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The Levy Commission Report on the Legal Status of Building in Judea and Samaria

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**The Levy Commission Report on the
Legal Status of Building in Judea and
Samaria**

Jerusalem – 21 June 2012 – 1 Tammuz 5772

The Levy Commission Report

1 Tammuz 5772

(21 June 2012)

| | |
|------------------------|---------------------|
| To: Benjamin Netanyahu | Yaakov Neeman |
| Prime Minister | Minister of Justice |
| Jerusalem | Jerusalem |

Dear Sirs,

We have the honor of submitting this report, which sums up the work of the commission that studied the issue of building in Judea and Samaria, which was established at your instructions on 13 February 2012 (20 Shvat 5772).

Respectfully yours,

| | | |
|------------------------------|-----------------------------|-----------------|
| _____ | _____ | _____ |
| E. E. Levy | Tehiya Shapira | Amb. Alan Baker |
| (Ret.) Supreme Court Justice | (Ret.) District Court Judge | Member |
| Chairman | Member | |

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Terms of Reference

1. In proceedings before the Supreme Court on the matter of building in Judea and Samaria, the state informed the court that:

“As a rule, illegal construction situated on private land will be removed, and at the same time, the appropriate professional levels have been instructed to act towards regulating the planning status of structures located on state land; in places where such regulation will be decided upon, all this in accordance with the additional relevant considerations that apply to each and every area” (see for example the State’s reply to *H CJ 9060/08, Dar Yassin et al. v. the Minister of Def et al.*).

Pursuant to this, we have been asked by the Prime Minister and Minister of Justice to provide our recommendations on three topics (see Appendix 1):

- a. Actions to be taken where possible to legalize or remove construction – all in accordance with the aforementioned policy.
- b. To ensure the existence of a proper procedure to clarify matters related to real estate issues in the area, in accordance with the principles of justice and fairness of the Israeli judicial and administrative system, in consideration of the laws that apply in the area, including whether there is a need for changes to ensure transparency, equality, the removal of obstructions and the streamlining of processes and procedures to the extent these are required.
- c. In addition, we have been given the authority to consider and offer recommendations, at our discretion, on any other matter related to the aforementioned subjects.

2. The aforementioned tasks are extensive, and had we decided to address them all, we would have needed a very long time to do so. However, the issue that lies at the focus of the Committee’s Terms of Reference – the status of Jewish settlement in Judea and Samaria in general, and specifically, its expansion – lies at the core of a major controversy among the Israeli public and has also been the cause of international criticism. We therefore are of the view that we ought to present our recommendations to the appointing body as soon as possible. Consequently, we will deal principally with that subject.

We would like to precede our comments by clarifying that we have decided not to take any position as to the political wisdom of settlement activity as a whole, but will rather act in our capacity as legal experts whose duty it is to rule solely according to the law.

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To that end and with a view to enabling a wide range of views to be heard, we published a public call for proposals in the Hebrew, Arabic and English press (Appendix 1B), inviting all interested parties to appear before us or state their position in writing. In addition, we initiated direct appeals to various entities.

The results of this we present in this report, at the center of which is the issue of the establishment and continued existence of settlement points, which some view as new settlements, while others consider them to be “neighborhoods” of existing settlements.

These settlement points have been defined in the past as “unauthorized,” apparently due to the fact that with regard to some, their construction was not preceded by a government decision. However, some of them can also be considered to be “illegal” as they were built without approval from the planning authorities. That is the main issue that we will be pursuing here, although we will relate to other issues that we considered to be of special importance.

The Status of the Territories of Judea and Samaria According to International Law

3. In light of the different approaches in regard to the status of the State of Israel and its activities in Judea and Samaria, any examination of the issue of land and settlement thereon requires, first and foremost, clarification of the issue of the status of the territory according to international law.

Some take the view that the answer to the issue of settlements is a simple one inasmuch as it is prohibited according to international law. That is the view of Peace Now (see the letter from Hagit Ofran from 2 April 2010); B'tselem (see the letter from its Executive Director Jessica Montell from 29 March 2012, and its pamphlet *Land Grab: Israel's Settlement Policy in the West Bank*, published May 2002); Yesh Din and the Association for Civil Rights in Israel (ACRI) (see the letter from Attorney Tamar Feldman from 19 April 2012); and Adalah (see the letter from attorney Fatma Alaju from 12 June 2012).

The approach taken by these organizations is a reflection of the position taken by the Palestinian leadership and some in the international community, who view Israel's status as that of a “military occupier,” and the settlement endeavor as an entirely illegal phenomenon. This approach denies any Israeli or Jewish right to these territories. To sum up, they claim that the territories of Judea and Samaria are “occupied territory” as defined by international law in that they were captured from

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the Kingdom of Jordan in 1967. Consequently, according to this approach, the provisions of international law regarding the matter of occupation apply to Israel as a military occupier, i.e. *Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*,¹ which govern the relationship between the occupier the occupied territory, and the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August (1949)*.²

According to the Hague Regulations, the occupying power, while concerning himself with the occupier's security needs, is required to care for the needs of the civilian population until the occupation is terminated. According to these regulations, it is forbidden in principle to seize personal property, although the occupying power has the right to enjoy all the advantages derivable from the use of the property of the occupied state, and public property that is not privately owned without changing its fixed nature. Moreover, according to this approach, Article 49 of the Fourth Geneva Convention prohibits the transfer of parts of the occupying power's own civilian population into the territory it occupies.³ Accordingly, in their view, the establishment of settlements carried out by Israel is in violation of this article, even without addressing the type or status of the land upon which they are built.

In this context, we were presented with an approach by some of the abovementioned organizations, whereby they do not accept the premise that the lands that do not constitute personal property are state lands. It was claimed that in the absence of orderly registration of most of the land in Judea and Samaria, and precise registration

¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

² <http://www.icrc.org/ihl.nsf/INTRO/380>

³ Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons does demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated. The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place. The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demands. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

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of the rights of the local inhabitants, it is reasonable to assume that the local population is entitled to benefit from land that is neither defined nor registered as privately owned land. From this it follows that the use of land for the purpose of the establishment of Israeli settlements impinges on the rights of the local population, which is a protected population according to the Convention, and Israel, as an occupying power, is obliged to safeguard these rights and not deny them by exploiting the land for the benefit of its own population.⁴

4. If this legal approach were correct, we would, in accordance with our Terms of reference, be required to terminate the work of this Committee, since in such circumstances, we could not recommend regularizing the status of the settlements. On the contrary, we would be required to recommend that the proper authorities remove them.

However, we were also presented with another legal position, inter alia by the Regavim movement (Attorneys Bezalel Smotritz and Amit Fisher) and by the Benjamin Regional Council (the expert legal opinion of Attorneys Daniel Reisner and Harel Arnon). They are of the view that Israel is not an “Occupying Power” as determined by international law inter alia because the territories of Judea and Samaria were never a legitimate part of any Arab state, including the kingdom of Jordan. Consequently, those conventions dealing with the administration of occupied territory and an occupied populations are not applicable to Israel’s presence in Judea and Samaria.

According to this approach, even if the Geneva Convention applied, Article 49 was never intended to apply to the circumstances of Israel’s settlements. Article 49 was drafted by the Allies after World War II to prevent the forcible transfer of an occupied population, as was carried out by Nazi Germany, which forcibly transferred people from Germany to Poland, Hungary and Czechoslovakia with the aim of changing the demographic and cultural makeup of the population. These circumstances do not exist in the case of Israel’s settlement. Other than the fundamental commitment that applies universally by virtue of international humanitarian norms to respect individual personal property rights and uphold the law that applied in the territory prior to the IDF entering it, there is no fundamental restriction to Israel’s right to utilize the land and allow its citizens to settle there, as long as the property rights of the local inhabitants are not harmed and as long as no decision to the contrary is made by the government of Israel in the context of regional peace negotiations.

⁴ The position of Peace Now. See also B’tselem: *Under the Guise Of Legality: Israel's Declarations of State Land in the West Bank*, February 2012.

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5. Is Israel's status that of a "military occupier" with all that this implies in accordance with international law? In our view, the answer to this question is no.

After having considered all the approaches placed before us, the most reasonable interpretation of those provisions of international law appears to be that the accepted term "occupier" with its attending obligations, is intended to apply to brief periods of the occupation of the territory of a sovereign state pending termination of the conflict between the parties and the return of the territory or any other agreed upon arrangement. However, Israel's presence in Judea and Samaria is fundamentally different: Its control of the territory spans decades and no one can foresee when or if it will end; the territory was captured from a state (the kingdom of Jordan), whose sovereignty over the territory had never been legally and definitively affirmed, and has since renounced its claim of sovereignty; the State of Israel has a claim to sovereign right over the territory.

As for Article 49 of the Fourth Geneva Convention, many have offered interpretations, and the predominant view appears to be that that article was indeed intended to address the harsh reality dictated by certain countries during World War II when portions of their populations were forcibly deported and transferred into the territories they seized, a process that was accompanied by a substantial worsening of the status of the occupied population (see *H CJ 785/87 Affo et al. v. Commander of IDF Forces in the West Bank et al.* IsrSC 42(2) 1; and the article by Alan Baker: "The Settlements Issue: Distorting the Geneva Conventions and Oslo Accords, from January 2011."⁵

This interpretation is supported by several sources: The authoritative interpretation of the International Committee of the Red Cross (ICRC), the body entrusted with the implementation of the Fourth Geneva Convention,⁶ in which the purpose of Article 49 is stated as follows:

"It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race."

Legal scholars Prof. Eugene Rostow, Dean of Yale Law School in the US, and Prof. Julius Stone have acknowledged that Article 49 was intended to prevent the

⁵ <http://jcpa.org/article/the-settlements-issue-distorting-the-geneva-convention-and-the-oslo-accords/>

⁶ ICRC Commentary to the Fourth Geneva Convention, edited by Jean S. Pictet ,(1958) at pages 3-9.

inhumane atrocities carried out by the Nazis, e.g. the massive transfer of people into conquered territory for the purpose of extermination, slave labor or colonization.^{7 8}

“The Convention prohibits many of the inhumane practices of the Nazis and the Soviet Union during and before the Second World War – the mass transfer of people into and out of occupied territories for purposes of extermination, slave labor or colonization, for example....The Jewish settlers in the West Bank are most emphatically volunteers. They have not been “deported” or “transferred” to the area by the Government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent.” (Rostow)

“Irony would...be pushed to the absurdity of claiming that Article 49(6) designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that...the West Bank...must be made *judenrein* and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants. Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6).” (Julius Stone)

6. We are not convinced that an analogy may be drawn between this legal provision and those who sought to settle in Judea and Samaria, who were neither forcibly “deported” nor “transferred,” but who rather chose to live there based on their ideology of settling the Land of Israel.

We have not lost sight of the views of those who believe that the Fourth Geneva Convention should be interpreted so as also to prohibit the occupying state from encouraging or supporting the transfer of parts of its population to the occupied territory, even if it did not initiate it.⁹ However, even if this interpretation is correct, we would not alter our conclusions that Article 49 of the Fourth Geneva Convention does not apply to Jewish settlement in Judea and Samaria in view of the status of the territory according to international law. On this matter, we offer a brief historical review.

7. On 2 November 1917 –17 Heshvan 5678, Lord James Balfour, the British Foreign Secretary, published a declaration saying that:

⁷ American Journal of International Law, Vol. 84, 1990, p. 719.

⁸ Phillips, "The Illegal Settlements Myth," Commentary, 2010.

⁹ On this matter, see Alan Baker's article noted above in note 5, regarding the addition of the words “directly or indirectly” to Article 8 of the Rome Statute of the International Criminal Court..

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“His Majesty's Government view with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”¹⁰

In this declaration, Britain acknowledged the rights of the Jewish people in the Land of Israel and expressed its willingness to promote a process that would ultimately lead to the establishment of a national home for it in this part of the world. This declaration reappeared in a different form, in the resolution of the Peace Conference in San Remo, Italy, which laid the foundations for the British Mandate over the Land of Israel and recognized the historical bond between the Jewish people and Palestine (see the preamble):

“The principal Allied powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said powers, in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country. [...] Recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country.”¹¹

It should be noted here that the mandatory instrument (like the Balfour Declaration) noted only that “the civil and religious rights” of the inhabitants of Palestine should be protected, and no mention was made of the realization of the national rights of the Arab nation. As for the practical implementation of this declaration, Article 2 of the Mandatory Instrument states:¹²

“The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble,

¹⁰<http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Balfour+Declaration.htm>

¹¹ <http://www.cfr.org/israel/san-remo-resolution/p15248> Link doesn't work

¹²<http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Balfour+Declaration.htm>.

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and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.”

And Article 6 of the Palestine Mandate states:

“The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.”

In August 1922 the League of Nations approved the mandate given to Britain, thereby recognizing, as a norm enshrined in international law, the right of the Jewish people to determine its home in the Land of Israel, its historic homeland, and establish its state therein.

To complete the picture, we would add that upon the establishment of the United Nations in 1945, Article 80 of its Charter determined the principle of recognition of the continued validity of existing rights of states and nations acquired pursuant to various mandates, including of course the right of the Jews to settle in the Land of Israel, as specified in the abovementioned documents:

Except as may be agreed upon in individual trusteeship agreements [...] nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties” (Article 80, Paragraph 1, UN Charter).

8. In November 1947, the United Nations General Assembly adopted the recommendations of the committee it had established regarding the partition of the Land of Israel west of the Jordan into two states.¹³ However, this plan was never carried out and accordingly did not secure a foothold in international law after the Arab states rejected it and launched a war to prevent both its implementation and the establishment of a Jewish state. The results of that war determined the political reality that followed: The Jewish state was established within the territory that was acquired in the war. On the other hand, the Arab state was not formed, and Egypt and Jordan controlled the territories they captured (Gaza, Judea and Samaria). Later,

¹³ www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/UN+General+Assembly+Resolution+181.htm

the Arab countries, which refused to accept the outcome of the war, insisted that the Armistice Agreement include a declaration that under no circumstances should the armistice demarcation lines be regarded as a political or territorial border.¹⁴ Despite this, in April 1950, Jordan annexed the territories of Judea and Samaria,¹⁵ unlike Egypt, which did not demand sovereignty over the Gaza Strip. However, Jordan's annexation did not attain legal standing and was opposed even by the majority of Arab countries, until in 1988, Jordan declared that it no longer considered itself as having any status over that area (on this matter see Supreme Court President Landau's remarks in *H CJ 61/80 Haetzni v. State of Israel*, IsrSC 34(3) 595, 597; *H CJ 69/81 Bassil Abu Aita et al. v. The Regional Commander of Judea and Samaria et al.*, IsrSC 37(2) 197, 227).

This restored the legal status of the territory to its original status, i.e. territory designated to serve as the national home of the Jewish people, which retained its “right of possession” during the period of the Jordanian control, but was absent from the area for a number of years due to the war that was forced on it, but has since returned.

9. Alongside its international commitment to administer the territory and care for the rights of the local population and public order, Israel has had every right to claim sovereignty over these territories, as maintained by all Israeli governments. Despite this, they opted not to annex the territory, but rather to adopt a pragmatic approach in order to enable peace negotiations with the representatives of the Palestinian people and the Arab states. Thus, Israel has never viewed itself as an occupying power in the classic sense of the term, and subsequently, has never taken upon itself to apply the Fourth Geneva Convention to the territories of Judea, Samaria and Gaza. At this point, it should be noted that the government of Israel did indeed ratify the Convention in 1951, although it was never made part of Israeli law by way of Knesset legislation (on this matter, see *CrimA 131/67 Kamiar v. State of Israel*, 22 (2) IsrSC 85, 97; *H CJ 393/82 Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF Forces in the Area of Judea and Samaria*, IsrSC 37(4) 785).

¹⁴ According to Article II (2) of the armistice agreement with Jordan: "...no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.

According to Article IV(9) of the agreement: The Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto.

¹⁵ <http://www.jewishvirtuallibrary.org/jsource/arabs/jordanresolution.html>

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Israel voluntarily chose to uphold the humanitarian provisions of the Convention (*H CJ 337/71, Christian Society for the Holy Places v. Minister of Defense*, IsrSC 26(1) 574; *H CJ 256/72, Electricity Company for Jerusalem District v. Minister of Defense et al.*, IsrSC 27(1) 124; *H CJ 698/80 Kawasme et al. v. The Minister of Defense et al.*, IsrSC 35(1) 617; *H CJ 1661/05 Hof Aza. Regional Council et al. v. Knesset of Israel et al.*, IsrSC 59(2) 481).

As a result, Israel pursued a policy that allowed Israelis to voluntarily establish their residence in the territory in accordance with the rules determined by the Israeli government and under the supervision of the Israeli legal system, subject to the fact that their continued presence would be subject to the outcome of the diplomatic negotiations.

In view of the above, we have no doubt that from the perspective of international law, the establishment of Jewish settlements in Judea and Samaria is not illegal, and consequently, we can now proceed to consider this issue from the perspective of domestic law. We will now commence with an analysis of the relevant planning and zoning laws.

The planning and zoning authorities in Judea and Samaria and the principles of the planning and construction laws

10. Pursuant to of Article 2 of the *Proclamation with Regard to the Order of Government and Law (Judea and Samaria) (2), 5727- 1967*, the law in force in June 1967 was applied in Judea and Samaria, and from this point forward was based on a number of tiers: Jordanian law, Mandatory and Ottoman law, which had been in force until June 1967, security legislation and its various amendments, and rulings of the courts. The Planning and Construction Law in force in the area from 7 June 1967 on was the Jordanian *Cities, Villages and Building Planning Law (No. 79) of 1966* (hereinafter also “the Jordanian Planning Law”). In view of the need to engage in planning and construction in the held territory, and in accordance with Israel’s international commitment to maintain public order, *Order Concerning the Planning of Cities, Villages and Buildings (Judea and Samaria) (No. 418), 5731-1971* (hereinafter: “Order 418”) was issued, which amended the provisions of the Jordanian law and adapted the planning and construction laws to the prevailing reality in Judea and Samaria.

To this we add that the Israeli law, with all its various tiers, is more advanced than the law that applies in Judea and Samaria. Although the Israeli law serves as a source for comparison, it is not a binding norm.

11. The Jordanian Planning Law created a hierarchy of three main planning levels: a Higher Planning Council, a Regional Planning Committee and a Local Planning Committee. The establishment of these institutions and the authority invested in them are governed by Articles 5, 6 and 9 of the law. Further to the aforementioned planning and zoning authorities, the Jordanian Planning Law also provides instructions for the establishment of a Central Planning Bureau, whose powers are set out in Article 7 of the law. Inter alia, the Planning Bureau is required to provide technical and professional assistance to the planning and zoning authorities, prepare district and city planning schemes for the Regional Planning Committee and draft model bylaws.

Pursuant to 2 (2) of Order 418, the structure of the planning and zoning authorities in Judea and Samaria was altered so as to be consistent with the normative regime that was in place. Inter alia, all the authority of the District Planning and Construction Committee was transferred to the Higher Planning Council (hereinafter: “the HPC”). As a result, the authority of the HPC includes both the authority granted to it by Article 6 of the Jordanian Planning Law (which defines the authority of the Higher Planning Council), as well as the authority of the District Committees specified in Article 8 of the aforementioned law. Pursuant to the provisions of Article 8 (4), the HPC, in its capacity as the District Committee, also holds all “the authority and

functions of the Local Committee – in regard to the regional planning space and the villages situated in the district in which the said District Committee was established” (parallel authority). Nevertheless, according to the HPC, these committees have priority in the treatment of subjects under the authority of the District Committees, and consequently, intervention in building matters on the local level, by means of taking on the role of the authorized local committee, would be the exception. This mechanism may be set in motion when two cumulative conditions are present: a failure on the part of the local authority to fulfill its legal responsibility or collaboration with an action that is a breach of these responsibilities; and actual damage caused to public or private interests.

The subcommittees of the Higher Planning Council

12. Pursuant to Order 418, it was further determined that the HPC was authorized to establish subcommittees and delegate part of its authority to them. Accordingly, it was decided to establish subcommittees and transfer the authority of the district committees to them. Thus, the HPC delegates part of its authority to an Oversight Subcommittee, Settlement Subcommittee, Objections Subcommittee, Roads Subcommittee, Environment Subcommittee, Mining, Quarrying, Railroads and Airfields Subcommittee and a Planning and Permits Subcommittee.

13. In addition to the Israeli local councils established in Judea and Samaria, also established were special planning committees authorized to exercise part of the authority of the local committees in their planning space. In accordance with the legislation in force, the granting of planning authority to the special planning committees is carried out as part of a three-stage statutory scheme: declaration of the planning space, i.e. defining the geographic space that delineates the area in which the local planning committee is constituted, in accordance with Article 2 (a) of Order 418; upon completion of the aforementioned stages, the special planning committee must agree, pursuant to Article 2 (a) of Order 418 so that it can exercise its authority as defined in its terms of reference in regard to the geographic space as defined in the declaration of planning space. On 15 March 2008, the Head of the Civil Administration signed an Order Concerning the Declaration of Planning Spaces (Local Councils and Regional Councils) (Judea and Samaria) (5768-2008), which represents the most up-to-date declaration of planning spaces of the Israeli local councils in Judea and Samaria. On the same day, the Head of the Civil Administration signed the appointment of Special Planning Committees (Local and Regional Councils) (Judea and Samaria) (5768-2008), in the context of which the local councils and regional councils were appointed to serve as special planning committees in their planning spaces. Their terms of reference determined that the

members of the special committees are all the members of the council in the relevant local authority.

Objections

14. According to Article 21 (1) of the Jordanian Planning Law, any individual, authority, official or private institution so interested may submit their proposals for or objections to the master planning scheme to the chair of the Local Planning Committee. The Local Planning Committee considers all the objections submitted to it and sends its recommendations to the Regional Planning Committee. The Regional Planning Committee considers the objections based on the recommendations and sends the subjects to the HPC for the final decision. The HPC may authorize the plan and validate it as is, or amend it based on its discretion. Should the plan be amended, it can be ordered to be re-deposited for a period of one month, if as a result of the amendment, harm may be caused to a party that would not have been caused had it not been amended. According to Order 418, objections are considered by the HPC's Objections Subcommittee.

Receiving a permit

15. One of the chief functions of the local committee is to consider requests for building permits. In broad terms, the rule in this matter is determined by Article 34 (1) of the law, which states that no work or any kind or use of the land requiring a permit may be begun until such a permit has been received. Building permits are subject to the provisions of the law, regulations, detailed master planning schemes and re-division, and they must meet the requirements of the Special Planning Committee (or licensing authority), each case on its own merits. Article 34 (2) states that no permits may be issued for an area that has been declared a planning area but for which no plan has yet been authorized, except under the temporary oversight of the district committee. This is done in order to ensure that the construction of a building does not conflict with the provisions and goals of an existing or future planning scheme.

Works requiring a permit

16. Article 34 (4) of the Jordanian Planning Law lists all the various works that require a permit, including the erection of or changes to a building, the expansion, repair or destruction of a building, earthworks and excavation deep in the earth or aboveground, the installation of sanitation appliances and elevators in high rises as well as the use of the land or the external part of the building for advertising purposes. In addition to the list of works that require a permit, the latter part of Article 34 (4) also lists the types of works that do not require a permit, including the implementation of works by the authorities to improve roads, underground infrastructure works, as well as the use of the land for agricultural purposes in the areas designated as such.

The Jordanian Planning Law contains no demand for a “completion certificate,” in the sense of Article 21 of the *Planning and Building Regulations (Application for a Permit, Terms and Fees) 5730-1970*. Nevertheless, in order to settle the matter, on 25 January 2007, Order 1584 was issued, and pursuant to this order, ordinances were enacted concerning the planning of cities, villages and buildings (connecting buildings to electricity, water and telephone). The order and ordinances enable the Local Planning and Building Committee to oversee construction from the stage of the start of implementation after a building permit has been issued until the completion of construction.

Appeals

17. Article 36 of the Jordanian Planning Law determines that any person to whom harm has been caused as the result of a permit being given to another person, or due to the refusal of the local committee to issue a permit for building or land planning or the implementation of construction work or a permit required according to an order, regulations, instructions or any terms determined in accordance with this law, or as the result of a given permit that is restricted under certain conditions, and in the view of the applicant or any other person to whom harm has been caused, the decisions of the committee violate his rights – is entitled to request that the Local Committee move the consideration of his request to the District Planning Committee, and that it must do so within one month of the day that the refusal notice was received.

Administrative Demolition

18. Article 38 (7) of the Jordanian Planning Law permits entering real estate and carrying out administrative demolition without a judicial injunction. According to Jordanian law, a demolition order can include an order to halt works as well as an order to restore a situation to its previous state. Furthermore, according to the Jordanian law, the very fact of building without a permit does not constitute a criminal offense; this is committed only after the offender has violated a work-stop order. However, Order No. 1585 issued by the Military Commander of the area on 25 January 2007 (6 Shvat 5767) (City, Village and Building Planning Order [Amendment 19] [Judea and Samaria]), determines that anyone who carries out work or construction that requires a permit according to the provisions of the law without first receiving such a permit is subject to a fine or a two-year prison sentence; and for a continuing offence – a further fine or further imprisonment. Similarly, punitive provisions were included for anyone who deviates from the building permit that was issued. It further determines that the court may order the demolition of that which had been built without or in deviation from a permit, and that a further criminal proceedings may be initiated against a person who does not comply with this order.

19. The picture as it emerges from what has been described thus far is that Judea and Samaria has planning and zoning authorities invested with the authority to initiate and consider detailed construction plans, and to validate those plans provided they meet legal requirements. These institutions have also been empowered to consider objections, grant construction permits and take action to prevent unlawful construction.

20. Unlawful construction is of course construction carried out without a permit granted by the planning authorities. In order for a permit of this kind to be granted to an individual or corporation, they must present a plan. This plan will be considered on its merits by the planning authorities after the applicant has proved that he owns the rights to the land and that the plan does not contravene the detailed plan that applies to the land. This is the law in Israel and this is (almost) the law that applies in Judea and Samaria. The main difference is due to the fact that the State of Israel has been holding onto Judea and Samaria since the Six Day War, in view of the desire of parts of the population to live there; and on the other hand, the desire and obligation on the part of the State of Israel to maintain building oversight there, settlements were established up until 1979 as a **security need**. The land designated for that purpose was seized by “military order,” with no distinction made as to whether the land was state or private land. Thus, for example, (in *HCIJ 606/78 Saliman Taufiq Ayub et al. v. Defense Minister et al.*, IsrSC 33(2) 113), the High Court of Justice refrained from extending legal relief to the petitioners, the owners of the land, who opposed the seizure of their land for the purpose of building a Jewish settlement,

because it was found that although it was a civilian settlement, it had been established due to a military need. In the late 1970s, the approach to settlement on this issue changed in wake of the ruling in the case of *Elon Moreh (HCJ 390/79 Izzat Muhammad Mustafa Duweikat et al. v. the Government of Israel et al., IsrSC 34(1) 1*, which determined that private land belonging to Palestinians could not be seized for the purpose of building Jewish settlements, unless the seizure stemmed from a security need, and in the language of the court: “In its ruling (HCJ 606/78), this court did not provide an *a priori* legal seal of approval for all seizures of private land for the purpose of civilian settlements in Judea and Samaria, but rather each case must be examined whether military needs, as this term must be interpreted, indeed justified the seizure of private land.”

The decisions of the government related to settlement in Judea and Samaria relevant to this subject

21. In view of the complexity of the issue of Jewish settlement in Judea and Samaria, and in wake of the ruling in the case of *Elon Moreh*, the government passed a decision in November 1979, that stated that it was resolved: “To further the expansion of the settlement of Judea, Samaria, the Jordan Valley, Gaza District and the Golan Heights by adding population to the existing communities and by establishing new communities on state-owned land” (see Decision 145, Appendix 2). To complete the picture, we will add that on the issue of Jewish settlement in Judea and Samaria, the government made a number of further decisions over the years, some of which we will cite here:

- I. In May 1984, the Ministerial Committee for Settlement determined that: “*Expansion within the continuous area* of an existing or future settlement established following authorization from the Ministerial Settlement Committee does not require a special decision by the Committee as long as it receives professional authorizations from the Ministry of Justice in all matters related to ownership of the land; from the Ministry of Construction and Housing, the Ministry of Defense and the settling entities of the World Zionist Organization regarding all subjects related to construction (settlement and the Higher Planning committee)” (emphasis added) see Decision 640, Appendix 3).
- II. In the decision made in July 1992 (No. 13) (Appendix 4), it was determined that “The implementation of previous decisions regarding the establishment of settlements that have not yet been carried out will require renewed approval from the government.”

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III. In November 1992, it was decided to halt construction activities in the Jewish communities, with the exception of private construction of residences in existing communities based on a detailed master plan, as long as the infrastructure and construction did not involve expenditures from the state budget, as stated in Decision 360 (Appendix 5).:

It has been resolved:

- a. To authorize the decision of the Minister of Construction and Housing [...] regarding the halting of construction as detailed in Appendix 1 attached here, and the decision of the minister regarding the exchange of location grants with loans as specified in the [...] attached [...] appendix...
- b. To authorize the halting of construction activities in the Israeli communities in the area of Judea, Samaria and the Gaza district that were carried out pursuant to prior government decisions that are retained in the government secretariat, in accordance with the said ministerial decision...

[...]

- d. Private construction for residence will be permitted within the bounds of the existing Israeli communities in Judea, Samaria and the Gaza District based on detailed master plans that have been legally validated, as long as the infrastructure and construction do not involve expenditures from the state budget.
- e. (1) The procedures involving master plans not yet validated up to the day when this decision was made in regard to the Israeli communities in Judea, Samaria and the Gaza District will be halted, unless a special review board decides otherwise.

[...]

- f. All new planning permits (and allocations of land for construction on state land) in these areas require authorization from the said special review board.
- g. The content of the previous statements will be established respectively in security legislation in Judea, Samaria and the Gaza district.
- h. The enforcement of the above policy will be carried out by a supervisory unit.”

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IV. Pursuant to a decision passed in January 1995 (No. 4757), a ministerial committee was established to oversee the construction and expropriation of land in the area of Judea, Samaria and the Gaza District. A decision made in August 1996 (No. 150) (Appendix 6) determined that all construction and land allocation required the authorization of the Minister of Defense, and that his authorization would be required for consideration and validation of a master plan, and in the original:

- a. In the area of settlement in Judea, Samaria and the Gaza District [...], the government ministries will act as follows and subject to the authority granted to the defense system and Minister of Defense in this area, and in the context of the various sections of the authorized state budget – all in accordance with the instructions of the Prime Minister.
- b. Any new permit for planning and allocating land for construction on state lands in these areas will be carried out only after receipt of authorization from the Defense Minister.
- c. The Planning Committee in these areas will not consider a master plan unless it has received authorization from the Defense Minister, and will not validate such a plan, except with his authorization.

[...]

- f. Further to the above, subjects involving overall policy related to settlement, the paving of roads and proposals to establish new communities will be presented for the consideration and decision of the government.”

V) In March 1999, Decision 175 was passed, replacing Decision 640, which determined that the expansion of an existing or future community established in accordance with a government decision, or of a legally recognized community, does not require a government decision (Appendix 7). At the same time, it was determined that the abovementioned expansion of a settlement in Judea, Samaria and Gaza would require the authorization of the Defense Minister, with the knowledge of the Prime Minister. Although the words “expansion in continuous territory,” which were included in Decision 640, were omitted from this decision, in actual fact, this decision takes a stricter approach to settlement, inasmuch that from this point forward, every expansion required the authorization of both the Defense Minister and Prime Minister, whether or not it was planned on continuous area.

VI) On May 25, 2003, the government decided to approve the Prime Minister's statement that Israel would act in the spirit of the "Road Map," and concerning settlement, it said: "There will be no involvement in issues related to the final status settlement; inter alia, there will be no consideration of settlement in Judea and Samaria (with the exception of the freeze of illegal settlements and outposts); the status of the Palestinian Authority or its institutions in Jerusalem or any other issue which is essentially a matter for the final status settlement" (see Decision 292, Appendix 8)

22. In wake of the petition to the High Court of Justice – HCJ 390/79 (the case of Elon Moreh), which, as noted, forbade the seizure of privately owned land for the purpose of establishing Jewish communities not motivated by security needs, it was necessary to identify the lands that could be declared state land. This was not difficult in those places in which land that had undergone regulatory processes was involved, and in which the property rights to them were documented in land registry books. The task was considerably more difficult when lands that had not undergone regulatory processes were involved, which was the situation for the majority of the territory of Judea and Samaria. In order to overcome this obstacle, the state authorities decided on a course of action known as a "survey process," (*seker*) which included an examination of aerial photographs in order to confirm or refute claims regarding the cultivation of land by Palestinian inhabitants (one of the ways to acquire rights to the land), a tour of the areas intended for designation together with the mukhtars of the nearby villages. The subject was made public and a date was set for the submission of objections. This survey process has not yet been completed to this day, and this is one of the vulnerabilities of quite a number of the outposts subject to examination.

At the same time, it should be emphasized that that even after a way was found to overcome the issue of property ownership in the land upon which a Jewish community was planned in Judea and Samaria, the developers still faced a number of hurdles, which Supreme Court President Barak pointed out in *HCJ 5853/04 – Amanah Gush Emunim Settlement Movement et al. v. Prime Minister et al.*, IsrSC 59(2) 289, as follows: "... The preparation of an outpost requires the completion of procedures on the political level (a government decision to establish a new community or neighborhood), the municipal level (the issuing of an order by the military commander regarding the community's municipal affiliation), and the planning level (the deposit of a master plan and its approval along with receipt of building permits from the relevant planning authorities)."

It would appear that concerning the construction we were asked to consider in our Terms of Reference these conditions were not all met, and in some cases, none of the conditions was present. Consequently, the possible conclusion is that

the construction was carried out unlawfully and without authorization. Can construction be legalized after the fact? That is a question we will try to answer in this document, but first and foremost, we will address the claim that the fact that no decision by the government or any representative of the government preceded the construction under considerations here is unassailable. Before addressing this, we will turn our attention to a legal issue that may be relevant to the subject before us here, and we are referring to an “administrative promise,” as it is interpreted by the courts.

An administrative promise

23. The accepted doctrine is that an administrative promise given by someone invested with authority with the intent that it have binding legal force, and that was understood as such by the person to whom it was given, and which is detailed and feasible, can serve to obligate the authority and as grounds for intervention by the High Court of Justice to uphold it. This is unrelated to estoppel as a result of reliance on the promise, and even without the situation of the promisee being aggravated (see Eliad Shraga and Ro'i Shahaar – *Administrative Law*, Book 3, p. 313; *H CJ 5081/91 Petrochemical Industries, Ltd. v. the State of Israel*, IsrSC 47 (2), 773, 779; *H CJ 298/70 Pollack v. Minister of Industry and Trade* IsrSC 25(2) 8, 3; *H CJ 250/78 Aviyov v. Minister of Agriculture* IsrSC 32(3) 742, 749; *H CJ 534/75 Israel Hoteliers Association v Minister of Tourism*, IsrSC 36(1) 357; *H CJ 580/83 Atlantic v. Minister of Industry and Trade*, IsrSC 39(1) 29, 35; *H CJ 4225/91 Godovitz v. Government of Israel*, IsrSC 45(5) 781; *H CJ 142/86 Dishon v. Minister of Agriculture*, IsrSC 40(4) 523, 528; *H CJ 4383/91 Shpakman et al. v. Herzliya Municipality*, IsrSC 40(1) 447; *CivA 9073/07 State of Israel – Ministry of Construction and Housing v. Apropim Shikun Veyizum (1991), Ltd.* unpublished)

H CJ 135/75, 321 Scitex v. Minister of Trade and Industry, IsrSC 30 (1) 673, stated on this subject that it is a principle of paramount importance that a public authority must act in good faith, i.e. act honestly and fairly in its dealings with the public. If on the individual level, according to Section 12(a) and 39 of the Contracts Law (General Section) 5733-1973, an individual must behave in good faith when drawing up a contract and upholding the obligations that arise from that contract, this is all the more so in the case of a public authority dealing with the public. When a promise given by a person of authority in the context of this legal authority is involved, with the intention that this promise have legal standing and which the other side accepts as such, public fairness demands that the promise be carried out in practice when the official that gave the promise has the ability to fulfill it, even if the situation of the citizen is not worsened. The credibility of the government in the eyes of the public is far more important than the possibility of being given the opportunity to change his

mind or go back on the promise or pledge he took upon himself vis-à-vis the citizen, in the context of his legal authority and practical ability to carry it out.

In *H CJ 135/75 Aharon and Yehudit Sarig et al. v. Minister of Education and Culture, the Director-General of the Ministry of Education and Culture and the Yehuda Regional Council*, the court explained: “The abrogation of a governmental promise juxtaposes, one opposite the other, two conflicting interests, and the ability of the authority to default on a decision or deed, while defaulting on a promise to an individual or to the public, is conditional, in any given case, on the proper balance between these two conflicting interests. On the one hand, there is the need to uphold the authority of the governmental authority to rectify a mistake or aberration, which, left untouched, would be improper, or even harmful to the public; and, on the other hand is the need to ensure the stability of action of public administration, stability being one of the conditions for the normality of administrative regulations and an important guarantee for the preservation of the citizen’s trust in the governmental authority (*H CJ 799/80 Shlalam v. Licensing Clerk. Pursuant to the Shooting Law, 5709-1949, Petah Tikva District, Ministry of the Interior, IsrSC 36(1)*, remarks by Supreme Court President Barak on p. 331); and *H CJ 787/86 Elgrabli et al. v. Mayor of Rehovot et al.*, IsrSC 41(1) 225, remarks by Supreme Court President Shamgar on p. 240). Indeed, an authority that changes its mind as it breaches a promise it made to an individual or to the public is in fact attesting to the fact that it did not properly consider the content and implications of its first decision in a timely manner. And a fickle authority, one that makes rash promises and hurries to break promises, does not meet the duty imposed upon it to exercise its governmental authority reasonably and in good faith, and through its own actions, undermines not only the trust of the harmed promisee but also the trust of the public as a whole.

24. The proof of the existence of a governmental promise must be clear and unambiguous, and the conditions for such a promise must be as follows:

- 1) **The promisor had the authority to make the promise** – In the ruling, the view was expressed that “When examining state authorities in their actions vis-à-vis the individual, considerable weight should be given to the fact that when the government, its behavior and actions – through one of its branches or through a party acting on its behalf – are involved, this may create a situation that is binding upon all agents of the government, no matter who they are. The individual facing the governmental, bureaucratic apparatus should not have to contend with the internal division of authority among the various office holders, and the state should not be allowed to repudiate the actions and promises of its employees, even if they were given in the absence of proper authority to do so” (*CivA 2054/98 Roichman Brothers Samaria Ltd. v. State of Israel*, IsrSC 56 (2), 433, 455).

- 2) **The intention to give the promise binding legal validity** – The ruling that recognized the validity of an administrative promise conditioned it on terms that are essentially similar to those that underlie the validity of a contract – “firm resolve” and “specificity” (*CivA 6620/93 Ramat Gan Municipality v. Golomb* IsrSC 51 [30] 363, 370; *H CJ 4915/00 Reshet Media and Production Company [1992] Ltd, v. State of Israel*, IsrSC 54 [5] 451, 477). In other words, in order for an administrative promise to become binding, the promisor must have intended to give the promise legal validity and it must be sufficiently explicit (see also the above case of *Sci-Tex*; A. Stein, “An Administrative Promise,” *Mishpatim* 14 255 [1985]).
- 3) **The promisor has the ability to fulfill the promise** – A condition for obliging the administrative authority to fulfill a promise made by it is that it is possible to fulfill the promise (*CivA 2019/92 Ministry of Construction and Housing v. Zisser*, IsrSC 52 [3] 223, 208). From this it follows that when a promise is given that involves an overstepping of authority or a lack of legality, the administrative authority cannot be obliged to keep it (the case of *Uman Knitting Factories, Ltd.*; *CrimA 2910/94 Yefet v. State of Israel*, IsrSC 56 [2] 221, 366). On this matter, we will further clarify that an authority cannot make a promise not to fulfill its public duty or exercise its governmental authority, and nor can it waive or constrain the mandates granted to it by law.

25. An example of the application of the principles enumerated here can be found in the abovementioned *H CJ 5853/04*, which considered a petition against an IDF commander’s declaration of the Givat Aperiaon outpost in Judea and Samaria as a “defined area.” The petitioners argued that they had been given a promise that the outpost would be removed from the list of outposts designated for immediate evacuation, and that a survey process (“*seker*”) had been carried out to examine the legal status of the area on which the outpost stood. It was determined that:

“The one making the claim (that an administrative promise was made) must prove that this promise was given and that it was explicit, clear and indisputable, as required of a legal commitment that does not fall within the bounds of a declaration of intent (*H CJ 585/01 Kelachman v. Chief of Staff Lt. Gen. Shaul Mofaz*, IsrSC 58(1). 694, 706). Similarly, the promise must have been given by the organ authorized to give it (case of *Sci-Tex*, p. 676; case of *Uman Knitting Factories, Ltd.*, p. 474). In the petition before us [...], Respondents 1-2 had indeed decided (on Oct. 27, 2004) to remove the outpost from the list of outposts designated for immediate evacuation. Nevertheless, this decision, in of itself, should not be interpreted as a governmental commitment to refrain from evacuating the

outpost. The Respondents noted, on this matter, that the reason behind the decision to remove the outpost from the list of outposts designated for immediate evacuation was the desire to reach an agreement with the petitioners regarding its voluntary evacuation. We have not been persuaded that the fact of the removal of the outpost from this list represents, as the petitioners argue, a governmental promise that the Respondents would refrain from evacuating it in the future, and certainly not that they intended to legalize it. [...] As for the commitment made by Respondents 1-2 and their employees to take action to advance planning procedures aimed at establishing a legal settlement on the area of the outpost, the petitioners learned of the existence of this promise from the start of the implementation of the land-survey process and the promises made by Respondents 1-2 and their employees to take action to legalize the outpost and make it a legal settlement. The documents the petitioners attached to their petition show that Respondent 2 had decided (on 19 February 2003) to start a land-survey procedure. Nevertheless, the factual infrastructure presented to us does not point to the existence of a governmental promise to carry out a land-survey procedure. The decision to carry out this procedure was made as part of Respondent 2's policy considerations, rather than as part of an agreement or promise made to one or more of the petitioners. [...] In any case, although the existence of a commitment to start a land-survey procedure does not point to an administrative promise to take action to establish a legal settlement on the area of the outpost [...], the survey of the outpost's land is not the same as regularizing the outpost (see and compare *HCJ 9195/03 Weinstock v. Supervisor of Government Property in the Gaza Strip* [unpublished]), while the regularization of the outpost is conditioned on the outcome of the examination of the legal status of the area of the outpost in the context of the land survey. Nevertheless, even if this examination should show that the outpost's land is owned by the state or by Israelis, this in of itself does not turn the outpost into a legal settlement. [...] Because this is the case, we have not been persuaded that the promises claimed by the petitioners are indeed based on a governmental commitment that prevents Respondent 3 from designating the outpost's area as a defined area (see and compare: *HCJ 5245/03 Laov v. State of Israel* [unpublished]).”

26. However, even if the administrative promise fulfilled all of these requirements (that the promisor had the authority to give it; that there was intention to give the promise legal validity; that the promisor had the ability to fulfill it), there still remains the question of whether the authority had legal justification to renege on its promise, because then it would override the “contractual” element in the administrative promise (see *HCJ 15/75* as above, 78/594 on p. 321; *Uman v. Minister*

of Industry, Trade and Tourism, IsrSC 32 [3] 469; HCJ 480/83 as above; HCJ 142/86 as above; *HCJ 636/86 Nahlat Jabotinsky v. Ministry of Energy and Infrastructures*, IsrSC 46 [2] 806; HCJ 4383/91 as above.) Reneging on a promise made by an administrative authority involves a conflict of interests: the public interest in rectifying a wrong or aberration in the actions of the authority as it is reflected in an administrative promise, on the one hand; and the public interest in flexibility on the part of the authority and the desire not to tie its hands and prevent it from acting, on the other. However, there is a further public interest in stability and certainty regarding the actions of the administrative authority (*CivA 2019/92 Ministry of Construction and Housing v. Zisser*, IsrSC 52 [3] 208, 220; the interest in public fairness and the preservation of public trust in the governmental authorities (*HCJ 5178/04 Central Galilee College of Science and Technology v. Ministry of Education, Culture and Sports*, unpublished); the interest regarding the promisee's personal expectation and the harm to be caused to him, and in the cases in which the promisee relied on the promise – the interest of the reliance too.

27. The precise scope and limits of the boundaries governing the ability of the authority to renege on a promise given by it have not been defined (*CivA 433/80 IBM Assets in Israel Ltd. v. Director Property Tax and Compensation Fund, Tel Aviv*, IsrSC 37 [1] 337). Nevertheless, it would appear that certain guiding principles can be extracted from the ruling, based on logic and common sense. One such principle has its origins, as noted, in the public interest “not to tie the authority's hands to the extent that it is unable to carry out its functions to benefit the public as the times, circumstance and needs change” (HCJ 580/83 as above; *HCJ 840/97 Sbeit et al. v. Government of Israel*, IsrSC 57 [4] 813, 870; *HCJ 4383/91 Shpeckman v. Municipality of Herzliya*, IsrSC 46 [1] 447, 454). Another principle is that the claim of an error is not always sufficient to justify the cancellation of a decision that an authority seeks to go retreat from or rectify (*CivA 417/74 Land Betterment Taxes Director Netanya v. Pali*, IsrSC 29 [1] 681; and the High Court of Justice ruling in the case of Shlalam, as above); a further principle involves the fact that the chances that an authority's claim that an inadvertent bureaucratic error was involved will be heard are far greater than the chances that its claim that “a clerk carried out the policy of the office unwisely or wrongly, or used his discretion in an unreasonable manner” will be heard (Civil Appeal 433/80 as above, on p. 351). We will now return to the question we posed in Section 22 of this report – whether illegal construction can be legalized after the fact – and to address this question, we will first consider the process of allocating land to settlements and their construction.

The allocation of land and construction in Judea and Samaria

28. In most cases, land for the establishment of a community or rural settlement in Judea and Samaria is allocated by the Custodian of Government and Abandoned Property to the Settling Entity. The allocations were made in principle to the World Zionist Organization (WZO), which is a “settling institution” as this is defined in Section 1 of the Law of Candidates for Agricultural Settlement 5713-1953. Through its settlement division, the WZO allocates land to regional or local councils in Judea and Samaria or to rural settlements located inside the boundaries of the regional councils. Although there are other settlement entities, the WZO is the principal Settling Entity where rural settlements in Judea and Samaria are concerned. The Settling Entity is responsible for the physical establishment of the settlement, as well as for forming the settlement group, preparing plans and infrastructures, building a temporary camp, i.e. the initial residential buildings and providing the settlers with production means. For urban settlements, the Custodian allocates the land to the Ministry of Construction and Housing. In addition to these principal allocations, there are other allocations that involve allocations to a different Settling Entity, based on the government’s decision, or if the entity purchased the land and it was declared government property.

29. Not everyone agrees on the scope of authority granted to a Settling Entity in regard to the expansion of settlements in Judea and Samaria, preceded by a government decision. One approach maintains that the expansion of an existing settlement through the construction of new neighborhoods does not require a further decision by the government, as long as the expansion is carried out on state land and is located within the mother community’s jurisdiction and in the territory allocated by the Custodian of Government and Abandoned Property. The other approach, the one that has been put forth, inter alia, in the report on what was designated as “unauthorized outposts” submitted by Attorney Talia Sasson to Prime Minister Ariel Sharon in 2005, holds that the further construction in existing settlements is not intended, in part, to expand them by building neighborhoods, but that it is in fact used to establish new and independent settlements by bypassing the need to go back to the government to get its permission. The Sasson Report offers extensive descriptions of the involvement of settlement entities and government ministries in the expansion of settlements, without a decision being made at the political level and without any planning arrangements. Before deciding between these two approaches and in order to clarify the facts, we will present excerpts from that report accompanied by comments made by the people under review.

30. In regard to the Settlement Division, the report found that the WZO

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“...played an intensive role in consolidating settlement groups for the territories, planning the area for settlement, establishing the temporary camp for the settlement, creating production means and dealing with social issues related to the existence of the settlement. [...] **The Settlement Division is entirely funded by the State of Israel**, and formally receives its budget through the Ministry of Agriculture. The Division qualified its involvement as a Settling Entity in rural areas only and has acted throughout all the years in cooperation with the Civil Administration in Judea and Samaria and the Ministry of Construction and Housing” (p. 120 of the report).

The report further states that

“the Division played a central role in the establishment of unauthorized outposts, despite the fact that no decision to establish them was made at the political level (p. 121). [...] The allocation of land without authorization from the Custodian (p. 122) [...] and the allocation to others in breach of what was permitted (p. 123) [...] the Settlement Division is the entity that funded mainly the temporary, initial camp that was built. The permanent buildings were constructed by a number of parties [...] apparently also by the Ministry of Housing (123). [...] Some of the land allocated to the Division was survey land or privately owned Palestinian land, and this was despite the disruption in the Civil Administration’s data. [...] The Division did not know about this and believed that it was receiving allocation of lands that were exclusively state lands” (p. 124).

Among those who espouse the other view is Mr. Yuval Funk, the deputy director of the Settlement Division in the WZO and the director of the Contracts, Guarantees and Lands Division in the central district. His position, briefly stated, is that there was nothing wrong in the conduct of the Settlement Division in regard to the construction in Judea and Samaria and that everything was done with permission and authorization. In a letter sent on October 26, 2004 (11 Heshvan 5765) to Attorney Talia Sasson (see Appendix 9), he explained that the Division that he headed dealt with the allocation of land for rural settlement handled by the WZO and the Jewish Agency (which will hereinafter be termed “the Settling Entity,”) on both sides of the Green Line. As he put it,

“The Settling Entity is in possession of permits from the Custodian of Government and Abandoned Property in Judea and Samaria [...] for all the sites noted in Ms. Sasson’s letter [...] except three...” (see Section 2).

It was argued that all the lands that the Settling Entity received from the Custodian of Government and Abandoned Property for the purpose of the planning, development, building and establishment of settlements were state-owned lands,

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based on the land registry and/or lands for which the process to “declare” them state lands had been completed by the Civil Administration in accordance with the rules it followed, and/or lands that were seized militarily, or survey lands (see Section 3 of the letter).

The letter added in Section 4(a) that:

“The establishment of the settlements in Judea and Samaria was carried out in accordance with government decisions based on the recommendation of the government’s Joint Ministerial Committee for Settlement Affairs and the Settling Entity. In these decisions, the government charged the Settling Entity both inside the ‘Green Line’ and in the settlements in Judea and Samaria with planning, developing and strengthening the settlements. By virtue of those decisions, land was allocated to the Settling Entity for the development of settlement by the Israel Lands Administration, within the ‘Green Line,’ and by the Custodian of Abandoned and Government Property, in Judea and Samaria. The Settling Entity acted as a contractor and transferred rights to the settlers and settlement societies for varied uses of the allocated lands, including residences, public areas and buildings, work and industrial areas and buildings and agricultural production means, all in accordance with the character of the settlement [...] as decided in regard to it in the relevant government decision.”

Mr. Funk further maintained (see Section 4(d) and Section 4(e)1 of his letter), that from 1977 on, the settlement-establishment policy changed in the sense that it was decided that settlements would be established on state-owned land only and that

“For all the agreements signed for specific settlements whose name was determined in government decisions, the allocation of land would be for the overall handling in the entire allocation area, and was designated for the planning and development of settlement activity within the bounds of the contract and which would help with the planning, building, development and establishment of the settlement.”

Section 4(5)(2) states:

“The areas allocated for all those settlements often included hundreds and thousands of dunams (1 dunam = 1,000 m²). The policy was to allocate all the state lands near that settlement in order to designate them for settlement. The permits defined these lands – similar to the accepted definition for rural agricultural settlement inside the Green Line – as areas of the settlement’s ‘plot,’ as is the accepted case for the plots for agricultural settlements inside the ‘Green Line,’ where a settlement plot is

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3,000-8,000 dunams in size, in some cases without territorial continuity. This is how the territory for the rural communities in Judea and Samaria were defined, and everything was subject to the limitations of the state land available for allocation.”

In Section 4 (5) 3, the motivation for this policy was explained:

“...Alongside the economic, social and demographic needs, which were given expression in the layout of the settlements, in accordance with governmental decisions, also taken into consideration by the policy and decision makers was the need to safeguard state lands, establish social and educational institutions, develop employment zones and so on.” (For more on this, see also Mr. Funk’s comments in a discussion held with him on March 14, 2012 (20 Adar 5772), from p. 5 of the minutes).

32. Regarding the expansion of settlements in the context of the allocated “plot”, Mr. Funk added:

“In the permit agreements between the Settling Entity and the Custodian regarding all the settlements in which the Settling Entity’s responsibility was decided, by government decision, the Settlement Entity may allow the society or settlers to live on the plot, and/or the institutions, factories, developers acting on behalf of the settlement ‘in accordance with the accepted conditions and/or those that are acceptable to it’ (the Settling Entity) in the context of which they may carry out planning, building, develop and strengthening of the settlements, with the help of the Settling Entity and additional governmental agencies. These rules and conditions are followed by Settling Entity in rural settlement inside the ‘Green Line’ too. According to these conditions, the Settling Entity has granted, up to the present day, to the societies and settlers in the rural, agricultural and community settlements inside the ‘Green Line’ and in Judea and Samaria only ‘Permit Holder’ (“*Bar-Reshut*”) rights. The rules and terms, as noted above, are known to all government agencies and they did not restrict the Settling Entity from acting in accordance with them. On this matter, the Custodian’s legal advisor wrote as follows: “The Custodian agrees that the WZO sign Permit Holder contracts with developers for all types of construction within the plot allocated to the WZO in accordance with the permit contracts.”

On the background of all these things, Mr. Funk’s conclusion was that:

“In every settlement that the permits relate to and that contain a neighborhood as noted in the letter by Talia Sasson, the settlement entity has contracts and memoranda of undertaking, as noted above. These

undertakings are valid for all the territory located inside the allocation, and these neighborhoods are an inseparable part of the settlement.”

33. As for the fact that the physical establishment of the settlement preceded the planning work, Mr. Funk maintained that:

“In every rural settlement, from the time of the establishment of the state up to the present, the physical settlement activity preceded the completion of the authorized planning procedures. This is how settlements were established in the late 1970s and throughout the 1980s. Some of them were termed “lookouts,” such as in the Segev bloc and in the Galilee, e.g. Moreshet, Adi, Atzmon, Alon Hagalil, Hoshaya, Maaleh Tzviyah, Yuvalim, Yaad, Shekhanya and others, which were established without an effectual outline plan. This is how the settlement of Merhavam was recently established in the Negev and that is how the 50 settlements of the Adulam Region, such as Tzafririm, Ajur and others, some of which do not have an effectual outline plan to this day, were established. [...] This was the practice of the Settling Entity, just as it was of other government agencies, throughout the entire country. All the new settlements were established on the ground before the planning and statutory procedures were completed, and this is what all the government agencies involved in the establishment of settlements, including the Civil Administration, did. [...]

“Various government ministries were partners to the settlement activity, including in Judea and Samaria, e.g. the Ministries of Construction and Housing, Agriculture, Defense, Interior, National Infrastructures, the Prime Minister’s Office and others. Accordingly, temporary living centers and public buildings were built, in accordance with the “erection plan” only. Only afterwards were the planning and outline stages begun, along with the construction of the permanent structures. However, the outline plans for the permanent structures in most of the settlements still lack statutory effectiveness, for various reasons...

“The various government ministries worked hand in hand with the Settling Entity. Thus, for example, in a manner conforming with work procedures still in effect today, the Ministry of Construction and Housing pays for the detailed planning of the outline plans and the consultants involved in their preparation by the planning agencies employed by the Settling Entity. A considerable portion of the settlements in Judea and Samaria were established as Nahal (military-agricultural) settlements that were eventually turned into permanent civilian settlements, in accordance with government decisions, even before their outline plans went into effect. Accordingly, when the neighborhoods that were the subject of Ms.

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Sasson's letter were built, they did not always have an outline plan in effect, just like the mother communities and other neighborhoods, and provisional building permits were granted by the local planning and construction committees, just as they had been granted to the mother settlement...

Moreover, from the point of view of releasing funding, not only were these neighborhoods recognized by all the government agencies, but even in regard to the allocation of financial resources from its budgets, the Settling Entity was instructed that the Settlement Division should handle these neighborhoods in the same way as the settlements themselves. On this matter, the PMO gave written instructions, by means of its director-general, to act as follows:

“In a number of settlements in Judea and Samaria, neighborhoods have been established within the plots of existing settlements. [...] I hereby request to authorize a separate framework for each community settlement that functions separately from the mother settlement, including a separate calculation of the establishment quota for each neighborhood...”

This included the following settlements: Alon, Nofei Prat, Shvut Rachel, Tal Menashe, Kfar Eldad, Tel Katifa, Talmon North, Haresha (Talmon), Mevo'ot Yericho (Yitav), Pnei Kedem (Meitzad), Negohot, Mitzpe Yair, Shirat Hayam (Kefarim), Shalev, Rotem, Maskiyot, Rechelim, Bruchim, Mitzpe Hagit, Ibei Nahal, Neve Erez, Migron, Mitzpe Keramim, Mitzpe Yair, Asael, Eshtamoa.”

“In all the parcels (lots) designated for residences and in the settlement's residential areas (including in the neighborhoods that are the subject of Ms. Sasson's letter), infrastructure and development work was carried out, funded by the various government ministries and with the knowledge of all the parties in the Civil Administration. Moreover, the Civil Administration gave permits to move buildings in all the mother settlements, when it was completely clear to it that these settlements did not have effectual outline plans. The infrastructures work for the electrical, water and sewage systems were carried out with the knowledge and agreement of the Civil Administration. [...] As noted above and to remove all doubt, I will clarify and emphasize that this was the practice of all the government ministry heads, ministers of housing and defense and the various governments of Israel...”

34. Similar remarks were included in a letter written by Attorney Shlomo Ben Eliyahu, the director-general of the Settlement Division in the Jewish Agency, dated

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December 7, 2004 (24 Kislev 5775), addressed to Attorney Talia Sasson (see Appendix 10). The letter said:

“According to the firm and abiding legal structure that has been in effect for more than 20 years now, the Settling Entity receives, as part of the permit agreement from the Custodian, the right of possession to land for the purpose of **building and/or developing and establishing a settlement**. To this agreement is attached a blueprint, which is an inseparable part of it, that defines and delineates the physical boundaries in the area in which one settlement, is to be established the name of which is in the relevant government decision. This real estate is defined in the ‘settlement plot’ agreement. [...] The permits are for an extended period of up to 49 years. This is because it is impossible to establish a settlement on the area of the plot within a short period of time. [...] The area of the plot is defined in the permit as the ‘settlement plot.’ Consequently, everything that is built and developed within the plot area is part of the settlement. It is indisputable that the extended authorization period and the commitment to establish and to continue the building, establishment and populating of the entire plot area are given expression in the establishment and expansion of the settlements by means of those very same residential neighborhoods, in each settlement in accordance with the plot area given to it for the purpose of its establishment. [...] Moreover, the plot area was defined in the ‘order of the area commander,’ as the sovereign in the territory, as the municipal area of one single settlement, meaning that there was no intention to establish additional settlements in its plot area...

In wake of the Oslo agreements, the Settling Entity was instructed by parties in the security establishment to plan the uses/designations of land for all those plot areas – outline planning, **with one settlement for each plot area**. Considerable funding was invested in this planning. [...] Moreover, the Settling Entity was also instructed to treat some of these neighborhoods as an independent settlement only from a budgetary standpoint, i.e. to create a separate budget framework for them, despite being neighborhoods of a single settlement.”

On this matter, Attorney Ben Eliyahu referred to a letter written by Sallai Meridor, the chairman of the Settlement Division, dated February 1997:

“In a number of settlements in Judea and Samaria, neighborhoods have been built within the plots of existing settlements. In a number of places, neighborhoods have been established by separate (cooperative) societies, and, due to topographical and organizational constraints, they were built at quite a distance, which does not enable a connection between the

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neighborhood and the mother settlement at this stage of their lives. These societies in fact maintain an independent lifestyle, including separate acceptance committees, members dues, secretariat, etc. I request hereby to authorize a separate framework for each community neighborhood which functions separately from the mother settlement, including a separate calculation of the establishment quota for each neighborhood.”

Attorney Ben Eliyahu added in his letter to Attorney Sasson:

“Government agencies considered the “new neighborhoods” or “outposts” as defined in your letter to be a neighborhood that is part of the existing settlements and that represent a part of their plots.”

He reiterated that,

“All the neighborhoods that you call ‘new neighborhoods’ or ‘unauthorized outposts’ have been authorized in accordance with the documents and authorizations noted above. [...] We have hundreds of other documents that express the awareness of the authorities that the activities and advancement of planning in Judea and Samaria were done with their knowledge and authority. As you know, almost all the outposts noted in your letter have the signature of the Minister of Defense and/or the Head of the Civil Administration for the Advancement of Planning Procedures.”

Attorney Ben Eliyahu sums up and notes:

“According to government decisions, the authorizations, permits and documents both from the PMO and the Ministry of Defense, all the neighborhoods, what you call ‘unauthorized outposts,’ are authorized, permitted and recognized (emphasis in the original). Based on guidelines handed down by the political levels and the Civil Administration, we were instructed to plan, build, develop and strengthen the settlements, and almost all the government agencies were partner to these actions, whether involving actual implementation or supervision and control. [...] There are another dozens of neighborhoods that share their status, and if they are defined as ‘unauthorized’ because the planning process has yet to be completed, then the statutory status of these neighborhoods is identical to that of dozens of settlements in Judea and Samaria, as well as to that of hundreds of settlements and neighborhoods within the boundaries of the Green Line. [...] Similarly, we recommend that the parties in charge instruct the planning authorities to do their job and get back to work, at least that they consider all the hundreds of plans that have been submitted

to them, either to authorize or reject them. In doing so, they will be meeting the commitment that the government took upon itself in the 'outpost agreement' to advance the planning processes of those outposts it decided not to evacuate."

35. In a further document submitted to the Ministerial Committee that debated the Sasson Report (see Appendix 11), the Settlement Division further maintained that the establishment of settlements in Judea and Samaria was preceded by the preparation of a regional master plan, in whose preparation steering teams from the various government ministries took part, along with the Civil Administration and the municipal authorities (see p. 2 of the document). As for the expansion of settlements by means of the building of neighborhoods, it was stated that:

"...These were established as an inseparable part of existing settlements whose establishment had been authorized by government decisions. [...] The neighborhoods were established on land that had been allocated to the Division in permits by the authorized party in the Civil Administration – the Custodian of Government and Abandoned Property. [...] All the neighborhoods are noted as being situated within the municipal area of the 'mother settlement,' defined by 'Order of the Area Commander.' [...] The expansions are neighborhoods located within the existing settlement's area of jurisdiction, in the authorized area given to the Division for the purpose of planning, building, development and strengthening the settlement and within the boundaries of its 'blue line,' which represents the planning boundaries of the 'mother settlement'" (p. 2 and p. 3).

The Division was aware of government Decision 175 of March 1999 (that the expansion of a settlement in Judea and Samaria requires the authorization of the Ministry of Defense with the knowledge of the Prime Minister). However, the Division maintained (see p. 3 and p. 4):

"Our interpretation and that of all the authorities was that this decision related to the expansion of a settlement's 'area of jurisdiction.' [...] An 'Order of the Area Commander' defines and delineates the municipal area of jurisdiction of a single settlement. It is not possible for there to be a number of settlements on the area of a single settlement. That is why, all the neighborhoods-outposts situated within the bounds of the 'Order of the Area Commander'" are within the bounds of a single settlement, and consequently, are not new settlements that require a further decision by the political level" (emphasis added).

At this point it should be noted that the exact same position was expressed to us by Yossi Segal, the Custodian of Government and Abandoned Property, who said:

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“The moment it has been decided to build a settlement, and that settlement wishes to expand itself by building a neighborhood within its area of jurisdiction as determined in the Order of the Area Commander – it should not be considered a new settlement, and consequently does not require a further government decision” (minutes from May 7, 2012).

36. As for the **Ministry of Housing**, the Sasson Report states:

“The central (albeit not only) branch through which the ministry is involved in unauthorized outposts is the Administration for Rural Construction, which has for years focused [...] on the establishment of new settlements in Judea and Samaria and on the expansion of existing ones” (p. 139).

The report (from page 141 on) quotes remarks made by the State Comptroller (Report 54b from 2003), as follows:

“The Ministry of Construction and Housing [...] helps the Jewish local councils in Judea and Samaria, Gaza and the Golan Heights in budgeting projects involving planning, construction and development. The Ministry is active in Judea and Samaria [...] both by means of the districts of the Administration for Rural construction, and mainly the Jerusalem District, as well as by means of the urban construction districts [...] A review found that in the period from January 2000 to June 2003, the Jerusalem District of the Rural Construction Administration signed 77 contracts with local authorities for construction and development in 33 sites Judea and Samaria. According to data of the Civil Administration, the work in these sites was executed unlawfully, either because of the absence authorization from the government or Ministry of Defense, or because of the absence of an effectual outline plan, or for reasons related to ownership of the land. The scope of these contracts totaled NIS 29 million. These contracts included works of different types: infrastructures for housing units, security roads, access roads to settlements, open public areas, connections to electricity, the building of a water tower or the laying of a water line and the construction of public institutions. According to the data provided by the Civil Administration, of the abovementioned 33 sites, 18 were not located within the limits of any settlement decided upon by the government. The scope of the contracts between the Ministry of Housing and the local authorities in these 18 sites totals approximately NIS 18.4 million. [...]

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“The Ministry of Construction and Housing does not demand that building permits be produced as a condition for the funding of projects; nor do other governmental authorities demand that building permits be produced. The Ministry of Housing aids the local authorities in Judea and Samaria in funding projects and it must determine operations procedures consistent with the procedures of the Civil Administration. It has been noted that it has not done so. The Ministry of Housing funded projects without coordinating them with the Civil Administration. In both cases, the Ministry funded road-paving works and the building of a structure in places for which the Civil Administration issued demolition orders. What emerges is that at the very same time that one governmental branch – the Ministry of Housing – was investing its resources in construction and development works in settlement sites in Judea and Samaria that lacked legal construction permits, another government branch – the Civil Administration – was investing its resources in finding and demolishing illegal construction.”

The Sasson Report further determines (see p. 143):

“A considerable part of the Ministry of Housing’s budgetary investments were carried out in the Rural Construction Administration; the Rural Construction Administration invested a considerable part, if not most of its resources in illegal construction in the illegal outposts and neighborhoods...”

The report later specifies the ways in which the Rural Construction Administration helped in the establishment of the outposts: funding of infrastructures and the establishment of public buildings, the expansion of existing settlements – without a decision by the government or the political level, without examining the nature of the rights to the land and in some cases, not on state land, and without a detailed plan as required by law (p. 145); indirect assistance was provided through the regional councils (p. 149); funding of infrastructures for outposts was provided from what was termed in the Ministry’s budget as “miscellaneous general development” (in 2002, the sum stood at NIS 34 million) (p. 150). The Ministry of Construction and Housing employed external architects as well as architects from the Ministry to plan the outposts, infrastructures and even employed electricity and water consultants for this purpose (p. 156). It was further found that the Ministry of Construction and Housing purchased hundreds of mobile homes, some of which were stationed in unlawful outposts (p. 164) without receiving any payment in return.

37. Sarah Aharon, the head of the Rural Construction Administration in the Ministry of Construction and Housing, in a letter she sent on 13 October 2004 (3 Heshvan,

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5765) to Attorney Talia Sasson (Appendix 12), disagreed with the findings and conclusions of the “Outpost Report.” In regard to the policy of the various governments over the years concerning settlement in Judea and Samaria, she wrote:

“This has not changed over the years and when for reasons of international relations it was not possible to establish new settlements in Judea and Samaria, the policy makers decided that rather than establish new settlements, existing ones would be expanded, even if the expansion was not adjacent to an existing settlement. In view of the fact that political rather than planning considerations underlay the interspersion of the settlements, the direction in which to expand the settlements was generally not determined by professional, bureaucratic considerations, but rather by entities on the ground, i.e. the regional councils and Amana movement, and with the backing of the various housing ministers. [...] The Ministry relied on the planning permits given by the Custodian of Government and Abandoned Property, when this permit was granted after being checked by the Director in Charge of Land Ownership. [...] The Ministry of Construction and Housing only plans on land that has been declared state land and on survey land. Survey land is land that is about to be declared and consequently, the government policy was that there is nothing to prevent planning on this land.”

38. A further letter from Sarah Aharon to Attorney Talia Sasson, dated 19 December 2004 (7 Tevet 5765) (Appendix 13) states:

“...Based on all the documents in our possession and on the permits given to the various parties that maintain ongoing work relations with us, it turns out that **the ‘unauthorized outposts’ are in fact authorized, recognized and permitted**, both based on government decisions as well as according to the high-ranking and authorized parties in the PMO and Ministry of Defense. The WZO received a permit for planning and development from the Custodian of Government and Abandoned Property for the overwhelming majority of the sites on the abovementioned list, with the exception of a small number of neighborhoods, which were given permits for planning only at this stage. Only three sites received no permit at all. It should further be clarified that all the ‘outposts’ were established within the plot area for which the WZO received the planning and development permit. The plot area is the municipal area of a single settlement, even if a number of neighborhoods have been built on it, when there is a physical separation between the different neighborhoods. It should be noted that separate settlement code was given to separate neighborhoods within the

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same plot area for administrative purposes, and does not indicate that authorization was given for the establishment of a separate settlement...

“In conclusion, all the ‘unauthorized outposts,’ as you called them, on the list that you transferred for our comments are authorized sites in accordance with a government decision and/or that of the senior authorities in the PMO and Ministry of Defense. In the vast majority of cases, permits for planning and development or permits for planning were given, and the outposts were built within the plot for which the permit was given.”

39. The Sasson Report shows that the **Civil Administration** was responsible for all of these things: for granting permits to transport mobile homes (caravans) to the territories; authorizing the survey-land procedure; giving instructions to connect outposts to the electric grid; authorizing planning and consideration of plans by the planning and zoning authorities; authorizing the allocation of land by the Custodian of Government and Abandoned Property in the Civil Administration; authorizing planning and permits to expand settlements; issuing demolition orders; (in coordination with the Prime Minister) for instructing the area commander regarding the issuing of delineation orders for the evacuation of outposts and giving orders to actually evacuate outposts.

The reports determines (see p. 178) that an examination by the Civil Administration regarding the nature of the land rights upon which outposts were built shows that they were in part built on land allocated to the WZO, and that over the years, some turned out to be survey or Palestinian-owned lands. This situation was caused, inter alia, by faulty drafting of the maps. It was further found that the outposts, even if unauthorized, had been connected to the electric grid thanks to a permit signed by the Electricity Staff Officer in the Civil Administration (p. 202), and following a letter sent by the Assistant to the Defense Minister on 4 May 2004, the text of which can be found on p. 205 of the report:

“Peripheral lighting in settlement areas, which are areas that are under threat, is a security factor of the first priority. Even in those places where there are reservations, and procedures are in place in preparation for evacuation, as long as human beings reside and live in them, their lives must be protected, just as the army carries on guarding and patrolling in these places. Thus, the electrical supply for lighting should be permitted as a crucial element in guarding until their status is decided.”

40. As for the **Ministry of Defense**, the Sasson Report claimed(see p. 243) that the Assistant to the Defense Minister for Settlement Affairs (Ron Schechner) would

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intervene in matters that were not within his jurisdiction and to that end, quotations were cited from a letter addressed to the Settlement Division in February 2003 (see p. 243):

“I hereby authorize that the settlements listed below function as independent settlements in every way and that they should be treated as such in regard to every matter, including budgeting and their settlement code: Pnei Kedem; Ibei Nahal, Haresha; Neve Erez; Migron; Mitzpe Keramim; Mevo’ot Yericho” (Appendix 14, and similar letters of the same kind – Appendix 15).

The Sasson Report further states that,

“Mr. Schechner intervened on behalf of the unauthorized outposts (p. 246), asked the Settlement Division to relate to them as full-fledged settlements, including by giving them a (separate) settlement code and budgeting. This was done without informing the Defense Minister (who is not even CCed on the letter) and contrary to the position of the Minister of Defense, whereby at least part of the outposts on the list in Schechner’s letter are unauthorized outposts. Ostensibly, the letter appears to be worded so as to give the authority to which it was sent the impression [...] that a legal settlement was involved, since that is the simple reading of what it says. The recipient would certainly find it difficult to assume that a high-ranking official such as Assistant to the Defense Minister for Settlement Affairs did not reflect the position of the government and had written a letter such as this contrary to its policy.”

In a written response to that criticism, the Assistant to the Defense Minister explained concerning the settlements that were claimed to be unauthorized (Appendix 16):

“Human beings live in these places. As long as those people are there, they are entitled to basic services, especially those related to security. When I wrote that I wanted these sites to be related to as independent settlements, I was referring mainly to the security components. I did not determine whether or not they were legal. I expressed no opinion as to whether or not they were legal and nor did I give any authorization regarding their status; I only determined that they should be dealt with because they are there and people live in the area and that consequently, it was necessary to relate to basic security aspects. [...] If they are unable to deal with a settlement that does not have a number – I asked to take care

of the settlement. I assumed that the settlement should receive everything that is required where its security is related.”

In response to our question to Mr. Schechner in his appearance before us – Can it be assumed that the political levels were aware of the construction of these settlements? – he responded:

“Of course. No more than two days goes by before construction of this kind is brought to the attention of the most senior political level (minutes – 2 May 2012).

A new settlement or new neighborhood? – A decision under dispute

41. As noted, the WZO’s Settlement Division is of the view that the mandate it was given in the permit agreement with the Custodian of Government and Abandoned Property was to build a single settlement in the area of a given “plot.” It is further of the view that pursuant to that mandate, it was entitled to plan the settlement, build and strengthen it by creating sources of employment and constructing public buildings. In view of this interpretation, it stands by its view that construction within the area of the “plot,” even if it is considerably distant from the mother settlement, is in fact an expansion by means of the addition of a new “neighborhood” rather than the establishment of a new settlement. The Division further added and maintained that this interpretation does not contradict Government Decision 640, from May 1984, in view of the fact that the term “continuous territory” does not refer to construction that is adjacent to the mother settlement, but rather to territory that does not exceed the boundaries of the “plot” as determined in the permit and the area of jurisdiction of the mother settlement, in accordance with the area commander’s order. This is the spirit in which it interprets Government Decision 175, i.e. that while the expansion of a settlement in Judea and Samaria does indeed require the Defense Minister’s authorization, here it refers to expansion **outside** the boundaries of the “plot” and municipal area as determined in the area commander’s order.

42. Government decision 640, which coined the phrase “**expansion within the continuous area**” of a settlement, did not define this term in such a way as to prevent various contradictory interpretations later on. Nevertheless, once again, there is no doubt that the intention was to prevent the establishment of new settlements under the guise of new “neighborhoods” in the absence of a government decision, and there is evidence of that. In 1998-5758, the Minister of the Interior asked to remove the words “continuous territory” from Government Decision 640, so that it would say, “the expansion of a settlement [...] does not require a special decision of the government.” **It would appear that the minister was referring to expansion**

within the “allocated plot” only, and despite this, his request encountered opposition from the then Deputy Attorney General Menahem (Meni) Mazuz, who warned of the possible implications of this move, saying:

“Whereas Decision 640 [...] from 1984 exempted ‘the expansion of the settlement’s continuous territory’ from a special decision, what is being requested here, without explanation, is to exempt an expansion that is not on continuous territory. Israeli governments over time have maintained their authority to decide on the establishment of new settlements because of the implications and repercussions that such a decision may have from various respects, especially when the establishment of settlements in Judea and Samaria is involved, and these things are well known. [...] The ‘expansion’ of a settlement not on continuous territory is essentially similar in many senses, in its implications, to the establishment of a new settlement, and which is liable in fact to be used to establish new settlements under the guise of “expansions.” Consequently, insofar as the draft decision put forth by the Minister of the Interior is indeed aimed only at settlements inside the State of Israel (the Green Line), this should be noted explicitly in the decision; it is also appropriate, in our view, to leave the reservations regarding expansion in an area that is not continuous unchanged” (emphasis in the original). (See Appendix 17 and the letter from Mr. Mazuz on the same matter dated 10 November 1998 (21 Heshvan 5759) (Appendix 18).

In the absence of the words “expansion in continuous territory,” once again there is no alternative but to allow logic and common sense to fill in the blanks. We shall clarify, already at this stage, that there is no doubt that Decision 640 did not require that the expansion be “adjacent” to an existing settlement. This is in view of the fact that not only does this term not appear in it, but that although construction of this type is not possible in some cases because of the settlement’s topography, the new neighborhood becomes part of the settlement. Thus, for example, a place in which a settlement is crossed by a deep valley, no matter how wide, construction on the other side of the valley could address the requirement of “continuous territory.”

We saw an example of this in a tour we conducted near Kfar Eldad, which is within the area of jurisdiction of the settlement of Nokdim, but located at a considerable distance from the mother settlement, for which the master plan was only recently authorized. And there are additional cases that have been authorized in the past years. A further example is the longtime settlement of Kfar Adumim and its neighborhoods Nofei Prat and Alon (see the remarks by Mr. Funk in the minutes from 14 March 2012, p. 6).

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In view of this situation, the approach taken by the Settlement Division of the WZO, i.e. that “continuous territory” refers to a land connection located within the area of the “plot” allocated by the Custodian and the municipal jurisdiction of the mother settlement, would appear to have merit. However, this approach could have been implemented from August 1996 on only in those cases in which the original town-planning scheme authorized by the planning and zoning authorities for the mother settlement included the area designated for expansion too. Any other scenario, including the expansion in territory not included in the mother settlement’s town-planning scheme, falls under Government Decision 150, which determined, inter alia, “Any new permit for planning and allocation for building on state land in the areas will be carried out only after it has been authorized by the Minister of Defense.”

Moreover, even if we adopt the position of the Settlement Division on the matter of the “expansions,” the greater the distance between the “expansion” and the mother settlement within the jurisdiction, the more this may in fact point to the establishment of an independent settlement. This is especially so in a place where it is discovered that the new “neighborhood” was established by a separate settlement society that maintains its own independent lifestyle, has its own secretariat and collects dues from its members, certainly when the expansion is located outside the mother settlement’s area of jurisdiction.

In any case, Government Decision 175, which in March 1999 replaced Decision 640, set down a general provision. This decision exempted expansion of an existing or future settlement from the need to receive a government decision, but in regard to settlements in Judea and Samaria, without any reference to the need for land continuity or location within or outside the area of jurisdiction, it was determined that their expansion “required the authorization of the Defense Minister, with the knowledge of the Prime Minister.” In other words, from that time forward, any expansion had to receive authorization from the political levels (the Defense Minister with the knowledge of the prime Minister) prior to construction. (See below on the authority of the Prime Minister and Defense Minister according to Decision 471, dated 28 October 1999, to act “in all matters related to isolated settlement/outpost sites that are not continuous to the built-up area of existing settlements in Judea and Samaria”).

Despite the aforesaid, dozens of new “neighborhoods” were established without government authorization, in some cases at a considerable distance, sometimes without any continuous land connection with the mother settlement, outside the area of jurisdiction set for it. This was an extensive phenomenon that required considerable funding, and as such, we find it hard to believe that government ministers and prime ministers were unaware of it. This is because not only were

the ministries of some of those ministers directly involved, but the expansion of settlements was a subject that many parties in Israel remarked on, including the State Comptroller; on the international level, the expansion construction served as a pretext to attack the State of Israel. And if, despite all this, the Settlement Division and the Ministry of Housing continued to build those “neighborhoods,” once again, it cannot but be determined that the Division’s interpretation of the government decisions was consistent with the genuine desires of many members of the most senior “political levels.”

43. This behavior is especially relevant on the legal level in the context of how it should have been understood by the settlers of Judea and Samaria. In our view, they were entitled to assume that the expansion of the settlement endeavor, however it was defined (whether as a “neighborhood” or “new settlement”), was something that the government desired and encouraged, with the evidence of that being the activities of the Settlement Division that were carried out (pursuant to permit agreements with the Custodian of Abandoned and Government Property) with the assistance of various government ministries. However, due to their distance from the mother settlement and the varying needs of the new settlements, it was difficult to continue over time to define some of those places as “neighborhoods,” and it was on this background that the time came, at a certain stage, to define the situation as it really was. This was expressed in the large volume of correspondence we examined, which included a letter from Avigdor Lieberman, the then director-general of the PMO, dated 2 October 1997 (3 Adar I 5757) (Appendix 19) that states the following:

“Neighborhoods have been built within the plots of existing settlements in a number of settlements in Judea and Samaria. In some places, the neighborhoods were established by separate settlement societies and due to topographical and organizational constraints, were built at some distance (from the mother settlement). This does not permit a connection between the neighborhood and the mother settlement at this stage of their lives. These sites in fact maintain a separate lifestyle, i.e. acceptance committees, membership dues, a separate secretariat, etc. I would like to authorize a separate framework for each community neighborhood that functions separately from the mother settlement, including a separate calculation of the establishment quotas for each neighborhood.”

A similar letter was written by then director-general of the PMO Avigdor Yitzhaki, dated June 2002 (Sivan 5762). In it, he instructed the WZO Settlement Division to take care of the settlement sites of Haresha (Talmon), Mevo’ot Yericho (Yitav), Pnei Kedem (Meitzad), Negohot, Mitzpe Yair, Shirat Hayam and Shalev – “just as you take care of all the settlements in your area of responsibility” (Appendix 20).

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A third letter is the one from Ron Schechner from when he served as Assistant to the Defense Minister for Settlement Affairs in February 2003 (Adar 5763) to the Settlement Division. As noted, in this letter, he confirmed that the settlements of Pnei Kedem, Ibei Nahal, Haresha, Neve Erez, Migron, Mitzpe Keramim and Mevo'ot Yericho:

“Function as independent settlements in every sense and they should be treated as such in regard to every matter, including their budgeting and settlement code” (see Appendix 14).

44. The distinction between the “expansion” of a settlement by building new neighborhoods and the establishment of a new settlement is of course important. However, as we have already hinted, far more important is how the officials of the Settling Entity perceived the authority that had been given to them and how these matters were presented to the settlers of Judea and Samaria. The “Settling Entity” itself was entitled to assume that the Custodian would not have allocated it land that was not state land or about to be declared state land. And if that is the case regarding the Settlement Entity, this conclusion applies even more so to the settlers themselves.

Moreover, the settlers were entitled to assume that the Settling Entity would not have approached the implementation of planning and building of infrastructures without having previously obtained all the necessary authorizations, including from the government.

Furthermore, even if we assume in detriment to the settlers that they turned a blind eye (a theoretical hypothesis that has not been proved to us), it would not change the outcome, because we further assume that if they had bothered to ask the Settling Entity questions regarding the matter of ownership rights and the authority to expand the settlements, the latter would have responded that it was acting with full authority and permission in view of its understanding of the subject of the “allocation” of land, and that there was no need to obtain further authorization for development and expansion within the area of jurisdiction, a view which it continues to abide by to this day.

And finally, even the fact that the settlements were established before receiving authorization from the planning and zoning authorities should not have rung an alarm bell in view of the fact that this type of behavior on the part of the Settling Entity and state authorities – flawed in of itself – was typical of their actions in Judea and Samaria, as described by Osnat Kimhi, the Director of Rural Affairs in the Ministry of Construction and Housing (see the minutes from 21 March 2012 [27 Adar 5772]):

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“I was in the office when the whole ‘celebration’ broke out, that is the establishment of the neighborhoods and outposts. There was an oral law at that time, in the years 1990-1995, according to which neither the state – nor the Ministry of Housing and the Settlement Division –strictly enforced statutory plans, either within the boundaries of existing settlements or outside the blue line, when building new neighborhoods. [...] The practice was that it wasn’t necessary to check anything from a statutory point of view, that one ‘runs and climbs up the hilltops.’”

We heard similar comments from Attorney Ahaz Ben Ari, the Defense Ministry’s legal advisor (see minutes from 18 April 2012 [23 Nisan 5772]):

“In the 1980s, there was a building boom; we did not strictly enforce the planning and construction laws almost as an ideology. When the government authorized Revava, some cabins were already standing there. Strict enforcement like in Israel itself belonged to a different stage. Today too, there are numerous settlements that don’t yet have master plans. When I started out as the legal advisor for Judea and Samaria, I encountered practical problems, such as requests for building additions, which the Ministry of Housing’s plan on which the settlement was originally built no longer addressed. We got all the settlements involved in the preparation of master plans. There is a government decision to prevent the granting of permits. There is a policy underlying it. The question is what exactly is delayed” (emphasis added).

And on p. 7, Attorney Ben Ari, in all candor, added,

“This is a sore point and is indicative of anarchy. Some ministers were close to the settlement endeavor and they did not strictly enforce things like that. Things were done without authorization. This fact embarrasses the government. Migron could not have been built without the help of the authorities but that doesn’t mean that it’s okay” (emphasis added).

And on p. 8, it says:

“At the end of the day, it’s not that we are opposed to the establishment of a settlement. After seeing the involvement, that people came and settled, it’s not that it’s impossible to legalize this behavior after the fact. But this is a political question – The government doesn’t want or can’t proclaim the establishment of new settlements. People that live there pay a price that although it is possible to take action to legalize the site, it can’t be done any more.”

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We heard a further description of how things were carried out during that period from MK Yaakov Katz (Ketzeleh), who in the early 1990s served as Ariel Sharon's Assistant for Settlement Affairs when Sharon was Minister of Housing. MK Katz told us that in that capacity, he was deeply involved in the establishment of settlements in Judea and Samaria, which further underscores the importance of what we heard from him, part of which is presented here:

“When the great exodus from Russia began and we managed to get a decision passed in the government that the construction would be budgetary throughout the country, including in Judea and Samaria and East Jerusalem, we built 120,000 housing units over a period of two years throughout the country, 60,000 in Judea and Samaria and East Jerusalem. [...] Arik Sharon built 120,000 housing units in two years without government permits, without planning, without anything. All we wanted was to move ahead. First, we took action on the ground and then came the permits; that's how it was in Judea and Samaria and that's how it was all over the country. [...] We worked [...] around the clock and in two years, we transported all the mobile homes that came to Israel to absorb the Russian immigrant to Judea and Samaria. [...] Going to the hilltops was at individual sites and was negligible compared to the amount that was being built in the settlements. Going to the hilltops was Sharon's approach and he reiterated it until he eventually changed his approach. [...] I want to say that all the governments were involved in the construction. [...] The people who entered the field had no doubt, that's how construction was done all over the country, that was the building mode, As far as the fence goes, that's how far the settlement reaches” (see minutes of 14 May 2012).

45. We have not lost sight of the fact that with the passage of time and considering the criticism voiced at home and abroad of the settlements in Judea and Samaria, some of people who were among the senior “political levels” have hurried to repudiate it. However, based on the data that we have collected and in view of the remarks quoted here, there can once again be no doubt that settlement was carried out in full knowledge of everyone – from the government ministries and those who headed them to the last of those on the implementation level, and denying it has but one goal – to rebuff the criticism voiced by certain parties, especially international ones. There would appear to be nothing more suitable than to cite from the report prepared by Attorney Sasson on this matter (with which we have reservations inasmuch as it assigns blame to the settlers), in order to describe the atmosphere that prevailed at that time:

“The State of Israel funds the establishment of illegal outposts, at least partially; the Civil Administration has for years been turning a blind eye to the expansion of entire neighborhoods not adjacent to settlements, that

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lack detailed plans as required by law; it does not supervise the construction there; it does not report when it is required to report on outposts, with pretexts such as definitions of what an outpost is, claiming a lack of information about the outposts, among other reasons due to the limitations on oversight that it applied to itself in the area of settlements; mobile homes often receive entry permits into Judea and Samaria from the Defense Ministry even if there is no legal planning basis for the site where they are to be positioned; the Assistant to the Defense Minister for Settlement Affairs confirms to the state authorities that unauthorized outposts are full-fledged settlements, when the Defense Minister publicly declares that they are unauthorized. Thousands of demolition orders issued over the years have not been carried out; the outposts multiplied and no orders to delineate the area were issued even for those outposts that are on the March 2001 list that the state pledged to evacuate; delineation orders that have already been issued and authorized by the High Court of Justice have not been carried out. [...]

“The outcome of all these things is that a message was sent that the seizing of land for the establishment of outposts and their establishment, despite the fact that they are not legal and that this is known to all, are positive actions, or at the very least, are not very bad. This is not an ‘ordinary’ offense... [...] In other words, breaking the law has become institutionalized and established. We are not talking about a criminal or group of criminals involved in breaking the law. The picture that comes to light is that of gross violation of the law by government ministries, public authorities, regional councils in Judea and Samaria and settlers – all in order to create the impression that we have an orderly system here that acts in accordance with the law” (emphasis in the original).

46. That conduct on the part of the government and its branches had a number of outcomes: Those very settlements/neighborhoods that were established were defined as “unauthorized”; they were unable to develop, if only to address their natural growth, or to resolve basic problems in the area of infrastructure and various services; and against their will, their residents became “construction offenders” and “trespassers” on land for which many of them had paid from their own pockets, taking bank loans authorized by the state to do so. We have decided to offer a number of examples of that same problematic behavior and its repercussions:

1. The settlement of Karnei Shomron was established in 1977 based on a government decision and its “area of jurisdiction” was defined in an “Order of the Area Commander.” Some time later, the members of the settlement sought to build a new neighborhood to be called “Alonei Shilo” (named after Staff

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Sergeant Shilo, who was killed in the 1997 IDF helicopter disaster). In 1999, the then Minister of Defense Moshe Arens visited the settlement, and according to the current mayor, gave his blessings to the building of the neighborhood. To remove all doubt, we are taking the trouble to make it clear that the claim regarding the minister's agreement to build the neighborhood was not pulled out of thin air, in view of the fact that this is evident from a number of documents presented to us. And thus, for example, on 14 September, 1999, Col. Blumenthal, the Director of Infrastructures in the Civil Administration, confirmed that the new neighborhood (which in the past had been called Nof Kanah) was located within Karnei Shomron's jurisdiction, and authorization was received from the Minister of Defense to move ahead with the planning and permits process.

Similar facts arise from a letter written by Colonel Blumenthal in August 2001 (Av 5761); a letter from the Assistant Regional Defense Officer for Judea and Samaria from 2003; and the minutes of meetings held in 2008 in the presence of the Assistant to the Defense Minister for Settlement Affairs. To sum up, it should be noted that everyone was of the opinion that there was nothing of a planning or legal nature to prevent the validation of the proposed master plan for the neighborhood, and if it didn't come to fruition, the reason was the Defense Minister's decision not to further the plan (Appendices 21, 22).

2. The establishment of Haresha, which was defined as a "new neighborhood" of Talmon, never received government authorization. Despite this, in July 1999, the Housing Ministry's Administration for Rural Construction authorized the sum of NIS 600,000 to build infrastructures for the neighborhood (Appendix 23). In December 2001, the same ministry authorized participation in the building of a day-care center to the tune of NIS 200,000 (Appendix 25). These were not the only sums invested in a location defined as "unauthorized," and in April 2002, for example, the Housing Ministry increased its participation in the building of infrastructures with a further sum of NIS 300,000 (Appendix 26); in December 2003, the same ministry decided to participate in the building of ten housing units to the tune of NIS 2.27 million, which was paid from its budget (Appendix 27). In time, and apparently when more people sought to move to the settlement, Amidar, the Israel National Housing Co. Ltd., signed an agreement on behalf of the State of Israel to sell Haresha 11 mobile homes (Appendix 28).
3. The settlement of Negohot (45 families, 22 permanent homes) was established in 1998 as a Nahal settlement, and later turned into a civilian settlement. Situated on state lands, its town-planning scheme was submitted for consideration, deposit and authorization quite some time ago. However,

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because the settlement's area of jurisdiction had not yet been determined, consideration of the plan was not moved forward. These circumstances are puzzling in view of the fact that in June 2001, the Ministry of Housing authorized participation to the tune of NIS 4 million from its budget for the construction of ten housing units in Negohot (Appendix 29), and in August 2002, a further sum (NIS 1.6 million) was authorized for the construction of four more housing units (Appendix 30). This demonstrates that although the Ministry of Housing was using public funds to provide assistance for the establishment of the settlement, the military commander, by not authorizing Negohot's area of jurisdiction (which precludes planning procedures), turned the act of establishing the settlement into a crime.

4. In July 1977, the government of Israel decided to recognize the settlement of Ofra as a permanent settlement (see Appendix 31). In August 1979, representatives of the settlement signed an agreement with the WZO whereby their status was determined as permit holders ("*bar-reshut*") (Appendix 32). Later (in 1981 and 1997), two further agreements were signed, this time with the Custodian of Government and Abandoned Property, in the context of which the area of the settlement was expanded to 370 dunams (Appendices 33, 34). Although those agreements were to be in effect for 49 years, the settlement's area of jurisdiction was never determined by an "Order of the Area Commander," and the consideration of the settlement's town-planning scheme, previously submitted to the planning and zoning authorities, was held up at orders from the political echelon. Despite this and although it did not have an authorized plan, the settlement expanded by building new neighborhoods (Givat Zvi and Neveh David), and although it seemingly acted unlawfully, the Administration for Rural Construction in the Ministry of Construction and Housing covered the cost of the planners' wages (Appendix 35), the overall cost of the infrastructures (Appendix 36), infrastructures for housing units, specifically (Appendices 37, 38), and earthworks to prepare additional lots for residences (Appendices 39, 40). In addition, the Ministry authorized one of the banks to give the settlement a loan in order to build housing units with the housing units themselves serving as a guarantee for the loan (Appendix 41). To complete the picture, we would add that today, 36 years after it was established, some 700 families (3,500 people) live in Ofra and despite the need to address its natural growth, this is not possible due to the absence of an authorized building plan.

A further issue related to this discussion is the principle of good faith and the claim of "estoppel" towards the authorities.

Good faith and the claim of estoppel

47. It goes without saying that an administrative authority has a greater obligation to act in good faith, and this is for two reasons: One is because it acts as a trustee of the public and the other because of the

“...built-in inequality between the administrative authority and the citizen or public facing it. In this kind of relationship, the administrative authority enjoys real advantages: It not only possesses the knowledge, it also has the power to make decisions that impact the rights and duties of the citizen. In order to balance these salient and important advantages in the relationship between the authority and the citizen, a stronger requirement of good faith must be imposed on the authority than that imposed on the citizen” (Eliad Shraga and Roei Shahar, *Administrative Law, Grounds for Interventions*, p. 178; and see *H CJ 840/79 The Association of Contractors and Builders in Israel v. the Government of Israel*, IsrSC 34 (3), 729).

Regarding the matter at hand, the settlers in the settlements under dispute were entitled to assume that the government was acting lawfully in their case, and consequently, the claim heard from the government – that the settlements were established unlawfully notwithstanding the fact that it itself encouraged their construction, on the one hand, and “froze” the planning procedures, on the other – is behavior that is tainted by a lack of good faith of the worst kind.

Moreover, that same behavior on the part of the government through its various branches (the Settlement Division of the WZO, the Housing Ministry, the Defense Ministry and others) prevents it by virtue of “estoppel” from claiming that it was unlawful for the settlers to hold onto the land. Especially fitting to these circumstances are the remarks made by Supreme Court Justice E. Rubinstein in his ruling in *CivA 7275/10 Special Announcement according to the Law Implementing the Disengagement Plan 5765-2005 v. Amiram Shaket et al.* (unpublished) (see paragraph 24):

“The principle of estoppel applies in a situation in which a party created a pretense for another party, and the other party relied on it and was caused damage. In such circumstances, the reliance precludes the one that created the pretense from denying its content (Daphne Barak-Erez, *Administrative Law*, Vol. I 2010); *CivA 4928/92 Ezra v. Tel Mond Local Council*, IsrSC 47(5) 94, 100 [1993]). However, the application of estoppel against administrative authorities causes special difficulties because of the fear that estopping the authorities would allow them to violate the norms of administrative law, which are of a cogent nature and are not subject to

stipulation. This was noted by (then) Judge Yitzhak Cohen in *CivA 831/76 Levi v. Income Tax Assessor*, Haifa IsrSC 32 (1), 421, 434-435 [1977]: ‘The main argument against accepting the claim of estoppel is that accepting it could destroy the principle that an action of the authority that goes beyond its jurisdiction has no validity, or to enable an authority to extend its jurisdiction beyond what has been permitted to it by law.’ However, Judge Cohen further emphasized: ‘On the other hand, it is difficult to accept a situation in which a citizen who relies in good faith on the promise of an authority should be harmed without any possibility of receiving relief from the court.’ The difficulties that are caused by the application of the estoppel principle in administrative law do not then necessarily lead to the conclusion that the claim of estoppel made by an individual against an administrative authority should be dismissed out of hand; there are, however, claims that bear considerable weight that support the application of this principle in administrative law as well. Indeed, the perception of justice that underlies the general law of estoppel is befitting situations in which an individual relies, reasonably and in good faith – and I emphasize in good faith – on the promise of an administrative authority and is subsequently injured or damaged) (*CivA 6996/97 Abada Ltd. v. Development Authority – Israel Lands Administration*, IsrSC 53(4) 117 [1999]) (hereinafter: the matter of Abada); Eliad Shraga and Roe Shahaar, *Administrative Law*, Vol. 3, 332-335 (2008) (hereinafter: *Administrative Law*). The source of the claim of estoppel against an administrative authority is the principle of good faith, because the aim of both principles – estoppel and good faith – is to prevent inequitable behavior. It goes without saying that if the false representation by the administrative authority was done as part of a conspiracy and was aimed at creating a false impression, and if the party that “relied” on it was aware of this, there is no room for estoppel; this, however, is not the case here.”

An administrative promise – and its breach

48. That same behavior on the part of the government by means of its branches also falls under the category of an “administrative promise” given to the settlers. As noted, the settlers were entitled to assume that the government was acting lawfully and was not contravening its own decisions on the issue of settlement in Judea and Samaria. They were further entitled to assume that the government was settling them on land that it owned, and that it would later legalize the status of the settlement on the planning level. Moreover, there is no doubt that a promise in this spirit was given by those who had the authority to do so, based on the intention to give it legal

validation, and that the promisors (the government of Israel by means of its various branches) were capable of fulfilling it.

A further question is whether the government had grounds to renege on that promise, and the answer that it did not appears self-evident. *First*, the terms of reference of this committee demonstrate that not only does the serving government not wish to default on the promises given to the settlers by its predecessors, but that it is seeking a way to help give those promises legal backing. The same conclusion must be drawn from remarks made by Prime Minister Benjamin Netanyahu at a cabinet session held on 4 April 2012 (12 Nissan 5772):

“The principle that guides me is to strengthen Jewish settlement in Judea and Samaria. [...] We are strengthening Jewish settlement in Judea and Samaria and are strengthening the Jewish settlement of Hebron, the City of the Patriarchs. But there is one principle we uphold – we do all this while obeying the law, which we will continue to do” (see the website of the PMO, Cabinet Secretariat).

Second, upon examining the actual decision itself, we did not find any grounds that would permit the government to renege on its promise. As noted, from the perspective of international law, there is nothing to prevent Jewish settlement in Judea and Samaria and the fate of that settlement will be determined in the future in the framework of diplomatic negotiations; even if no government decisions preceded the establishment of the new “neighborhoods” or “settlements,” once again, there can be no doubt that they were established with the full knowledge of the government and with its tacit consent, which was accompanied by considerable financial investments coming from the public coffers; and finally, the absence of a building permit from the planning and zoning authorities was the result of a decision by the political level to freeze the procedures, despite the fact that those same authorities had the appropriate tools at their disposal to consider and decide on the many plans that lay untouched on their desks for so many years.

49. In view of the aforesaid, the government ought to elucidate its policy on the matter of Israeli settlement in Judea and Samaria with a view to preventing future mistaken or “creative” interpretations of its decisions.

We propose that its decision include the following principles:

- 1. Any new settlement in Judea and Samaria will be established only following a decision by the government or by a duly empowered ministerial committee.**

- 2. Construction within the bounds of an existing or future settlement will not require government or ministerial decision, but such construction must be approved by the planning and zoning authorities after they have ascertained that the proposed construction is not contrary to the approved town/area plan applicable to the land in question.**
- 3. Extension of an existing or future settlement beyond the area of its jurisdiction or beyond the area set out in the existing town-planning scheme will require a decision by the Minister of Defense with the knowledge of the Prime Minister or the Ministerial Committee for Settlement prior to any of the following stages: commencement of planning and actual commencement of construction.**

With regard to settlements established in Judea and Samaria on state lands or on land purchased by Israelis, with the assistance of official authorities, e.g. the WZO Settlement Division and the Housing Ministry, and which have been defined as “unauthorized” or “illegal” due to the fact that their establishment was not preceded by a formal government decision – our conclusion is that the establishment of such settlements was carried out with the knowledge, encouragement and tacit agreement of the most senior political level – government ministers and the Prime Minister, and consequently such conduct is to be seen as implied agreement. Hence, in our view, the status of these settlements can be legalized without requiring a further decision by the government or any of its ministers. The way we propose that this be done is then as follows:

- 1. The area of municipal jurisdiction of each settlement, if not yet determined, must be determined by order, taking into due consideration future natural growth.**
- 2. The administrative barriers imposed on the planning and zoning authorities must be removed immediately, so that they may fulfill their function of examining plans that have been submitted to them by each settlement (on the matter of legalizing construction after the fact, see *H CJ 419/88 Fa'iz Moussa et al. v. Higher Planning Council* – unpublished) without delay and without any further need for additional approval by the political level.**
- 3. Pending completion of those proceedings and examination of the possibility of granting valid building permits, the state is advised to refrain from carrying out demolition orders, since it brought about the present situation through its own actions.**

4. **With a view to avoiding doubt, it is stressed that all the settlements, including those approved pursuant to this proposed framework, may in the future extend their boundaries in order to address their needs, including natural growth, without the need for additional government or ministerial decision, as long as the proposed extension is located within the jurisdiction of the settlement, within its bounds as set out in the approved town-planning scheme, and has received due approval from the planning and zoning authorities.**
5. **Settlements established wholly or partially on land that is subject to examination as to whether it is public or private land (“seker”), are to be considered settlements whose legal status is pending. Most of these were established years ago, and it is thus necessary to accelerate the slow examination process (“seker”), in all areas of Judea and Samaria, and to complete it within a fixed time period, and to this end, even consider, utilizing assistance from external entities. Upon completion, the processing of each settlement will continue according to the results of the land examination (“seker”) and determination of the type of land, in accordance with the framework proposed by us.**

Property Rights – Construction on private land

50. The state acted properly when it stated, when presenting its position before the High Court of Justice, that it does not intend to legalize Jewish settlements built on private Palestinian land. The right of a person to his property is grounded in international law, and thus, for example, Paragraph 17 of the Universal Declaration of Human Rights¹⁶ from 1948 determines:

“Everyone has the right to own property alone as well as in association with others,”

and also:

“No one shall be arbitrarily deprived of his property.”

The European Convention on Human Rights includes a provision in this spirit too:

“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

¹⁶ <http://www.un.org/en/documents/udhr>

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public interest and subject to the conditions provided for by law and by the general principles of international law.”¹⁷

A series of doctrines handed down by the Supreme Court, even before the legislation of the Basic Laws, recognized the right to property as a basic right in our legal system (*CivA 377/79 Peitzer v. The Local Planning and Construction Committee*, IsrSC 35(3) 645, 656; *H CJ 67/79 Shmuelzon v. The State of Israel*, IsrSC 34(1) 281, 285; *H CJ 307/82 Lubianiker v. The Minister of Finance*, IsrSC 37(2) 141, 147).

In wake of the legislation of the Basic Laws, a fundamental change occurred in the legal status of property rights in Israeli law. Section 3 of Basic Law: Human Dignity and Liberty states:

“There shall be no violation of a person’s property.”

Accepted wisdom has it that this Basic Law moved property rights up the steps of the pyramid of legal norms, all the way to the top, making them not only a basic right, but also a constitutional one (*H CJ 2390/96 Kerasik v. State of Israel*, IsrSC 55[2] 625, 698).

That property rights are a basic constitutional right is doubly important: First, a Basic Law gives the court the authority to cancel new legislation if it is inconsistent with the provisions of the Basic Laws (the Bank Mizrahi case; the case of the Investments Managers Bureau; *H CJ 6055/95 Tzemach v. Minister of Defense*, IsrSC 53[5], 241). Second, the legal status of property rights requires us to interpret legislation passed by the legislature even before the passage of the Basic Law so as to make it consistent with the new normative reality created upon its passage (*CivA 3901/96 The Ra'anana Local Planning and Construction Committee v. Horowitz*, IsrSC 56[4] 913, 922), and as the then Deputy President of the Supreme Court Aharon Barak put it:

“What are the interpretive ramifications of Basic Law: Human Dignity and Liberty for the old law? I feel that we can point – without fully exhausting the scope of its impact – to two important ramifications of the Basic Law: First, in determining the legislative purpose underlying the (old) legislation, new and enhanced weight should be given to the basic rights as determined in the Basic Law. Second, in exercising governmental discretion, as established in the old law, new and enhanced weight should be given to the constitutional nature of the human rights anchored in the Basic Law. These two ramifications are interrelated and intertwined. They are two sides of the following concept: Upon the legislation of Basic Laws

¹⁷ <http://www.hri.org/docs/ECHR50.html>

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regarding human rights, new reciprocal relations have been created between the individual and other individuals, and between the individual and the public. A new balance has come into being between the individual and the government” (*Miscellaneous Criminal Motions 537/95, Ghanimat v. State of Israel*, 49(3) 355, 412).

Justice M. Heshin added in *Further Criminal Hearing 2316/95 Ghanimat v. State of Israel*, IsrSC 49(3) 589, 643):

“We will add that which is self-evident, that it is proper that a Basic Law give us interpretive inspiration. The legislator planted a rose bed in the garden of law and we can inhale the roses’ fragrance. We will interpret past laws as the Basic Law inspires us. However, we will always continue to travel in the same circles set by the previous law.”

In a long series of rulings, the Supreme Court insisted that legislation should be interpreted so as to minimize the harm caused to the right to property. In this spirit, in her discussion of the relationship between the Land Ordinance and Basic Law: Human Dignity and Liberty, Justice D. Dorner wrote:

“Indeed, the Land Ordinance preceded the Basic Law, and consequently, our provisions contain nothing to affect its validity (Section 10 of the Basic Law). At the same time, Section 11 of the Basic Law applies to how it is interpreted and to the exercise of discretion by virtue of it. According to this section of the law, all governmental authorities – including the court – are bound to respect the rights under this Basic Law, as far as is consistent with the relevant legislation based upon which they act. The court must fulfill this duty by strictly interpreting the provisions of the law that permit the impingement of property rights, giving expression to one’s right to property as a constitutional, super-legal right. This status mandates a new balance between the public interest and the basic right. From this mandate, which is derived from Section 11 of the Basic Law, it also emerges that we must revisit and reexamine whether the existing rulings, which relate to legislation whose validity is preserved, are consistent with the provisions of the Basic Law” (*HCJFH 4466/94 Nuseibeh v. Minister of Finance [1995]*, IsrSC 49(4) 68, 85).

Similar remarks were made by Justice Y. Zamir in *CivA 1188/92 Local Planning and Construction Committee Jerusalem v. Bareli*, IsrSC 49(1) 463, 483:

“Indeed, the Basic Law does not undermine the validity of a law that existed on the eve of the application of the Basic Law (Section 10), including the Planning and Construction Law. However, it could definitely

impact the super-interpretation of the law. The interpretation, today more so than in the past, must work towards keeping the infringement of the right to property to a minimum.”

And indeed, numerous areas of law were impacted by the new status enjoyed by the right to property, including the laws involving the expropriation of land, in which it was determined that the authority to expropriate must be interpreted so as to strengthen the protection of the right to property (Kerasik case, pp. 698-699); the Planning and Construction Laws (*HCJ 7250/97 Soulimani vs. The Minister of Interior*, IsrSC 54(3) 783; and even matters related to criminal legal procedure, such as the confiscation of property (*Miscellaneous Criminal Motions 3159/00 Rabin v. State of Israel* [unpublished])). Thus, we can see that the elevation of the right to property within the normative hierarchy filtered down into numerous and sundry fields of law and impacted both the way in which one should approach the interpretation of legislation and the normative point of departure insofar as these things relate to the balance between property rights and other interests.

51. Nevertheless, it is of course understood that a person’s right to his property is not an absolute right, but is rather a relative one, and consequently, it is subject to harm, subject to the qualifications as noted in Section 8 of the Basic Law (“There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required”). And thus, for example, it was determined in an order regarding government property (Judea and Samaria) (No. 59) 1976-5727, that:

“Any transaction made between the Custodian and any other person in respect of property that the Custodian thought at the time of the transaction to be state property shall not be invalidated and shall remain in force even if it is proved that the asset was not state property at the time” (Section 5).

And Section 10(A) states:

“Any transaction made in good faith between the Custodian and another person in respect of property that the Custodian considered at the time of the transaction to be vested property shall not be invalidated and shall remain in force even if it is proved that the property was not vested property at the time.”

Section 3 of Amended Jordanian Act Concerning Real Estate No. 51/1958 states:

“All sales which are generally carried out by means of a document and that are carried out in *miri* or *mulk* lands situated in areas in which no arrangement has been declared, or that were removed from the area of the

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arrangement, will be considered as being valid if the land was in the possession of the buyer for a duration of 10 years for *miri* lands and 15 years for *mulk* land.”

A similar type of provision of law exists in the Ottoman Land Code regarding someone who is in possession and makes use of someone else’s land. Section 20 of the law creates a deliberative barrier for someone who adversely possessed land for ten years that prevents a plaintiff, the registered owner, from demanding that it be evacuated. This is the case under two conditions: The defendant must prove that his possession does not arise from the right of the owners but rather that it is adverse to it; and the possession must come from the possessor’s claim of ownership, even if he does not have the burden of proving how it came into his possession. Only if the possessor admits that his possession is not by virtue of ownership must he restore it to its registered owners, in which case the protection of Section 20 does not protect him.

The rationale behind this claim is that of obsolescence, and it has its source in what appears to be a waiver or relinquishment of property rights. From this it follows that if the registered owner did not know about the invasion of his land, waiver or relinquishment should not be concluded from his behavior. This matter should be given added emphasis when state lands, the situation of which the state is not held to be aware of over the years, are involved. Article 78 of the Ottoman Land Code states that:

“A person who possessed *miri* or *muqafa* land and cultivated it for ten consecutive years without dispute, has a prescriptive right to the land. Whether he had a title deed or not – the land is not considered abandoned and he is given a title deed free of charge. If the possessor admits that the land was abandoned (*mahlul*) and he held it without permission – the period of time is not calculated and he is offered the land upon payment of its deed value; and if he does not so desire, the land will be sold at public auction.”

52. Provisions of law of the same type were also included in Israel's Land Law 5729-1969. Section 10 states that anyone who has acquired regulated real estate for payment and relied in good faith on the registration, his right to the property is valid even if the registration was not proper. Article 23 deals with the right of someone who builds on someone else’s property:

“Where fixtures have been installed on unsettled immovable property, the person who installed them may acquire the immovable property at a price equal to the value thereof without the fixtures at the time of the payment of the price, if: (1) at the time of the fixtures he believed in good faith that

he was the owner of the immovable property; and (2) the amount invested by him in the fixtures exceeded, at the time of their installation, the value of the property without the fixtures at that time; and (3) the acquisition by him of the immovable property is not likely to cause the owner of the immovable property serious damage which cannot be made good by payment of its value.”

53. We can see that despite the special status of the right to property, not everyone that has possession of another person’s property is automatically evicted and has everything he built demolished, in view of the fact that he has worthy defense claims; he may also have the right to register himself as the owner of the land. A further possibility is when a new reality is created, in which the long-term possession of the land and massive construction on the disputed land are combined, creating an outcome in which evacuation is not feasible. The state’s representatives were aware of this latter point in *Civil Case 8787/07 of the Jerusalem Magistrate’s Court, Har Vagai Company Ltd. v. Custodian of Government and Abandoned Property in Judea and Samaria et al.*, in which the argument against removal was as follows:

“...For over ten years, use has been made of the land that the Plaintiff ostensibly had ownership rights in, when during this period, dozens of housing units were built on this land, currently representing the center of life of dozens of families. [...] It is clear that the relief of removal is not feasible. [...] Given the character of the claim and the identity of the Plaintiff, the principal relief in this case is payment of a usage fee and compensation” (Appendix 42).

Land registration as a factor in land disputes

54. Most land disputes in Judea and Samaria are the result of the fact that there is no orderly and accessible registration of rights in real estate assets. Moreover, the public is not allowed to see some of the existing registry documents – the Bills Registry, the Rights Registry, the Permits Registry, the registry managed by the Custodian of Government and Abandoned Property, the registry managed by the Settlement Division – with the claim, as it was articulated before us, of fear of possible fraud.

We are not convinced of the compelling nature of this argument; on the contrary, preventing the public from perusing the registries is a sure recipe for fraud, inasmuch as those interested in purchasing land will have difficulty finding out if the seller of the land is indeed the owner, or if the land has liens on it. Seemingly, these obstacles could be removed if the Civil Administration completed the land-survey process (“*seker*”) that was begun during the period of the Jordanian rule. However, to the

extent that it was argued before us that there is a difficulty in doing this, it would appear that the minimum that can be done is to give the public the right to peruse those registries.

Furthermore, with an eye to promoting stability and preventing uncertainty, we believe that the residents of Judea and Samaria, Palestinians and Israelis alike, should be encouraged to register their rights in the land within a fixed period of time (four or five years seems a reasonable period), at the end of which time, anyone who has not carried out the registration will lose whatever rights he may have had.

In addition, and at the same time, we recommend doing whatever is needed to step up the processes required to carry out “Primary Registration,” which has been going on today for many months, even years (see judge’s remarks in *H CJ 1299/11 Zurim 2000 v. Head of the Civil Administration for Judea and Samaria*, unpublished). On this matter, we note that an Israeli who wishes to purchase land in Judea and Samaria is forced to wait not only until the completion of the laborious “Primary Registration” process, but also to overcome numerous other hurdles, including the requirement to receive a “transaction permit” from the Head of the Civil Administration. This requirement appears to have its source in the desire to prevent the purchase of land for settlement in those places that might involve a political or security difficulty.

However, the point of departure for our position is, as noted, that Jews have the legal right to settle in all of Judea and Samaria, and at the very least, in those areas under the control of Israel by virtue of agreements with the Palestinian Authority. In these circumstances, it would appear to us that the requirement that every land-purchase transaction be carried out only after receiving permission from the head of the Civil Administration or a committee duly empowered by him for that purpose is superfluous and unduly onerous. This is because its goal – the oversight of Israeli settlement in Judea and Samaria – can be attained in any case by means of the requirement that the building of a settlement in that area can only be carried out following a decision by the political level, which is also authorized to oversee the advancement of planning procedures.

The purchase of lands in Judea and Samaria by Israelis

55. A further comment on the same subject relates to the fact that Israelis are not allowed to acquire land themselves in Judea and Samaria, but are forced to do so through a corporation registered in the same area (see the [Jordanian] law on the

matter of renting and selling real estate to foreigners, No. 40, from 1953, and the Military Commander's Order 419 from 1979). The Jordanian law states that only a citizen or resident of the Hashemite Kingdom may purchase land in Judea and Samaria. This prohibition does not apply to Palestinians living in Judea and Samaria, and as such, not only does it violate a recognized basic right in our legal system, but is also tainted with *turpis causa* discrimination. For these reasons, it is our view that the existence of this prohibition is unacceptable; this is also the case because it runs counter to the basic position that Jews have the right to settle in all parts of Judea and Samaria. Accordingly, we propose that action be taken to cancel this prohibition by means of appropriate security legislation.

Deciding in land disputes

56. In civilized legal systems, land disputes are usually adjudicated by the courts. In Judea and Samaria, however, the situation is different. Based on the considerable documentation and testimonies presented to us, it is our impression that the point of departure of the enforcement entities in the Civil Administration is that there is a tendency on the part of Israeli settlers to trespass on their Palestinian neighbor's property, and consequently, the settlers must prove that they possess the land lawfully, and if not – they must be evicted (on this matter, see the article by Ronit-Levine Schnur, "Disputes Over Private Land in the West Bank and the Land Registration Problem"). If that same proof were presented to a judicial body in order to contend with a rival claim put forth by someone else claiming ownership, that would be one thing. However, in recent years, Israeli settlers have been required to produce evidence proving their lawful possession before an administrative authority (the head of the Civil Administration or whomever he duly empowered for that purpose), who decides on questions of land ownership and takes action involving the discontinuation of possession further to that decision.

No less serious is the fact that the parties are not subject to the same criteria where the quality of the proof of possession of the land is involved. On this matter, let us look at comments made by the current head of the Civil Administration Col. Moti Almoz when he appeared before us (see the minutes of 30 May 2012 – Sivan 5772 meeting), as follows:

“The current situation is biased in favor of the Palestinian, since the procedure is that the Palestinian may present any proof at all, but if the Israeli cannot show a piece of paper (i.e. a contract), he's off the property. The default is that the Palestinian side has the advantage. The Palestinian only needs to show an initial piece of evidence, a

receipt of some kind – payment of taxes on a distant parcel of land, etc.... The big question is whether the Jewish individual can produce a contract; if he can't, he's off the land. The Palestinian can bring me a receipt, which is considered an initial piece of evidence, and the legal advisor for the area of Judea and Samaria will say that it's sufficient."

In addition to the fact that this points to inequality before the entity that decides in land disputes, it turns out that although the legal authority has been given to the Head of the Civil Administration, in fact, the decision on issues related to land rights are not made by him, but rather by the legal advisors (who are not subordinate to him in the chain of command), and in his words:

"The situation is that in land disputes in Judea and Samaria, I am required by the legal advisors to adopt the point of view of the legal experts, even in those cases in which it is very difficult to decide and I feel uncomfortable with their decision, and have doubts after having personally examined the facts on the ground."

An example of this same biased approach is the use made of the "Order Concerning Disruptive Use of Private Land" (Order 1586), in which "private land" is defined as "land that is not state land." "Disruptive use" is defined as seizing possession of land, positioning movables, fences, planting trees, cultivating, disrupting cultivation, digging and baring the land, and the shepherding of animals. Pursuant to this order, the Head of the Civil Administration may take action even without a claim of ownership by a local resident, as long as he has a reasonable suspicion that disruptive use is being made of the land, or as it says in the order:

"If use has been made of private land and the Custodian has a reasonable suspicion that this involves disruptive use of private land, the Custodian may demand that that an affidavit supported by documentation be submitted within 15 days from the time that the demand was submitted, which details why it should not be viewed as disruptive use of private land..." (see Section 2).

The original order determined that the Head of the Civil Administration would not be entitled to use his authority according to the order if three years had passed since the beginning of the disruptive use. However, an amendment introduced in March 2010 (Nissan 5770) changed that period to five years. Moreover, the boundaries of the order were expanded considerably when it was determined that the countdown of the period of the "obsolescence" as determined in the original Section 2(v) of the order would be restarted whenever any real change was made in the use of the land,

if there was an expansion of the area of the use or if there was a transition from a one-time use to continued use. Indeed, the order states (see Section 2[iv] that the settler against whom the procedures have been carried out may present his reservations with the decision of the Head of the Civil Administration before an appeals committee. However, the decision of the appeals decision is merely a recommendation that the head of the Civil Administration may adopt or reject (see Section 28[i] of the Order Concerning Appeals Committees Judea and Samaria [No. 172] 5728-1967).

57. As we see it, this is a draconian order and a civilized legal system cannot accept its existence, even if the explanation given for it is the need to maintain public order. First, because the expression “disruptive use” is in of itself problematic, because it is unclear, for example, how the farming of unclaimed land that is not state land (in any case, there is no plaintiff in the matter) arouses fear of disruption of public order. And this is the place to emphasize that what is involved here is long-term possession of the land – and in this matter, there is no difference between regulated land and land that has not undergone regulation procedures – and one cannot but wonder why that person did not take the trouble to make use of the available procedures to remove a new invasion.

This gives the impression that the conceivers of this order had a certain goal in mind – to prevent Israeli settlement in Judea and Samaria from expanding. It would appear that the cat was let out of the bag when the order was amended in April 2010 (Nissan 5770), when the authority to demand the eviction of the person in possession the land was expanded to a period of up to five years. If to that is added the excessively broad definition of the phrase “disruptive use” and the varied possibilities as stated in Section 2(5) regarding the renewed countdown of the period of the obsolescence, once again, there can be no doubt that the aim of the order was to almost entirely prevent any possibility that Israeli settlers could raise any claims of defense in the category of obsolescence arising from long-term possession and cultivation in land disputes in that area, and *a fortiori*, any claim of “Acquisition through Possession.”

Second, land disputes are a matter for private law and the authorities should not intervene in them, especially when the basic assumption guiding their actions is that a person using the land is doing so unlawfully unless proved otherwise. In these circumstances, we feel that land disputes should be adjudicated by a judicial authority rather than an administrative one, certainly not one that is seen to have a view that is biased against the Israeli settler. A decision in disputes of this kind requires the hearing of evidence and the clarification of matters of fact and law, and the most appropriate forum to do so is before professional judges who specialize in this field. This conclusion must be drawn in view of the fact that the local resident

that claims ownership of the land, to the extent that he exists, could have asked the authorities to carry out “Primary Registration” (see the [Jordanian] law No. 6 from 1964, The Registration of Previously Unregistered Real Estate Law; as well as the Order Concerning Amendment to the Registration of Previously Unregistered Real Estate Law [Judea and Samaria] [No. 448], 5732-1971). Alternatively, he had the option of appealing to the court in order to declare his rights in the land and order the eviction of trespassers. As a further alternative, he had the right to appeal to the authorities and ask for their help in evicting the trespasser pursuant to the Order Concerning Land (Removal of Trespassers) (Judea and Samaria) (No. 1472) 5760-1999. The fact that that resident did not take any of these steps could have a number of explanations; however, it is difficult escape the suspicion that there is no substance to his claim of rights to the land, and consequently such a claim should not be handled by an administrative authority, but rather heard by a judicial authority.

A further example of decisions in land disputes not made by a judicial authority is the procedure that went into effect just a few months ago. This procedure is called **“Procedure to Deal with Land Disputes Involving Private Land.”** It was written by the legal advisor to the Civil Administration in Judea and Samaria and authorizes he himself or his representative to decide on the matter of possession rights concerning land in dispute. His authority according to this procedure includes barring entry into land, and the exercise of further authorities that exist in the security legislation and are detailed in the Procedure. This can be done without any discussion, based only on the claims and documents submitted to him – if they are submitted; and if they are not – based only on the initial report he received from the relevant infrastructure officer (see Appendix 43). It should be emphasized that this procedure does not determine, unlike the case of the “Order Concerning Disruptive Use of Private Land,” a mechanism to appeal these decisions of the legal advisor.

It is important to note that decisions of this kind have far-reaching practical and legal repercussions and could harm or even contravene legitimate legal claims that should be adjudicated by a judicial body.

58. The need for early judicial rulings in land disputes in Judea and Samaria also arises in another context – procedures held before the High Court of Justice. Here too, we will reiterate that what is involved is an issue that essentially belongs to the field of private law that should be adjudicated before a judicial authority; in fact, however, it is decided by an administrative authority. This refers to the fact that the issue of property rights is often argued by Palestinian petitioners living in Judea and Samaria who petition the High Court of Justice to instruct the security forces to fulfill their duty and remove construction or plants done in the land to which they claim ownership. In the absence of instruments to clarify questions of fact, the court mostly bases itself on declarations made by the state based on examinations

conducted by military entities acting in the same area (and this is what was done, for example, in the case of the construction at Ulpana Hill in Beit El, despite the claim that the land was purchased from its owner).

We believe that it is not enough to make do with an examination of this kind, in view of the fact, and as we have already stated, even if private ownership is proved for land upon which a Jewish settlement was built, possible defense claims by the possessor and other solutions preferable to eviction and demolition should be considered, for example: the payment of compensation to the owners, especially when the settlers at that site were acting in good faith.

A solution of this kind was acted upon by the European Court of Human Rights in its ruling from 1 March 2010 concerning the land dispute of Demopoulos and Others v. Turkey¹⁸ in Cyprus. This is especially important in view of the existence of statutory instructions aimed at addressing similar circumstances. The Mecelle deals with one of them (compare to Section 23 of the Land Law 5729-1969), and discusses construction and planting in *mulk* land belonging to someone else as a result of “robbery.” In such a case, the robber must remove the buildings and plants. However, in a place where this could involve damage to the land, the owner may keep the buildings and plants and pay their value to the “robber.” A special law was enacted for someone who acted in good faith (based on “an imagined assumed right,”) and when the value of the buildings and plants exceeds the value of the land. In such a case, the “builder” or “planter” is allowed to pay the owner for the land and become its owner.

As for *miri* land, Section 10 of the Jordanian Holding and Use (*Tasruf*) of Real Estate Assets No. 49 of 1953. states as follows:

“If a person constructed buildings or planted trees on *miri* or *muqafa* land held by deed, and afterwards, the person who owns the title to that land appears and proves his claim, they shall act as follows: If the value of the buildings or trees, if such exist, exceeds the value of the land, that person shall pay the value of the land to the person with the title and will be allowed to possess the land with the buildings or trees; if the value of the land exceeds the value of the buildings and trees, if such exist, the person with the title shall pay the owner of the buildings and trees their value and will be their owner.”

What this means is that not only should the question of the existence of another person in the land be clarified in a civil procedure before a procedural body, but that it is not entirely clear that the buildings must be demolished in any case, inasmuch in

¹⁸[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97649#{"itemid":\["001-97649"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97649#{)

certain circumstances, the owner can be required to pay its value to the person that built them; and in other cases, the latter has the right to purchase the land for himself after the question of the value has been clarified.

59. A further scenario that arises from that same context has its source in the fact that in the declarations made in the past regarding “state lands,” some errors were apparently made. As a result, settlements were established on land that was lawfully allocated by the Custodian of Government and Abandoned Property until after some years had passed, and it was discovered that the land was in fact privately owned. **In these circumstances, and insofar as what is involved are settlers who acted in good faith and who changed their situation in light of what was presented to them by the authorities, it would appear, on the face of things, that relief in the form of eviction is not practicable, and that another solution should be sought, for example, the payment of compensation or the offer of alternative land** (on this matter, let us revisit the position of the State in *Civil Case 8787/07 Jerusalem Magistrate’s Court, Har Vagai Company Ltd. v. Custodian of Government and Abandoned Property in Judea and Samaria et al.* It argued the demand for removal as follows:

“...For over ten years, use has been made of the land, in which the Plaintiff ostensibly has ownership rights, when during that period, dozens of housing units were built on this land, currently representing the center of life of dozens of families. [...] It is clear that relief in the form of eviction is not feasible. [...] Given the character of the claim and the identity of the Plaintiff, the principal relief in this case is payment of a usage fee and compensation.”

This scenario and its circumstances should be adjudicated before a court of law and judges who are experts in this area, rather than before an administrative authority whose ostensible working assumption is that the Jewish settlers unlawfully possess land, unless proved otherwise.

60. Let us go back and note once again the reason why the Sasson Report condemned the “unauthorized” settlements in Judea and Samaria, i.e. that they were established without a government decision and without the authorization of the planning and zoning authorities. We have explained our position in regard to the need for a government decision in great detail, and our conclusion is that the settlements were established with the knowledge, encouragement and agreement of the highest political level – government ministers and prime ministers – and consequently, we determined that this behavior should be viewed as implied consent. As for the fact that these settlements were established without the authorization of the planning and zoning authorities, here too our conclusion is that this was the result of an approach that was acceptable to the Ministry of Housing and the WZO

Settlement Division (and apparently not just them!), whereby building permits were a matter that could be dealt with subsequent to the actual construction of the settlements. However, even when plans were ultimately prepared and submitted to the planning and zoning authorities, the political level decided not to promote their consideration by these authorities. In these circumstances, in which the blame for the “unlawfulness” in the establishment of the settlements without permits lies within the government itself, we find it difficult to see how it can claim in all innocence that it was the settlers that acted unlawfully, and that the response to this should be to demolish everything that was built without a permit.

61. In these circumstances, all that is left is to decide in a dispute, in those places where one exists. It is our view that it would be appropriate to adopt a policy whereby prior to any determination by the state regarding petitions for eviction or demolition, a thorough examination of the conflicting claims be conducted by a judicial tribunal dealing with land issues. This is all the more necessary in cases in which there is a claim of prior purchase or obsolescence, or where the possessor acted in good faith. Pending such a determination, it is our view that the parties acting on behalf of the state should refrain from taking any position in land conflicts and from taking irreversible measures, such as eviction and demolition.

To that end and with an eye to facilitating the accessibility of the local residents to the courts, it is hereby proposed that courts to judge land disputes in Judea and Samaria be established. Alternatively, it is proposed to expand the authority of the judges of the District Court to adjudicate matters in their area of essential authority and that relate to land disputes in Judea and Samaria, to this area.

With regard to the "Order Concerning the Disruptive Use of Private Land" – it is our view that this order must be canceled. In the event that it is decided to keep it in force, we proposed that it be amended such that any decision by the Appeals Committee will not be recommendatory, but will be binding upon the Head of the Civil Administration to act pursuant to such decision. The Head of the Civil Administration and other interested parties may appeal the decisions of the Appeals Committee before a Court for Administrative Affairs, whose decision will be final. We propose that this arrangement be applied to other decisions of the Appeals Committee, including questions of “Primary Registration” of land in Judea and Samaria.

A further matter we propose is to change the composition of the appeals committee, which currently consists of jurists, uniformed reserve officers, who are, of necessity, perceived, at the least, to be subordinate to, if not under the

command of the Head of the Civil Administration or the Military Advocate General, the supreme authority in the area of legal counsel for the head of the Civil Administration. We believe that this situation is not proper and therefore recommend that the Appeals Committee be composed of non-uniformed jurists, a factor that could contribute to the general perception of the Appeals Committee as an independent body acting according to its own discretion, in the eyes of the Palestinian population too.

We are also of the position that the current procedure for dealing with disputes involving private land should be done away with. Any disputes in this area that arise, should they arise, should be adjudicated and decided before a judicial body.

Access roads to the settlements

Some of the representatives of the Jewish settlements that appeared before us complained of the absence of proper access roads to their settlements, insofar as that those roads or part thereof would pass through private Palestinian land. This situation led to a further outcome, and this refers to the claim by the planning entities that in the absence of a proposal for access roads that do not pass through private land, they have no way to advance the consideration of the plans for those settlements, despite the fact that they were established within the plot of the mother settlement, with the full knowledge and funding, at least in part, of the state. While the Jewish settlers in Judea and Samaria have not been defined as “protected settlers,” as we have made clear, their living in the area arises from their basic right to settle in that territory, a right that withstands, as explained above, the test of international law too. This is the basis for our view that the military commander of the area has the duty to protect the security of the settlers, as this found expression in the words of Justice Vogelman in *H CJ 2150/07 Ali Hussein Mahmoud Abu Safiya et al. v. Minister of Defense et al.*, (Paragraph 21), as follows:

“The military commander’s duty to protect the lives and the security of Israelis who reside within an area under belligerent occupation derives not only from his duty pursuant to Article 43 of the Hague Regulations, but also, as stated above, from internal Israeli law. As was ruled (in a case relating to the legality of the construction of a section of the security fence): ‘The authority of the military commander to construct a separation fence includes the authority to construct a fence in order to protect the lives and the security of Israelis who reside in Israeli settlements in the Judaea and Samaria Area. This is true notwithstanding the fact that the

Israelis who live in the Area are not considered “protected persons” in the sense of art. 4 of the Fourth Geneva Convention ... This authority is derived from two sources. One is the authority of the military commander, pursuant to Article 43 of the Hague Regulations, to safeguard public order and safety... The other is the duty of the State of Israel, which is anchored in internal Israeli law, to protect the lives, the security and the well-being of the Israeli civilians who reside in the area.”

The need to protect the security of the Jewish settlers arises from the constant danger they face and consequently, the existence of proper access roads to the settlements, especially at times of emergency, is in our view a clear security need that in the right circumstances can justify the seizure or expropriation of privately owned land (*High Court of Justice 202/81 Sa'id Mahmoud Tabib v. Minister of Defense et al.*, IsrSC 36(2) 622).

At the same time, it should be emphasized that this procedure should be used as a last recourse when there is no other solution, and in that case, the owners should be allowed to choose between alternative land and compensation. (On the general authority of the military commander to regulate the use of a road or to determine the course of traffic, see Section 88(i)(1) of the Order Concerning Security Instructions).

The demand to “improve” land seized by military order

63. Many settlements in Judea and Samaria were established on land seized by “military order,” after it was found that they were an integral part of the territorial defense of the area. As is the case with every settlement, at first it is built in order to address the needs of its inhabitants; however, as is only natural, there comes the stage when it needs to expand in order to address natural growth or the establishment of vital public institutions, such as additional kindergartens and schools for the various age groups, which were not yet needed at the time the settlement was first built. The problem is that requests to expand these settlements, and even requests to build inside the settlements themselves, are rejected by the Civil Administration with the claim that the government decision to designate the territory that was seized militarily for civilian use was intended to legalize the construction that was carried out for that decision or soon after it only, and not for the construction that they seek to carry out years later.

This approach on the part of the Civil Administration is unacceptable to us. The establishment of a civilian settlement on land that was seized by military order was based, as noted, on the assessment by security experts that that settlement was an integral part of the territorial defense of the area. If this basic given is no longer in

force, the Civil Administration should return the land to the owners from whom it was taken, or at the very least, those parts of the land that have not yet been used for civilian needs. The fact that the Civil Administration did not do so is indicative that the security component in the establishment of the settlement has not ceased to exist and remains firm and abiding. As noted, a settlement of this kind cannot lie stagnant, and sooner or later it will have address at least the natural growth of its population. Furthermore, the expansion of the settlements in Judea and Samaria is also a goal that the government sought to achieve, as per Decision 145 (“To expand the settlement of Judea, Samaria [...] by adding people to the existing communities and by establishing new communities on land owned by the state”). Building within the boundaries of a settlement on land that was militarily occupied, when the security component remains in force, fits in very well with Decision 145, and consequently, there are no ground to forbid it. In these circumstances, the security forces should express their view on the vital nature of additional construction before the matter is looked into to on the planning level.

Hence, we recommend that the Civil Administration be instructed that there is no prohibition on and nothing at all to prevent further construction within a settlement that is built on land that was militarily occupied, and that requests of this kind be considered on the planning level only.

Nature reserves and parks in Judea and Samaria

64. The National Nature and Parks Authority, whose representatives appeared before us, has a considerable interest in the preservation of nature in Judea and Samaria. According to it, in the current situation, phenomena such as allowing sewage to flow, the dispersion of poisons, destruction of natural habitats, the obstruction of ecological corridors, etc. are quite prevalent, with repercussions that are destructive to the flora and fauna in the area. Refraining from dealing with these issues could cause irreversible damage.

In order to prevent these undesirable phenomena and to best protect the nature and heritage, the National Nature and Parks Authority considers it of utmost importance to be able to declare nature reserves and parks in the areas of Judea and Samaria under Israeli control. The declaration applies a series of rules to the declared areas aimed at protecting them. These rules give the authorities effectual and legal enforcement tools (see Rules of Behavior in Nature Reserves (Judea and Samaria), 5733-1973, and Rules Concerning Behavior in Parks (Judea and Samaria), 5734-1974).

According to the arguments presented to us, the master plan in the area designates some 51 sites for use as nature reserves and eight other sites as parks. However, to this day, only 18 sites (14 reserves and 4 parks) have been regularized, after undergoing a process involving detailed planning and declaration as required by law. This process of planning and declaration of nature reserves and parks began in the late 1980s, only to be discontinued in 1995. Since 1995 up to the present, the planning has not been completed and no new reserves have been declared despite the repeated efforts on the part of the National Nature and Parks Authority to move this matter forward.

According to the position of the National Nature and Parks Authority, the responsibility for halting the planning and declaration process lies with the fact that according to the position taken by the Civil Administration, the Oslo Accords do not permit the declaration of nature reserves and parks in Area C, outside the Israeli settlements and military locations without coordination with the Palestinian side (**“The Israeli side shall coordinate with the Palestinian side activities in Area C, outside settlements and military locations, which may change the existing status of this sphere.”**). It has been argued that since there is no Palestinian cooperation with Israel, the Civil Administration has been unable to advance the treatment of this subject.

We believe that the protection of nature and heritage values, in addition to its universal importance, benefits both sides in the area, the Israelis and Palestinians both. This explains our position that there is nothing in the declaration of nature reserves and parks that changes the status of this area, except to improve it for the benefit of the entire public. Hence, we see no justification to halting the regularization process of the reserves in Area C as a whole, and in particular in the vicinity of the Israeli settlements and military locations. We **therefore recommend advancing the planning and declaration procedures in all the areas designated for nature reserves and parks in Area C.**

Conclusions and Recommendations

65. After having considered the terms of reference set out in the Commission's mandate, and in light of what we have heard, as well as the considerable amount of material that has been presented to us by a wide range of bodies, our conclusions and recommendations are as follows:

Our basic conclusion is that from the point of view of international law, the classical laws of "occupation" as set out in the relevant international

conventions cannot be considered applicable to the unique and sui generis historic and legal circumstances of Israel's presence in Judea and Samaria spanning over decades.

In addition, the provisions of the 1949 Fourth Geneva Convention, regarding transfer of populations, cannot be considered applicable, and were never intended to apply to the type of settlement activity carried out by Israel in Judea and Samaria.

Therefore and according to international law, Israelis have the lawful right to settle in Judea and Samaria, and consequently, and the establishment of settlements cannot in and of itself be considered to be illegal.

With regard to the other issues considered, our recommendations are as follows:

First, the Government is advised to elucidate its policy regarding settlement by Israelis in Judea and Samaria, with a view to preventing future mistaken or “creative” interpretations of its decisions. We propose that its decision include the following principles:

- a. Any new settlement in Judea and Samaria will be established only following a decision by the government or by a duly empowered ministerial committee.
- b. Construction within the bounds of an existing or future settlement will not require government or ministerial decision, but such construction must be approved by the planning and zoning authorities after they have ascertained that the proposed construction is not contrary to the approved town-planning scheme applicable to the land in question.
- c. Extension of an existing settlement beyond the area of its jurisdiction or beyond the area set out in the existing town-planning scheme will require a decision by the Minister of Defense with the knowledge of the Prime Minister, prior to any of the following stages: commencement of planning and commencement of actual construction.

Second, with regard to settlements established in Judea and Samaria on state lands or on land purchased by Israelis with the assistance of official authorities such as the World Zionist Organization Settlement Division and the Ministry of Housing, and which have been defined as "unauthorized" or "illegal" due to the fact that they were established without any formal government decision, our conclusion is that the establishment of such settlements was carried out with the knowledge, encouragement and tacit agreement of the most senior political level – government

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ministers and the Prime Minister, and therefore such conduct is to be seen as implied agreement.

Regarding these settlements, as well as those established pursuant to a government decision but lacking definition of their municipal jurisdiction, or without having completed the planning and zoning procedures, and which as a result, have been described as “unauthorized” or “illegal,” the remaining outstanding procedures should be completed as follows:

- a. The area of municipal jurisdiction of each settlement, if not yet determined, must be determined by order, taking into due consideration future natural growth.
- b. The administrative barriers imposed on the planning and zoning authorities must be removed immediately, so that they may fulfill their function of examining plans that have been submitted to them by each settlement, without any further need for additional approval by the political level.
- c. Pending completion of those proceedings and examination of the possibility of granting valid building permits, the state is advised to refrain from carrying out demolition orders, since it brought about the present situation through its own actions.
- d. With a view to avoiding doubt, it is stressed that all the settlements, including those approved pursuant to this proposed framework, may in the future extend their boundaries in order to address their needs, including natural growth, without the need for additional government or ministerial decision, as long as the proposed extension is located within the jurisdiction of the settlement, within its bounds as set out in the approved town-planning scheme, and has received due approval from the planning and zoning authorities.
- e. Settlements established wholly or partially on land that is subject to examination as to whether it is public or private land (“*seker*”), are to be considered settlements whose legal status is pending. Most of these settlements were established years ago, and it is thus necessary to accelerate the slow examination process (“*seker*”), in all areas of Judea and Samaria, and to complete it within a fixed time period, and to this end, even consider, utilizing assistance from external entities. Upon completion, the processing of each settlement will continue according to the results of the land examination (“*seker*”) and determination of the type of land, in accordance with the framework proposed by us.

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- f. In the event of conflicting claimants to land, it would be appropriate to adopt a policy whereby prior to any determination by the state regarding petitions for eviction or demolition, a thorough examination of the conflicting claims be conducted by a judicial tribunal dealing with land issues. This is all the more necessary with respect to claims of prior purchase or obsolescence, or where the possessor acted in good faith. Pending such determination, state authorities should be instructed to refrain from taking any position in land conflicts and taking irreversible measures, such as eviction or demolition of buildings on the property.
- g. To this end and with a view to facilitating accessibility by local residents to judicial tribunals, we suggest the establishment of courts for the adjudication of land disputes in Judea and Samaria, or alternatively, extending the jurisdiction of district court judges in order to enable them to handle land disputes in Judea and Samaria in their courts.
- h. It is necessary to draft into the security legislation a right for the public to review databases administered by the various official bodies, including the Civil Administration, concerning land rights in Judea and Samaria.
- i. With an eye to promoting stability and preventing uncertainty, we are of the view that the residents of Judea and Samaria, Palestinians and Israelis alike, should be encouraged to register their rights in the land within a fixed period of time (four or five years seems to be a reasonable period), at the end of which, anyone who has not carried out the registration will lose whatever rights he may have had
- j. With regard to the “Order Concerning the Disruptive Use of Private Land ” — we are of the view that this order must be cancelled. In the event that it is decided to retain it, we propose that it be amended such that any decision by an Appeals Committee will not be recommendatory, but will rather be binding upon the Head of the Civil Administration to act pursuant to such a decision. The Head of the Civil Administration and other interested parties may appeal the decision of the Appeals Committee before a Court for Administrative Affairs, whose decision will be final. We propose that this arrangement be applied also to other decisions of the Appeals Committee, including concerning questions of "Primary Registration" of land in Judea and Samaria.
- k. The composition of the Appeals Committee should be changed. It presently consists of uniformed reserve officers, jurists, who are, of necessity, perceived at the least to be subordinate to, and even under the command of the Head of the Civil Administration. We feel that this situation is not proper, and

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therefore recommend that the Appeals Committee be composed of non-uniformed jurists, a factor which would contribute to the general perception of the Appeals Committee as an independent body, acting according to its own discretion.

- l. The "Procedure for Dealing with Private Land Disputes" must be revoked. Such disputes must only be considered and adjudicated by a judicial body.
- m. Security legislation must be amended to enable Israelis to purchase land in Judea and Samaria directly, and not only through a corporation registered in the area. We also recommend that the procedures for "Primary Registration" of land rights be accelerated and completed within a reasonable and fixed time period.
- n. The Civil Administration should be instructed that there is no prohibition whatsoever on additional construction within the bounds of a settlement built on land initially seized by military order, and such requests should be considered at the planning level only.
- o. We also recommend advancing the planning and declaration procedures for all areas designated for nature preserves and parks in all those areas of Judea and Samaria under Israeli responsibility.

Finally, we wish to stress that the picture that has been displayed before us regarding Israeli settlement activity in Judea and Samaria does not befit the behavior of a state that prides itself on, and is committed to the rule of law.

If as a result of this report, the message is conveyed that we are no longer in the formative stages of the creation of our state when things were done in an informal and arbitrary manner, we will be satisfied.

The proponents of settlements, including at the most senior political levels, should take to heart and acknowledge the fact that all actions on this matter can only be done in accordance with the law. Similarly, official governmental bodies should act with alacrity and decisiveness in fulfilling their functions to ensure that the law is duly observed.

66. As noted in Section 2 of this report, many issues were raised before us by the interested parties, and some of an exceedingly complex nature. Were we to address all of them, e.g. issues related to the leasing of land belonging to absentees by the Custodian of Government and Abandoned Property, the issue of the status of land purchased in Judea and Samaria by Jews before the establishment of the state, it would have taken many long months of study and examination and a further delay in

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the consolidation of our recommendations. In these circumstances, we decided to focus on the main guidelines concerning the principal issues upon which we were asked to express our opinion. Should the government decide to adopt our recommendations, it will be necessary to implement those principles in detail.

To conclude, we would like to express our thanks to the coordinator of the committee, Attorney Eran Ben-Ari, who thanks to his pleasant manner, hard work and devotion, efficiency and professionalism greatly assisted us in achieving the goals we were tasked with by the Terms of Reference.

Jerusalem, 21 June 2012 – 1 Tammuz, 5772

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| E. E. Levy | Tehiya Shapira | Amb. Alan Baker |
| (Ret.) Supreme Court Justice | (Ret.) District Court Judge | Member |
| Chairman | Member | |

Regavim is a research backed legal advocacy organization focused on land ownership issues whose mission is to ensure responsible, legal & accountable use of Israel's state lands and the return of the rule of law to all areas and aspects of the land and its preservation.

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