its rule in the West Bank, Israel took various measures to greatly increase the extent of land defined as government property or state land. In 1967 the West Bank (whose total area is some 5.7 million dunums or 570,000 hectares) included less than 530,000 dunums (53,000 hectares) of state land registered in the

²⁴³ Order concerning the Declaration of Planning Areas (Local Councils and Regional Councils) (Judea and Samaria), 2008.

²⁴⁴ Appointment of Special Planning Committees (Local Councils and Regional Councils) (Judea and Samaria), 2008.

²⁴⁵ Order concerning the Declaration of a Planning Area – Jahalin Neighborhood, 14 April 1999.

²⁴⁶ Appointment of a Special Planning Committee, Jahalin Neighborhood, 17 May 1999.

Land Registry.²⁴⁷ By the end of 2009, the amount of state land in the West Bank reached a figure of more than 1.4 million dunums (140,000 hectares), while some additional 500,000 dunums (50,000 hectares) are defined by the Israeli authorities as survey land, which is land over which the state is claiming ownership.²⁴⁸

The fact that large areas of land are government-owned does not in itself dictate the land use or the identity of those permitted to use it. But in the West Bank, Israel employs a long-term policy, according to which state land is allocated almost exclusively to Israelis, and only in exceptional cases to Palestinians.

This policy was underlined in Israeli Government Decision No. 730 of 1979, which stated the following:

State-owned land and uncultivated land [in the West Bank] – the Israeli authorities may use it for three purposes:

- a. Building military and defence facilities;
- b. Jewish settlements, rural and urban, and security areas, without dispossessing Arab residents from the city or village;
- c. Building housing for Arabs living in refugee camps in Judea, Samaria and the Gaza Strip, in cooperation with the Administrative Council.²⁴⁹

According to the government decision, therefore, state land can be allocated to Palestinians in the West Bank only if they are refugees. In all other cases, the Palestinian population must make do with the private land it owns, whereas the government land – including tens of thousands of hectares declared by Israel as state land – is reserved for settlements and military needs.

In the realm of planning, this policy was reflected in a decision of the Higher Planning Council in 1987, which established the principles for preparing outline plans for Palestinian villages. In its decision, the Higher Planning Council said that “state land and land requisitioned by the Army” should not be included in those outline plans²⁵⁰ – in other words state land is not meant for Palestinian construction.

In practice, almost all of the plans for settlements are based on state land, whereas the special outline plans approved for the Palestinian villages usually include almost only private Palestinian land. The only case known to us where the Civil Administration allocated a substantial amount of state land for Palestinian construction is the Jahalin village (see Part 3.1.2.1), which was built to allow the removal of the Jahalin tribe from lands designated for the expansion of the settlement of Ma’ale Adummim.

²⁴⁷ The Unit for the Coordination of Activity in the Territories, the Defense Ministry, *The Occupied Territories 1973/1974: Data on Civil Activity in Judea and Samaria, the Gaza Strip and Northern Sinai*, 1976, p. 76.

²⁴⁸ Website of the Israel Land Administration, <http://www.mmi.gov.il/static/agapim.asp> [last accessed May 2011] [Hebrew].

²⁴⁹ Section 17 of Government Decision no. 730 – Proposed Principles for the Autonomy Arrangements, 21 May 1979. The term “Administrative Council” refers to the Self Administration Authority of the Palestinians of the West Bank, which was supposed to be established as part of the autonomy.

²⁵⁰ Higher Planning Council, *Addendum to Protocol from December 8, 1987 – Delimiting Villages*, 13 December 1987.

3.1.3.1 The Boundaries of the Settlements as a Closed Military Zone for Palestinians

In 1996, shortly after the Interim Agreement was signed, the Israeli Military Commander declared all of the areas of the settlements as closed military zones for Palestinians.²⁵¹ According to the declaration, which was renewed in 2002²⁵² and is still in force today, Palestinians are prohibited from entering the jurisdiction areas of settlements, unless they receive a special permit to do so from the Israeli army. At the same time, Israeli citizens are allowed to enter settlements, along with anyone entitled to emigrate to Israel (mainly Jews) based on the Law of Return and to tourists with a valid visa. It should be emphasised that the prohibition on Palestinian entry applies only to the jurisdiction areas of the settlements themselves, but not to the huge areas included in the jurisdiction areas of the regional councils, so long as these vacant areas do not fall within the official boundaries of specific settlements.

In practice, this prohibition on Palestinians is enforced almost exclusively around the built and populated area of the settlements. In most settlements, the jurisdiction area in practice is much larger than the actual built area, and the entrance of Palestinians into the non-built parts is usually not prevented. The military legislation specifically empowers security coordinators and settlement guards, who in many cases are residents of the settlements, to enforce the prohibition and prevent the entrance of Palestinians into the settlements.²⁵³

Entering the area of settlements without a permit is a criminal offense, with a penalty of up to five years in prison or a fine²⁵⁴ of up to ILS 202,000 (about \$53,000 USD).²⁵⁵ In practice, the punishments given to Palestinians who enter settlement areas without permits tend to be much lighter.

3.1.4 Planning in Palestinian Communities

When it comes to initiating plans for Palestinian villages, the elimination of the Local Planning Committees by Military Order No. 418 generally prevents the Local Councils that represent the residents of those villages from promoting plans for their communities. Furthermore, detailed planning involves high costs and, in most cases, the Palestinian Village Councils in the West Bank do not have the necessary financial resources.

There are two main kinds of valid planning schemes in West Bank Palestinian communities that are under Israeli planning control: the Mandatory Regional Outline Plans (Mandatory Plans), approved in the 1940s, and the Special Outline Plans initiated by the Israeli Civil Administration since the 1980s.

3.1.4.1 The Mandatory Regional Outline Plans

During the British Mandate, the West Bank was divided between several regional planning areas, and a Mandatory Regional Outline Plan was approved for each one. These Mandatory

²⁵¹ Declaration concerning Closing Area (Israeli Settlements) (Judea and Samaria), 1996.

²⁵² Declaration concerning Closing Area (Israeli Settlements) (Judea and Samaria), 2002.

²⁵³ Order concerning Powers to Maintain Public Security (Judea and Samaria) (no. 1628), 2009.

²⁵⁴ Order concerning Security Provisions (Judea and Samaria) (no. 378), 1970, Sections 164 and 333.

²⁵⁵ Order concerning Raising Fines Established by the Military Legislation (Amendment no. 6) (Judea and Samaria) (no. 1597), 2007.

Plans did not apply to the cities, for which separate planning areas were declared. Thus, for example, the Mandatory Plan for the Jerusalem district did not apply to the planning areas of the cities of Jerusalem, Ramallah and Bethlehem. Hence, the Mandatory Plans were meant to regulate planning and building mainly in the rural areas. These plans remain valid to this day and they apply to most of the area of the West Bank. It should be stressed at this point that these are not Regional Plans as defined by the Jordanian Planning Law (see Part 3.1.1.2), but rather outline plans applied to large areas.

There are four Mandatory Regional Outline Plans that apply in the West Bank:

1. Plan RJ/5 for the Mandatory Jerusalem district, approved in 1942,²⁵⁶ which applies to the area from the southern Hebron Hills in the southern West Bank to the vicinity of Salfit in the northern central West Bank;
2. Plan S/15 for the Mandatory Samaria district, approved in 1948,²⁵⁷ which applies to most of the northern part of the West Bank, from Salfit in the south up to the Jenin area in the northern West Bank;
3. Plan R/6 for the Mandatory Lydda district, approved in 1942,²⁵⁸ which applies to certain areas of the west-central part of the West Bank, from Bil'in to Rantis; and,
4. Plan R/1 for the Mandatory district of Gaza, approved in 1945,²⁵⁹ which applies to a tiny area in the southwest of the West Bank.

The Main Features of the Mandatory Plans

All Mandatory Regional Outline Plans are characterised by tension between overall planning on the district level on the one hand, and detailed planning, on the basis of which building permits can be issued, on the other hand. The plans encompass vast areas. Thus, the Mandatory Jerusalem district, to most of which Plan RJ/5 applies, covers 4,334 square kilometres (more than 4.3 million dunums or 420,000 hectares; only part of the Mandatory district falls in the West Bank and some of it is within the Green Line).²⁶⁰ Obviously it is not possible, in a plan that applies to such a large area, to reach the level of detail that characterises detailed plans. Therefore, the Regional Outline Plans do not mark building lots. Instead, they zone areas for several main uses only – roads, an agricultural zone, development zones, nature/forest reserves and beach reserves. In this respect the Mandatory Plans serve as a general framework under which detailed plans should be prepared for their various parts.

At the same time, the Mandatory Plans include detailed provisions which allow building permits to be issued. Thus, plan RJ/5 defines the minimum curtilage²⁶¹ for a building lot; the maximum permissible building area on a lot; the maximum height of a building and other details.²⁶² Arguably, if the only purpose of the plan was to create a general framework for the preparation of detailed plans, it would not have included such detailed provisions. Indeed, according to a ruling of the Israeli Supreme Court, the Mandatory Plans are essentially local outline plans that apply to large areas and enable the issuance of building permits.²⁶³

²⁵⁶ *Palestine Gazette – Supplement 2 No. 1188*, 16 April 1942, p. 569.

²⁵⁷ *Palestine Gazette – Supplement 2 No. 1644*, 29 January 1948, p. 108.

²⁵⁸ *Palestine Gazette – Supplement 2 No. 1180*, 26 March 1942, p. 550.

²⁵⁹ *Palestine Gazette – Supplement 2 No. 1459*, 6 December 1945, p. 1409.

²⁶⁰ The entry "Eretz Israel" [Palestine] in the *Hebrew Encyclopedia*, Jerusalem and Tel Aviv, 1957, Vol. 6, p. 37 [Hebrew].

²⁶¹ The minimal lot on which construction could take place.

²⁶² Written provisions of RJ/5, Sections 27, 28, 29, 31 and 32.

²⁶³ Ruling in CA 9355/02 *State of Israel v. George Yousef Rashed*, 58(4) PD 46. The ruling discusses the Regional Outline Plan of the Galilee district, but its conclusions are also valid for the regional plans prepared for the other Mandatory districts.

What Construction is Allowed Under the Mandatory Plans?

Most of the area under the Mandatory Plans is designated as an agricultural zone, but the plans allow construction for a variety of uses in this zone (see Table 1).

Table: Building options in the Agricultural Zone, according to the Mandatory Regional Outline Plans

Plan	Minimum Curtilage	Maximum Building Area	Maximum Number of Buildings Per Lot	Maximum Height of Main Building	Permissible Uses	Planning Institution Authorized to Issue Building Permits
RJ/5	1,000 square metres	150 square metres for the main building	Main building plus one outbuilding	Two storeys	Agricultural buildings; the farmer's home; guard buildings; technical facilities (water and electricity) Other residential buildings (besides the farmer's home); industrial buildings; buildings for the production and storage of oil, explosives and so on; buildings that are part of a general development scheme	The Local Committee The District Committee
S/15	1,000 square metres	180 square metres for the main building	Main building plus one outbuilding	Two storeys	Agricultural buildings; recreational buildings; guard buildings; technical facilities (water, electricity); residential buildings Industrial buildings; buildings that are part of a general development scheme; other buildings	The Local Committee The District Committee
R/6	1,000 square metres	150 square metres for the main building	Main building plus one outbuilding	Two storeys	Agricultural buildings: the farmer's home; guard buildings; technical facilities (water and electricity) Other residential buildings (besides the farmer's home); industrial buildings; buildings for the production and storage of oil, explosives and so on; buildings that are part of a general development scheme	The Local Committee The District Committee
R/1	1,000 square metres	180 square metres for the main building	Main building plus one outbuilding	Two storeys	Agricultural buildings; recreational buildings; guard buildings; technical facilities (water, electricity); residential buildings Industrial buildings; buildings that are part of a general development scheme; other buildings	The Local Committee The District Committee

According to the Israeli Supreme Court ruling, the uses for which a Local Committee is authorised to issue building permits are vested building rights – i.e., building rights that the

plan itself provides – whereas the uses that require the permission of a District Committee are subject to planning discretion and are not vested rights.²⁶⁴

Even when it comes to vested rights, they consist of only limited construction in rural areas. The Mandatory Plans allow the construction of only one main building (for instance for residential purposes) on an original plot that was not subdivided.²⁶⁵ The term “original plot” refers to the area of the plot as defined in the Land Registry or in property tax documents. In most cases, the area of original plot in the West Bank is very large, and may reach tens or even hundreds of dunums (a few or even dozens of hectares) per plot. Therefore, on the basis of the Mandatory Plans themselves, only the construction of a single residential building of 150-180 square metres on an original plot can be approved. In order to erect additional buildings on the area of the original plot, it must be subdivided. Such a division requires planning approval, which is not guaranteed and does not constitute a vested right. But once such approval is granted, in the form of a subdivision scheme or a detailed plan, a residential building can be established, in accordance with the Mandatory Plans, on each of the new lots – provided their curtilage is at least 1,000 square metres. This means that if the area of the original plot is 20 dunums (2 hectares), without subdivision only one residential building can be erected there, under the orders of the Mandatory Regional Plan. But if a subdivision scheme is approved, then the original plot can be divided into up to 20 new lots, and a single residential building may be erected on each of the 20 lots. Hence, securing a planning approval for the subdivision of land may dramatically increase the building rights vested in the Mandatory Regional Plans.

The Implementation of the Mandatory Plans by the Civil Administration

Despite the existence of detailed provisions in the Mandatory Plans, the position of the Civil Administration in the last few years is that it is not possible to issue any building permits directly on their basis. It claims that these plans are only a general planning framework, and in order to issue building permits on their basis, a detailed plan or a subdivision plan must be approved for the plot in question.²⁶⁶ At the same time, the Civil Administration rejects almost all detailed/subdivision plans submitted by Palestinians. This position is based on an extreme interpretation of the provisions of the Mandatory Plans concerning the obligation to prepare subdivision/detailed plans when the owners of the original plot wish to build more than one residential building on it. The Civil Administration claims that the construction of even a single building is prohibited, unless a subdivision scheme/detailed plan was approved for the original plot. The issue is (at the time of writing) under consideration by the Israeli High Court of Justice.²⁶⁷

This extreme interpretation constitutes a sharp departure from the way the Mandatory Plans were implemented during the Mandate period, and even throughout most of the years of Israeli rule in the West Bank, when building permits (albeit with many restrictions) were

²⁶⁴ *Ibid.*, Section 8 of ruling. Since a planning scheme is a legally binding document – just like a law – when a plan gives certain building rights, under Israeli court rulings it means that only in exceptional circumstances can the Local Planning Committee refuse a request for a permit where the request meets all the conditions of the plan. This is in contrast, for example, with a plan that only zones a certain area for residential construction but doesn't provide any detailed instructions, so consequently one needs another plan in order to be able to obtain a building permit. In this case, there are no vested building rights in the plan itself.

²⁶⁵ For example, Section 17 in the written provisions of Plans RJ/5 and R/6.

²⁶⁶ State response in HCJ 2657/07 *Ottman Manssur 'Ali Manssur v. Local Planning Subcommittee*, 18 January 2009.

²⁶⁷ *Ibid.* Full disclosure: the legal editor of this guide, Attorney Michael Sfard, represents the petitioners in this file, and the author of this part of the guide, Mr. Nir Shalev, helped on behalf of Bimkom – Planners for Planning Rights, in preparing a supplementary argument submitted to court within the framework of this petition.

issued directly on the basis of those plans, without demanding the approval of a detailed plan or a subdivision scheme. The practical outcome of the current interpretation of the Civil Administration is a sweeping prohibition on Palestinian construction in the vast areas covered by the Mandatory Plans which constitute most of Area C.

The basic assumption of the planning and building laws, as interpreted by the Israeli court, is that when an application for a building permit meets all of the conditions specified in the plan that apply to the land, the planning institutions have little discretion and in the vast majority of cases they are obligated to issue the building permit as requested.²⁶⁸ Conversely, approval of planning schemes (including detailed plans) and even subdivision plans is subject by both legislation and court rulings to the discretion of the planning authorities, and the courts usually avoid intervening. Therefore, the present position of the Civil Administration – according to which approval of an additional plan (detailed or subdivision) is needed in order to obtain a building permit on the basis of the Mandatory Plans – means in effect granting sole discretion to the Civil Administration to prevent any construction on the basis of the Mandatory plans. Furthermore, preparing a subdivision plan, not to speak a detailed plan, involves a high monetary expense, which many Palestinians cannot afford. And, as mentioned, in virtually all cases detailed/subdivision schemes which have been submitted by Palestinians for the approval of the Civil Administration have been rejected. In many other cases, where the Civil Administration doesn't invoke the alleged need for a detailed/subdivision plan, applications by Palestinians for building permits tend to be rejected on the grounds that the applications violate the provisions of the Mandatory Plans – for instance, concerning the permissible building area, the building lines and so on.²⁶⁹ The final outcome is that in virtually every case the Civil Administration refuses to issue building permits – even for agricultural structures – on the basis of the Mandatory Regional Outline Plans.

3.1.4.2 The Special Outline Plans

In 1987 the Civil Administration began to prepare a new kind of outline plans called “Special Outline Plans” or “Partial Special Outline Plans”. This type of plan was reserved by the Civil Administration for Palestinian villages: there is not a single Israeli settlement for which a Special Outline Plan has been made.

To date, Special Outline Plans have been approved for more than 400 Palestinian villages in the West Bank. Most of the area of those plans, that were approved prior to the Interim Agreement of 1995, is currently in Area B, which is under Palestinian planning responsibility. In the last few years the Civil Administration has also prepared several Special Outline Plans for Palestinian villages whose entire built-up area falls in Area C under Israeli planning authority.

Main Features

The Special Outline Plans typically have a low level of detail: the map of the plan is an aerial photograph rather than a surveyor's map which is used for detailed plans for settlements. Whereas plans for settlements include various zones (residential, public buildings, commerce,

²⁶⁸ CA (Tel-Aviv District Court) 1668/97 *Natan Schuyimmer v. Local Planning and Building Committee in Tel Aviv*, Dinim-Mehozi 2000(9) 1046.

²⁶⁹ For an elaboration on this subject, see Bimkom, *The Prohibited Zone*, *supra* note 10, pp. 55-100, and especially pp. 77-87.

etc.), the Special Outline Plans typically designate four land zones at the most: roads, residential A, residential B, and residential C, which differ only in density (number of housing units per dunum).²⁷⁰ The plans do not mark building lots, only rarely zone land for public uses and, in most cases, even the network of roads that they delineate is partial and does not allow access to all of the areas zoned for construction.

These features of the Special Outline Plans are partially due to budgetary constraints (detailed planning is much more costly), but also reflect objective difficulties in planning in many of the Palestinian villages in the West Bank: In traditional rural Palestinian society, construction and development are, as a rule, based on land ownership, so that each family builds on its own land. Since land ownership is not guided by planning criteria, it is often the case that a few families have large parcels in the village centre or in its vicinity, while other families have land only far away from the built-up area of the village. This, as well as the common phenomenon of land sub-division amongst family members, makes it difficult to prepare detailed plans for Palestinian villages.

The provisions of the Special Outline Plans are prepared in standard written format, and are applied to hundreds of plans in different villages without any adjustment for the specific needs of each village. This is in contrast to the plans for the settlements, each one of which has its own unique written provisions.

Another salient feature of the Special Outline Plans is their restricted area: usually tens to hundreds of dunums (from a few up to several dozens of hectares) for an entire village. Thus, the Special Outline Plan for the village of An-Nabi Elyas (1,219 residents),²⁷¹ for example, covers 87 dunums (8.7 hectares),²⁷² and the Special Outline Plan deposited in 2008 for the village of Umm ar-Rihan (385 residents) originally covered only 56 dunums (5.6 hectares).²⁷³ Following objection filed by residents of Umm ar-Rihan and Bimkom–Planners for Planning Rights, the Civil Administration deposited a new version of this plan, which covers 122 dunums (12.2 hectares).²⁷⁴ In comparison, the area of the approved detailed plan for the settlement of Reihan (171 residents),²⁷⁵ which is near Umm ar-Rihan, is 1,209 dunums²⁷⁶ (almost 121 hectares), and the total area of the detailed plans approved for the settlement of Sal'it (465 residents), which is close to An-Nabi Elyas, is 1,414 dunums (over 141 hectares).²⁷⁷ It should be mentioned that the detailed plans for Reihan and Sal'it allocate land for agricultural uses, while the plans for Umm ar-Rihan and An-Nabi Elyas do not zone land for agriculture, although many of the residents of these villages are farmers.

According to the standard written provisions, construction density in the Special Outline Plans is 3.3 housing units per dunum (33 per hectare) in residential area A, 10 housing units per dunum (100 per hectare) in residential area B and 15 housing units per dunum (150 per hectare) in residential area C. As a result, in many of these plans the average construction density is very high. For example, in the plan for An-Nabi Elyas, the average construction

²⁷⁰ In some Special Outline Plans prepared recently, another zone appears: a green strip of land where construction is forbidden along main roads.

²⁷¹ The number of residents in the Palestinian villages is taken from the website of the Palestinian Central Bureau of Statistics (available at www.pcbs.gov.ps) and is updated to mid 2009 [last accessed May 2011].

²⁷² Special Outline Plan 1230, approved in 1992.

²⁷³ Special Outline Plan 1170/08, deposited on 20 July 2008 and not yet approved.

²⁷⁴ Special Outline Plan 1170/08 in its revised version, deposited in July 2011.

²⁷⁵ The source of the population data for the settlements is the Israeli Central Bureau of Statistics (available at www.cbs.gov.il), and is updated to the end of December 2008 [last accessed May 2011].

²⁷⁶ Detailed Plan 103/1, approved in 1999.

²⁷⁷ Detailed Plans 112/1/1 and 112/1/2, approved in 1999, and Detailed Plan 112/3, approved in 2003.

density is 10 housing units per net dunum.²⁷⁸ In comparison, in the detailed plan for the settlement of Reihan, the average building density is 1.63 housing units per net dunum (16.3 per hectare), and in the detailed plans for Sal'it it is 1.48 housing units per net dunum (14.8 per hectare). The average housing density the Civil Administration defines for Palestinian villages is therefore sometimes hundreds of percents higher than the construction density in the plans it approves for settlements in the same area.

The Civil Administration itself admits that the high construction density set by the Special Outline Plans is not realistic, and assumes that only 40-50 percent of the number of housing units they allow will actually be built.²⁷⁹ But, in many cases, even by that low assumption of actual building, the construction density in the Special Outline Plans remains high and unreasonable for rural communities. In any case, from the Civil Administration's perspective, the most significant element in the Special Outline Plans is their boundaries. In most cases, the Civil Administration doesn't enforce the planning and building laws within the Special Outline Plans and doesn't issue demolition orders against buildings erected there without permits – provided that these buildings don't exceed the boundaries of the Special Outline Plan in question.²⁸⁰

3.1.5 Planning in the Settlements

Special Planning Committees were appointed for all of the recognised Israeli settlements. These committees are authorised to prepare plans and grant building permits on the basis of plans approved by the Higher Planning Council or its subcommittees. Most of the settlements have high quality detailed plans that define building lots, zone land for public uses (public buildings, public parks and more) and provide for a high quality of life.²⁸¹ Many of the plans were prepared by government ministries such as the Housing and Construction Ministry, or by bodies that enjoy government support, such as the World Zionist Organization's Settlement Division.²⁸²

The direct involvement of Israeli government bodies in the planning of the settlements guarantees state funding for the detailed plans, whose preparation is very costly. The fact that the direct representatives of the settlers (the Special Planning Committees) are involved in the preparation and/or promotion of the plans guarantees due regard for the needs of the plans' specific target population.²⁸³

²⁷⁸ The terms "net dunum" and "net hectare" refer to land zoned for residential construction only. By comparison, the terms "gross dunum" and "gross hectare" refer to the entire area of the plan, including land designated for public buildings, roads and other non-residential uses.

²⁷⁹ Bimkom, *The Prohibited Zone*, *supra* note 10, p. 124.

²⁸⁰ *Ibid.*, pp. 111-112.

²⁸¹ For example, in 1996 the Settlement Subcommittee approved Plan 235/2 for a 368 housing unit neighbourhood in the settlement of Talmon. The plan covers 493 dunums (49.3 hectares) of the village land of Al Jania. The plan was initiated and promoted by the World Zionist Organization's Settlement Division – Detailed Plan 235/2, Talmon – Phase 2. Approved by the Settlement Subcommittee at Meeting no. 5/96, 11 September 1996.

²⁸² However, in certain cases the promoters of plans for settlements are private companies, such as companies that purchased or who claim they purchased the land. Thus, on 17 January 2007, the Higher Planning Council approved Detailed Plan 210/8/1 for a residential neighbourhood with 2,520 housing units in the settlement of Modi'in Illit. The plan was initiated and promoted by the Fund for the Redemption of Land – Planning and Development of Settlements Ltd., a company that claimed to have bought most of the land covered by the plan.

²⁸³ Plan 210/4/2 in Modi'in Illit is designated for an ultraorthodox Jewish population, which requires an especially large allocation of land for public buildings. Accordingly, the plan zones 25% of its area for public buildings. In contrast, Plan 420/1/17 in Ma'ale Adumim is designated for a secular population, whose needs with respect to public buildings are much more modest. Accordingly, the plan zones less than 13% of its area for public buildings.

Another general characteristic of many of the plans for the settlements is the fact that these plans designate a large part of their area for non-residential uses (public buildings, open public spaces, roads, commerce, light industry and so on).²⁸⁴

In certain cases, the generous allocation for non-residential uses is a tool for taking hold of as much land as possible.²⁸⁵ In other cases, the designation of large areas for non-residential uses reflects adequate detailed planning and guarantees a high quality of life for the settlers.

3.1.5.1 Planning and Construction in Requisitioned Land

In its 1979 ruling concerning the *Elon Moreh* case (see Part 2.7), the High Court of Justice stipulated that Israeli government authorities are not allowed to requisition private Palestinian land to build settlements in the West Bank, unless the settlements serve a clear military purpose.²⁸⁶ Following the *Elon Moreh* ruling, the Israeli Military Commander stopped issuing requisition orders for land designated for settlements. But almost all the settlements established before the ruling were built on private Palestinian land, for which requisition orders, allegedly for military needs, had been issued. Construction and development in these settlements has continued since then. The Israeli military legislation created a special planning and building procedure for lands covered by requisition orders.

According to a 1982 Israeli Military Order, those wishing to build on land covered by requisition orders were obliged to obtain a building permit from the competent official in the Civil Administration.²⁸⁷ The Military Commander appointed the Director of the Planning Bureau to be in charge of licensing building in requisitioned lands, and he or she is the person empowered to issue building permits therein. However, the military and security forces are authorised to build in lands for which requisition orders were issued without a permit.

In 1985 regulations were issued on the basis of the 1982 Military Order. The regulations specify the conditions for obtaining building permits for non-military purposes in lands covered by requisition orders. According to the regulations, an application for a building permit in requisitioned lands must comply with the “guidelines” set forth by the Director of the Planning Bureau. The “guidelines” constitute, in effect, a detailed plan.²⁸⁸ Therefore these regulations create a planning bypass process, by which the Director of the Planning Bureau approves a detailed plan (“guidelines”) without depositing it, without publishing it, without allowing the public to object to it and, in fact, approving it in a process that is hidden from the public – in complete contravention to the provisions and spirit of the Jordanian Planning Law, which applies to the West Bank.

In 2008 the order concerning construction in requisitioned lands was amended, so as to allow the Director of the Planning Bureau to empower the Special Planning Committees that operate in the settlements to grant building permits in requisitioned lands, provided that the

²⁸⁴ For example, in Plan 235/2 for Talmon, 26.2% of the area is zoned as residential, and the rest is designated for other land uses; in Plan 210/4/2 in Modi'in Illit, 27.6% of the area is designated for residential purposes and in Plan 420/1/7 in Ma'ale Adumim, 26.8% of the area is zoned as residential.

²⁸⁵ For example, in Detailed Plan 235/2 in Talmon, where 44% of the land is allocated for forestation, a regional land use which, from a planning perspective, should not be included within a plan for a residential neighbourhood.

²⁸⁶ HCJ 390/79, *supra* note 159.

²⁸⁷ Order concerning Granting Permits for Work on Land requisitioned for Military Purposes (Judea and Samaria) (no. 997), 1982.

²⁸⁸ Regulations concerning Granting Permits for Work on Land requisitioned for Military Purposes (Judea and Samaria), 1985.

permits are issued on the basis of the “guidelines” approved by the Director.²⁸⁹ This amendment actually equalises the status of the settlements built on requisitioned lands to those built on state land, and allows the Special Planning Committees (namely, the administrative authorities of the settlements) to issue building permits on private Palestinian land seized by military requisition orders.

3.1.6 Other Plans and Additional Restrictions

The main means Israel uses to restrict the spatial expansion of Palestinian construction in Area C is through planning that allocates large amounts of land for settlements compared to restrictive planning that allocates small amounts of land for Palestinian development. But, in addition, the Civil Administration has approved plans for roads and declared natural reserves and national parks which, in many cases, also impose significant restrictions on Palestinian development.

3.1.6.1 Roads

In 1991 the Civil Administration approved a regional plan for roads in the West Bank entitled Regional (Partial) Outline Plan 50 (ROP 50). This plan states that its purpose is to delineate the system of main and regional roads in the West Bank. In practice, many of the new roads delineated by ROP 50 connect to main roads in Israel, allowing quick and comfortable travel to the settlements and, from them, over the Green Line.

From the point of view of the Palestinian residents in the area, the main implications of ROP 50 are the severe building restrictions it imposes along the roads marked therein. The right of way in ROP 50 is exceptionally wide, well in excess of the norm in Israel. Thus, ROP 50 provides that the right of way of the main roads should be 100 metres,²⁹⁰ whereas according to the National Outline Plan for Roads (NOP 3), which is valid within the boundaries of Israel, the right of way of such roads should not exceed 50 metres.²⁹¹

The building lines (the margin relative to the road where construction is forbidden), as defined in ROP 50, are also excessive compared to the norm in Israel. Thus, ROP 50 sets a building line of 70 metres from the edges of the main roads, compared to only 25-50 metres in NOP 3, which is valid inside Israel. As a result, the total width where construction is forbidden along a main road is 240 metres under ROP 50, compared to a maximum of 150 metres under the NOP 3 which applies inside the Green Line.

In some cases, ROP 50 defines even secondary roads that have a small volume of traffic as main roads, although there is no justification for this from a planning perspective. For example, the plan provides that Road 57 in the Jordan Valley is a main road whose designated width is 100 metres, even though in fact it is a road of only 15 metres in width, with a small volume of traffic.

These definitions have significant consequences. The practical meaning of a prohibition on construction along a band 240 metres wide is that for every kilometre of road, construction on 240 dunum (24 hectares) is forbidden. The total length of Road 57, according to ROP 50, is

²⁸⁹ Order concerning Granting Permits for Work on Land requisitioned for Military Purposes (Amendment no. 3) (Judea and Samaria) (no. 1612), 2008.

²⁹⁰ Written provisions of Regional (Partial) Outline Plan 50 (ROP 50), Part c, Section 1.

²⁹¹ National Outline Plan for Roads (NOP 3), Amendment 7, 1990.

approximately 75 kilometres. That road alone, therefore, prevents building on some 18,000 dunums (1,800 hectares). The Palestinian village of Jiftlik in the Jordan Valley for example has several large clusters of residences, each made up of dozens of houses, which are situated within the building line of Road 57. The Civil Administration is preventing further construction in that area and, in the last few years, has demolished dozens of buildings within that area.²⁹²

The building prohibitions set forth by ROP 50 impact mainly Palestinians, because the settlements were built, in most cases, at a distance from both the existing and planned main roads.

3.1.6.2 Nature Reserves

In areas designated as nature reserves there are severe restrictions on development and construction to the point of complete prevention. In 1967 the Israeli Military Commander issued a military order concerning the protection of the nature reserves in the West Bank.²⁹³ The order was amended a number of times over the years,²⁹⁴ but its substantial provisions remained intact. Section 2 of the original version of the order provides that “a person must not harm animals, vegetables or minerals, including the land in a nature reserve”. “Harm” is defined as including “changing the natural shape of the terrain” and “any act of construction”. The order therefore completely forbids building and development within the boundaries of nature reserves, except for erecting buildings that serve the reserve itself (e.g., visitors’ sheds and so on).²⁹⁵

Protecting natural assets is a worthy pursuit, undertaken by many countries in the world. But in the West Bank it appears that at times the area of land included within the boundaries of nature reserves declared by the Israeli Civil Administration was not determined by pure considerations of the protection of nature, but was influenced by the motivation to prevent Palestinian development whilst allowing for settlement expansion.

For example, in 1983 the head of the Civil Administration declared the nature reserve of Bil’in Oaks on the land of the Palestinian village of Bil’in in order to protect ancient oak trees in the area. However, the area of the declared reserve is 350 dunums (35 hectares), even though the area on which the ancient oak trees are actually planted is only 30 dunums (three hectares). The declaration of the nature reserve, covering an area 11 times greater than the area that actually requires protection, has thus prevented Palestinian construction on all 350 dunums (35 hectares). Then, in the early 1990s a settlement was planned next to the Bil’in Oaks reserve. In 1993, the Civil Administration subsequently approved a plan for the Bil’in Oaks nature reserve, reducing the nature reserve down to 35 dunums (3.5 hectares).²⁹⁶ In 1999 the Civil Administration approved another detailed plan for a residential neighbourhood of 1,533 housing units in the settlements of Modi’in Illit, known as the Matityahu East neighbourhood, which would be adjacent to the Bil’in nature reserve. While approving the detailed plan for the settlers’ neighbourhood, the Civil Administration reduced the area of the Bil’in Oaks reserve even further, to 30 dunums (three hectares).²⁹⁷ In 2007 a new, amended,

²⁹² Bimkom, *The Prohibited Zone*, *supra* note 10, p. 151-155.

²⁹³ Order concerning the Protection of Nature Reserves (the West Bank area) (no. 166), 1967.

²⁹⁴ Order concerning the Protection of Nature (Judea and Samaria) (no. 363), 1969.

²⁹⁵ Order concerning the Protection of Nature (Judea and Samaria) (no. 363), 1969, Combined Version, Section 5.

²⁹⁶ Protocol no. 10/06 of the Objections Subcommittee of the Higher Planning Council, “Decision on Objection to Detailed Plan 210/8/1 – Modi’in Illit”, 3 July 2006, pp. 28-29.

²⁹⁷ Detailed Plan 210/8.

detailed plan was approved for the neighbourhood of Matityahu East, which increased the number of housing units there to 2,520. In this plan, the area of the Bil'in Oaks reserve was reduced again, to only 25.5 dunums (2.55 hectares).²⁹⁸

Over the period of 14 years, therefore, the Civil Administration reduced the area of the Bil'in Oaks reserve to 7.5 percent of its original size. The reduction of the area of the reserve was simultaneous with the planning procedures for the neighbourhood of Matityahu East and was undertaken in order to allow construction and expansion of a settlement on land that was previously defined as part of the nature reserve.

In this case, it appears that the original boundaries of the reserve were not defined on the basis of material considerations but in order to prevent Palestinian construction and development. When the decision was made to develop a settlers' residential neighbourhood at the site, the Civil Administration did not hesitate to cut more than ninety percent of the original area of the reserve.

3.1.6.3 National Parks

In 1967 the Israeli Military Commander issued an order concerning national parks.²⁹⁹ Various parts of the West Bank were declared as national parks where construction was forbidden, except for buildings meant to serve the park itself.³⁰⁰

Protecting special areas as National Parks can serve the wider community, as long as it is undertaken by objective criteria and without discrimination. The Israeli Civil Administration does not always act on the basis of such criteria. In 1998 it declared the National Park of Nabi Samuel north of Jerusalem on 3,500 dunums (350 hectares), inside which³⁰¹ the Palestinian village of An-Nabi Samwil, with 265 residents, which had been established hundreds of years before the national park was declared, is located. The Civil Administration approved a detailed plan for the national park, prohibiting the construction of housing units, new residences, public buildings and infrastructure in An-Nabi Samwil. The plan allows a maximum building addition of 20 percent of the building area of the existing houses.³⁰² The plan for the park was approved without consideration for the vital needs of the residents of the village. For example, the old school in An-Nabi Samwil is a one-room building of only 25 square metres, and has long since been inadequate to the needs of the community it serves. Because of the park plan, however, it is now impossible to build a new school in An-Nabi Samwil or to expand the existing one.

In contrast, the land designated for the development of the nearby settlement, Har Shmuel (administratively attached to Giv'at Ze'ev), was not included in the area of the national park and hundreds of housing units were built on it.

²⁹⁸ Detailed Plan 210/8/1, approved in January 2007. The further reduction of the area of the reserve in this plan was required also in order to return to its owners private Palestinian land included in Plan 210/8.

²⁹⁹ Order concerning Parks (West Bank Area) (no. 89), 1967.

³⁰⁰ Order concerning Parks (Judea and Samaria) (no. 373), 1970, Combined Version. Order no. 373 replaced the original order, no. 89.

³⁰¹ Website of Nature and Views in Israel:

http://www.inature.info/w/index.php?title=%D7%92%D7%9F_%D7%9C%D7%90%D7%95%D7%9E%D7%99_%D7%A0%D7%91%D7%99_%D7%A1%D7%9E%D7%95%D7%90%D7%9C&printable=yes [last accessed May 2011].

³⁰² Detailed Plan 51/107.

3.1.6.4 Archaeological Sites

The West Bank abounds with archaeological findings. Military legislation and the Antiquities Law³⁰³ empower government agencies to prevent damage to archaeological sites, including limiting construction within their boundaries.³⁰⁴ An archaeology staff officer at the Israeli Civil Administration does indeed often forbid construction in such sites.

As a rule, the Civil Administration allows construction in places where archaeological findings were discovered, as long as it is not an important archaeological site. To ascertain that, the Civil Administration stipulates its agreement to the construction based on preliminary surveys and rescue excavations – i.e., digs to find and preserve essential archaeological items. According to the Civil Administration's policy, such surveys and rescue excavations are undertaken only as part of detailed planning. When it comes to outline plans that apply to areas where there are archaeological sites, the Civil Administration normally forbids construction on such sites, without further inquiries to find out whether they contain trivial findings or whether the site in question is important and deserves maximum protection.³⁰⁵

This policy creates a substantial difference between the Israeli settlements and the Palestinian villages, because high-level detailed planning is undertaken for the settlements routinely, whereas for the Palestinian villages under its responsibility, the Civil Administration prepares Special Outline Plans only. The difference in the type of plans that are offered to the two sectors leads to the preparation of many detailed plans for the settlements, which include archaeological sites, after surveys and rescue excavations had been conducted by the archaeology staff officer.³⁰⁶ Conversely, in the Palestinian villages there is an almost sweeping prohibition against building in the archaeological sites marked in the Special Outline Plans made for them by the Civil Administration.

3.1.6.5 Restrictions on Agricultural Use of the Land

All of the prohibitions and restrictions described in Part 3.1.6 refer to construction and development. In addition, various restrictions have been placed on agricultural cultivation in the area.

The first restriction is on the use of state land. As a whole, by government decision and Civil Administration policy, state land is designated almost exclusively for the use of Israelis, and is only occasionally allocated to Palestinians – even when the latter ask to use it for agricultural purposes rather than for construction.

Restrictions on Planting Fruit Trees and Vegetables

In 1982 the Israeli Military Commander issued an order concerning supervision of fruit trees

³⁰³ Antiquities Law (no. 51) for 1966; Order concerning Antiquities Law (Judea and Samaria) (no. 1116), 1986, Combined Version.

³⁰⁴ *Ibid.*

³⁰⁵ The Head of the Planning Bureau said this at a hearing at the Civil Administration's Local Planning Subcommittee on Special Outline Plan 1720/05 for the Zif area, 25 April 2007.

³⁰⁶ For example, in 1998 the archaeology staff officer conducted rescue excavations at the site designated for construction of an industrial park at the settlement of Shim'a. Similarly, Detailed Plan 515 for the settlement of Tene-Omarim, approved in 2000, includes two archaeological sites whose total area is 79 dunums (7.9 hectares); the settlers have erected a building on one of the sites.

and vegetables.³⁰⁷ The order forbids planting plum trees and vines – except for self-use and as long as the number of saplings does not exceed 20 – without an advance permit from the Civil Administration. Furthermore, the order prohibits growing tomatoes and eggplant in the Jordan Valley except for self-use, without a similar permit from the Civil Administration. The order also prohibits growing onions or onion seed in all areas of the West Bank under Israeli control, except with the permission of the Civil Administration. Officially, the order applies to both Palestinians and settlers.

The professed aim of the order is to act “for the benefit of the population and in the interest of protecting the water resources and the agricultural produce of the area for the public good”, but it is not clear how its provisions serve that goal. It is also unclear to what extent the order is enforced, but it continues to this day to constitute part of the valid legislation in the West Bank area.

Restrictions on Planting Ornamental Plants

In 1980 a military order was issued that imposes supervision on planting ornamental plants.³⁰⁸ The order provides that growing and reproducing five species of ornamental plants (ruscus, chrysanthemum, statice, spray carnation and gypsophilia) should only be by quotas set by the Civil Administration. The order forbids either growing these plants or propagating them beyond the personal quota set for each grower.

In this case, too, the professed goal of the order is the good of the local population and protection of the agricultural produce in the area, but it is not clear how its provisions serve that purpose. It is also unclear to what extent the order is enforced but it continues to this day to constitute part of the valid legislation in the West Bank area. Officially, the order applies to both Palestinians and settlers.

³⁰⁷ Order concerning Supervision on Fruit Trees and Vegetables (Judea and Samaria) (no. 1015), 1982, Combined Version.

³⁰⁸ Order concerning Regulation of Planting Ornamental Plants (Judea and Samaria) (no. 818), 1980, Combined Version.

PART FOUR: THE JURIDICAL SYSTEM

The extensive legislation on land, planning and construction which presently applies to Area C of the West Bank is administered by a variety of legal bodies. The legislation itself includes many provisions about the juridical powers in these matters, yet some of these provisions, such as those defining the authority of Jordanian courts to hear petitions pertaining to land issues, are inapplicable within the context of the Israeli occupation.

This example, and others, has led to changes in the provisions of the Law, empowering other legal bodies to hear matters which, since 1967, the Jordanian courts have been unable to address. Israeli military legislation has addressed this issue in two ways: first, by changing the composition of quasi-judicial tribunals, legally authorised to hear appeals by residents of Area C against administrative decisions by government authorities, and replacing the Jordanian representatives, who had sat on those bodies in the past, with Israeli military and government representatives; secondly, by establishing new tribunals, that did not exist in the law that was valid at the time that Israel occupied the West Bank, and empowering the new tribunals to adjudicate various civilian and administrative affairs.

This part describes the juridical system that exists today in Area C. It also briefly addresses how Palestinian residents can appeal in certain cases to Israeli courts, including the Supreme Court sitting as the High Court of Justice.

4.1 The Military Appeals Committees

The Military Appeals Committees, established by military legislation, are the legal body authorised to adjudicate most administrative affairs, including land affairs, in Area C. The Order establishing the Appeals Committees was passed in 1967³⁰⁹ and has since undergone many changes.³¹⁰

According to the Order, the members of the Military Appeals Committees are appointed by the Military Commander. One of them, who is required to have a graduate law degree, is appointed by the Military Commander to be the chancellor. The Appeals Committees operate with a quorum of three members, with the chancellor allocating members to each panel, with the requirement that the chairman of each panel has a legal education.³¹¹ The chancellor is authorised to establish Appeals Committees which can consist of a single member, as long as that person has a legal education.³¹² The chancellor of the Appeals Committees is also authorised to outline the working procedures of the Appeals Committees, insofar as they were not established explicitly by military legislation.³¹³

The Order goes on to say that the Military Appeals Committees shall be independent and will not be subject to the Military Commander or to any other party, and their only obligation is to

³⁰⁹ Order concerning Appeals Committees (the West Bank) (no. 172), 1967. Collection of Proclamations, Orders and Appointments no. 9, pp. 350-353.

³¹⁰ Order concerning Appeals Committees (the West Bank) (no. 172), 1967, Combined Version.

³¹¹ *Ibid.*, Article 3(a).

³¹² *Ibid.*, Article 3a.

³¹³ *Ibid.*, Article 3(c).

act according to the Law and military legislation.³¹⁴ However, most of the decisions made by the Appeals Committees are recommendations, which the Military Commander is allowed to accept or reject.³¹⁵ There are certain decisions defined by military legislation which do not require the approval of the Military Commander. They include rulings on an appeal against the decisions of the First Registration Committee to either order the registration of land in the name of a private individual or to reject a request for such registration.³¹⁶ It is interesting to note that in 2008 the Military Commander filed a petition to the High Court of Justice against a decision by the Appeals Committee to order the registration of certain lands in the name of Israeli settlers.³¹⁷ In that case the Military Commander had no other legal option, because the committee's decision did not require his approval. But, even in matters in which the committee decision is only a recommendation to the Military Commander, those recommendations are almost always accepted. Cases where the recommendations of Appeals Committees are rejected are rare.

According to the Order, the Military Appeals Committees are not subject to the laws of evidence or accepted legal procedures. They are allowed to establish their own procedures, "as long as the right of every appellant to appear before them is guaranteed".³¹⁸ As far as evidence discovery, the Order instructs the Appeals Committees not to accept evidence which the Military Commander has asserted would endanger security in the area or could harm "an important public interest".³¹⁹ Furthermore, the Appeals Committees are authorised to receive evidence and discuss it without disclosing it to the appellant, if they are convinced that disclosing the evidence to the appellant "could harm area security or an important public interest".³²⁰

These vague provisions, which do not define what an "important public interest" is, enable the Military Appeals Committees to conceal important information from appellants. For example, in 1992 the Military Appeals Committee decided to reject dozens of objections submitted by the residents of the village of Bil'in against a declaration by the Custodian of Government and Abandoned Property declaring 780 dunums (78 hectares) of Bil'in village land to be state land.³²¹ The decision by the Appeals Committee clearly indicates that the only criteria used by the Committee to decide whether the land was state land or not was whether it was cultivated. To fit with its findings the Appeals Committee even excluded several sub-plots that were found to be cultivated from the area declared as state land.³²²

However, as part of recent High Court of Justice proceedings it has emerged that, in this case, the declaration by the Custodian was made at the request of Israeli settlers who claimed to have bought the land. Even though the Appeals Committee knew well that there was a claim of purchase by settlers, it concealed that fact from the residents of Bil'in lodging the appeal

³¹⁴ *Ibid.*, Article 7.

³¹⁵ *Ibid.*, Article 6.

³¹⁶ Law of Registration of Unregistered Immovable Property, law no. 6 of 1964, as amended in article 7 of the Order Amending the Law of Registration of Unregistered Immovable Property (Judea and Samaria) (order no. 1621), 2008, Article 7(h).

³¹⁷ The petition in HCJ 9296/08, *supra* note 90. The petition claimed that the appeals committee erred by opining that the land that was the subject of the appeal should be registered in the name of settlers even though they did not prove any legal source of possession (purchase documents or transfer from the person in the name of whom the land was registered in the property tax ledgers). On 9 June 2011, the court dismissed the petition after the parties reached an agreement according to which the Military Appeals Committee would acknowledge that a legal source of possession is required.

³¹⁸ Order concerning Appeals Committees (the West Bank) (no. 172), 1967, Combined Version, Article 8(a).

³¹⁹ *Ibid.*, Article 8(b1).

³²⁰ *Ibid.*, Article 8(b2).

³²¹ Custodian of Government Property, *Declaration of Land as Government Property – 10/91*, 15 January 1991.

³²² Military Appeals Committee, decision on appeal 21/91, 30 July 1992.

while, at the same time, making the false statement that its decisions were based solely on the question of agricultural cultivation (according to article 78 of the Ottoman Land Code; see Part 2.2.1).³²³ As a result, the appellants were prevented from being able to refute the claims of the settlers who, instead of registering the land at the Land Registry, had chosen the faster, simpler procedure of requesting the Custodian to declare the land government property.

4.1.1 Matters under the Jurisdiction of the Military Appeals Committees

The addendum to the Order concerning Appeals Committees includes a detailed list of legislation – both Jordanian laws and orders issued by the Military Commander. Under the Order, appeals against administrative decisions issued on the basis of these pieces of legislation are to be heard before the Appeals Committees. Among other issues, the Appeals Committees are empowered to hear appeals about customs, registration of corporations and various types of licensing. With respect to land issues, the Military Appeals Committees can adjudicate on the following subjects:

- Cancelling transactions by the Custodian of Absentees Property, and demands by the Custodian to evict anyone possessing absentee property without a permit or after expiration of a contract on the basis of which the Custodian had allowed him or her to possess the property.³²⁴
- Declarations of state land, as well as demands by the Custodian to evict anyone who possessed government property on the basis of an expired contract or without permission.³²⁵
- Registration of permits to use state land and land requisitioned for military purposes, refusal to issue such a permit and demands to evict anyone possessing such land without a permit.³²⁶
- Disputes with the Israeli military authorities as to the amount of compensation that should be paid for land they expropriated for public needs.³²⁷
- Refusal of the Civil Administration to issue a license to conduct a land transaction.³²⁸
- Refusal of the Civil Administration to allocate a quota to grow certain ornamental plants or disputes over the approved quota.³²⁹
- Refusal of the Civil Administration to approve the cultivation of fruit trees and certain vegetables for commercial needs or a restriction it imposed on the extent of the area approved for cultivation.³³⁰

³²³ These facts were discovered in the proceedings of H CJ 8414/05 *Ahmad 'Isa 'Abdullah Yassin, Head of Bil'in Village Council v. Government of Israel et al.*

³²⁴ In this case the appeal is against decisions made on the basis of Articles 10(d) and 15(c) of the Order concerning Abandoned Property (Private Property) (Judea and Samaria) (no. 58), 1967.

³²⁵ In this case the appeal is against decisions made on the basis of articles 2c, 6.a(a) and 6.a(b) of the Order concerning Government Property (Judea and Samaria) (no. 59), 1967.

³²⁶ Of decisions made under the Order concerning the Registration of Certain Land Transactions (Judea and Samaria) (no. 569), 1974.

³²⁷ Of decisions by the authorities made under the Land Law – Purchase for Public Needs (law no. 2) 1953 and the Order concerning the Land Law (Purchase for Public Needs) (no. 321), 1969.

³²⁸ In this case the appeal is against decisions made on the basis of the Order concerning Land Transactions (Judea and Samaria) (no. 25), 1967. The Order provides that every land transaction in the area requires a license and its conclusion without a license invalidates it.

³²⁹ Against decisions made by the authorities under the Order concerning Regulation of Planting Ornamental Plants (Judea and Samaria) (no. 818), 1980. The order, discussed in Part Three, provides that cultivation of certain ornamental plants in the area shall be subject to a quota determined by the official responsible for implementing the order.

- Decisions by the First Registration Committee³³¹ at the Civil Administration concerning the registration of unregistered land (for example: decisions in disputes between different private parties who all claim ownership of the same plot).³³²
- A decision by a land staff officer to reject an application for First Registration of land because of a defect in the application documents, such as an unreasonable difference between the area of the plot as it appears on the surveyor's map and its area in property tax documents.³³³
- A decision by a land staff officer to exempt an applicant for First Registration of land from submitting certain documents required by the Law and military legislation, such as: an order of probate and a certificate signed by the *mukhtar* of the village, on whose land the plot for which the registration was requested is located, confirming the applicant's rights to the land.³³⁴
- A decision by the Civil Administration to evict a person who trespassed on private land and used it, as long as the use did not last more than five years.³³⁵
- A decision by the Civil Administration to grant a quarrying license or to refuse to grant such a license.³³⁶

It is evident that the Military Appeals Committees have been granted powers to discuss a wide range of subjects related to land. However, the Appeals Committees are not authorised to hear appeals pertaining to planning and construction. The appeal procedures on those issues are specified in the Jordanian Planning Law of 1966, as amended by Israeli military legislation (see Part 4.2).

4.1.2 Procedures

The format of an appeal, the documents that must be attached to the appeal and the general procedures of its hearing are set out in military legislation.³³⁷

The appeal must be submitted within 30 days of the date the appellant was given the decision against which the appeal is being lodged.³³⁸ But for appeals concerning land (for example, declarations on state land), the appeal can be lodged within 45 days of the date of receiving the decision.³³⁹ A receipt of payment of the required fee must be attached to the appeal, as

³³⁰ Against decisions made by the Civil Administration under the Order concerning Inspection of Fruit Trees and Vegetables (Judea and Samaria) (no. 1015), 1982. The order says that growing plums, grapes, onions and planter onions not for self-use requires the permission of the "competent authority". Furthermore, under the Order, growing tomatoes and eggplant in the Jordan Valley also requires such a permit. The order is discussed in Part Three.

³³¹ See Part 2.5.2, *infra*.

³³² In this case the appeal is against decisions made under Article 7 of the Law of Registration of Unregistered Immovable Property, law no. 6 of 1964, as amended in the Israeli military legislation.

³³³ Against decisions made by the land staff officer based on Article 4(c)(2) of the Regulations of Registration of Unregistered Immovable Property (applications for registration) (Judea and Samaria), 2008.

³³⁴ In this case the appeal is against a decision made by the land staff officer according to Article 3(b) of the Regulations of Registration of Unregistered Immovable Property (applications for registration) (Judea and Samaria), 2008.

³³⁵ Against decisions made on the basis of the Order concerning Land (Disruptive Use of Private Land) (Judea and Samaria) (no. 1586), 2007. This order was meant to deal mainly with settler agricultural trespass of private Palestinian land.

³³⁶ Against decisions made under the Order concerning Exploitation of Natural Resources (Judea and Samaria) (no. 389), 1970.

³³⁷ Regulations concerning Appeals Committees (Legal Procedures) (Judea and Samaria), 2010.

³³⁸ *Ibid.*, Article 3

³³⁹ *Ibid.*, Article 33.

well as a power of attorney, if the appellant is represented by a lawyer.³⁴⁰ For appeals concerning land, an updated surveyor's map of the plot in question must also be attached.³⁴¹

The respondents to the appeal (for example, the Custodian of Government and Abandoned Property, if the appeal is against a declaration on state land) must submit their response to the appeal within 30 days of delivery of the appeal to them.³⁴²

After receiving the written response, the Appeals Committee calls a preliminary hearing where it decides the stages of hearing of the appeal, the list of witnesses and the date of the next hearing.³⁴³ At the end of the hearings the committee announces its decision and may also charge one of the sides with expenses.³⁴⁴

The submission of an appeal does not prevent the execution of the action against which the appeal is being made. Thus, an appeal against a demand by the Custodian of Government and Abandoned Property to evict Palestinians who use land for agriculture or grazing cannot in itself prevent their eviction from the land. But the chancellor of the Appeals Committees or the head of the panel hearing the appeal may issue an interim order to suspend the execution of the action until a decision on the appeal.³⁴⁵

4.1.3 Commentary on the Military Appeals Committees

The actions of the Military Appeals Committees have been criticised by various parties. In a 2002 report, the Israeli human rights organization B'Tselem argued that when it comes to appeals against declarations of state land (see Part Two), in most cases the Appeals Committee operates as a “rubberstamp to the military administration’s decisions. Since the appeals committee is the only body before which the decisions of the Custodian may be challenged, its existence allows the Israeli authorities to continue the process of declaring lands as state land on one hand, while claiming that this process was under judicial review on the other hand.”³⁴⁶

Recently, harsh criticism was also levelled at the Military Appeals Committees in a report by a committee appointed by the Attorney General to examine the issue of land registration in the West Bank. The report said that “there is a serious problem of staffing the committee [the appeals committee] with jurists familiar with land law... likewise, we heard complaints about hearings held without summoning all the sides, bias in favor of the Israeli buyers and an exaggerated tendency by the attorney of the Custodian of Government and Abandoned Property to help the Israeli buyers.”³⁴⁷

Evidence of the political bias, which until recently allegedly characterised at least some of the panels that sat as Military Appeals Committees in the area, emerged in a press interview given by the former chancellor of Appeals Committees, Maj. Adrian Agassi. Agassi, a resident of the settlement of Giv’at Ze’ev, who served as chancellor of the Appeals

³⁴⁰ *Ibid.*, Articles 4(c) and 5(b).

³⁴¹ *Ibid.*, Article 34(2).

³⁴² *Ibid.*, Article 8.

³⁴³ *Ibid.*, Article 14.

³⁴⁴ *Ibid.*, Articles 41 and 45.

³⁴⁵ Order concerning Appeals Committees (no. 172) (Judea and Samaria), Combined Version, Article 9.

³⁴⁶ B’Tselem, *Land Grab: Israel’s Settlement Policy in the West Bank*, *supra* note 37, p. 53.

³⁴⁷ *Report by the Committee Appointed to Examine the Question of Land Registration in Judea and Samaria*, 2005, p. 37 [Hebrew].

Committees for 15 years and resigned from office in 2009, told journalist Meron Rapoport: “At the time I was responsible for the whole subject of land, which is actually the heart of the conflict...today I see how important it was to do those things [declarations of state land in the territories]. They are what preserve our existence in the Land of Israel...that [stopping the settlements] is such an unnatural process, of course it cannot succeed.”³⁴⁸

4.2 Appeals Concerning Planning and Construction

One of the main areas the Military Appeals Committees do not have the authority to adjudicate is planning and construction. The Jordanian Planning Law that applies to the West Bank created a three-tier hierarchical administrative planning system, which allows for internal appeal processes. The Israeli military legislation changed the structure of the planning system as set forth by the Planning Law (see Part 3.1), but it left intact its provisions regarding appeals against planning decisions. The result is an absurd situation in which one subcommittee of the Higher Planning Council of the Civil Administration hears appeals against the decisions of another subcommittee, even though essentially both subcommittees are of the same hierarchical status.

According to the Jordanian Planning Law, Local Planning Committees, District Planning Committees and a Higher Planning Council on the national level should be operating in the West Bank. The Planning Law provides that an appeal can be submitted against a decision by a Local Committee to refuse to issue a building permit, to set conditions before issuing it or to grant a building permit that could harm another person (such as a neighbour), and that this appeal should be heard by the District Committee.³⁴⁹ Besides private parties, the chairman of the Local Committee, or three of its members who disagree with its decision regarding applications for building permits, may appeal the matter to the District Committee.³⁵⁰ When it comes to areas where the District Committee has the authority to issue building permits, its decisions can be appealed to the Higher Planning Council.³⁵¹

As explained in detail in Part 3.1.2, military legislation annulled the Local Committees in all Palestinian villages in the West Bank, as well as the District Committees. The powers of the Local Committees in the Palestinian villages were transferred to a subcommittee of the Higher Planning Council, and instead of the District Committees additional subcommittees were established which are also subordinate to the Higher Planning Council.

Today there are two Planning Committees that are authorised to issue building permits in the Palestinian villages in Area C: the Inspection Subcommittee, which is authorised to issue building permits for buildings whose construction began without a permit and for which enforcement procedures were initiated; and, the Planning and Licensing Subcommittee, authorised to approve applications for building permits submitted in advance, before the building was actually erected (see Part 3.1.2).

³⁴⁸ Meron Rapoport, “Thus Spoke Adrian Agassi: A Conversation with a Judge in the Kingdom of Occupation”, Ha’oketz website, 29 October 2009, available at the website of the occupation magazine: http://www.kibush.co.il/show_file.asp?num=36408 [last accessed 20 June 2011].

³⁴⁹ Towns, Villages and Buildings Planning Law (no. 79) of 1966, Article 36(1).

³⁵⁰ *Ibid.*, Article 36(2).

³⁵¹ *Ibid.*, Article 36(3).

When an application for a building permit before construction of the building is submitted to the Planning and Licensing Subcommittee, and the committee rejects the application, there is a right of appeal to the Objections Subcommittee.³⁵² In the frequent case that the application for a permit is submitted only after construction of the building has already begun, an appeal against the decision of the Inspection Subcommittee to reject the application for a building permit can be submitted only to the Planning and Licensing Subcommittee.³⁵³ In either case, there is no fee for submitting an appeal.

The Inspection Subcommittee ordinarily invites the owner of the building, against which a demolition order or an order to stop work was issued, to the hearing. Conversely, the Planning and Licensing Subcommittee does not ordinarily invite to its hearings people who appeal against the decisions of the Inspection Subcommittee. Those hearings are typically held *in camera*, without the presence of the appellant or his counsel.

This division of powers between the different subcommittees creates an administrative absurdity. The military legislation says the Planning and Licensing Subcommittee has all the powers the Jordanian Planning Law granted the District Committees and the Higher Planning Council. The Inspection Subcommittee has various powers of the Higher Planning Council and the District Committees, including the power to inspect construction work in Area C. While both the Inspection Subcommittee and the Planning and Licensing Subcommittee are hierarchically equivalent to the District Committee, the Planning and Licensing Subcommittee has the authority to hear appeals submitted against the decisions of the Inspection Subcommittee.³⁵⁴ Thus, when the Inspection Subcommittee rejects an application for a building permit and issues a final demolition order for a building erected without a permit, the applicant may submit an appeal that will be heard before the Planning and Licensing Subcommittee, even though, as mentioned, the two committees are at the same level within the hierarchy of the planning system (both have certain powers of the District Committee and of the Higher Planning Council).

Both the Inspection Subcommittee and the Planning and Licensing Subcommittee include representatives of the Central Planning Bureau; the legal adviser for Judea and Samaria; and, the head of the infrastructure department at the Civil Administration (the Planning and Licensing Subcommittee also includes representatives of the Custodian of Government and Abandoned Property, the environment staff officer and a surveying staff officer). The result is that an appeal against a decision by the Inspection Subcommittee is heard before an administrative body, half of whose members are representatives of the very officials who sat on the Inspection Subcommittee.

Nonetheless, the High Court of Justice recently ruled that there is no administrative flaw in the Planning and Licensing Subcommittee hearing appeals submitted against the decisions of the Inspection Subcommittee, as long as the panel of the Planning and Licensing Subcommittee hearing the appeal does not include a person who sat on the panel of the Inspection Subcommittee that made the decision against which the appeal is being submitted.³⁵⁵

³⁵² Appointments and Delegation of Powers by the Higher Planning Council (Judea and Samaria), 2009, Article 13(a)(2).

³⁵³ *Ibid.*, Article 19(c).

³⁵⁴ *Ibid.*, see generally.

³⁵⁵ H CJ 10408/06 *Mustafa Kabha et al v. Higher Planning Council in Judea and Samaria*, Dinim-Elyon 2007(49) 82, paragraph 8 of the ruling. The judgment, given on 25 September 2007, refers to the Local Planning Subcommittee, as it was called at the time the judgment was released. Since then the name of the committee was changed and it is currently called the Local Planning and Licensing Subcommittee. See also Part Three.

4.2.1 Objections to Planning Schemes

Even though it is not a juridical procedure in the narrow sense of the term, a brief discussion of the objections to planning schemes procedures in the area is included.

The objection procedure is specified in the Jordanian Planning Law and in Israeli military legislation. According to the Planning Law, planning institutions are obligated to issue a notice concerning the deposit for objections against any planning scheme (regional, outline and detailed plans). The deposit period normally lasts 60 days (or as decided by the Planning Committee), during which any person or body who thinks the deposited scheme could harm him or her or affect them may submit a written objection to it.³⁵⁶ Submitting objections does not involve paying a fee.

Today objections to planning schemes are heard before the Higher Planning Council Objections Subcommittee. This subcommittee has five members,³⁵⁷ all Israeli employees of the Civil Administration. The Objections Subcommittee is empowered to hear objections and to issue recommendations about them, but does not have the authority to approve planning schemes that were deposited by other subcommittees or by the Higher Planning Council. The authority to approve each and every plan is vested exclusively in the subcommittee of the Higher Planning Council that decided to deposit the plan. For example, in the case of a plan for a new neighbourhood in an Israeli settlement, the Settlement Subcommittee is the body that decides to deposit the plan, the Objections Subcommittee hears the objections submitted to it and gives its recommendations on the matter to the Settlement Subcommittee, which is the only body authorised to approve the final version of the plan.³⁵⁸

This situation greatly impairs the propriety of the objection procedure, because the only body that hears the objections and discusses them – the Objections Subcommittee – is just a recommending body which, theoretically at least, has no power to make a final decision on the plans brought to it. However, in practice, as far as is known, the other subcommittees view the recommendations of the Objections Subcommittee as binding decisions. No cases are known to us where the recommendations of the Objections Subcommittee were rejected by other planning committees in the Civil Administration.

Submitting objections to plans does not officially require representation by a lawyer or planner, and theoretically all of the residents of the area - including Palestinians – are allowed to submit objections to plans independently. In reality, however, Palestinians who want to object to plans deposited by the Civil Administration almost always need a great deal of help from Israeli professionals, for a number of reasons.

First of all, in many cases Palestinians resident in the West Bank do not even know that a plan that could harm them has been deposited. According to the Jordanian Planning Law, notices about the deposit of plans must be published in two local newspapers, in addition to the official gazette of the Hashemite kingdom.³⁵⁹ Even though the Civil Administration has its own official gazette, which is published in a bilingual edition (Hebrew and Arabic) and is

³⁵⁶ Towns, Villages and Buildings Planning Law (no. 79) of 1966, Articles 16, 17, 20, 21 and 24.

³⁵⁷ The head of the Central Planning Bureau or his representative, the legal adviser to Judea and Samaria or his representative, the Custodian of Government and Abandoned Property or his representative, the surveying staff officer or his representative, the officer of the Israeli settlements in the area or his representative.

³⁵⁸ Appointments and Delegation of Powers by the Higher Planning Council (Judea and Samaria), 2009, Article 13.

³⁵⁹ *See for example*, Towns, Villages and Buildings Planning Law (no. 79) of 1966, Article 20.

available on the Internet,³⁶⁰ it does not publish notices there on planning and construction. When it comes to publication in commercial newspapers, the Civil Administration requires publication in two Hebrew newspapers and in two Arabic newspapers but, until recently at least, there was no requirement to publish in an Arabic newspaper that is widely distributed in the West Bank. As a result, in certain cases notices about the deposit of plans were posted in Arabic newspapers published in Israel but which are not widely distributed in the West Bank. In response to criticism by the Israeli NGO Bimkom, the Civil Administration recently announced that from now on, notices concerning the deposit of plans in the area are to be published in commercial newspapers in Arabic that are widely distributed in the West Bank.

Secondly, when Palestinians do learn in time about the deposit of a plan, in many cases they cannot obtain a copy of it to examine the plan and its provisions in depth - a necessary step in order to submit a proper objection. Special Outline Plans for Palestinian villages can be inspected at the Central Planning Bureau, located in the Beit El military camp. Until recently, access to the Beit El camp was very limited for Palestinians and generally is only by invitation and prior coordination. Recently, a new gate allowing free access (subject to security inspection and depositing an ID card) of Palestinians to the Civil Administration offices in Beit El was opened. Special Outline Plans can also be inspected at the relevant District Coordination Office (DCO). For example, a plan for a village in the Tulkarm sub-district can be inspected at the Tulkarm DCO. But neither at the Central Planning Bureau nor at the DCO can the plan be copied (even its provisions cannot be copied by a copy machine), and in the DCOs, in most cases it cannot be photographed by a digital camera either – it can only be read on-site. The Civil Administration has promised recently to allow Palestinians to buy, for a reasonable price, copies of Special Outline Plans deposited in the relevant DCO, but this promise is yet to be realised.

Deposited plans for Israeli settlements can be inspected at the Central Planning Bureau as well as at the offices of the Special Local Committee of the settlement in question. Since all settlements areas have been declared closed military zone for Palestinians (see Part 3.1.3.1), they cannot access the offices of the Special Local Committees and inspect the deposited plans there. Following the recent change in entrance restrictions to the Civil Administration offices at the Beit El military camp, now Palestinians can access the Central Planning Bureau and inspect such plans there. However, plans for settlements are only deposited in Hebrew, so that Palestinians who do not understand Hebrew well enough cannot understand the provisions of such plans and, consequently, cannot submit proper objections to them on a solid factual basis.

Thirdly, the Civil Administration erects substantial obstacles to Palestinians who want to submit objections to plans that have been deposited – especially in the case of plans for Israeli settlements. When it comes to plans for Palestinian villages, all that is usually required of an objector is to submit a written objection in five copies.³⁶¹ But, when it comes to plans for settlements, the Civil Administration has determined that objections to such plans will not be heard unless they meet several threshold conditions: (a) The objection must include an affidavit signed before a lawyer to support the factual arguments in the objection; (b) When the plan applies to unregistered land (which is true in most cases), the objection must also

³⁶⁰ The gazette of the Civil Administration is called *Collection of Proclamations, Orders and Appointments*. It is published by the office of the legal advisor for Judea and Samaria. The collection is published periodically both in print and on the Internet and is available at <http://www.mag.idf.il/487-he/Patzar.aspx> [Hebrew] [last accessed 11 May 2011].

³⁶¹ For example, the notice by the Local Planning Subcommittee (presently called the Local Planning and Licensing Subcommittee) of the deposit of Special Outline Plan 1207/0/6 for the village of Brukin, *Ha'aretz*, 28 July 2008.

include a surveyor's topographical map, prepared by a certified surveyor authorised by the Civil Administration, showing the boundaries of the plot that belongs to the objector; and, (c) The objector must also attach to the objection documents that prove the objector's ownership of the land (property tax extracts, orders of probate).³⁶² Obtaining all these documents involves a heavy cost and their preparation requires considerable time. For instance, preparation of a surveyor's topographical map of the plot belonging to the objector could, in many cases, cost hundreds and even thousands of shekels (hundreds of dollars). Even regardless of the cost, in most cases it is very hard to complete preparation of all of the required documents within the 60-day limit. Submitting an objection late may disqualify it and, as a rule, in such cases the Objections Subcommittee will refuse to hear it.

The result of these stringent requirements, which are not enshrined in the Jordanian Planning Law nor in Israeli military legislation, but only in internal regulations of the Central Planning Bureau, is that in most cases when plans for settlements are deposited, Palestinians are unable to submit objections to them.

The Jordanian Planning Law and military legislation say nothing about the timetable of hearing objections and, in many cases, they are heard months after being submitted. All of the objectors are invited to the hearing and are allowed to argue orally before the Objections Subcommittee. The legislation does not provide for a deadline for rendering a decision on objections. Sometimes the Objections Subcommittee gives its recommendations within weeks after the hearing, while in other cases months or even a few years go by before a final decision is made.³⁶³

4.3 Petitions to the High Court of Justice

After all the appeal procedures in the Civil Administration are exhausted (whether through the Military Appeals Committee or one of the Planning Committees), the only option open to someone whose appeal was rejected is to petition the Israeli Supreme Court sitting as the High Court of Justice. In most cases the High Court of Justice sits as a panel of three judges, but petitions of fundamental importance are sometimes heard by broader panels. Submitting a petition to the Court involves paying a court fee which, as of May 2010, was set at ILS 1,666 (about \$500 USD). Furthermore, the petitioner has to pay lawyers' fees, which can reach tens of thousands of shekels.

The authority of the High Court of Justice to hear petitions by Palestinian residents of the West Bank cannot be taken for granted. Since the West Bank is under belligerent occupation, it is not clear that the High Court of Justice is authorised to oversee government activities in territories that do not constitute part of the State of Israel.³⁶⁴ The court itself addressed this question incidentally in one of the first rulings it gave on petitions submitted by Palestinians against activities of the military administration in the occupied territory. In a petition submitted in 1972 against the military requisition of land to build the settlement of Yamit in the Rafah Salient, the HCJ said the following:

³⁶² For example, a notice by the Settlement Subcommittee of the deposit of Detailed Plan 130/10 for Ariel, *Ha'aretz*, 7 September 2008.

³⁶³ On 20 July 2008, notice was published of the deposit of Special Outline Plan 1170/08 for the village of Umm ar-Rihan in the Jenin sub-district. On 23 September 2008, residents of the village submitted an objection to the plan through Bimkom – Planners for Planning Rights. The hearing was held before the Objections Committee on 29 March 2009. The decision concerning the objection was given only on 27 February 2011.

³⁶⁴ Moshe Drori, *Legislation in the Judea and Samaria Area*, The Hebrew University, Jerusalem, 1975, pp. 74-75.

Is this court authorized to review actions performed by state authorities, and especially its military forces, in the areas of the military administration? And if the court does have such authority, what is its source and by what standards shall it be exercised? Like in other cases in the past (for example, HCJ 337/71, p. 580; HCJ 256/72), Mr. Natan [of the State Attorney's office] did not differ in the name of the Respondents over the very existence of the authority, and in the absence of any claim to that effect we will assume this time again, without ruling on the matter, that the authority exists personally against the officers of the military administration who belong to the state's executive branch, as "people filling public offices by Law", and who are subject to the oversight of this court by section 7(b)(2) of the Courts Law, 1957.³⁶⁵

Since these words were written in 1973, the High Court of Justice has not addressed the question again and has taken for granted that it has the authority to hear petitions of Palestinian residents of the occupied territory and to rule on them.

The fact that the doors of the Court are open to Palestinians is often presented by Israel as proof that the latter receive a worthy and due legal process, in which objective judicial review of the actions of the Israeli administration in the West Bank is undertaken.³⁶⁶ But in reality, the High Court of Justice process is problematic in many respects and often is not a suitable forum to clarify the issues raised by Palestinian petitioners.

First of all, the Court has no suitable process to clarify petitions where there is a factual dispute between the sides. The High Court of Justice does not hear witnesses but relies almost exclusively on the evidential material submitted to it in writing and which is supported by affidavits signed by the petitioners and the respondents. As a rule, the Court is expected to decide on legal questions that arise in the context of facts that are not in dispute. But in many petitions significant contradictions emerge between the petitioners and the respondents concerning the facts at the basis of the petition. For example, when the petitioner claims that the land declared by the Custodian to be government property is actually cultivated, while the state claims it is rocky land unfit for cultivation, the Court does not have real tools to decide which side is correct, such as by hearing expert witnesses. In these cases the High Court of Justice almost always adopts the state's position, among other reasons because of the presumption of administrative propriety which stipulates that the public authority is presumed to have been acting properly.

Secondly, the High Court of Justice is not a court of appeal against the decisions of the other courts. Sitting as the High Court of Justice, the Supreme Court can review the decisions of administrative bodies and intervene in their decisions if it finds that there were significant administrative flaws in the process whereby these decisions were made. Therefore the range of cases that allow High Court of Justice intervention in the decisions of the administrative bodies (such as the Military Appeals Committees, the various planning committees and the other Civil Administration bodies) is limited and focused. Thus, for example, the High Court of Justice can intervene if it emerges that the decision was tainted by alien considerations,

³⁶⁵ HCJ 302/72, *supra* note 141, p. 176.

³⁶⁶ For example, after giving its ruling on the route of the Barrier in the area of Beit Sourik (in which the High Court of Justice disqualified 30 of 40 kilometres segment of the barrier debated in this petition), the Israeli Ministry of Foreign Affairs issued a statement saying that "the Court decision regarding the planned routing of Israel's security fence...emphasizes the important position of the rule of law and judicial review over Israel's security initiatives to protect its citizens from Palestinian terrorism". See Israeli Ministry of Foreign Affairs website, <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2004/Statement+on+Fence+Ruling+30-June-2004.htm>, [last accessed 11 May 2010].

that it was made on the basis of a faulty factual basis, or that it is tainted by discrimination, extreme unreasonableness or the disproportionate violation of human rights.³⁶⁷ However, the High Court of Justice will not intervene in a decision solely because its judges think the decision is wrong (as an appeal court would). The High Court of Justice is the first and last court hearing the petition, and no appeal can be made against its decisions. However, it is possible to apply for an additional hearing by the High Court of Justice, involving an expanded panel of judges, but such a hearing is granted only in very rare cases.

4.4 Ownership and Dispossession Cases in Israeli Civil Courts

Other relevant courts authorised to adjudicate certain aspects of land law in the West Bank are the civil courts of the Jerusalem district: the Magistrate's Court and the District Court.

Under Israeli law, the Magistrate's Courts in Israel are authorised to hear civil claims concerning the possession and use of land.³⁶⁸ Claims concerning ownership rights over land are under the authority of the District Courts.³⁶⁹

Within Israel, each District court has jurisdiction over a specific geographical area (a specific administrative district), and likewise, each Magistrate's Court has authority to adjudicate cases in a specified area. Accordingly these courts should not have the authority to adjudicate land issues in the West Bank, just as they do not have the authority to adjudicate affairs concerning land in any other place in the world. But the Supreme Court's interpretation of the regulations that established procedures to present judicial documents in the West Bank created a doctrine that in certain conditions gives Israeli courts jurisdiction over this area. The regulations in question are the Legal Procedure Regulations (Presenting Documents in the Administered Territories), 1969. This interpretation of the regulations, combined with the fact that the courts in the Jerusalem district were granted residual authority to adjudicate claims on matters that are outside the local jurisdiction of other courts,³⁷⁰ resulted in these courts having jurisdiction over land disputes in the West Bank.³⁷¹

Therefore, claims for dispossession against trespassers into land assets in the West Bank can be submitted to the Jerusalem Magistrate's Court, and claims of declaratory remedy concerning ownership rights of West Bank land can be submitted to the Jerusalem District Court.

³⁶⁷ HCJ 910/86 *Resler v. Minister of Defense*, 42(2) PD 441 on pp. 505-506; *See also* HCJ 297/82 *Berger v. Minister of Interior*, 37(3) PD 29 on pp. 42-43.

³⁶⁸ Courts Law (Combined Version), 1984, Article 51(a)(3).

³⁶⁹ *Ibid.*, Article 40(1).

³⁷⁰ Civilian Legal Procedure Regulations, 1984, Regulation 6.

³⁷¹ Civilian appeal 300/84 *Abu Atiya v. Arbatsi*, 39(1) PD 365.

PART FIVE: INTERNATIONAL LAW

5.1 Protection of Land and Property Rights in Areas under Belligerent Occupation

Until now, the focus of this guide has been on the various local laws, orders and plans governing land and property rights and use in Area C of the occupied Palestinian territory. International law applies to the West Bank, including East Jerusalem, and its application is key to enforcing both the duties of the occupying power (here, Israel) and the rights of the occupied, or “protected persons” (here, the Palestinians). Specifically, the two main fields of international law that govern the relationship between Israel and the Palestinians are international humanitarian law and international human rights law. International humanitarian law applies in situations of war and armed conflict, including occupation. It grants rights to civilians and prisoners of war, and it stipulates both the powers and duties of the state parties involved in the conflict, especially the occupying state in cases of occupation. In contrast, international human rights law applies at all times (in war and peace), granting a wide range of rights (from political to economic, social and cultural) to all human beings and obligates the state under whose control they live to uphold and defend those rights. Part 5.1.1 outlines the obligations and rights enshrined in the relevant bodies of international humanitarian and human rights law; afterwards, this part examines how Israeli courts and tribunals have interpreted these laws and to what extent they have been willing to apply them.

5.1.1 International Humanitarian Law: Laws of Belligerent Occupation

The body of international humanitarian law, while vast, deals specifically with times of war and armed conflicts, both international and non-international, and includes a specific set of rules for the situation of belligerent occupation. The basic premise for creating specific laws for belligerent occupation was the notion that national sovereignty must be preserved, balanced with a concern for individual freedom, dignity and justice, and furthermore that sovereignty must not be negated through the use of force.³⁷² Thus, a situation of occupation, as anticipated by international law, is generally a natural – and temporary – consequence of war, in which the occupying power serves as a kind of trustee over the territory, preserving and maintaining security and public order until such time as a legitimate sovereign, chosen through international agreement or any other legal process, will take responsibility over the occupied territory.

In 1907, the major world powers codified international humanitarian law, as well as a legal framework for analysing situations of occupation, by signing into force a series of conventions, including the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed regulations (together referred to as the “Hague Regulations”). Article 43 of the Hague Regulations, which acts like a charter of the laws of occupation (sometimes referred to as an occupation’s “mini constitution”), provides a useful guide to the role of the occupying power, or occupant, in administering the occupied territory, and maintaining “public order and safety”, without altering its general landscape and laws “unless absolutely prevented”. While the notion of “unless absolutely prevented” generally

³⁷² The Charter of the United Nations, on which the international organisation was founded, states in Article 2, paragraph 4: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

refers to the power to make changes based on the occupying power's military and security needs, similar to a military necessity exception, it also has been interpreted as the right to make changes in accordance with the needs of the public (the "protected persons") in the territory.

If the Hague Regulations focused mostly on the scope of an occupying power's *rights vis-à-vis* the occupied territory, in 1949, on the heels of World War II, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) added a full body of *duties* toward both the territory and its population – the protected persons.³⁷³ Israel is a party to the Fourth Geneva Convention. In 1977, an additional set of duties was added in the Additional Protocol I to the Fourth Geneva Convention.³⁷⁴ These duties, which very often establish prohibitions on the occupying power, at the same time, endow the protected persons with "negative rights", or the right to be free from certain behaviours on the part of the occupying power.³⁷⁵ For instance, Hague Regulations Article 46 and Fourth Geneva Convention Article 53 both prohibit the destruction of private property in the occupied territory, which is discussed in more detail in Part 5.1.1.1.

5.1.1.1 Protection of Private Immovable Property

Basic Principles and Sources

In addition to the codified bodies of law discussed in Part 5.1.1, sources of international humanitarian law can be found in the common practice of the majority of states (state practice), and in judicial interpretation, or jurisprudence, from national courts to international tribunals, such as the International Court of Justice (ICJ) in *The Hague, The Netherlands*, which is a United Nations organ.

Legal norms are considered customary – and binding on *all states* – when an overwhelming majority of states are party to an international convention, such as The Hague Regulations, the Fourth Geneva Convention and the Additional Protocols to the Convention, and/or when such a majority exhibits a certain state practice regarding a particular issue. As such, certain rules are customary, and binding, regardless of having been codified in law, and regardless of whether a particular state is a signed party to a treaty or convention.³⁷⁶ In order to guide states in recognising what is customary in the laws of war, or humanitarian law, in 2004 and 2005 the International Committee of the Red Cross (ICRC), which had been instrumental in

³⁷³ Note: the Fourth Geneva Convention did not replace the Hague Regulations, but rather is a supplement to them. According to Article 154 of the Fourth Geneva Convention, if the Convention applies to a situation, so too do the Hague Regulations.

³⁷⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

³⁷⁵ Several "positive rights" may also be found in these documents, but the overwhelming majority of its provisions are written as prohibitions upon the occupying power, and thus, negative rights endowed to the protected persons.

³⁷⁶ For instance, Israel is a party to the Fourth Geneva Convention, but not to the Hague Regulations; however, the International Military Tribunal of Nuremberg has found that the "rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war" (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65), and thus they are binding on Israel as on all states. This was reinforced by the International Court of Justice in the ICJ Wall Advisory Opinion, *supra* note 3, para. 89. Israel has formally accepted the Hague Regulations as customary international law, and thus has accepted their application to the occupied Palestinian territory. Regarding the Fourth Geneva Convention, however, the Israeli government's view is that it is not applicable to the occupied Palestinian territory, but that it nevertheless "voluntarily" applies only what it terms the "humanitarian provisions" of the Convention. The Israeli High Court of Justice, however, has left open the question of the applicability of Fourth Geneva Convention to the occupied Palestinian territory, and its status as customary or conventional law.

drafting the Fourth Geneva Convention, compiled a manual of 161 rules of “Customary International Humanitarian Law” (ICRC Study).³⁷⁷ The provisions of law, customary rules, and jurisprudence of international courts will be outlined here.

Scope of Protection Granted to Private Immovable Property under International Humanitarian Law and the Customary Exceptions

The protections granted to private immovable property vary based on the type of use by the occupying power, and can be classified into four categories.

1. **Seizure (requisition):** The seizure of property is a specific act, limited to the taking of property (publicly or privately owned) for temporary, military use only. Military necessity is the threshold standard for such a taking, with the presumption that upon the disappearance of the military necessity, the property will be returned to its owners. Military necessity is the general exception to all laws of belligerent occupation, and can be found, for instance, in:
 - a. The Hague Regulations, Article 23 (g): “In addition to the prohibitions provided by special Conventions, it is especially forbidden (g) To destroy or *seize* the enemy’s property, unless such destruction or seizure be *imperatively demanded by the necessities of war*” (emphasis added).
 - b. The Fourth Geneva Convention, Article 53: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered *absolutely necessary by military operations*” (emphasis added).
 - c. ICRC Study, Rule 51: “In occupied territory: (c) private property must be respected and may not be confiscated; except where destruction or *seizure* of such property is required by *imperative military necessity*” (emphasis added).

However, military necessity is not a trump card that can be played in any situation. A real military necessity must be demonstrated, and the chosen act must be tailored to the specific objective. The ICJ has reached this conclusion in several of its advisory opinions and has added that a state may not be the sole judge of whether the conditions giving rise to such a necessity have been satisfied.³⁷⁸ Swathes of land have been seized in this way by the Israeli military in order to build the Barrier, and the Israeli Supreme Court has created its own jurisprudence for examining the legality of each segment of the Barrier (see Part 5.3.1.2).

2. **Confiscation:** The confiscation of property involves a taking that permanently changes the title to the land. The confiscation of private property is strictly forbidden under Article 46 of the Hague Regulations, and the provision contains no military necessity exception.

³⁷⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, 2009, p. 178.

³⁷⁸ See for example, ICJ Wall Advisory Opinion, *supra* note 3, para. 135; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Reports 1997, p. 40, para. 51.

In addition, property transactions based on discriminatory laws enacted by the occupying power that affect the property rights of private individuals will themselves constitute a violation of Article 46. This is particularly relevant to the Israeli occupation over the occupied Palestinian territory, as restrictions on access to land may amount to illegal confiscation should they involve the effective loss of ownership rights by the private owner(s). However, it is important to note that the temporary seizure of private land by the occupying power and its use based on military necessity does not amount to confiscation (see seizure above).

A less clearly defined situation is that of Israeli declarations of land as “state land”, in other words property owned by the “state” and managed by the occupying power. The Israeli military claims that such declarations are based on the applicable land laws regarding ownership and, as such, these declarations do not alter ownership rights, but merely declare their status. However, the pattern of use of “state land” for the benefit of Israeli settlements and settlers calls the implementation of the laws, and thus these declarations, into question, as both unlawfully discriminatory and supporting illegal settlements (for more on settlements, see Part 5.1.1.3; for more on state land declarations see Part 2.8).

3. **Expropriation:** The expropriation of private land involves the transformation of private property into public property for public use. Where private land is expropriated, compensation must be granted by the government, or here, the occupying power. Expropriation of land is a central function of any government, and Article 43 of the Hague Regulations, which obligates the occupying power to preserve and maintain public order and safety, has been interpreted to permit the expropriation of private property in accordance with the local laws in force in the occupied territory prior to its occupation.

However, Article 43 of the Hague Regulations also imposes limitations on the activities of the occupying power. In the context of property and expropriation, this provision stipulates that the existing laws of the occupied territory shall not be interfered with except where “absolutely prevented”. Hence, expropriation is only possible when justified by exigent conditions, and where the change in rights is unavoidable in the preservation and maintenance of public order and safety.

It follows that international humanitarian law requires that expropriation of occupied land be conducted for the benefit of the *protected persons* (here, the Palestinians). The Israeli military and various High Court of Justice opinions have claimed that expropriation is permissible whenever it benefits *the local population* in the occupied territory, such that their interpretation might include Israeli civilian settlers along with Palestinians as beneficiaries.³⁷⁹ However, at least two Israeli Ministry of Justice legal opinions have stipulated that expropriation of private Palestinian land for the sole benefit of Israeli settlers is unlawful.³⁸⁰ Given that international humanitarian law prohibits the establishment of settlements, it is clear that expropriation that serves the settlements is illegal, based on Fourth Geneva Convention Article 49(6). Moreover, both international humanitarian and human rights law prohibit discrimination based

³⁷⁹ HCJ 256/72 *Hevrat Ha'hashmal v. Minister of Defense*, PD 27 (1) 124.

³⁸⁰ State's reply to HCJ 10611/08 *Ma'ale Adumim City Council et al. v. IDF Commander et al.* (Not published); State Attorney's legal opinion in HCJ 997/01, quoted in the State's reply in the previous case (HCJ 10611/08).

on nationality, such that expropriation of private land for the benefit of one group only, or for one group over another, within a population is a violation of these laws.³⁸¹

4. **Destruction:** Destruction of property, private or public, can occur as a natural consequence of military operations in a war or occupation situation. The military necessity exception will apply in situations of property destruction as a result of necessary military operations, such as under Article 23(g) of the Hague Regulations and Article 53 of the Fourth Geneva Convention, mentioned above under “seizure”. However, pursuant to Article 33 of the Fourth Geneva Convention, an occupying power is forbidden from carrying out reprisals and collective punishment against persons *or their property*, and under Article 56 of the Hague Regulations public property, especially municipal property serving a public religious, cultural or educational function, should be treated as private property and destruction thereof is strictly forbidden.

Moreover, the wanton, or reckless, destruction of property – whereby the destruction is carried out without regard to the private and public owners of the property, and beyond the necessary scope required to carry out the operation – is not only a violation of International Humanitarian Law, but it is a grave breach thereof. Article 147 of the Fourth Geneva Convention describes this grave breach as “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

In fact, international criminal law contains various provisions rendering such wanton, or excessive, destruction a war crime. Examples include the Rome Statute of the International Criminal Court (ICC), Article 8(2)(a)(iv); the Statute of the International Criminal Tribunal for the Former Yugoslavia, Articles 2(d), 3(d), and 3(e); the Statute of the International Criminal Tribunal for Rwanda, Article 4(f); and the Charter of the International Military Tribunal in Nuremberg, Article 6(b). Although Israel is not party to these legal documents, they declare international law and aid in the interpretation of the already existing and customary principle of unlawfulness of destruction of property in a war or occupation setting. As noted previously, customary international law is applicable to Israel.

In the West Bank, including East Jerusalem, destruction of property often takes the form of house demolitions. House demolitions in the region may be divided into three categories: military operations, punitive and administrative. Regarding demolitions of private (or public, see Part 5.1.1.2) property during military operations, the military necessity of the operation will generally justify the demolition as long as it can be reasonably claimed that the demolition was either a part of the operation or an unavoidable casualty thereof. Naturally, wanton and reckless destruction during the course of a military operation is not justified and constitutes a grave breach of international humanitarian law as described above.

³⁸¹ See for example, the case of Highway 443, which was built on land expropriated for public use and was used by both Israelis and Palestinians until it was closed by military order to Palestinian traffic following sniper attacks on Israeli cars. The highway was recently partially reopened to Palestinian traffic following a petition brought before the High Court of Justice. HCJ 2150/07 *Abu Safiya v. Minister of Defense*, Dinim-Elyon 2009(133) 867. See the Israeli Supreme Court website for an official translation of the judgment, available at http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf [last accessed 14 June 2011].

Punitive demolitions, a practice that was prevalent in the West Bank and Gaza for decades and until the first few years of the second Intifada, but which has slowed over recent years, are demolitions of the homes of those suspected to have been involved in attacks against Israeli civilians or military. Regardless of the suspected individual's guilt or innocence, punitive house demolitions are carried out extra-judicially and punish not only the suspect but also the entire residents of the home, and they therefore constitute prohibited collective punishment under Article 33 of the Fourth Geneva Convention and Article 50 of the Hague Regulations.

Administrative house demolitions, which comprise the majority of house demolitions executed by the Israeli authorities in the oPt, present a more legally complex situation. Administrative demolitions of private (and public) property are carried out against structures that lack Israeli authorisation. A system of planning, zoning, and building licensing is essential for maintaining the safety and order of any society, and thus Israel is required to ensure that such a system is in place in the oPt.³⁸² In cases in which unlicensed construction threatens public safety and order, Israel's demolition may be considered legal *per se*, despite the prohibition on destruction of protected persons' property.

However, where buildings are demolished only because they lack permits, but otherwise do not pose any threat to public safety and order, and are not demolished based on military necessity, they constitute prohibited destruction of property under international humanitarian law.³⁸³

Furthermore, safety and order also require the availability of an adequate amount of housing, as well as the ability of a community and a society overall to develop and progress, particularly in response to population growth. The fact that in Area C and East Jerusalem Israel has frozen the expansion of plans for the areas and has zoned much of the existing plans in such a way that limits building opportunities means that Israel is not upholding its duty to maintain safety and order. Additionally, a regime that limits the protected persons' rights to housing and development violates several provisions of international human rights law.³⁸⁴ Furthermore, where the planning, zoning and building system limits development for one segment of the population and allows that of another (Jewish settlers), it unlawfully discriminates according to international humanitarian and human rights law.³⁸⁵

5.1.1.2 Protection of Public Immovable Property

Basic Principles and Sources

International humanitarian law addresses public property within the framework of the basic notion that the role of the occupying power is to preserve existing public and municipal institutions as part of maintaining security, order and public life. Thus, for instance, the

³⁸² Hague Regulations, Article 43; Fourth Geneva Convention, Article 64.

³⁸³ Hague Regulations, Article 23(g); Fourth Geneva Convention, Article 53; *See also* ICRC Study, Rule 51.

³⁸⁴ *See in particular*, Article 27 of the International Covenant on Civil and Political Rights (ICCPR), and General Comment 23; Article 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR); and the right to housing under the various international human rights bodies discussed in Sec. 5.2.2.

³⁸⁵ *See for example*, Article 27 of the Fourth Geneva Convention; in international human rights law, *see also* Article 26 of the ICCPR, and General Comment 18; Article 2(2) of the ICESCR, and General Comment 20; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Hague Regulations require the occupying power to serve “only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates” (Art. 55) and to treat them as private property, where all “seizure, destruction or wilful damage” is strictly forbidden (Art. 56).

Scope of Protection Granted to Public Immovable Property under International Humanitarian Law and the Customary Exceptions

Again, the military necessity exception allowing the destruction of public (or private) property can be found in the Fourth Geneva Convention, Article 53, but the exception is as limited as it is with regard to private property, as discussed in Part 5.1.1.1.

5.1.1.3 A Note on Israeli Settlements in the occupied Palestinian territory

The transfer of civilians from the occupying power into the territory it occupies is strictly forbidden under the Fourth Geneva Convention, Article 49(6), and constitutes a grave breach of the Convention according to Article 147. This prohibition has been codified in the Rome Statute of the International Criminal Court, Article 8(2)(b)(viii), which explicitly states that the transfer may be conducted “directly or indirectly”. In other words, the occupying power does not have to physically transfer its population into the occupied territory, but rather could simply support such a transfer through financial incentives, providing a legal structure, including planning and building laws and policies, and forcibly taking control of land and allocating it to facilitate the construction of these settlements, as has been seen in many occupations, including Israel’s.³⁸⁶ Additionally, international law prohibits the acquisition of territory by force and the transfer or change of sovereignty over the occupied territory.³⁸⁷ Although one could argue that settlements are temporary, and thus not a permanent, *de jure* annexation or acquisition of land, many of them were established decades ago and thus, at the very least, they constitute a *de facto* annexation or acquisition of parts of occupied territory.

The use of public land to facilitate settlements is also arguably a violation of Article 55 of the Hague Regulations. As noted, this article limits the occupying power’s rights vis-à-vis public property to acting “only as administrator and usufructuary”. Given that the Hague Regulations intended the beneficiary of such administration to be the occupied people – in this case the Palestinians – the allocation of public lands and resources to settlements (i.e., to civilians of the occupying power) is a breach of Regulation 55, independent of the prohibition set out in Fourth Geneva Convention Article 49(6).

As such, while the laws regarding settlements in occupied territory do not explicitly deal with land and property rights, they certainly impact them, particularly when the unlawful taking of land – *both* private and public – is required in order to create and maintain them. The Israeli courts’ approach to settlements is discussed in Part 5.3.1.1.

³⁸⁶ Population transfers were also seen in Europe in World War II, which prompted the inclusion of the prohibition in the Fourth Geneva Convention. See J. Pictet (ed.), *Commentary: The Fourth Geneva Convention*, 1958, p. 283. Such government-supported transfers (whether directly or indirectly) have also taken place regarding Indonesia’s occupation of East Timor and Morocco’s occupation of Western Sahara.

³⁸⁷ See for example, Article 47 of the Fourth Geneva Convention; Pictet commentary, *supra* note 386, p. 275; and the prohibition on the acquisition of territory by force, found in the Charter of the United Nations Articles 1 and 2, and Common Article 1 (of the ICCPR and the ICESCR).

5.1.2 International Human Rights Law

International human rights law is enshrined in a wide body of United Nations treaties, conventions and resolutions, the General Comments of the assigned UN bodies to several of those conventions, and the interpretations of national and international courts. Additionally, there are many regional human rights law treaties and legal systems, such as the Inter-American Court of Human Rights and the European Court of Human Rights, and their corresponding statutes.

Human rights generally reflect an international, or regional (depending on the source), understanding of the basic rights owed to all human beings, and they are often specialised for certain groups, such as women, children, minorities and indigenous groups. The rights themselves are articulated as either positive rights (such as the right *to* adequate housing), or negative rights (such as the right to be free *from* interference with the enjoyment of property). They are considered to be rights owed to those living under the control of a particular government.

There is some debate, however, about whether occupying powers are obligated to uphold human rights standards, given that they are not the sovereign government over the said territory. It is the position of the UN Human Rights Committee,³⁸⁸ the ICJ,³⁸⁹ the European Court of Human Rights,³⁹⁰ and the British House of Lords (regarding the occupation of Iraq),³⁹¹ among others, that the standard of effective control over a territory substitutes for sovereignty and therefore triggers the extra-territorial application of international human rights law, and thus an occupying power's obligations, and that they fill in the gaps of humanitarian law. Israeli courts have been reluctant to apply human rights law to the oPt, but have begun to do so in certain circumstances, which is explored further in Part 5.3.

5.1.2.1 Protection of Private Immovable Property

Basic Principles and Sources

One of the main critiques of international human rights law is that it is often worded in general terms, such that it is often difficult to understand its aim and scope. This is particularly true of the area of property rights.

For instance, Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) of 1966, to which Israel is a party, recognizes the individual's right to be free from "arbitrary or unlawful interference with his privacy, family, *home* or correspondence" (emphasis added). This provision can be generally interpreted to suggest the right to freedom from confiscation, unwarranted destruction and even unlawful eviction. It should be noted that the full extent of the right to property is missing from the ICCPR. The reason for this

³⁸⁸ Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

³⁸⁹ See for example, ICJ Wall Advisory Opinion, *supra* note 3, p. 136, at pp. 177-181; and, *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996 (Advisory Opinion), p. 226, at p. 240.

³⁹⁰ See for example, *Loizidou v. Turkey* (Preliminary Objections), Decision of 23 February 1995, para. 62; and, *Behrami v. France, Saramati v. France, Germany and Norway* (Application No's 71412/01 and 78166/01 (unreported), 2 May 2007.

³⁹¹ See for example, *R (Al-Skeini) v. Secretary of State for Defence* UKHL 26, [2007] 3 WLR 33, 13 June 2007, available at: <http://www.parliament.the-stationery-office.com/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf> [last accessed May 2011]; *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* UKHL 58, [12.12.2007], available at: <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf> [last accessed May 2011].

omission is that the ICCPR was drafted during the Cold War, and efforts to find a definition upon which both Western and Eastern powers could agree were unsuccessful.³⁹² Thus, the ICCPR was left with a very narrow reference to property.

The same prohibition on arbitrary interference with one's home can be found in other bodies of international human rights law, such as the Human Rights Committee's General Comment 16 of 1988 (regarding Article 17 of the ICCPR); Article 12 of the Universal Declaration of Human Rights (UDHR) of 1948; and Article 16 of the Convention on the Rights of the Child (CRC) of 1990. Additionally, a prohibition on forced evictions of lawful owners from their homes is found in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, and its corresponding Committee on Economic, Social and Cultural Rights (CESCR) General Comment 7 of 1997. Israel is a party to the CRC and ICESCR, and, like all countries, has accepted the UDHR.

The European Convention on Human Rights (ECHR) contains a provision in Article 1 of Protocol 1 that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Article 8(1) of the same Convention states that "Everyone has the right to respect for...his home", which suggests a similar standard of freedom from arbitrary interference. The ECHR clearly does not bind Israel, as it is not a member state of the Council of Europe, but its provisions provide a useful reference in international law as they express a consensus among many European countries regarding specific human rights standards.

The right to housing, or more specifically to adequate housing, is a more developed area of international human rights law, which is discussed in Part 5.2.

5.1.2.2 Protection of Public Immovable Property

Basic Principles and Sources

Public property receives less attention in human rights law because the very nature of human rights law places a focus on the individual. That said, certain notions of group rights to public property, land, and natural resources can be derived from the right of all peoples to self-determination, to sovereignty over resources, and the prohibition on the acquisition of territory by force, found in the UN Charter Articles 1 and 2, and Common Article 1 (of the ICCPR and ICESCR), from which states may not derogate, even during situations of occupation.

These principles suggest a collective right on the part of peoples to public land, spaces and resources, without explicitly articulating a prohibition on outside exploitation or other use thereof. Regardless, the principle of self-determination would suggest that public institutions, buildings, forests, parks, water sources and other natural resources must not be taken for use by the occupying power, except perhaps under absolute military necessity.

³⁹² Javid Rehman, *International Human Rights Law* (2nd edition), Pearson Education Limited, Essex, 2010, p. 85.

5.2 Right to Housing and Land Use in Areas under Belligerent Occupation

The right to land use is not a particularly developed area of international law. That said, there is increasing discussion of the notion that the rights to land and property, and the prohibitions on their destruction, have little meaning – or arguably, even go unfulfilled – if access and use are not ensured. Therefore, it can be said that these provisions of law suggest, if not fundamentally require, a guarantee of access and a right to use.

5.2.1 Right to Housing and Land Use under International Humanitarian Law

Basic Principles and Sources

Regarding housing rights, Article 27 of the Fourth Geneva Convention stipulates the right of all protected persons to “family rights”, among other personal privacy, cultural, and religious rights. The ICRC Commentary on the same Article, which is the official commentary on the Geneva Conventions, states that: “The family dwelling and home are therefore protected; they cannot be the object of arbitrary interference.”³⁹³ Such interference was referred to in Part 5.1.2.1 on international human rights law pertaining to land and property rights, and it is relevant to access and use as well. Interference with one’s home (which is private immovable property), be it by seizure, confiscation, expropriation, or destruction, would, arguably, infringe upon the right to use it and in certain cases the right to housing – the right to have a home.

Additionally, the obligation on the part of the occupying power to maintain “public order and safety”, enshrined in Article 43 of the Hague Regulations, arguably entails an obligation to ensure the availability of adequate housing for the protected persons, and as such, a right to obtain housing, as it would be difficult to imagine public order and safety being successfully maintained in the occupied territory without the guarantee of legally available housing.

With regard to land use, international humanitarian law and the laws of occupation do not expressly provide for such use. However, the limitations on seizure, and the prohibitions on confiscation and wanton destruction, serve as negative rights to be free from the denial of such use for improper, or illegal, purposes.

By way of reasonable interpretation, it is fair to say that the use of planning as a tool for the limitation or denial of land use might also amount to a violation of the rights discussed in Part 5.1.2.1. Though planning in itself does not destroy property or alter property rights, it has the potential to deny the possibility of certain uses, and thus infringes upon the enjoyment of the property. However, a distinction must be made between reasonable planning, which is necessary in modern societies, and planning that deliberately curtails development or discriminates against segments of a population in designating or prohibiting a particular use of the land, and thus would arguably violate international humanitarian law’s protection of land use in an occupied territory.

5.2.2 Right to Housing and Land Use under International Human Rights Law

The positive rights to housing and land use are significantly more developed under international human rights law than under international humanitarian law. As such, we will

³⁹³ J. Pictet (ed.), *Commentary: The Fourth Geneva Convention*, *supra* note 386, p. 202.

examine them separately, despite some areas of overlap.

5.2.2.1 Housing Rights

Basic Principles and Sources

The right to housing, or what is often termed the right to *adequate* housing, is enshrined in several bodies of international human rights law to which Israel is a party. The right to an adequate standard of living has also been considered to include a right to housing. Thus, for instance, Article 25(1) of the UDHR on the right to an adequate standard of living expressly includes a right to housing, among others. Article 11(1) of the ICESCR provides the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing”. Article 27 of the CRC includes a child’s right to a “standard of living adequate for the child’s physical, mental, spiritual, moral and social development”. In its 34th Session Recommendations on the Rights of Indigenous Children, 2003, the Committee on the Rights of the Child called for full implementation of the CRC Article 2 non-discrimination clause, including measures to ensure equal access to housing, among other services and resources.³⁹⁴

CESCR, which monitors the compliance of states with the ICESCR, stated in General Comment 4 of 1991 that “the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.”

Additionally, as was mentioned previously, Article 17 of the ICCPR and the corresponding General Comment 16 of 1988, as well as Article 16 of the CRC, read a right to freedom from interference in the home into the right to respect of privacy. In other words, the right to housing includes a right to freedom from interference with one’s home.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1969, to which Israel is a party, contains a right to housing [Article 5(e)(iii)], and a right to own property alone as well as in association with others [Article 5(d)(v)], both of which have implications for land use rights as well.

5.2.2.2 Land Use Rights

Access to land and its use are generally articulated in international human rights law as implicit, rather than explicit, rights. An exception can be found in Article 5(f) of the ICERD, which provides an individual right of access to public property, stipulating “the right of *access* to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks” (emphasis added). However, the positive right seemingly articulated by this document is rooted in a negative right against discrimination in public places. Still, such a right becomes relevant in a situation of occupation in which the occupying power’s civilian population has settled parts of the occupied territory and access is restricted for protected persons.

³⁹⁴ Committee On The Rights Of The Child, 34th Session, Day of General Discussion on the Rights of Indigenous Children, Recommendations, 3 October 2003.

The personal right to access and use public and private property can also be implied through rights for which their *fulfilment* necessitates access to and use of land. For instance, the rights to an adequate standard of living, housing, food, health, education and work (enshrined in the various bodies of human rights law discussed in Part 5.1.2.1) imply the right to use the land in order to access food, and in some cultures medicine, and especially in order to find paid work, such as farming and agricultural work, including the herding and grazing of livestock.

In fact, CESCR General Comment 12 of 1999 on the right to adequate food defined “availability” as including “the possibilities either for feeding oneself directly from productive land or other natural resources”, in addition, of course, to purchasing food in the marketplace.³⁹⁵ The then UN Special Rapporteur on the right to food, Jean Ziegler, stated in a 2002 report that “access to land is one of the key elements necessary for eradicating hunger in the world”.³⁹⁶ Additionally, among the Voluntary Guidelines of the Food and Agriculture Organization of the United Nations (FAO), adopted in the 127th Session of the FOA Council, November 2004, Guideline 8B deals with this exact point, directing states to increase access to land.

The right to adequate housing has also been interpreted to include access and use of land, by necessity, such as was stated in 2005 by then UN Special Rapporteur on adequate housing, Miloon Kothari, that “[I]and is often a necessary and sufficient condition on which the right to adequate housing is absolutely contingent for many individuals and even entire communities”.³⁹⁷ CESCR General Comment No. 4, “The Right to Adequate Housing”, states that “[w]ithin many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.”³⁹⁸ Similarly, the right to own property, alone and in association with others,³⁹⁹ as well as the prohibition on forced illegal evictions of lawful owners from their property (see Part 5.2.1), suggest a right to access and use land.⁴⁰⁰

Additionally, collective land use rights – in other words, rights held by the public at large, or groups within it – may be derived from general legal principles regarding self-determination and the permanent sovereignty of peoples over their natural resources, including land, as found in the UN Charter Articles 1 and 2, and Common Article 1 (of the ICCPR and ICESCR), and, as was mentioned previously, from which states may not derogate under any circumstances, including under occupation regimes.

Specifically, indigenous people’s special status has recently been more clearly defined in international law, with the introduction of Convention 169 on Indigenous and Tribal Peoples, which was adopted by the International Labour Organization in 1989, and the UN Declaration on the Rights of Indigenous Peoples in 2007, which states that “indigenous peoples have the right to the lands, territories and resources which they have traditionally

³⁹⁵ CESCR, General Comment 12, The Right to Adequate Food (Art. 11), E/C.12/1999/5, 12 May 1999, para. 12.

³⁹⁶ Commission on Human Rights, *Report of the Special Rapporteur on the right to food, Jean Ziegler*, para. 22, U.N. Doc. A/57/356, 27 August 2002.

³⁹⁷ Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, 41, U.N. Doc. E/CN.4/2005/48, 3 March 2005.

³⁹⁸ CESCR General Comment 4, The Right to Adequate Housing (Article 11(1) of the Covenant), E/1992/23, Sixth session, 13 December 1991, para 8(e).

³⁹⁹ UDHR, Article 17(1); ICERD, Article 5(e)(iii).

⁴⁰⁰ See also ICESCR, Pinheiro Principles, UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, 2005.

owned, occupied or otherwise used or acquired” (Art 26(1)). Israel is not a party to Convention 169, and the Declaration is not binding law; however, Israel is obligated to uphold the human rights of the Palestinians as protected persons and evolving international human rights standards are certainly relevant in assessing and interpreting Israel’s specific obligations.

5.3 Relevancy of International Law to West Bank Land Litigation in Israeli Courts and Tribunals

When the Israeli military conquered the West Bank, including East Jerusalem, in June of 1967, the territory fell under the laws of belligerent occupation, which are discussed in Part 5.1.1, and are anchored in the Hague Regulations, Fourth Geneva Convention, and the more recently signed Additional Protocols to the Geneva Conventions, from 1977. As is mentioned in Part 5.1.1.1, the Israeli courts have accepted the Hague Regulations as customary international law and therefore the applicability of the relevant provisions in their entirety to the oPt, but they have not made a clear ruling regarding the Fourth Geneva Convention’s application. The official Israeli government position is that the Fourth Geneva Convention is not customary international law and does not apply to the oPt, as it was not “a territory of a High Contracting Party” before the occupation, a prerequisite for the Convention’s application (Art. 2).⁴⁰¹ The Israeli High Court of Justice, however, has never been forced to rule on this issue because the Israeli government has “voluntarily” accepted the application of the Convention’s “humanitarian provisions” without specifying to which provisions it refers.

Again, Article 43 of the Hague Regulations is viewed as the main premise and the supreme rule within the laws of occupation, obligating the occupying power to preserve the existing situation, *unless* military needs or the welfare of the occupied people, or protected persons, absolutely necessitate making changes. Given that Israel maintains a prolonged, decades-long occupation over the West Bank, including East Jerusalem,⁴⁰² it naturally has an elevated interest in the needs of its security forces and operations in the occupied territory. Thus, the jurisprudence of the Israeli High Court of Justice (whose rulings are binding on all lower courts) has tended to reflect these commentaries, creating a framework based on the balancing of two pillars: the welfare of the protected persons, with the security needs of the occupying power. This balancing act is demonstrated in numerous High Court decisions regarding the occupation and was expressly outlined, *inter alia*, in H CJ 393/82 *Jamait Askhan v. IDF Commander in Judea and Samaria*, a case in which the Court both acknowledged the application of international humanitarian law to the West Bank and to the Israeli military and civil administration over the territory, and discussed the obligation to consider both pillars.

In later rulings the High Court, in principle, reinforced and expanded the application of international humanitarian law to the West Bank and the state’s obligations toward the protected persons, holding that the state and military (the Israeli Military Commander and the Civil Administration, the occupying security forces in the West Bank) are subject not only to prohibitions intended to prevent them from harming the rights of the protected persons, but

⁴⁰¹ From 1948 to June 1967, and following the British Mandate over the territory, Jordan occupied and annexed the West Bank. It should be noted that the majority of the international community did not recognise this annexation.

⁴⁰² As previously mentioned, given that Israel annexed East Jerusalem in June 1967 and considers it a legitimate part of the State of Israel, the discussion of Israeli legal treatment of land and property rights found in occupation law will focus only on the West Bank, excluding East Jerusalem.

also to certain active duties intended to secure and protect those rights – or negative and positive duties, respectively, in the words of the court in H CJ 4764/04 *Physicians for Human Rights-Israel et al. v. IDF commander in Gaza*.

5.3.1 Relevant Israeli Jurisprudence Regarding the Application of International Humanitarian Law to Land and Property Rights in the West Bank

In the *Physicians for Human Rights-Israel et al.* case mentioned in Part 5.3, the High Court acknowledged the Israeli Military Commander and Civil Administration's duty to protect the property of protected persons in an occupied territory, based on the rules enshrined in the Hague Regulations and Fourth Geneva Convention. The High Court explicitly expressed that duty in another case from the same time period, H CJ 9593/04 *Rashad Morad, Yanon Village Council Head, et. al. v. IDF Commander in Judea and Samaria, et al.*, regarding the rights of Palestinian farmers to access and work their land. However, it should be noted that in the same case, the Court upheld the Israeli military's right to restrict Palestinian access to privately held land located within close proximity to settlements in order to protect the security of the settlers.

5.3.1.1 Settlements

Notwithstanding these rulings, the Israeli High Court of Justice has been reluctant, if not entirely unwilling, to apply international humanitarian law to the major land issues of Israeli settlements and the Barrier (in so far as it is a tool to protect settlements). On a number of occasions, the legality of the establishment and construction of Israeli settlements in the oPt under the provisions of international humanitarian law outlined in Parts 5.1. and 5.1.1 was challenged by petitioning the High Court. Those petitions were discussed here in Part 2. It should be reiterated, however, that although the Court has been willing to hear petitions challenging the legality of the means of land acquisition and/or the building within specific settlements under the local property and planning and building laws applied to the area, the Court is unwilling to hear petitions challenging the basic legality of any one or all Israeli settlements under Article 49(6) of the Fourth Geneva Convention, or international law generally. According to the High Court, this question's dominant trait was its "political" nature (rather than its legal aspect), and thus it was not for the Court to address but rather for the political branches (legislative or executive).⁴⁰³

5.3.1.2 The Barrier

Despite the ICJ's ruling in 2004 that the route of the Barrier, so long as it penetrates the West Bank, is illegal under both international humanitarian and human rights law, the High Court of Justice has resorted to its own jurisprudence in which a similar balancing act is conducted, examining each segment of the Barrier as a separate entity and issue.

Having found no relief in challenging seizure orders for the Barrier in various administrative appeal bodies of the Israeli military Central Command, the first High Court petitions on the matter were filed in 2003. Three types of petitions were filed: the first were of a general nature, filed on behalf of major human rights NGOs claiming the illegality of the project in its entirety, based on the violation of myriad rights under international humanitarian and

⁴⁰³ See for example, H CJ 4481/91 *Bargil v. Government of Israel*, 47 (4) PD 210; English translation available at: http://elyon1.court.gov.il/files_eng/91/810/044/Z01/91044810.z01.htm [last accessed June 2011].

human rights law, the violation of the prohibition on annexation, and the discriminatory permit regime that would ensue in the Seam Zone; the second were specific segment petitions, filed on behalf of individual Palestinian plaintiffs and village councils affected by the Barrier, together with Israeli NGOs, against specific sections of the Barrier (either already built or about to be built); and the third type dealt with the operation of the gates spread along various points of the Barrier, which were supposed to provide villagers with access to their land beyond the Barrier.

To this day, the High Court has not been willing to adjudicate claims of the illegality of the Barrier as a whole.⁴⁰⁴ The Court has agreed, however, to adjudicate petitions challenging specific segments. In 2004, prior to the ICJ having issued its Advisory Opinion, the High Court handed down its decision in a Barrier petition filed by the Beit Sourik Village Council and several other village councils in the Jerusalem area.⁴⁰⁵ Examining the case under its interpretation of international humanitarian law, while the Court upheld the State's authority to seize private property for military necessity, it also examined the question of proportionality – weighing the security needs against the duties owed to the protected persons – and ruled that the harm caused to property and land use rights by the route of the Barrier in Beit Sourik was *not* proportionate to the legitimate security advantage gained, and thus it should be moved to a different and less intrusive location in the area.⁴⁰⁶ To the question of proportionality, the Court replied that the injury to the local residents – primarily *access to their land*, which provides an important source of livelihood – outweighed the security benefit. Thus, the Court held that the route must be altered, even if the military objectives will not be satisfied as well by the new route as they might have been by that originally planned.⁴⁰⁷

Thus, the *Beit Sourik* case, while it dismissed the petitioners' claims that the Israeli military lacked the authority to construct a barrier within the occupied territory itself, the Court considerably limited the degree of freedom of military and governmental administrations in choosing the Barrier's route. As a consequence, many segments of the Barrier were subsequently examined by the Court according to the principles laid down in the *Beit Sourik* decision, and the routes of many more that had not yet been erected by 2004 were altered by the Israeli military even without the Court's review. More than 100 cases were filed to the High Court challenging various segments of the Barrier.

It is interesting to note that in a petition challenging another segment of the Barrier, *Mara'abe et al. v. Prime Minister of Israel et al.*,⁴⁰⁸ which included claims of the illegality of the settlement around which the Barrier was planned to be constructed and which formed the impetus for its route inside the occupied territory, the Court agreed that the effect of the route of the Barrier on the villagers' rights was *disproportionate* to the military advantage gained

⁴⁰⁴ The Israeli human rights NGO HaMoked filed a petition in 2003 challenging the legality of the Barrier as a whole, but the then Chief Justice Aharon Barak decided to hear only petitions challenging specific segments of the Barrier, examining each segment as a separate entity. The *HaMoked* case was narrowed to address only the legality of the permit system applied to Palestinians in the Seam Zone, and combined with a petition submitted in 2004 by the Association for Civil Rights in Israel. In April 2011 the High Court of Justice upheld the legality of the permit regime, based on the enduring legality of the Barrier, requiring only that the Israeli military make a few minor changes to the regime. H CJ 9961/03 *HaMoked: Center for the Defence of the Individual v. Government of Israel*; H CJ 639/04 *The Association for Civil Rights in Israel v. Commander of IDF Forces in the Judea and Samaria Area et al.*, available at <http://elyon2.court.gov.il/files/03/610/099/N37/03099610.N37.htm> (Hebrew) [last accessed 11 December 2011].

⁴⁰⁵ H CJ 2056/04 *Beit Sourik Village Council v. The Government of Israel et al.*, 58(5) PD 807. English translation available at: http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm [last accessed 20 June 2011].

⁴⁰⁶ *Ibid.*, paras. 60-62, 70-71, 76, 80.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ H CJ 7957/04, *supra* note 19.

by the State, and the Court ordered the Barrier to be rerouted. Nevertheless, the Court held that Article 43 of the Hague Regulations obligates the Israeli military to protect all civilians in the occupied territory, whether or not their presence is legal under international law. Additionally, although it did not form the basis of the Court's decision, the High Court refused to consider arguments based on Article 49(6) of the Fourth Geneva Convention and examine the legality of the settlement itself. Instead, the Court avoided addressing the legality of the settlement and its expansion under the provisions of international humanitarian law and held that: "It is not at all relevant to examine whether this settlement activity is according to international law or contradicts it as stated in the ICJ Advisory Opinion. For this reason, we will not take any stand on this question".⁴⁰⁹

5.3.2 Relevant Israeli Jurisprudence Regarding International Human Rights Law Principles on Land and Property Rights

As discussed in Part 5.1.2.1, the body of international human rights law includes, among other things, the ICCPR (1966) and the ICESCR (1966), both of which Israel signed and ratified in 1991. In the past, the State of Israel expressed a position – which numerous authorised parties in the international legal community and the relevant UN bodies reject – that this field of law applies only within the boundaries of a sovereign state in times of peace.

Recently the High Court of Justice has begun to acknowledge the application of international human rights law over certain areas in the occupied territory. For instance, with regard to bypass roads – roads built on expropriated or seized land and on which Palestinian traffic is prohibited or denied – the Court has shown more willingness to examine these policies under the framework of international human rights law, specifically under the right to freedom of movement. Examples include the petition filed by the *Association for Civil Rights in Israel* regarding Highway 443, in which the High Court made reference to the human rights law violations associated with the restrictions on Palestinian traffic⁴¹⁰ and, as recently as October 2009, a decision regarding another bypass road located south of Hebron, in which Chief Justice Dorit Beinisch stated that "sometimes, humanitarian instructions [of international humanitarian law] can be complemented by international human rights law".⁴¹¹

Similarly, in the *Mara'abe* case, the Court tentatively accepted the notion that it can be assumed that "the international conventions on human rights apply in the area [the West Bank]".⁴¹² At the same time, the Court repeated its previous line of ruling according to which public safety and order are paramount, and human rights considerations must be balanced proportionally against the security needs to be determined by the Military Commander.

These developments notwithstanding, the High Court of Justice focused its discussion of international human rights law in the previously mentioned cases on freedom of movement, above all other rights. Although the harm caused to the petitioners specifically regarding their

⁴⁰⁹ *Ibid.* at para.19. The ICJ, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, while noting that "since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49 paragraph 6", concluded on the basis of Security Council Resolution 446, that "the Israeli settlements in the Occupied Palestinian Territory (including east Jerusalem) have been established in breach of international law". See ICJ Wall Advisory Opinion, *supra* note 3, para. 120.

⁴¹⁰ HCJ 2150/07, *supra* note 381.

⁴¹¹ HCJ 3969/06 *Dir Samet Village Council Head Muhammad Abd Mahmud et al. v. IDF Commander in the West Bank et al.* Dinim-Elyon 2009(97) 1045, para. 10 of the ruling.

⁴¹² HCJ 7957/04, *supra* note 19, para. 27 of the ruling.

access to and use of their land was addressed by the Court, the specific human rights to property, housing, land use and access did not form the legal basis of the decision that the Barrier must be re-routed.

In sum, it can be said that international human rights law principles are granted increasing relevance in High Court of Justice deliberations in petitions challenging land takings, such as for the Barrier, settlements, and infrastructure designed to serve the Israeli population, rather than the Palestinians, in the West Bank. Certainly, these principles, along with humanitarian law principles, are incorporated into the Court's proportionality test, as it considers the harm suffered by Palestinian residents versus the security objectives of the land taking. Nonetheless, the Court has yet to directly apply human rights law, particularly regarding land and property rights, and it certainly has not been willing to consider human rights law as prevailing over the security needs expressed by the Military Commander over the West Bank.

GLOSSARY

Absentee property	With regard to the West Bank, property belonging to a person who fled or was forced to flee the West Bank in 1967 (not to be confused with absentee property in Israel, which is property belonging to a person who fled or was forced to flee Israel in 1948).
<i>Badal al-mithl</i>	A legal phrase meaning “true value” with reference to valuation of land under the Ottoman Land Code. It refers to the gross value of land, disregarding any increase in value due to cultivation or other actions undertaken by the holder.
The Barrier	The physical barrier built by Israeli authorities mostly within the occupied West Bank. A small part of the Barrier is a concrete wall up to eight metres high, while most of its planned 700 kilometre route is comprised of a system of fences, including a central electric fence to detect attempts to cross it.
Building permit	A document authorising the holder to construct a particular building on a particular plot of land.
Closed military zone	According to Israeli military legislation, a military commander is allowed to declare any area within Area C of the occupied West Bank as “closed”, and to forbid the entrance of people who were not present in the area before the time of its closure. The maximum penalty for violating a <i>closed military zone</i> by entering it without a special permit from the military commander is five years in prison or a fine (as of April 2010) of 202,000 ILS (about \$57,700 USD).
District Coordination Office (DCO)	Joint Israeli-Palestinian offices under the Israeli Civil Administration in the West Bank that are in charge of coordination with regard to all security and civilian matters in all areas.
Dunum	A unit of measurement equivalent to 1,000 square metres.
First Registration	A procedure of land registration of a previously unregistered parcel of land, in most cases

instigated by private initiative rather than by the state.

Green Line

The 1949 Armistice Line between Israel and the West Bank. The land within the Green Line is internationally recognized as sovereign Israeli territory.

Interim Agreement

The Interim Agreement on the West Bank and the Gaza Strip (also known as the Oslo II agreement), was signed in Washington D.C., USA, by Israel and the PLO on 28 September 1995. It established a temporary administrative division of the occupied West Bank into areas A (full Palestinian control), B (Palestinian civil control, Israeli control over security) and C (full Israeli control over security and most civil matters, including all issues relating to land). The Interim Agreement established an elected Palestinian Council, defined the respective powers and responsibilities of each side in the areas they control.

Israeli Civil Administration

The Israeli military agency responsible for all civilian aspects of life in Area C of the West Bank. Established in 1981 in Military Order No. 947, the Civil Administration is subordinated to the Coordinator of the Government Activities in the Territories (COGAT), a unit in the Israeli Ministry of Defense that engages in coordinating civilian issues between the Government of Israel, the Israeli army, international organisations, diplomats, and the Palestinian Authority.

Israeli military/Israeli Defence Forces (IDF)

The Israeli armed forces, which was officially established in 1948 following the establishment of the state of Israel.

Israeli Military Commander

The head of the Israeli military forces in the West Bank.

**Israeli Supreme Court/
High Court of Justice**

The Supreme Court is the highest instance court in Israel, and sits as an appellate court and as the High Court of Justice. As the High Court of Justice it rules as a court of first instance primarily in matters regarding the legality of the decisions of state authorities, government decisions and other public authorities. It rules on matters it considers necessary to grant relief in the interests

of justice and which are not in the jurisdiction of another court or tribunal.

Judea and Samaria

The official Israeli term roughly corresponding to the territory usually known as the West Bank.

***Mahlul* land**

Under the Ottoman Land Code, land which has been abandoned.

***Mewat* land**

Under the Ottoman Land Code, land which was not allocated to anyone, is not cultivated and is 2.5 kilometres or more away from the last house in the village/town.

Military order

A decree issued by Israeli military commanders that immediately become law in Area C of the West Bank, covering criminal and civil matters as well as security and military matters.

***Miri* land**

Under the Ottoman Land Code, land designated for agricultural cultivation. All land within a strip with a radius of 2.5 kilometres surrounding the built-up area of the village/town, as it existed in 1858 when the Code came into force, is *miri* land, whether it is cultivated or not. Cultivated land beyond the 2.5 kilometres strip are also considered to be *miri*. In *miri* land the ownership of the *raqaba* is held by the sovereign, but the right of use is given to the individual.

Mukhtar

The male head of the village, whose traditional role is to represent his village before the government. He often plays an integral role in informal dispute resolution and the application of customary law (*urf*).

Nature reserve

A protected area of importance for wildlife, flora, fauna or features of geological or other special interest, which is reserved and managed for conservation and to provide special opportunities for study or research.

Oslo Accords

A bilateral agreement between the government of Israel and the Palestine Liberation Organization (PLO) signed in Washington D.C. in September 1993 following secret negotiations in Oslo. Officially entitled the Declaration of Principles on Interim Self-Government Arrangements, the Oslo Accords established the framework for a negotiated peace process within which all outstanding “final status issues” between the two

sides would be addressed and resolved. Israel agreed to recognize PLO Charmain Yasser Arafat as its partner in peace talks, and agreed to recognize Palestinian autonomy in the West Bank and Gaza Strip by beginning to withdraw from the cities of Gaza and Jericho. The PLO in turn recognized Israel's right to exist while also renouncing the use of terrorism and its long-held call for Israel's destruction. Both sides subsequently repeatedly violated the agreement, particularly during the second Intifada.

Raqaba

Under the Ottoman Land Code, the abstract right of ownership of the land, held by the sovereign ruler on behalf of God.

Seam Zone

The area between the Barrier and the Green Line, declared a closed military zone for Palestinians.

Settlement

A Jewish civilian community built on land that was captured by Israel during the 1967 War and that is considered occupied territory by the international community. There are currently 124 "official" settlements recognized by the Israeli government and some 100 unauthorised outposts which the Israeli government does not officially recognize.

State land

Land held by the central government, not belonging to individuals or municipalities. In the occupied West Bank, there are two categories of state land: land registered in the name of the government, the result of land settlements during the Mandate period and during Jordanian rule; and, unregistered land declared by the Israeli authorities to be government property, although it was not defined by previous authorities of the area as state land.

Tessaruf

Under the Ottoman Land Code, the right to use the land.

West Bank

The West Bank, lying west of the Jordan River, is Palestinian territory that was occupied by Israel in 1967 (along with the Gaza Strip, also Palestinian, the Syrian Golan Heights and the Egyptian Sinai Peninsula). From 1948 to 1967, the West Bank was under the rule of the Hashemite Kingdom of Jordan.

