

Fake Justice

The Responsibility Israel's High Court Justices
Bear for the Demolition of Palestinian Homes
and the Dispossession of Palestinians

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February 2019

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Introduction

On 5 September 2018, after years of legal proceedings, Israel's High Court of Justice (HCJ) handed down its final ruling in the matter of the Palestinian community of Khan al-Ahmar. The justices determined there was no legal obstacle to demolishing the structures in the community, as construction in the compound was unlawful.¹ Khan al-Ahmar, located about two kilometers south of the settlement of Kfar Adumim, is home to 32 families, a total of 173 people, including 92 minors. Khan al-Ahmar also has a mosque and a school. Built in 2009, the school has a student body of more than 150 children between the ages of six and fifteen, about half of whom come from nearby communities.

For years, Israel has been endeavoring to displace Khan al-Ahmar, in part for the purpose of expanding settlements which were built nearby. Israeli authorities have refused to hook up the community to electricity or a sewage system, to pave access roads, have prohibited the construction of homes or structures for public use in the community, and have reduced residents' pastureland. As a result, the residents live in appalling conditions.

The ruling and the subsequent cabinet statement regarding plans to demolish the homes as soon as possible sparked harsh criticism within the international community.² In addition, in an unusual move, Prosecutor of the International Criminal Court Fatou Bensouda issued a statement noting that "extensive destruction of property without military necessity and population transfers in an occupied territory constitute war crimes."³ Cabinet ministers swiftly came to the defense of demolishing the community's homes. Minister of Justice

Ayelet Shaked tweeted: "The Israeli administration is responsible for maintaining the public order in the area, including enforcing planning and zoning laws... Israel will continue to uphold the rule of law, in accordance with international law, and pursuant to the jurisprudence of the HCJ."⁴ Yisrael Katz – the Minister of Transport and Minister of Intelligence Services – said "Khan al-Ahmar is an illegal outpost" and must therefore be removed.⁵ Minister of Education Naftali Bennett said that Khan al-Ahmar would be removed. As he put it, "We are dealing with illegal construction whose demolition has been approved by the HCJ. In a state subject to the rule of law, the law is enforced even if the international community objects or issues threats."⁶ In early November 2018, Prime Minister Benjamin Netanyahu announced that negotiations with the residents of Khan al-Ahmar would be given another chance and demolition suspended for the time being.

The fact that the ministers chose to address the destruction of the community solely in terms of "law enforcement" accurately reflects how Israel has framed its policy regarding Palestinian construction in the West Bank for years. On the declarative level, Israeli authorities consider the demolition of Palestinian homes in the West Bank as no more than a matter of illegal construction, as if Israel does not have long-term goals in the West Bank and as if the matter does not have far-reaching implications for the human rights of hundreds of thousands of individuals, including their ability to subsist, make a living and manage their own routine.

1. HCJ 5193/18 *Residents' Committee of the Village of Khan al-Ahmar v. Commander of IDF Forces in the West Bank*.

2. See, for example, "European Parliament Resolution of 13 September 2018," <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0351+0+DOC+PDF+V0//EN>.

3. "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the Situation in Palestine," 17 October 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=181017-otp-stat-palestine>.

4. https://twitter.com/Ayelet_Shaked/status/1040477169519091712.

5. Noa Landau and Yotam Berger, "Cabinet OKs Netanyahu's Proposal to Postpone Khan al-Ahmar Evacuation until Negotiations Exhausted," *Haaretz*, 21 October 2018.

6. Itamar Eichner, "Security Cabinet approves delay of Khan al-Ahmar evacuation," *ynetnews*, 21 October 2018. (Quote appears in Hebrew version of the *ynet* article.)

The Supreme Court has fully embraced this point of view. In thousands of rulings and decisions handed down over the years on the demolition of Palestinian homes in the West Bank, the justices have regarded Israeli planning policy as lawful and legitimate, nearly always focusing only on the technical issue of whether the petitioners had building permits. Time and time again, the justices ignored the intent underlying the Israeli policy and the fact that – in practice – it imposes a virtually blanket prohibition on Palestinian construction for private and public purposes alike. They have consistently overlooked the clear consequences of this policy for Palestinians: the barest – sometimes positively appalling – living conditions, being compelled to build homes without permits, and absolute uncertainty as to the future.

The present report explores HCJ rulings on the demolition of homes in Palestinian communities in the West Bank. The first two chapters provide the context and background for understanding the rulings and review the particulars of the Israeli planning policy and the state's position as presented to the HCJ. The third and fourth chapters explain how the justices – explicitly and implicitly – granted legitimacy to the Israeli planning policy, for all its devastating implications for the Palestinian residents of the West Bank.

A. Planning policy in the West Bank⁷

The planning system Israel instituted in the West Bank serves only the state's own needs, as if the West Bank were its sovereign territory, and utterly disregards the needs of the Palestinian population. To that end, the system operates so as to limit construction for Palestinians as much as possible, while at the same time striving to expand construction in the settlements – whose very establishment is unlawful to begin with – and taking over as much land as possible, including for the purpose of future settlement expansion.

While this planning apparatus is implemented only in Area C, where Israel retains planning authority, it affects all West Bank residents. The 1995 Oslo II Accord divided the West Bank into three areas according to a classification that was meant to remain in effect for a period of five years only. Land which consisted mostly of built-up Palestinian areas, which were – and still are – home to most of the Palestinian population in the West Bank, was designated Area A and B. Officially, these non-contiguous areas were handed over to the control of the Palestinian Authority (PA), including planning and construction powers there. The remaining roughly 60% of West Bank land was designated Area C. It is contiguous, and Israel retained full control over security matters there as well as over all land-related civil affairs, including planning, building, laying infrastructure and development.

The planning and construction powers transferred to the PA do not enable substantial regional development. First, the lands handed over to the PA were already populated for the most part. Since then, the Palestinian population of the West Bank has nearly doubled and the land reserves have been almost fully exhausted. Second, the potential for urban, agricultural and

economic development of the West Bank lies in Area C, as do the West Bank's natural resources, first and foremost groundwater. Area C is contiguous, with isolated "islands" of Area A and B land scattered throughout. Therefore, any development which exceeds the boundaries of those islands, including plans meant to strengthen functional relationships between communities or to lay infrastructure – for water, electricity or transport – goes through Area C and must get approval from the Israeli planning apparatus. The upshot is that the policy Israel implements in Area C affects all Palestinians in the West Bank and their ability to realize any future planning potential.

The sections below explain how the planning system operates on two parallel planes, one for Palestinians and the other for settlers.

1. Dispossession of Palestinians from vast areas, generous land allocations to settlements

Israel prohibits Palestinian construction on some 60% of Area C, or roughly 36% of the entire West Bank. It does so by applying a variety of legal definitions to vast areas, with classifications occasionally overlapping:

State land:⁸ Israel considers about 1,200,000 dunams (1 dunam = 1,000 square meters) of Area C as "state land." A small portion of this land was registered as government property under the British or Jordanian rules, and the rest was declared as such by Israel after it occupied the West Bank. Israel does not allow Palestinians to build on these lands, which constitute about 22% of the West Bank and about 35% of Area C.

7. For further details, see: Bimkom, *The Prohibited Zone: Israeli Planning Policy in the Palestinian Villages in Area C*, June 2008 (hereafter: Bimkom, *The Prohibited Zone*); B'Tselem, *Acting the Landlord: Israel's Policy in Area C, the West Bank*, June 2013 (hereafter: B'Tselem, *Acting the Landlord*).

8. For further details, see: B'Tselem, *Under the Guise of Legality: Declarations of State Land in the West Bank*, February 2012 (hereafter: B'Tselem, *Under the Guise of Legality*).

Under the British Mandate, and to a greater extent under Jordanian rule, the authorities began systematically registering West Bank lands in the land registry, a regularization proceeding known as “land settlement rights” (not to be confused with the term “Israeli settlements”). As part of the procedure, the rights to the land were investigated and the land of entire villages was registered, mostly in the Jordan Valley and in the Nablus and Ramallah Districts. By June 1967, when Israel occupied the West Bank, only roughly a third of West Bank lands had been successfully registered, with approximately 74% of that land listed as privately owned. In 1968, Israel suspended registration proceedings, thereby leaving ambiguous the ownership status of some two-thirds of the West Bank.

In the late 1970s, the HCJ handed down its ruling in the case of the settlement of Elon Moreh, making it difficult for the state to continue building settlements on private lands seized for “military purposes,” as Israel had done up until then.⁹ The state, which wanted to keep on building settlements, announced that henceforth settlements would be established on state land. However, extant state lands were limited in extent and in where they were situated. As a result, Israel was unable establish settlements on the scale it wanted to or in the areas it favored. Therefore, Israel developed a new mechanism that would allow it to substantially increase the amount of state land. It did so even though the law that applies in the West Bank does not allow authorities to initiate declarations of state land, unless done as part of land settlement rights registration, as the British and Jordanian authorities had done.

From 1979 to 1992 Israel declared over 900,000 dunams state land, taking advantage of the fact that these areas were unregistered because the “land settlement rights” procedure had been suspended. By doing so, Israel increased the area designated state land from 527,000 dunams in 1967 to some 1,440,000 dunams in 1992 (increasing from 9.1% to about 25% of the West Bank, excluding the land Israel annexed to Jerusalem in 1967). Israel does not allow Palestinians to build on state land.

For a period of several years, beginning in late 1993, Israel stopped declaring state land in the West Bank. It renewed these declarations in 1997, although at a considerably slower rate. That same year, Israel imposed a new procedure “regarding the monitoring and preservation of survey lands, their management and the removal of squatters.” The procedure examined the status of lands that had not undergone the process of registration or declaration as state land, with a view to exploring the possibility of declaring them so. Approximately 20% of Area C is currently classified as “survey lands.” Palestinians are not allowed to build on survey land either.¹⁰

Apart from the unlawfulness of the proceeding itself, the declaration of state land was based on rewriting the legal provisions and applying a reading of the Ottoman Land Code that was completely different from the standard interpretation applied until then. Moreover, declaring state land was carried out in contravention of the basic tenets of due process. In many cases, Palestinian residents were not even informed that their land had been registered as state property. By the time they found

9. HCJ 390/79 *Duweikat v. Government of Israel*.

10. According to information the Civil Administration provided to Peace Now (NGO) in 2005. Ever since, the Civil Administration has refused to provide updated data layers.

out, it was too late to appeal, the final due date for filing having passed.

All this casts doubt on Israel's declarations of state land. For example, under the skewed interpretation Israel adopted, some of the declared state land would not have been considered as such under the rule of either the British Mandate or the Jordanian government. Instead, it would have been registered as either privately or collectively owned by Palestinians. Therefore, the distinction Israel makes between state land, on which it alleges settlements can be built, and privately owned land, on which it refrains – or rather, only professes to refrain – from building, is virtually pointless.

Even according to Israel's way of thinking, whereby all land declared state land is actually so, that land must be used to serve the needs of the local Palestinian population. Instead, Israel allocates state land almost exclusively to its own settlements, military and infrastructure. According to figures provided by the Civil Administration (the branch of the Israeli military designated to handle civil matters in Area C) further to an HCJ petition by two Israeli human rights NGOs – The Association for Civil Rights in Israel (ACRI) and Bimkom: Planners for Planning Rights – only 1,625 dunams, or 0.24%, of all state land allocated by the Civil Administration, were given to Palestinians. Moreover, nearly 40% (630 dunams) of the said area was allocated for the establishment of communities for Bedouins who Israel expelled from their lands so that the settlement of Ma'ale Adumim could be expanded.¹¹

Military training zones: Roughly 30% of Area C, mostly in the Jordan Valley, has been designated as military training zones. This land is home to nearly 10,000 Palestinians living in 41 communities,¹² most of which were located at their present sites prior to the occupation. The declaration of training zones commenced very shortly after the occupation began. By the mid-1970s, over 1,500,000 dunams had been declared closed zones.¹³

The zones were closed under the Order regarding Security Provisions (Judea and Samaria), which grants the military commander broad discretion “to declare an area or place closed.” The commander is empowered to prevent people from being in or entering the declared zone. He is further empowered to remove people who enter the zone in violation of these orders. The one exception is people who are permanent residents of the closed-off area. Consequently, Palestinians who do not live in the closed zone cannot move into it, and those already living in it are prohibited from any further development of their communities.

Training zones are declared not necessarily for that purpose. According to research published in 2015, the Israeli military does not carry out training on 80% of the land declared closed for that purpose.¹⁴ Even in the areas the military does use for training, doing so is not based solely on security considerations. At a meeting of the Judea and Samaria Region Subcommittee of the Knesset Foreign Affairs and Defense Committee, Colonel Einav Shalev, an operations officer in the Central Command, explained that one of the main reasons for stepping up training in the Jordan Valley is as a

11. Letter dated 13 June 2018 from Captain Bar Naorani, Public Inquiries Staff Officer at the Office of the Head of the Civil Administration, to Noa Shalit of the Movement for Freedom of Information. For an analysis of the data, see <http://peacenow.org.il/en/state-land-allocation-west-bank-israelis>.

12. For detailed figures, see <https://public.tableau.com/profile/ocha.opt#!/vizhome/VPP2013MMay21N-Basic24/DashBasic>.

13. Israel declared nature reserves on approximately 9% of Area C. Most of the reserves overlap with closed military zones, with only 2% of land designated nature reserves lying outside military zones.

14. Kerem Navot, *A Locked Garden: Declaration of Closed Areas in the West Bank*, March 2015.

countermeasure against Palestinian construction. As he put it:

I think that one of the good proceedings that could fall between the cracks is restoring firing zones to places where they are meant to be and still are not. [That is] one of the main reasons that we, as a military system, send a lot of the training maneuvers to the Jordan Valley... I think that the traffic of AFVs (armored fighting vehicles) and vehicles etc. in the region, and thousands of troops walking, gets things to move aside. When the troops march, people move out of the way, and I'm making no distinction between Jews and Palestinians here, I'm speaking generally... There are some places [where] we significantly cut down on the amount of training, and weeds cropped up.¹⁵

Settlements: There are nearly 250 settlements across the West Bank (excluding East Jerusalem): 131 are officially recognized by Israel's Ministry of the Interior; another 110 or so – known as settlement outposts – were established without official sanction, but with the backing and support of government ministries. According to Israel's Central Bureau of Statistics, at the end of 2017, the overall population in these settlements was 413,400. The built-up area of settlements makes up about 1.5% of Area C, but the jurisdiction of all officially recognized settlements sprawls over approximately 541,000 dunams, equal to nearly 10% of all West Bank land and about 16% of Area C.¹⁶ In 1997, Israel declared all settlement jurisdiction areas closed military zones off-limits to Palestinians. They are allowed neither to enter the area nor to build there.

National Master Plan 50: National Master Plan 50 (NMA 50), a road plan for the West Bank, was approved in 1991. It designates many areas along existing or planned roads as off-limits to construction. The plan classified many local roads in the West Bank as regional or major arteries, supposedly up to 100 meters wide. However, in fact, these roads are narrow and have little traffic. NMA 50 prohibits construction on 70 meters on either side of these roads, exceeding the restriction set out in the corresponding plan in Israel proper. The plan limits construction in Palestinian villages located near existing roads, as well as near roads that exist only on paper in NMA 50, even when there is clearly absolutely no intention of building them.

By using classifications such as “state land” and “military training zones,” Israel has significantly reduced the amount of land available to Palestinians for residential use, economic or agricultural development, and building infrastructure. The prohibition on Palestinian development across these vast tracts of land also precludes all regional planning for Palestinian communities that would take into account ties between the various communities or between large cities and rural areas.

International humanitarian law (IHL) imposes restrictions on the occupying power as to the uses it may make of occupied land.¹⁷ Under IHL, Israel may operate in the occupied territory on the basis of only two considerations: for the benefit of the local population or imperative military needs within the occupied territory. These considerations do not grant permission to declare state land on hundreds of thousands of dunams or to allocate

15. Meeting of the Judea and Samaria Region Subcommittee of the Knesset Foreign Affairs and Defense Committee, 27 April 2014.

16. For more details, see: <http://peacenow.org.il/en/settlements-watch/settlements-data/lands>.

17. See, e.g., Annexes to Convention (IV) respecting the Laws and Customs of War on Land, (The Hague, 1907) [hereafter: The Hague Convention of 1907]: Article 46 regarding private property; Article 55 regarding public state property.

them for the benefit of Israeli interests and the establishment of settlements. IHL likewise prohibits making use of occupied land for military training. The establishment of settlements in an occupied territory also constitutes, in and of itself, a breach of the stated prohibition, whereby the occupying power is not allowed to transfer any of its civilian population into the occupied territory.¹⁸

Above and beyond these prohibitions, the building of settlements has led to devastating consequences for Palestinians' human rights because of the extent to which they affect the reality of life in the West Bank, their impact far exceeding the hundreds of thousands of dunams stolen to establish them. For example, on the basis of the location of settlements, the Israeli military decided on the placement of dozens of checkpoints that restrict Palestinians' movement. The military also bars Palestinians from accessing their own land where it lies near settlements, while at the same time allowing settlers to cultivate that very land. In addition, the meandering route of the Separation Barrier was set inside the West Bank with a view to leaving as many settlements and land for their future expansion west of the barrier, on its "Israeli" side.

2. Creating separate planning committees¹⁹

When Israel occupied the West Bank, planning and construction there was governed by the Jordanian Planning Law.²⁰ The Jordanian law set out a tiered system of planning bodies – in a hierarchy from national to district to local – and defined the makeup of these bodies and their powers. The law also set

out the processes for planning and approving outline plans, the procedures for obtaining building permits on the basis of these plans, and the appeals process.

IHL prohibits the occupying power from changing the laws in force in the occupied territory, unless it is for imperative military needs or to benefit the local population.²¹ In 1971, on the basis of this exception – and arguing that the Jordanian Planning Law stipulates procedures that Israel cannot uphold – the military commander signed Order 418, setting out the regulations governing planning and construction under the occupation.²²

The order – along with amendments and annexes added over the years – significantly changed the provisions of the Jordanian Planning Law and enabled Israel to establish two parallel planning systems, one for Palestinians and the other for settlers.

Order 418 did away with the district planning committees, stipulated that village councils would no longer be able to serve as local planning committees, and eliminated any option of their cooperating amongst themselves in planning the space they share. The order transferred all planning authority in the West Bank to the Civil Administration's Supreme Planning Council and stipulated that that council could appoint sub-committees staffed by its members.

At the same time, the order empowered the commander of the area "to appoint, for a particular planning area, a special planning committee with the same powers as a local planning committee." Using neutral wording, the order stated that this power

18. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), Article 49.

19. For more on this topic, see: Bimkom, *The Prohibited Zone* (above, note 7), pp. 39-45; B'Tselem, *Demolishing Peace: Israel's Policy of Mass Demolition of Palestinian Houses in the West Bank*, September 1997, pp. 4-8.

20. City, Village and Buildings Planning Law No. 79, 1966 (hereafter: The Jordanian Planning Law).

21. The Hague Convention of 1907, Article 43.

22. Order No. 418: Order concerning the City, Village and Buildings Planning Law, 1971.

would be available only when “the planning area does not include the jurisdiction of a municipality or a village council.” In other words, it does not apply to Palestinian communities. On the basis of this provision, Special Planning Committees were formed for the larger local councils and for all regional councils established in settlements. The powers of the district committees were transferred to the Settlement Subcommittee, which only handles settlements. No Special Planning Committee was established in any Palestinian community.

In this way, the Civil Administration became the sole and exclusive authority for planning and development in the West Bank, for Palestinian communities and settlements alike. Palestinians have no representation in this system. It does not reflect what the Palestinian population wants, nor does it reflect local traditions, religions and culture; Palestinian commercial, industrial and agricultural interests; or the expert opinions of Palestinian professionals. This dramatic change to the planning apparatus enabled Israel to fashion a system that represents only Israeli interests and this, in turn, changed the map of the West Bank.

3. Restrictive planning for Palestinians, generous planning for settlers

In the areas where Israel does not a priori prohibit Palestinian construction (approximately 40% of Area C), the state argues that planning must adhere to the outline plans the British Mandate authorities drafted back in the 1940s, which defined land-use zoning for the entire West Bank. It relies on the fact that the Jordanian rule did not cancel the Mandatory plans so that they are considered part of the local law the occupying power must uphold. Israel relies on the British plans to the letter, disregarding the Jordanian Planning Law provision – also part of

the local law – that requires planning institutions to re-examine plans at least once every ten years to see if they need to be updated.²³

The very idea that communities can be planned according to outline plans drafted nearly eighty years ago is preposterous. Nevertheless, Israel has chosen not to apply the exception that allows changes to the local law, as it did when it served its own interests to change the Jordanian Planning Law via that exception. Israel has not applied the exception even though the extant plans cannot possibly reflect the needs of the population, given that the areas where these plans permit construction have long been exhausted and the planning needs of the modern world have altered drastically in the interim. In order to avoid just such a predicament, the plans themselves stipulated they must be revised and updated once every five years. Nonetheless, they have not been updated since the end of British rule.

The reason that – specifically with regard to these outdated plans – Israel has insisted on not taking advantage of the exception that allows it to change the local law is that the plans serve as an effective tool for limiting Palestinian construction, demolishing homes and blocking development. Not only are applications for building permits systematically denied on the grounds that they do not conform to the British Mandate era plans, but the Civil Administration refuses to approve even the limited construction the plans do allow. The refusal is grounded in a strict or even faulty interpretation of the plans’ provisions, or on hard-nosed adherence to the plans and refusal to grant latitude even when the plans themselves provide for it.²⁴

In the 1990s, in order to continue upholding the appearance of a relevant and functioning planning apparatus, the Civil Administration drafted Special

23. The Jordanian Planning Law, Article 25(1).

24. For further details on the British Mandate-era plans, see: Bimkom, *The Prohibited Zone* (above, note 7), pp. 55-91.

Outline Plans for the Palestinian population, with the declared objective of replacing the Mandate-era plans. However, these plans were not meant to facilitate Palestinian construction, but rather to curtail and limit it.

From 1987 to 1995, the Civil Administration approved about 400 Special Outline Plans for Palestinian villages. For a decade after the Oslo II Interim Agreement was signed in 1995, the Civil Administration drafted no outline plans. Only in 2005 did it resume planning for villages in Area C. As of November 2017, the Civil Administration had drafted and approved plans for only 16 of the 180 communities which lie in their entirety in Area C. The plans cover a total of 17,673 dunams, less than 1% of Area C, most of which are already built-up.

The Special Outline Plans were drafted by the Civil Administration alone, without consulting the local residents at all or carrying out a planning survey to identify their needs. Their name notwithstanding, they are not outline plans. In other words, they are not designed to set out a policy for planning and development. Rather, the Special Outline Plans are demarcation plans, whose primary function is to outline the perimeter of the village's built-up area on the basis of aerial photographs. Consequently, isolated structures, farmland and pastures are not included in the plan. Lands declared state land or else seized by the military are also excluded from the area the covered by the plan. These plans cover dozens to several hundred dunams per village. All they offer is a restrictive delineation of the village and freezing expansion beyond the boundary set by the demarcation line.

The hundreds of Special Outline Plans are identical, apart from the size of the area they cover, as set

according to the community's built-up area. All the plans classify areas only for residential purposes. They do not include any areas for public purposes such as schools, medical clinics, parks or commercial areas. One result of these plans is extreme crowding in Palestinian villages. According to calculations by Bimkom, these plans allow for a residential density ten time higher than that in rural communities in Israel. In fact, under the plans, the designated residential density for Palestinian villages in the West Bank is higher than that of some of the most densely populated cities in the Western world: at least 70% greater than cities such as New York and London.²⁵

In 2011, the Civil Administration published a list of criteria it purportedly uses in deciding whether to prepare outline plans for built-up land in Area C. Taken at face value, the criteria seem reasonable: they relate to the size of the built-up area, the age and density of the buildings, proximity to an existing community, to nature reserves or archeological sites, as well as the possibility of building public buildings and infrastructure.

However, a closer look at the criteria shows that they are – deliberately – unsuited to the small Palestinian communities that lie scattered across West Bank, particularly in the South Hebron Hills, the area of Mishor Adumim and the Jordan Valley. These communities are small, with non-permanent structures (due to the families' economic situation as well as to Israel's refusal to allow them to build such structures), and situated far from large Palestinian communities, because of their need for extensive pastureland.

In point of fact, these criteria were used by the Civil Administration in order not to recognize existing villages, while completely ignoring the fact that

25. For further details: *ibid.*, pp. 101-141.

Palestinians have been living there for years. Since 2011, seeing that the Civil Administration did not draft plans as it is obliged to do, dozens of Palestinian communities – with the help of Palestinian and international organizations and in coordination with the PA – drafted their own plans. Some of the plans covered communities or villages located in full in Area C and others covered places only partly in Area C. As of September 2018, 102 plans had been submitted to the Civil Administration’s planning bodies, but by the end of 2018, a mere five plans – covering an area of about 1,00 dunams (or about 0.03% of Area C) – had received approval.²⁶

There is currently no planning underway for Palestinians. At a meeting of the Subcommittee of the Knesset Foreign Affairs and Defense Committee, Head of the Civil Administration Brig.-Gen. Ben-Hur Achvat said:

*The policy of the Civil Administration perfectly matches the directives of the civilian government officials and the policy of the Ministry of Defense... There is currently no planning for Palestinians due to instructions from government officials. Therefore, at present, all our planning resources are, almost entirely, being used for the Israeli sector.*²⁷

As a report by Bimkom so aptly put it,²⁸ the planning for Israeli settlements often mirrors, in reverse, the situation in Palestinian communities. With the single exception of the settlements in the city of Hebron, all settlements were established in open areas. In addition, generous, highly detailed outline plans have been prepared for nearly all settlements,

replacing the outdated British Mandate-era plans in force there. The new plans include new zoning compatible with the needs of modern communities. They include land for public use, green space, and land for expansion and development, far beyond what is necessary based on the rate of normal population growth. The Civil Administration also built a new network of roads to link the various settlements to one another – and the settlements to the other side of the Green Line (the boundary between Israel’s sovereign territory and the West Bank) – constraining and confining Palestinian development.

The above shows how the planning apparatus, which is under full Israeli control, operates in the service of a policy that promotes and expands Israeli takeover of lands across the West Bank. When planning for Palestinians, the Civil Administration endeavors to thwart any development, minimize the size of communities and increase construction density, with a view to leaving as many land reserves as possible to benefit Israeli interests, with the expansion of settlements first and foremost. Yet when planning for settlements, the Civil Administration’s actions are the very reverse: planning reflects the present and future needs of the settlements, aiming to include as much land as possible in the outline plan so as to take over as many land resources as possible. Such planning leads to wasteful infrastructure development, loss of natural countryside and relinquishing open areas.

26. E-mail to B’Tselem from UN Habitat, dated 27 November 2018.

27. Meeting of the Subcommittee of the Knesset Foreign Affairs and Defense Committee, Judea and Samaria Region Subcommittee, 28 October 2018. [All quotes from committee transcripts and HCJ rulings translated by B’Tselem, unless otherwise noted.]

28. Bimkom, *The Prohibited Zone* (above, note 7), p. 158.

4. Enforcement policy: Strict for Palestinians, lenient for settlers

According to Civil Administration figures, from January 2000 to mid-2016, Palestinians filed 5,475 applications for building permits. Only 226 (about 4%) were granted.²⁹ In view of the extremely slender chances of securing a building permit, and given the considerable time and expense involved in the application process, Palestinians usually do not try to apply for a permit. Generally, they will submit an application only after the Civil Administration has already instigated an enforcement process against their home, and in the absence of any other alternative.

The Civil Administration takes decisive action to track down Palestinian structures built without a permit. At a meeting at the Knesset in early June 2018, Col. Uri Mendes of the Civil Administration said, "There is nearly no illegal construction that goes undetected; there are almost no incursions – I'm talking percentagewise – 97-98% of illegal construction is discovered and is served orders. About 95% of incursions onto state lands are discovered."³⁰

Over the years, the Civil Administration has issued thousands of demolition orders for Palestinian structures. According to Civil Administration figures, 16,796 demolition orders were issued from 1988 to 2017; 3,483 (about 20%) were carried out; and 3,081 (about 18%) are under legal proceedings. Up to 1995, the Civil Administration issued fewer than 100 demolition orders a year. However, since

1995 – the year the Interim Agreement was signed and Areas A and B handed over to the PA – the numbers have risen steadily. From 2009 to 2016, the Civil Administration issued an average of 1,000 demolition orders a year.³¹

Not all structures issued demolition orders are in fact demolished. Marco Ben-Shabbat, who heads the Civil Administration's Central Supervision Unit, said at a meeting of the Knesset Foreign Affairs and Defense Committee in June 2017 that up until 2010 the Civil Administration demolished 10-15% of the buildings it identified as unlawful, but that since then, "we are at about 30-35%." He said that the source of the discrepancy between the number of orders and the number of actual demolitions is buildings that are the subject of proceedings still underway at the planning committees, and cases of pending legal proceedings seeking to overturn the orders:

*The legal sphere is very dominant... HCJ petitions by Palestinians have gone up by more than 100% from 2015 to 2016... They realized, whoever it is that needs to realize, that going the route of HCJ petitions takes a long, long time.*³²

The first step in enforcement proceedings, which are based on the Jordanian Planning Law, is a stop-work order, which includes a summons to a meeting of the Subcommittee for Building Supervision of the Civil Administration's Supreme Planning Council. Generally, only after the order is issued do residents apply for a building permit. Approval is systematically denied, always on the same grounds, usually citing incompatibility with the British Mandate plans. Then, once the application is denied, the subcommittee

29. Civil Administration figures B'Tselem received from Bimkom on 13 June 2018.

30. Meeting of the Judea and Samaria Region Subcommittee of the Knesset Foreign Affairs and Defense Committee, 3 June 2018.

31. For detailed Civil Administration figures, see <https://www.ochaopt.org/page/demolition-orders-against-palestinian-structures-area-c-israeli-civil-administration-data>.

32. Meeting of the Knesset Foreign Affairs and Defense Committee, 27 June 2017.

issues a demolition order. Similarly, appeals of the decision to demolish, made to another subcommittee of the Supreme Planning Council, are nearly always denied. Following the rejection, residents can petition the HCJ. In some cases, the state then says that it does not plan to carry out the demolition at this point or that further proceedings are needed.

These proceedings have a predictable, foregone conclusion. Nevertheless, they are lengthy and can last months or even years, and they require a detailed mapping of the area and the buildings as well as much time in handling the petitions. Therefore, in recent years various official Israeli bodies have been seeking alternative ways to secure demolitions. At a meeting of the Knesset subcommittee, Col. Mendes discussed “adding enforcement tools via legislative processes spearheaded by the Legal Adviser in Judea and Samaria in partnership with the Ministry of Justice.” Similarly, the Annual Report of the Military Prosecution stated: “In 2018, the department will work on implementing various measures to better contend with the phenomenon of illegal construction. This will include developing and expanding the legal and administrative tools available for enforcement against illegal construction.”³³

Thus far, these attempts have given rise to at least three types of military orders that allow for swifter enforcement proceedings:³⁴

•**Confiscation orders:** Military legislation permits confiscation of mobile structures, a designation which covers any structure that can be dismantled or removed without demolishing or damaging it, such as water towers, shipping containers and pre-

fabricated structures. Confiscation can be carried out forthwith, without the right of a hearing. Initially, the regulations permitted confiscation of mobile structures within 30 days from the time they were erected. Then, in November 2015, this number was expanded to 60 days. At the above-mentioned 27 June 2017 session of the Knesset Foreign Affairs and Defense Committee, Marco Ben-Shabbat of the Civil Administration described the process: “Every such pre-fab [known in Hebrew as a *caravilla*] – within 60 days from the time it’s set in place – based on our deposition, without any process, is dismantled and put on a truck. I seize it. I don’t demolish it. I hold on to it, in a lot.” Ben-Shabbat reported that, at that time, the Civil Administration had in its possession 500 pre-fabs confiscated by this method. In June 2018, Col. Mendes said at a session of the Knesset Foreign Affairs and Defense Committee that there had been “128 confiscation raids in four months ... You confiscate trucks and machinery and mobile structures.”

•**Demarcation orders:** In 2003, the military commander signed the Order concerning Unauthorized Buildings (Temporary Provision) (Judea and Samaria) (No. 1539), 5744-2003. Originally meant for the eviction of settlers from settlement outposts established across the West Bank, the order allows the military commander to declare an area in the West Bank “confined,” and order the removal of all property found therein. Israel has hardly ever exercised the order against settlers, but in early 2017 the state first made use of it against Palestinian communities. The Israeli military informed three communities – two in the Jordan Valley and one in the region of Ma’ale Adumim – that they must vacate their homes within

33. See IDF Military Prosecution Annual Activity Report for 2016, p. 28 [Hebrew]; IDF Military Prosecution Annual Activity Report for 2017, p. 29 [Hebrew].

34. Meeting of the Judea and Samaria Region Subcommittee of the Knesset Foreign Affairs and Defense Committee, 3 June 2018.

eight days, in accordance with confinement orders issued there. The communities petitioned the HCJ, and the petitions are still pending.³⁵

• **Order cancelling legal proceedings:** In June 2018, a new military order went into effect allowing the Civil Administration to demolish structures forthwith. The order states that any Civil Administration inspector has the authority to order the “removal” of a new structure, including structures still under construction or else completed in the preceding six months. If the holder of the property has a building permit, s/he can file – within 96 hours – a request to revoke the demolition. However, if such a request is not filed, the inspector is allowed to “remove him from the property and all that is connected to it,” after consulting with the legal adviser and as long as the structure “is not within the boundaries of a detailed plan.” At the Knesset meeting, Col. Mendes said that the order “is far-reaching in terms of the extent of its implementation. It is quite unprecedented in its capacity to get to an illegal structure: that within 96 hours from the time of serving the notice, the structure can be demolished without the need to resort to any committees or anything else.” Three petitions have been brought against the new order, and the state has undertaken not to implement demolition as long as they are pending.³⁶

According to B’Tselem figures, from 2006 (the year B’Tselem began recording home demolitions) through 2018, Israel demolished at least 1,401 Palestinian residential units in the West Bank (not including East Jerusalem), causing at least 6,207 people – including at least 3,134 minors – to lose their homes. In Palestinian communities

unrecognized by the state, many of which are facing the threat of expulsion, Israel repeatedly demolishes homes. From 2006 through 2018, the homes of at least 1,014 people living in these communities – including 485 minors – were demolished more than once by Israel. In addition, from January 2016 through December 2018, the Civil Administration demolished 630 non-residential structures (such as fences, cisterns, roads, storerooms, farming buildings, businesses and public buildings) in the West Bank (excluding East Jerusalem).

In the settlements, Israel implements a policy that is the very reverse, even if officials do try to draw parallels between enforcement in the settlements and in Palestinian communities, taking pains to note at every opportunity that enforcement is the same for both populations. For example, in response to a report about demarcation orders for Palestinians, the IDF Spokesperson said, “The authorities in the Judea and Samaria region take action constantly against illegal construction” and added that the regulations “apply to both Jewish residents and Palestinian residents.”³⁷ Similarly, Marco Ben-Shabbat of the Civil Administration stressed that “everything I am saying right now is a law, or measures or policy enforced on Israelis to the letter. There is no discrimination here.”³⁸

Yet these statements are completely unfounded. For one thing, under international law any construction in settlements is unlawful, as is the land theft undertaken to establish them. Therefore, any comparison between Palestinian construction and construction in settlement is irrelevant, by definition. Second, as described above, Israel’s

35. HCJ 9785/17 *Village Council al-Maleh v. Commander of IDF Forces in the West Bank*, HCJ 10060/17 *Head of the Jabal al-Baba Council v. The Prime Minister*.

36. HCJ 4588/18 *Society of St. Yves, the Catholic Center for Human Rights v. The Military Commander in the West Bank*.

37. Amira Hass, “According to Israel’s Deputy Defense Minister, the Palestinians Might Have Landed from Mars: Orders Intended to Deal with Jewish Outposts Are Now Being Used to Uproot Palestinian Communities in the West Bank,” *Haaretz*, 18 November 2017 [originally published in Hebrew on 17 November 2017].

38. Meeting of the Knesset Foreign Affairs and Defense Committee, 27 June 2017.

planning policy in the settlements is the very reverse of that implemented in Palestinian communities. The state expends considerable efforts to facilitate construction in settlements: it initiates, approves, plans and funds settlements. Also, by offering a variety of incentives and benefits, Israel encourages its citizens to move to settlements. This policy does not apply only to settlements recognized by the state, but also to what is termed “unauthorized outposts.” While the state does sometimes argue that they are “unlawful,” the outposts receive funding and support from the Israeli authorities, which provide them protection, assist in building them and their infrastructure, and even legalize them after the fact.

As part of this policy, and in stark contrast to Israel’s tenacity when it comes to combating Palestinian construction, the state does not take action against construction carried out without a permit

in settlements. Whereas Israel used to express a reluctant willingness to carry out enforcement measures against settler structures built on privately owned Palestinian land, in recent years the state has been endeavoring to obtain approval for construction on such lands. It is in this context that the Judea and Samaria Settlement Regulation Law was recently passed, designed to retroactively validate such construction.³⁹ Two petitions to the HCJ have challenged the law. The petitions are still pending.⁴⁰ In addition, the cabinet formed a committee – known as the Zandberg Commission – to address the legalization of construction in the West Bank. The commission wrote a report listing various proposals for legalizing structures.⁴¹ The prime minister appointed a special team to implement the commission’s recommendations and to seek solutions on this matter.⁴²

39. Judea and Samaria Settlement Regulation Law, 5777-2017.

40. HCJ 1308/17 *Silwad Municipality v. The Knesset*; HCJ 2055/17 *Head of Yabrud Village Council v. The Knesset*.

41. See “Concluding report by the expert team for formulating a plan for the regulation of construction in Judea and Samaria,” 15 February 2018, https://www.haaretz.co.il/embeds/pdf_upload/2018/20180504-102258.pdf [Hebrew].

42. For details on the various efforts Israel has made, see Yotam Berger “Ignoring High Court, Netanyahu’s Office Appoints Settler Leader to Head Outpost Legalization Team,” *Haaretz*, 5 February 2018; Yotam Berger, “Israel Presents: How to Legalize West Bank Settlements Built on Private Palestinian Land: Committee presents unprecedented recommendations to legalize thousands of homes built on privately owned Palestinian land in West Bank settlements,” *Haaretz*, 4 May 2018; Revital Hovel, “Who Really Wrote the New Outpost Report,” *Haaretz*, 23 May 2018 [Hebrew].

B. The position Israel presents to the High Court of Justice

In notices it filed in response to HCJ petitions against Civil Administration demolition orders issued for Palestinian structures, Israel defended the planning apparatus it devised in the West Bank. The state argued that it is a properly functioning system, that it serves the interests of the Palestinian population and the rule of law, and that it complies with the provisions of international law. Against this backdrop, construction without a permit by Palestinians is portrayed as criminal action, pure and simple and, as such, must be considered a violation of planning and construction laws and handled via law enforcement measures.

The state argues that its policy on planning and construction in the West Bank is based on the provisions of IHL, and primarily on Article 43 of the Hague Conventions, which obliges the occupying power to “take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁴³ The state stresses that it is obliged to employ these powers as, if it does not, things will deteriorate:

*It is not clear how the Petitioners expect the authorities in the Area not to take action to enforce planning and building laws, a situation which could result in reckless, unchecked construction that would ultimately harm residents of the Area. It is clear that enforcement action taken by the authorities in the Area, including the enforcement of planning and building laws is designed to maintain public order and safety and, as such, meets the requirements of international law.*⁴⁴

Israel claimed the change it made to the Jordanian Planning Law in 1971 was imperative due to the changeover in regimes, and that had it not been made, the state would have been unable to fulfill its obligations in the occupied territory:

*This change was introduced as part of the functions performed by the military commander, who stands in for the sovereign in the Area, so long as the Area is under belligerent occupation. In this case, the function at hand is maintaining public order. Therefore, issues related to land policy, land development, boundaries, zoning and usage, determination of illegal construction clusters and so on, are consolidated in the hands of the military commander. While it is true that the military commander's actions must benefit the local population, decisions in such matters must remain in the hands of the military commander, as the acting substitute of the sovereign in the Area, and power over such decisions should not be handed over to the local population.*⁴⁵

The state denies there is any difference between the policies it implements vis-à-vis the Palestinian population and the settlers, claiming: “There is no difference between the populations in the area; promoting and approving plans for all the populations (Palestinian and Israeli) is carried out by the Supreme Planning Council and its subcommittees, not by District Committees.”⁴⁶ Elsewhere the state argued:

The considerations weighed by planning institutions in the Area are confined mainly to expert planning aspects and do not include issues of a national or political nature. In the context of promoting public interest,

43. Paragraph 11 of the Response by the Respondents in HCJ 5667/11 *Deirat Rafaya Village Council v. The Minister of Defense*. See also Paragraphs 133-135 of the Response by the Respondents in HCJ 413/13 *Abu 'Arab v. The Minister of Defense*.

44. Paragraph 11, Preliminary Response on behalf of the Respondents, HCJ 11258/05 *Hanni v. Subcommittee for Building Supervision*.

45. Paragraph 18 in state's response in HCJ 5667/11 *Deirat Rafaya Village Council v. The Minister of Defense*.

46. *Ibid.*, paragraph 68.

*planning institutions also represent the interests of the Palestinian population... Enforcement authorities exercise their powers regarding illegal construction in an equitable manner with respect to both Jewish and Arab communities.*⁴⁷

Israel boasts of the efficiency of the planning system and states that “the planning institutions examine every application for a building permit individually, on the basis of the relevant considerations.”⁴⁸ In response to a petition of principle filed against the way the structure of the planning institutions, and primarily against the exclusion of Palestinian residents, the state said it is hard put to see any problem:

*The Respondents clarify that there is no planning “vacuum” in the current structuring of the planning institutions and that the Petitioners, and others (such as village councils) may initiate planning and submit it for review by the existing planning institutions. Such initiatives are, and will continue to be, reviewed according to expert planning considerations.*⁴⁹

The state considers the outline plans that apply in the West Bank – both the British Mandate plans and the plans the Civil Administration drafted – as reflecting the needs of the population. For example, in the petition against the plan to demolish homes in Khirbet Tana, near Beit Furik, the state argued that although its duty to uphold the local law means it is compelled to adhere to the Mandatory plans, nevertheless it is also hard at work drafting plans specifically for Palestinian communities:

*We wish to reiterate basic tenets: Master Plan RJ/5... is a valid plan for all intents and purposes, given the provisions regarding the preservation of law instituted in Jordanian legislation... The authorities in the Area have made scores of changes to the outline plans applicable in the Area since 1967, in order to adjust them to the needs of the population in the Area. Thus, in the 1990s, hundreds of new plans were prepared for many villages, in order to reflect the changes that have occurred on the ground and in the population, relying partly on the projection for population growth by 2015.*⁵⁰

The state goes on to argue that in recent years the Civil Administration has been working “vigorously ... to promote planning for the Palestinian population in a variety of matters”:⁵¹

*In the last few years alone, the Civil Administration has promoted 19 plans in the Palestinian sector which are now in planning (two plans have been drawn up but have yet to undergo statutory debate, most plans have been approved to be deposited for review and are expected to continue moving along in the planning procedure, and four have been approved for validation)... Some eleven more plans have recently been submitted to the planning authorities, but proceedings in their matter have yet to begin. They await authorization for advancement... Once the advancement of said plans is reviewed by the Civil Administration, the possibility of advancing further plans for the Palestinian population will be considered.*⁵²

In view of all of the above, the state expressed its surprise at the bad faith or “lack of probity,”

47. Paragraph 83, Preliminary Response on behalf of the Respondents, H CJ 11258/05 *Hanni v. Subcommittee for Building Supervision*.

48. *Ibid.*, paragraph 49.

49. Paragraph 5, Response on behalf of the Respondent, H CJ 5667/11 *Deirat Rafaya Village Council v. The Minister of Defense*.

50. Paragraphs 40 and 42, Preliminary Response on behalf of the Respondents, H CJ 11258/05 *Hanni v. Subcommittee for Building Supervision*.

51. Paragraph 36 in state’s response in H CJ 5667/11 *Deirat Rafaya Village Council v. The Minister of Defense*.

52. *Ibid.*, paragraphs 44-45.

(in violation of the clean-hands doctrine) of the Palestinian petitioners, of their building without permits and against the law and then applying to the Court for legal remedy. This was the state's argument, for example, in the matter of Khirbet Zanutah in the South Hebron Hills:

*The Petitioners built structures without a permit and now seek to have the status of the illegal structures they built retroactively approved. The Respondents maintain that construction without permits does not confer a right for retroactive approval of the structures and, therefore, hold that the petition should be dismissed in limine due to unclean hands.*⁵³

On the other hand, with regard to demolitions in settlements, the state has adopted the opposite position. Firstly, it considers the demolition of structures in settlements as a political, state matter, in contrast to the demolition of Palestinian structures, which it sees merely in terms of enforcing planning and construction laws. For example, in March 2011, the state submitted that:

Construction in Judea and Samaria and the demolition of illegal structures are key political issues in the State

*of Israel. The government must, therefore, weigh all relevant considerations when implementing policy. Consequently, state policy considerations do influence enforcement priorities in the Area.*⁵⁴

Second, violation of planning and construction laws by settlers is viewed as legitimate, no more than a trifling matter that measures should be taken to regulate and legalize. In a series of petitions that Israeli NGOs Peace Now and Yesh Din filed with the HCJ, the state made clear its position with regard to building without permits in settlements. In the first petitions, the state announced that it plans to remove all structures built without permits in the settlements, and that it would do so according to its priorities. Structures that the Court ordered demolished and structures built on privately owned Palestinian land would have the be the top priority. In March 2011, the state informed the HCJ that it would explore the possibility of approving structures built without permits in settlements located on declared state land. The state, however, has since altered even this position, announcing that it would take action to legalize structures built on land that even Israel deems privately owned by Palestinians.⁵⁵

53. Paragraph 10 in state's response in H CJ 9715/07 *Batat v. Subcommittee for Building Supervision in the Judea and Samaria Area*.

54. Paragraph 5, Supplementary Response on behalf of Respondent 1-2 in H CJ 7891/07 *Peace Now v. The Minister of Defense*.

55. *Ibid.*, paragraph 4. For more on this topic, see Peace Now, *From Occupation to Apartheid: Substantive Changes in Israel's Control of the Territories 2015-2018*, December 2018 [Hebrew].

C. HCJ Rulings: Complete validation of the planning apparatus

Over the years, Palestinians have filed hundreds of petitions with the HCJ, seeking to overturn demolition orders the Civil Administration issued for their homes. Over the past few years, the number of such petitions has grown significantly.⁵⁶ In most cases, the Court has issued interim injunctions prohibiting the state to demolish the structures pending a ruling in the petition.

Many petitions were denied by the justices. Others were withdrawn by the petitioners, sometimes after the state said it does not plan to implement the demolition orders at this point in time and pledged to give the petitioners advance notice should it change its position. However, to the best of B'Tselem's knowledge, there has not been a single case in which the justices granted a petition Palestinians filed against the demolition of their home.

The justices have rejected all arguments of principle regarding the planning policy Israel implements in the West Bank, sometimes not even addressing them at all. Arguments raised dealt with such issues as setting areas off-limits to Palestinians, the structure of the planning system, the applicability of the British Mandate plans, and the limited value of the outline plans the Civil Administration drafted. The justices have also rejected all arguments the petitioners made with regard to various interpretations by the planning committees. In all cases in which they had to make a ruling, the justices approved committees' decisions.

As a rule, the Court has kept its examination confined to issues of planning policy, a priori accepting the policy as legitimate and relevant. The justices consider the petitioners as "building offenders," preferring to deal with technical matters such as

whether applications for permits have been filed, whether all avenues and remedies available to the petitioners have been exhausted, and whether the parties can reach an agreement without the Court having to make its own ruling in the case.

1. Agreeing to the dispossession of Palestinians across vast areas of the West Bank

In none of the cases they heard did the justices call into question the very declaration of "state land" or "training zones" and the subsequent allocation to settlers or the military. In each and every case, the Court has accepted the state's argument that Palestinian construction there is unlawful and that the structures must, therefore, be demolished.

A. State Land

The Court has hardly dealt with the policy of declaring state land. In the 1980s, a smattering of petitions were filed on this issue, but the justices focused on procedural aspects in the cases they heard, and denied the petitions.⁵⁷ Once the Court made it clear that it had no intention of intervening in decisions regarding the declaration of state land, with the exception of cases involving flagrant faults in the administrative process, petitions to the HCJ on this matter ceased.⁵⁸

Recently, the issue of declaring state land again reached the HCJ. In February 2017, the settlement of Amona was vacated and removed after the HCJ determined that it had been built on privately owned Palestinian land.⁵⁹ The state swiftly planned a new settlement – by the name of Amihai – for the evicted settlers. Two petitions were filed against the

56. See above, note 33.

57. See HCJ 285/81 *al-Nazar v. Commander of Judea and Samaria*; HCJ 277/84 *a-Ghraib v. Appeals Commissions under the Order regarding State Property, Region of Judea and Samaria*.

58. For further details, see B'Tselem, *Under the Guise of Legality*, pp. 57-59.

59. HCJ 9949/08 *Hammad v. The Minister of Defense*.

establishment of Amihai, addressing the proceedings of declaring the land it was built on as state land and the planning process for the new settlement. In October 2018, the Court handed down its ruling on these petitions. In keeping with the position consistently held by the Court that the process of declaring state land is merely a technical matter that does not introduce any legal difficulties, Chief Supreme Court Justice Esther Hayut, who wrote the ruling, rejected all of the petitioners' substantive arguments against the declaration. Instead, she focused on questions of procedure, rejecting the argument that the process of declaration was faulty and that the residents were not given the opportunity to appeal it. Hayut downplayed the significance of the declaration:

*The Order regarding Government Property, pursuant to which land in the Area is declared "state land," does not alter the substantive law pursuant to which property rights are determined. Therefore, dismissal of the petition does not deny the Petitioners the option of launching another appropriate proceeding to clarify their purported proprietary rights insofar as they choose to do so.*⁶⁰

Chief Justice Hayut related here to the declaration process as though it were not creating facts on the ground. She entirely ignored the reality that Israel has created in the West Bank, whereby hundreds of thousands of dunams of Palestinian land have been declared state land via an unlawful proceeding, which the state considers irrevocable. Palestinians cannot, in fact, launch "another appropriate proceeding to clarify their purported proprietary rights." The only avenue the Civil Administration offers them is an arduous and costly proceeding whose chances of success are slim to none. Consequently, denying

the petition obviously does deprive them of their rights to the land.

The Chief Justice also completely disregarded the fact that the state land declared in the case of the settlement of Amihai was allocated only to settlers, while Palestinians were prohibited from building there. Even if the lawfulness of the declaration were undisputed, which is not the case, public lands are meant to serve the local Palestinian population, not the needs of the occupying power. These lands most certainly should not serve for the construction or expansion of settlements, whose very establishment is, a priori, unlawful.

This ruling is entirely in keeping with the decisions the Supreme Court has made over the years. The HCJ has always accepted the state's position whereby the Palestinians, unlike the settlers, are not allowed to build on state land. For example, in 1996, in the first ruling handed down on the matter of the Jahalin tribe who had been living on the land where the settlement of Ma'ale Adumim was later built, Supreme Court Justice Aharon Barak ruled that the petitioners have no rights to the land as they were living in an area "declared state land." Therefore, he found no fault with the appellate committee's decision that the Jahalin tribe must vacate their homes.⁶¹ In a later ruling on a petition by the residents of the Palestinian village of Fasayil in the Jordan Valley, the state argued that the structures had been built on state land. Justice Uzi Vogelman said that the Court "found no cause for intervening in the Respondents' decision" because, inter alia, "the Petitioners had not successfully proven their right to the land."⁶²

The requirement to prove "right to the land" has never been imposed on settlers. Because the Court

60. HCJ 5470/17 *Muhammad v. The Minister of Defense*.

61. HCJ 2966/95 *Harash v. The Minister of Justice*.

62. HCJ 7229/10 *Muhammad v. Subcommittee for Building Supervision in Judea and Samaria*.

intervenes only in cases in which settlers built on lands that Israel recognized as privately owned Palestinian property, the fact that settlers' homes were built without permits on state land actually enables retroactively approving or regulating them. The determination by Justice Asher Grunis with regard to the settlement of Amona illustrates this point:

*The case at hand concerns a violation of planning and building laws which ranks high on the priority scale adopted by Petitioners 1-4, since the land in question is privately owned. This is so given the significant impingement on the property rights of the protected residents of the Judea and Samaria Area on whose land the structures were built. The military commander of the Judea and Samaria Area has a duty to actively protect the private property rights of the protected persons. This includes protection from illegal construction on their private land and from hostile possession thereof.*⁶³

Another petition was filed in connection with construction in the settlement outposts of Harasha and Hayovel: some structures were built on state land, some on survey land and some on private Palestinian property. In hearing the petition, the Custodian of Government Property in Judea and Samaria declared that most of the lands referenced in the petition were state land. Consequently, the state said it would take action to regulate the construction on state land and to implement demolition orders for structures on land recognized as privately owned, "finding a suitable arrangement for the families living there." Former Chief Supreme Court Justice Grunis accepted the state's position, finding that:

Currently, given that the Custodian of Government Property has declared plots within the outposts as

*state property, most of the construction is on land on which it can be retroactively approved. While this does not suffice to retroactively approve the illegality at present, these changes do inherently impact the priorities of Petitioners 1-4 for the enforcement of demolition orders. Under these circumstances, given that the structures were built some years ago, on land now considered state land, we believe there is no cause for us to intervene in the decision of Petitioners 1-4 to postpone the demolition in order to examine the possibility of regularizing and approving the construction... All this applies to structures built on state land or on survey land that has been declared state land.*⁶⁴

B. Military training zones

In petitions in which the state alleges that the construction in question is on land declared a military training zone, the Court does not even address the actual issue of declaring the place a closed area and does not examine whether the designation was just or lawful, even when the petitioners explicitly raise these arguments. Instead, the hearings in these cases are confined to the question of whether the petitioners are in fact "permanent residents" of the firing zone, the only status that would allow them to be there under the military orders, or whether they are "interlopers." In all cases decided to date, the justices accepted the state's argument that the petitioners are not "permanent residents" of the closed zone.

In the vast majority of cases, the justices favor trying to reach temporary or permanent arrangements between the parties that would allow the petitioners to go on living in the area for at least part of the year. The chief argument submitted is that being in the closed zone endangers the residents and must

⁶³. HCJ 9949/08 *Hammad v. The Minister of Defense*.

⁶⁴. HCJ 9051/05 *Peace Now v. The Minister of Defense*. For similar decisions see also HCJ 8887/06 *al-Nabut v. The Minister of Defense* (on Migron); HCJ 9669/10 *Qassem v. The Minister of Defense* (regarding the Dreinoff Compound in Beit El); HCJ 5023/08 *Shihadah v. The Minister of Defense* (regarding nine structures in Ofra); HCJ 7292/14 *Musa v. The Minister of Defense* (regarding Derech HaAvot); HCJ 2297/15 *Head of Yasuf Village Council v. The Minister of Defense* (regarding Tapuah Ma'arav); HCJ 8395/14 *Head of Turmusaya Village Council v. The Minister of Defense* (regarding Adei Ad).

therefore be coordinated with the Israeli authorities. In some cases, the parties reach an arrangement whereby the petitioners will vacate their homes for the duration of the training, from several hours to several days at a time.⁶⁵ In other cases, the justices extend the interim injunction, even after denying the petition, in order to give the parties time to reach other agreements.

The Court's refusal to question the very declaration of so-called training zones is particularly egregious in the case of the Palestinian village of al-'Aqabah in the northern Jordan Valley. Immediately after the West Bank was occupied in 1967, the military declared "closed military zones" on vast tracts of land, including the built-up area of the village. In 1983, a military outpost was built on al-'Aqabah's land. Shortly thereafter, the military began training in the village and on its lands. The training included the use of live gunfire, both during the day and at night, as well as the use of tanks and helicopters. In 1995, the frequency of the training was stepped up, completely disrupting daily life in the village. The livelihood of al-'Aqabah's residents was harmed and they lived in a state of perpetual fear. Over the years, two villagers were killed by soldiers' gunfire. Four others – including a 6-year-old girl – were killed when unexploded ordnance left over from training detonated. In addition, at least 38 residents were injured when unexploded ordnance detonated.⁶⁶

In June 1999, the residents of al-'Aqabah had ACRI file an HCJ petition on their behalf. The petition explained how severely the training near the villagers' homes impinges on their lives. The petition further argued that the very declaration of a firing zone on the villages' built-up area and its cultivated farmland constituted a breach of the provisions of

international law in the absence of any imperative military need to justify it.

The Court tried to persuade the parties to find alternatives for the training zone. The petitioners suggested several options, which the state rejected as unsatisfactory. Supreme Court Justices Mishael Cheshin, Itzhak Zamir and Dorit Beinisch, who made their ruling in the case after the Second Intifada broke out, accepted the state's arguments in full:

*The Petitioners' contention that there is no imperative military need for either the declaration or the training was unpersuasive two years ago. Today, given the worsening state of security, it has lost all sway. Therefore, there are no grounds to grant the Petitioners the relief sought. This suffices to dismiss the petition.*⁶⁷

The justices noted in the ruling that they had tried "to accommodate the Petitioners, through discourse with the Respondents, in a way that would make the daily life of the Petitioners easier insofar as possible, in the context of the Respondents' needs and available options." This led to "substantial progress," the formulation of "regulations and directives regarding training carried out by the military in the area of the village so as to minimize harm to the residents" and the proposal of "a discourse mechanism." The petition was, therefore, denied.

In another case, Bedouin residents living on the lands of the Palestinian village of Rammun, northeast of the city of Ramallah, filed a petition against the evacuation orders they were issued for land that had been declared a training zone. Justice Ayala Procaccia rejected the petitioners' arguments that they had been living in that area for years, that the military does not train there, and that they had

65. Regarding temporary arrangements of this kind, see HCJ 7736/12 *Hrub v. Commander of IDF Forces*; HCJ 2207/12 *Sbeih v. Subcommittee for Building Supervision in Judea and Samaria*; HCJ 2103/09 *Bani Fadel v. Subcommittee for Building Supervision in Judea and Samaria*; HCJ 7527/11 *Salamin v. Commander of IDF Forces in the West Bank*.

66. For further details, see petition for order nisi in HCJ 3950/99 *Sami Sadeq Mahmoud Sabih v. The Minister of Defense*.

67. HCJ 3950/99 *Sami Sadeq Mahmoud Sabih v. The Minister of Defense*.

never been informed that they must leave the area. Instead, Justice Procaccia accepted all the state's claims: that the area is an actively used training zone that the petitioners have encroached upon. She asserted:

Given the nature of the area as a closed military zone and given the threat to the safety of those present within an active firing zone, there is no cause to intervene in the decision of the military commander of the Area to issue the evacuation orders. The presumption of reasonableness and propriety still stands in favor of the decision and has not been refuted.

The Court left the interim injunction in effect for another 30 days "to enable discourse between the Petitioners and the Civil Administration authorities in order to find a goodwill solution for the pasturing needs of the Petitioners on the land, without creating a safety hazard, and use of which land for this purpose would not involve breaking the law or breaching anyone's property rights."⁶⁸

Another petition was filed by three brothers from the Palestinian community of Khirbet 'Ein Karzaliyah in the Jordan Valley. They were served evacuation orders in January 2010 for being in a training zone. Justice Miriam Naor found that "the key question in this proceeding is whether the Petitioners have successfully proven that they had been living in the area when Order No. 7/99 was issued. I find that they have not." Here, too, Justice Naor referred to attempts by the Court to reach an agreement with the petitioners and wrote that, "we have made many endeavors to find a solution for the Petitioners and their herds that would be amenable to all parties." A solution was not found, as the petitioners demanded that it be determined that the closure of the area does not apply to them (as permanent residents of the area in question). Justice Naor also rejected the

petitioners' claim that no training is taking place in the area, stating that "there is no basis for accepting the claim that the area is not being used for training in practice, in view of the very existence of the order and in view of the Respondents' statements as to the imperative military need to use the firing zone for military training." She made this finding without checking whether any training was actually taking there. Justice Naor denied the petition, but first extended the interim injunction, adding another 30 days "so as to allow time for the facilities to be evacuated, and to enable the parties to reach understandings, after all."⁶⁹

2. Acknowledging the planning system as reasonable and lawful

In its rulings, the Supreme Court has found that the planning system the Civil Administration administers in the West Bank functions properly, that the changes Israel made to the Jordanian Planning Law were necessary and that the extant outline plans – both the British Mandate plans and those drafted by the Civil Administration – meet the needs of the Palestinian population.

Given this point of departure, the justices have examined the petitions as though enforcement of planning and construction laws is the full extent of the issue at hand, disregarding the broader reality engendered by the planning system, which compels Palestinians to build without permits, risk the demolition of their homes and live in uncertainty regarding their future. The judges demand that the petitioners exhaust all the pointless proceedings the system offers. They strike petitions so that the petitioners apply for permits or draft their own outline plans. They reprimand petitioners for failing to submit the necessary documents, and are appalled that they "take the law into their own hands" and build homes

68. HCJ 80 35/08 *Ka'abneh v. The Civil Administration of the Area of Judea and Samaria*.

69. HCJ 613/10 *Bani Maniyah v. Commander of IDF Forces in the West Bank*. See also HCJ 6999/10 *Abu al-Kabash Commander of IDF Forces in the West Bank*; HCJ 7281/13 *al-Kurshan v. The Minister of Defense*.

without obtaining permits. Finally, when the petitioners return to the Court – after all their applications have been, predictably, denied – the judges reject the petition on the grounds that the Court does not interfere in decisions by the planning apparatus.

The Supreme Court has also determined that the changes Israel made to the Jordanian Planning Law are necessary and lawful. The first ruling on this matter was handed down in November 1991 by then Chief Supreme Court Justice Meir Shamgar. He found that these changes were “needful due to the establishment of the rule of the IDF in the area because the above-mentioned Jordanian Planning Law was based, in terms of its arrangements and the authorities established in accordance with it, on the authorities of the Jordanian rule and did not fit into the changes stemming from the very fact of the establishment of IDF rule.” Shamgar added:

We have found no merit in the Petitioners’ arguments against the validity of Order No. 418. The need to engage in planning and building in the held territory necessitated the promulgation of the order. Were it not for the establishment of the planning authorities, it would be impossible to lawfully build even a single structure in the area. Such a situation would have caused substantive harm to the local population and, as such, constituted a breach of the obligation of the military regime under Article 43 of the Annex to the Hague Convention... The obligation of the military regime under said Article 43 is designed to ensure measures are put in place to enable the residents of the area to maintain the routines of civilian life, a matter which refers – as is well-known – to the entire social, economic and commercial fabric of the community’s life.⁷⁰

The justices of the HCJ have relied on this ruling in justifying changes to the Jordanian law. In a petition

regarding the demolition of homes in the Palestinian village of Barta’a, Justice Dvora Berliner stated that the arguments against Order No. 418 had already been rejected by the Court. Ignoring the fact that Palestinians no longer have any representation on the planning committees, she added that the change to the law is actually beneficial for the residents because it shortened the duration of planning procedures: “It is hard to understand what cause the Petitioners have for disputing the matter since, if their argument is true, then bypassing the stage of the local committee has been to their benefit, as it spared them the need to pass the review of yet another administrative level.”

Justice Berliner also rejected the petitioners’ claim as to the inherent conflict of interests within the planning apparatus, with the Supreme Planning Council reviewing both the permit application and the appeal of its decision via two subcommittees of its own, namely the Subcommittee for Building Supervision and the Subcommittee for Local Planning:

Accepting the argument concerning an inherent conflict of interests could result in the blanket disqualification of the planning institution structure constituted by Order 418. It is also important to recall that there is no allegation of a conflict between personal and public interests, but rather, at most, a conflict of interests located entirely on the public plane. The conflict of interests in question, even were we to concede it exists, is very minor.⁷¹

In 2015, the HCJ rejected a petition of principle against the planning apparatus in the West Bank, when Justice Elyakim Rubinstein likewise approved the change to Jordanian law. He stressed that the military order amending the Jordanian law “adapted it to the reality that came about in the Area and the

70. HCJ 4154/91 *Dudin v. IDF Commander in the West Bank*.

71. HCJ 10408/06 *Kabaha v. Supreme Planning Council in the Judea and Samaria Area*; see also HCJ 5493/08 *Khatib v. Subcommittee for Building Supervision*.

complexity it entails.” He explained that “the very duties of the military commander under Article 43 required adapting the planning institutions in the Area to a special situation, as was done at the time, in order to enable any planning processes to go forward at all in the Area in the reality created after the IDF forces entered it.” Justice Rubinstein rejected the petition, adding that – regardless – it was a diplomatic, state matter in which the Court does not intervene:

*It is difficult to consider this petition outside the overall political context. It cannot be denied that accepting the petition as presented to the Court would mean changing the longstanding structure of the planning institutions. This might have significant consequences for the delicate relationship between the State of Israel and the Palestinian Authority... The core of the matter dealt with herein is inherently linked to diplomatic, defense policy.*⁷²

The Supreme Court accepted the state’s arguments also with regard to the content of the decisions made by the planning and construction system, and not only its structure. The HCJ stated that the British Mandate outline plans and those drafted by the Civil Administration were reasonable and reflected the residents’ needs. A case in point is Justice Vogelman’s rejection of a petition against demolishing structures in the village of Beitin. He accepted the state’s arguments verbatim:

While Plan RJ-5 does provide for construction in the area zoned for agriculture which is the subject of this petition, under conditions included therein, as we have seen, the Petitioner has failed to comply with these conditions... As the Respondents clarify, in 1995, an

*outline plan was approved for the village of Beitin (Plan No. 1525). Said plan expressed the changes on the ground and in the population according to the projections for population growth by 2015. In the circumstances, we have not been presented with a basis for ruling that the Respondents had abdicated their duties concerning the area which is the subject of the petition, nor is there a basis for ruling that the decision of the planning and enforcement authorities, which is predicated on planning considerations, exceeds reasonableness to a degree that justifies intervention by this court sitting as the High Court of Justice according to accepted standards.*⁷³

In another case, Justice Rubinstein wrote:

*Many amendments have been made to the Mandatory outline plan, Plan RJ-5, over the years (most recently in 1992), with the object of adapting it to meet the needs of the population and geographic conditions. As noted also in the hearing before us, the plan is based on projections up to 2015. Therefore, the Petitioner’s contention that the plan is not current and that it is divorced from developments on the ground cannot be accepted... The planning authorities do not ignore the need to build residential structures and act properly. However, the matter is subject to planning provisions, which the Petitioner seems to have attempted to circumvent by building without a permit.*⁷⁴

The Court has repeatedly stated that the system functions properly and that it accurately reflects the residents’ needs. Therefore, all that is left to the Court is to reject the petitions on procedural grounds: unlawful construction, “taking the law into one’s hands” and not exhausting all remedies.

72. HCJ 5667/11 *Deirat Rafaya Village Council v. The Minister of Defense*.

73. HCJ 2089/08 *‘Abd al-Karim v. Subcommittee for Local Planning, Judea and Samaria*.

74. HCJ 5493/08 *Khatib v. Subcommittee for Building Supervision*. For further examples see HCJ 143/04 *Jaber v. State of Israel*; HCJ 10408/06 *Qabaha v. Supreme Planning Council in the Judea and Samaria Area*; HCJ 2228/08 *Taqatqah v. Subcommittee for Local Planning in Judea and Samaria*; HCJ 3647/08 *Hajjajra v. Commander of the Judea and Samaria Area*; HCJ 6496/10 *‘Asawseh v. Subcommittee for Local Planning, Judea and Samaria*.

A. Unlawful construction

In examining the petitions brought before them, the justices have adopted a point of view that follows that of the planning system itself, and a priori accept the criteria the system sets. In one of the early rulings handed down on this matter – a petition regarding the demolition of 15 structures in the village of Idhna, Hebron District – Justice Moshe Bejski determined that:

*Having heard both parties' arguments, it has emerged, and has not been disputed by counsel for the Petitioners, that none of the Petitioners have building permits and that the structures, both completed and under construction, have been built without permits. It has further emerged that there is no approved building plan for the village of Idhna and that such a plan is now being prepared. In terms of the applicable law – that is, Jordanian Planning Law – the Local Planning Committee or the Regional Planning Committee have the power to inform and alert landowners, parties in possession of land, and developers and builders about structures built without a permit or in defiance of the permit and regulations (see Section 38(1) of the aforesaid law) and may also order the demolition of structures built without or in breach of a permit. The fact that no permit was given, and this, as stated, is undisputed, seals the fate of this petition.*⁷⁵

Elsewhere, regarding the demolition of a structure in Hebron, Justice Edmond Levy found:

The planning authority did take the trouble to provide an explanation for why they are unable to grant a permit – the structure was built in an area zoned for agriculture, the Petitioner's right to the plot is partial as the land was parceled without an approved plan,

*the structure's frontage is not in compliance with the applicable plan and there is a building line deviation. Given this state of affairs, we fail to understand why the Petitioner believed he had cause to seek relief from this Court. Since no adequate explanation was provided during oral arguments either, we can but dismiss the petition.*⁷⁶

In another case, regarding the village of Fasayil in the Jordan Valley, Justice Vogelmann determined:

*We have found no cause to intervene in the decision of the Respondents. The Petitioners failed to prove rights to the land, which served as grounds to dismiss their motion in limine. In addition, in the sphere of planning, their counsel also failed to present valid arguments to counter the planning considerations that preclude approval for the sought construction under the existing plan S15. While the plan does provide for construction in the area zoned for agriculture where the structures were built under conditions included therein, as we have seen, the Petitioners fail to comply with these conditions.*⁷⁷

In one case – in a rare departure from practice – the justices addressed the broader problem of the Civil Administration's planning apparatus. In a petition filed by three Palestinians, members of a single family, who live on the outskirts of the village of al-Jiftlik in the Jordan Valley, the justices ordered the state to indicate "options of a fundamental solution to the repeated violations of planning and construction laws." The state argued that plans had been drafted for the area where the petitioners live and that those plans "have not yet been fully implemented." The petitioners, for their part, made it clear that the plans are no more than "regularization

75. HCJ 419/88 *Bashir v. Supreme Planning Council*.

76. HCJ 1336/10 *Jaber v. Military Commander of the West Bank*.

77. HCJ 7229/10 *Muhammad v. Subcommittee for Building Supervision in the Judea and Samaria Area*.

of the existing situation, without any possibility of future development of the village.” Justice Noam Sohlberg accepted the state’s position in full and denied the petition:

*We have found that the Respondents offer the Petitioners a planning route which is indubitably in the realm of reasonableness and does not warrant intervention... We have not been persuaded that the Respondents’ professional judgment was flawed in this case. The Petitioners’ desire to remain on the particular land they occupy at the moment is understandable, but although the Respondents have presented us with reasonable practical solutions, that is insufficient.*⁷⁸

B. “Bad faith”

Another reason justices have given for denying petitions on this matter is stating that the petitioners “took the law into their own hands” and, therefore, stand accused of “bad faith” or “lack of probity.” As far as the judges are concerned, quite apart from the fundamental issue of whether the state upheld its duty to prepare plans for the Palestinian population, the petitioners were not allowed to build without permits, even if they had no other choice. On those grounds they then reject the petition.

In 2005, the Civil Administration demolished the entire village of Khirbet Tana. All 17 structures in the village – dwellings, farming buildings and a school – were demolished on the grounds that they were built without a permit on land declared a firing zone. After the demolition, the residents started rebuilding, and at the same time petitioned the HCJ. They sought that the Civil Administration

be prohibited from demolishing their homes, and that the Civil Administration draft an outline plan and issue building permits on its basis. Justice Levy denied the petition:

*Even had we found the Petitioners’ grievances regarding lack of planning to be of substance, it appears that they too understand that any omission on the part of the Respondents, if there was any such, does not confer upon them the right to build as they please in breach of the law and in violation of legally issued orders. Moreover, the fact that the structures were built illegally, demolished and then rebuilt cannot be reconciled with the requirement that petitioners appear before the High Court of Justice with clean hands.*⁷⁹

A similar argument was made in a ruling handed down in October 2017 in a petition by the residents of Khallet Makhul in the Jordan Valley. The case of this Palestinian community was in the courts for over eight years, during which time the residents filed three petitions: two were withdrawn with their accord and one was dismissed *in limine*. Over the years, Israeli authorities twice demolished the community’s homes, once in 2013 and again in 2015. The residents then rebuilt the structures. At the same time they also applied for building permits, but all their applications were denied. When they filed a fourth petition, they sought that the petition be stricken while keeping the interim injunction in effect so that they have a chance to prepare an outline plan, as they had only recently been able to raise the necessary money to have it drafted. Justice Sohlberg denied their request:

78. HCJ 3744/14 *Id’es v. Subcommittee for Building Supervision*.

79. HCJ 11258/05 *Hanni v. Subcommittee for Building Supervision*.

*The petition at bar is the fourth submitted by the Petitioners with respect to the same illegal construction cases... Throughout the chain of events, the Petitioners have lapsed, taking the law into their own hands and building illegally. Therefore... there is no justification to allow this illegal state of affairs to persist under the auspices of the court. The petition is, hence, dismissed.*⁸⁰

Another petition was filed in the matter of the state's demand to demolish a structure in the village of Hizma that did not conform to the Mandatory plans. Justice Rubinstein ruled that:

*Even if the Petitioner has general grievances against the planning authorities in the Area and against the outline plan applicable to the village (and I shall note at this early point that I do not deem them valid), such grievances cannot legitimize a fait accompli created by illegal construction – it is a prime principle that a state of anarchy cannot be tolerated. While it is true that it is not easy for a person who invested his money and built a structure to see that structure demolished, it is harder still to have the authorities lend support to lawlessness.*⁸¹

C. "Failure to exhaust remedies"

It is reasonable to require that all available procedures be exhausted before filing a petition with the HCJ. That said, when past experience has proven that applying to the pertinent authorities will not serve to obtain the remedy sought, this demand does not stand to reason. The Supreme Court itself determined, in another context, that when the alternate remedy is inefficient, there is no justification to insist on this requirement.⁸²

Nevertheless, the HCJ has demanded that the petitioners exhaust all proceedings and remedies available in the planning apparatus, including applying for building permits and – should the applications be denied – filing appeals. In some cases, the judges have even reprimanded petitioners for not having troubled themselves to draft an outline plan for their own community. However, the judges ignore the fact that the Civil Administration denies Palestinians the option of obtaining building permits. As a result, the petitioners are compelled to take part in a charade, for appearances' sake, as if they were playing the part of extras in an Israeli propaganda film. They are required to invest a great deal of resources in order to exhaust all remedies, despite knowing the foregone conclusion will inevitably be unfavorable.

In some cases, the petition is stricken in accord with the parties, as when the state agrees to allow the petitioners a certain amount of time to apply for building permits, and after the time is up they can return to court.⁸³ In other cases, the petition is dismissed *in limine* for not exhausting all remedies. In a petition regarding the demolition of structures in Mikhmas, southeast of Ramallah, Justice Edna Arbel determined:

As indicated by the submissions... the Petitioners have not applied for a building permit, and as noted by the Respondents, have not even appealed the decision of the Supervision Subcommittee, which has issued final stop-work and demolition orders. The petition is to be dismissed in limine, with no hearing on the merits of Petitioners' arguments given their failure to

80. HCJ 2097/15 *Bsharat v. IDF Commander in the West Bank*.

81. HCJ 5493/08 *Khatib v. Subcommittee for Building Supervision*. See also, HCJ 3384/13 *Za'ariq v. Subcommittee for Building Supervision in the Judea and Samaria Area*; HCJ 7229/10 *Muhammad v. Subcommittee for Building Supervision in the Judea and Samaria Area*; HCJ 143/04 *Jaber v. State of Israel*.

82. See, e.g., HCJ 52/06 *The al-Aqsa Company for the Development of Waqf Property in the Land of Israel Ltd. v. Simon Wiesenthal Center Museum Corporation*; HCJ 1661/05 *Gaza Coast Regional Council et al. v. Knesset et al.*

83. See, e.g., HCJ 9689/09 *Abu Harbish v. Subcommittee for Building Supervision in the West Bank*; HCJ 7738/12 *Bsharat v. Commander of IDF Forces*.

*exhaust the remedies. It is the rule that petitioners must engage with the administrative authority and exhaust proceedings it offers prior to seeking relief from this Court.*⁸⁴

In another case, regarding the demolition of structures in the South Hebron Hills, a petition was filed before all proceedings with the planning committees had concluded. Justice Yoram Danziger denied the petition, stating:

*Having heard the arguments presented by parties' counsel, we have not seen fit to accept the petition. It is hereby dismissed. The Petitioners have submitted detailed outline plans for Majas and Safai, followed by amended maps due to a need that arose to change the location of public areas in the outline plans. The Response further noted that the Civil Administration Planning Bureau has yet to review the plans and amended maps it has received and that it plans to hold a hearing with the director of the Planning Bureau, the Petitioners, their counsel and the planner in order "to receive assistance with respect to the plan and examine its feasibility." In his oral arguments, counsel for the Respondents has also said that, contrary to the concerns of the Petitioners, the result of this hearing is not predetermined and that, should the Petitioners successfully prove that they had lived in the area before the firing zone was declared, or else present special humanitarian needs, their arguments and their needs will be considered in a serious and receptive manner, as required by law.*⁸⁵

However, this does not quite work. When the petitioners return to Court, having exhausted all remedies as instructed, the Court denies the petition, stating that it does not normally interfere in the

considerations of the planning apparatus. The Court states that it would certainly intervene in cases in which the planning apparatus has made egregiously unreasonable decisions, but that such circumstances have yet to be found in even a single petition. In keeping with this, Justice Uri Shoham wrote:

*As is known, this Court does not serve as a "supreme planning" institution and generally tends not to intervene in the expert decisions made by planning authorities, unless it finds that the authority has failed to comply with the norms of administrative law, such as when it has overstepped its powers, conducted itself in bad faith in its dealings with the petitioner or when the decision it made severely exceeded the bounds of reasonableness.*⁸⁶

Elsewhere, Justice David Heshin determined:

*The material presented to us indicates that each of the construction cases opened against the Petitioner included an administrative procedure with a hearing which the relevant Petitioner was summoned to attend to present their arguments. In some of the cases, various extensions requested by the Petitioners were granted and appeals were filed. When all administrative proceedings concluded, an extension was again granted to allow for the submission of the petition herein. However, the petition raises no arguments to the effect that the decisions made by the planning authorities have been tainted by any specific flaw. In any event, no cause was found for intervention.*⁸⁷

84. HCJ 8634/10 *Musa v. Civil Administration for Judea and Samaria Area*.

85. HCJ 983/16 *'Awad v. IDF Commander in the West Bank*.

86. HCJ 3384/13 *Za'ariq v. Subcommittee for Building Supervision in the Judea and Samaria Area*.

87. HCJ 2389/04 *Bsharat v. IDF Commander in the Judea and Samaria Area*. For similar judgments, see: HCJ 10408/06 *Kabaha v. Supreme Planning Council in the Judea and Samaria Area*; HCJ 6795/16 *Sheikh v. Subcommittee for Building Supervision*; HCJ 2986/15 *Bsharat v. IDF Commander in the West Bank*.

D. Implicit features of HCJ rulings

The Supreme Court has explicitly determined that the planning policy Israel implements vis-à-vis the Palestinian population is lawful, appropriate and meets all the residents' needs. On the basis of this position, the justices have refused to hear the arguments of principle brought before them, taking care to examine petitions that Palestinians file against the demolition of their homes solely through the prism of the building and construction laws. They then ultimately deny or dismiss all these petitions.

The Court, however, provides not only an explicit legal stamp of approval, but also an implicit one. It does so via two primary methods. One measure is blurring the differences among the various planning apparatuses: for Palestinians, for settlers, and the one that operates within Israel proper (i.e., within the boundaries of the Green Line). The second route is stating that every aspect of the planning policy Israel implements with respect to the Palestinian population is lawful under the provisions of IHL.

1. Obscuring the differences between the various planning apparatuses

In their rulings on construction in Palestinian communities, the justices of the Supreme Court have also cited rulings that deal with planning for settlements or within Israel proper, and vice versa, in rulings regarding planning for settlements or within Israel, the justices cited rulings that dealt with planning for the Palestinian population.

Reliance on precedents is characteristic of the Israel justice system. However, the various planning apparatuses are underpinned by differing values and are designed to safeguard conflicting interests.

Moreover, the planning system within Israel proper is based on a completely different framework of laws than the one that serves the planning system for Palestinians in the West Bank. A system whose object is planning for the benefit of the population – such as the one that applies in settlements and in the Jewish communities in Israel proper – is nothing like an apparatus whose object is to initiate, carry out and legalize the systematic dispossession of the population, like the one in place for Palestinian communities. Jumbling them all together eliminates differences, making a patently illegitimate system seemingly ethical and valid.

The following examples illustrate how the HCJ makes a hodgepodge of the various systems.

Obliterating the differences between the planning apparatuses for Palestinians and settlers: In cases dealing with Palestinian structures built without permits, Supreme Court justices have routinely cited rulings given in cases of demolition of settlement structures built on privately owned land. A case in point is the latest ruling on Khan al-Ahmar. Justice Isaac Amit relied almost exclusively on rulings regarding cases of construction in settlements, even when he was addressing purely procedural or hearing-related matters. Justice Amit is well-aware of the difference, but made it clear that he considers the difference irrelevant because both cases involve unlawful construction and address issues relating to the duties of the military commander:

I am not oblivious to the fact that the aforementioned judgments concerned Jewish settlement on land privately owned by Palestinians, whereas the matter herein concerns Palestinian settlement on privately

*owned Palestinian land (even if the land has allegedly been expropriated). Nevertheless, a final and conclusive judgment remains a final and conclusive judgment and the military commander has an obligation to take reasonable, equitable action to have it enforced, whether the illegal construction was carried out by Israeli or Palestinian residents of Judea and Samaria.*⁸⁸

Similarly, in the ruling regarding the establishment of the new settlement of Amihai, Chief Supreme Court Justice Hayut wiped out any differences between the planning apparatus for settlements and the one for Palestinian communities. She noted that the planning procedures “mainly follow the Jordanian Planning Law, in its form in effect in June 1967, and in accordance with changes the military commander made by virtue of security legislation.” She relied on rulings that found the amendment to be legal, even though the subject of the cases was actually construction in Palestinian communities. The Chief Justice wrote that the military order cancelled the various planning committees that operated on the basis of the Jordanian law. She then went on to say:

*The power to review and approve, inter alia, outline plans for land located within the jurisdiction of a “regional council” as defined in the Order regarding the Administration of Regional Councils (Judea and Samaria) (No. 783) 5739-1979 has been delegated to the Settlement Subcommittee... In the same order, the Supreme Planning Council delegated to the Subcommittee on Objections the power to review objections to a deposited plan.*⁸⁹

Yet the Chief Justice did not make the observation that this change applies only to settlements,

that the said committees do not operate at all in Palestinian communities, or that planning for these communities is done without any Palestinian representation. Her reliance just one sentence earlier on rulings regarding Palestinian construction completely blur this difference, creating the impression that the planning apparatus at hand is uniform and equitable.

Justice Rubinstein likewise obliterated the differences among the various systems in a case in which he had to address a claim regarding discrimination between the planning apparatus for Palestinians and that for settlers. He said, “It is hard to merit this claim with regard to the District Committees in that the promotion and approval of the plans is carried out by the Supreme Planning Council and its Subcommittees for both the Palestinian population and the Israeli population.”⁹⁰

Objectives of the planning apparatus: An organization called We Are on the Map filed two HCJ petitions, demanding that the Civil Administration demolish eight Palestinian structures built without permits. The state argued that it assiduously enforces the law, but that various considerations – including issues of security, manpower and resources – oblige it to set a priority-based schedule of demolitions. The structures in question are low priority. Justice Procaccia denied the petition “on the basis of the room for discretion that enforcement authorities have in setting their priorities for applying the law and implementing it in practice. These laws are underpinned by important ends of environmental protection, landscaping, land preservation and long-term societal interests.”⁹¹

88. HCJ 5193/18 *Khan al-Ahmar Residents' Committee v. IDF Commander in the West Bank*.

89. HCJ 5470/17 *Muhammad v. The Minister of Defense*.

90. HCJ 5667/11 *Deirat Rafaya Village Council v. The Minister of Defense*.

91. HCJ 1161/06 *We Are on the Map Movement v. The Minister of Defense*.

In support of this statement, Justice Procaccia cited one of her earlier rulings. In a case regarding the planning of the marina complex in the city of Herzliya (located within the boundaries of the Green Line, within Israel proper), she had written of the importance of planning and construction laws. In citing this ruling, she completely disregarded the fact that planning for the Palestinian population, the subject of the petition, is predicated on interests that are the very reverse:

Recent generations have seen growing recognition that land is a public resource that could be exhausted if exploited without regard for the needs of future generations. Traditional planning concepts, which permitted maximum exhaustion of the land's economic value over the short term, have been replaced with modern planning laws, which are particularly attuned to the need to safeguard society's long-term interests and adopt a cautious approach with respect to the extent of land use. This approach is motivated by a sense of public, national and social responsibility, with a view to both the present and the future. Therefore, current planning laws also lend expression to the need to preserve land and consider the economic, social, distributive and ecological impacts of plans alongside the recognized need for development and construction.⁹²

The contention that the HCJ is not an appellate instance of the planning committees: HCJ justices have regularly declined to intervene in decisions made by the subcommittees of the Supreme Planning Council, on the grounds that the Court is not an instance for appealing their decisions. To establish this contention, the justices have cited

rulings that deal with the Israeli planning apparatus. A petition by a resident of 'Anata is a case in point. The Palestinian petitioner sought to rescind the demolition order issued for an auto repair shop and a carwash he had built. Justice Sohlberg denied his petition, inter alia, on the said grounds. He relied on a ruling with regard to the Jerusalem District Planning and Construction Committee,⁹³ which had also been cited in other rulings to justify the justices' non-intervention in decisions by the Civil Administration's planning committees.⁹⁴

As described above, there are no Palestinians on the subcommittees of the Supreme Planning Council which do the planning for Palestinian communities, and whose primary objective is thwarting Palestinian development and construction. As such, these subcommittees are fundamentally unlike the planning committees within Israel proper in terms of their makeup, objectives and mode of operation (at least in terms of the Jewish population). It follows that the same grounds cannot be used to validate the Court's decision not to intervene in the decisions the subcommittees make.

The requirement to prove ownership of the land:

In the petition against the demolition of structures in the settlement of Giv'at Yitzhar, Justice Levy ruled that the petitioner had not proven his right to the land and, hence, his home must be demolished. Justice Levy explained: "It is a basic tenet of the laws of planning and construction that a planning authority does not approach the examination of a permit application until the applicant has demonstrated his right to the land. Otherwise, the authority might find itself granting construction that trespasses on

92. AAA 2273/03 *Tchelet Island General Partnership v. The Society for the Protection of Nature*.

93. See HCJ 6795/16 *Sheikh v. Subcommittee for Building Supervision in Judea and Samaria*, citing AAA 2418/05 *Milgrum v. District Planning and Construction Committee*.

94. See, e.g., HCJ 2389 *Bsharat v. Military Commander in the Judea and Samaria Area*; HCJ 10408/06 *Kabaha v. Supreme Planning Council in the Judea and Samaria Area*; HCJ 2986/15 *Bsharat v. IDF Commander in the West Bank*. See similar rulings on non-intervention in settlements for the same reason: HCJ 8171/09 *Head of al-Janiya Village Council v. Supreme Planning Council of the Civil Administration*.

an owner's property."⁹⁵ To illustrate this principle, Justice Levy cited regulations that apply in Israel, namely Planning and Construction Regulations (Application for a Permit, Conditions and Fees), 5730-1970.

In a petition Palestinian residents of the Jordan Valley filed against the demolition of their homes, Justice Sohlberg relied on Justice Levy's assertions. He determined that "all that is required – and justly required – is that a person applying for a building permit prove, to an extent that would satisfy a reasonable administrative authority, that he has ties to the land, and therefrom may apply for a building permit."⁹⁶

Drawing a parallel between the cases – which implies that Palestinians can easily prove their rights to the land – is preposterous. The comparison disregards the fact that Israel has suspended land registration in the West Bank, that Palestinians are generally unable to prove their rights to their land, and that in the vast majority of cases, the Civil Administration denies building permits to Palestinians, even on their privately owned property.

2. Selective reference to the provisions of international law

The other mode by which the HCJ has managed to validate the planning apparatus is by conveying the message that planning carried out for the Palestinians meets the requirements of IHL. This is achieved primarily through selective citations of the law's provisions, so as to create the impression that the Israeli policy complies with IHL. However,

the interpretation of these provisions by the Supreme Court justices remains purely theoretical and ignores the reality on the ground. Moreover, the judges refrain from citing other provisions which indicate that Israel's policy does not conform to its obligations under international law.

One of the most telling examples is the way the justices have addressed the IHL prohibition against the occupying power making changes to the local law. Since the occupying state is not sovereign of the area, and occupation – by definition – is meant to be a temporary situation, the occupier may change the law only if necessary for imperative military needs or for the benefit of the local population. The Court has accepted the state's argument that the change it made to the Jordanian Planning Law was made for the benefit of the local population, as "the duty of the military rule under said Article 43 is to ensure that measures are put in place to enable the residents of the area to maintain the routines of civilian life, a matter which refers – as is well-known – to the entire social, economic and commercial fabric of the community's life."⁹⁷

These statements by former Chief Supreme Court Justice Meir Shamgar are all well and good in theory. In practice, however, it is hard to dispute that the change to the Jordanian law achieved the very opposite. There could be no greater or blunter contrast between theory and reality. Chief Justice Shamgar justified the amendment to the Jordanian law on the grounds that, without making the change, "it would be impossible to lawfully build even a single structure in the area." Yet, lo and behold, on the basis of this ruling, generations of justices have

95. HCJ 5194/03 *Grossman v. The Minister of Defense*.

96. HCJ 3758/13 *Bsharat v. Subcommittee for Building Supervision*.

97. HCJ 5667/11 *Deirat Rafaya Village Council v. The Minister of Defense*.

been validating a situation wherein, for Palestinians, it is nearly “impossible to lawfully build even a single structure.” That is precisely the “fundamental harm to the local population” that the ruling purported to avert. In fact, it merely lent this harm a semblance of legality.

The supposed concern that Chief Justice Shamgar expressed regarding the maintenance of Palestinians’ “routines of civilian life” was completely forgotten by the HCJ justices when they accepted the state’s arguments that the Mandatory plans – outdated and far-removed from the current needs of the local residents – are binding on the state in the Palestinian communities of the West Bank (but not, as explained above, in the settlements). The justices then ruled that these plans are part of the local law, which an occupying power is not allowed to change. What completely slipped their mind are the exceptions in international law that permit changes when they are made to benefit the protected population. Adopting the Mandatory plans is contrary even to other Supreme Court rulings, which explained the general principles that serve to guide the duties of the occupying power vis-à-vis the population under its control. For example, Justice Barak determined that the obligation not to change local law is not a sweeping one, and that changes in the situation must be taken into account:

In the framework of the Regulations themselves, there is room to address the powers and functions of a proper government, not according to social views held more than a hundred years ago, but according to what is accepted and practiced among civilized peoples in our day and age. Therefore, the concrete content which

*was given to the provision of Article 43 of the Hague Regulations with respect to ensuring public order and safety shall not be guided by public order and safety as they were in the late nineteenth century, but rather as they are in a modern, civilized country in the late twentieth century.*⁹⁸

Moreover, the Court has disregarded other international law provisions, whereby the Israeli planning policy is unlawful, and has completely refrained from examining the restrictions the law imposes on use of the land by the occupying forces. The provisions allow only limited use. For example, they prohibit carrying out military training, or making permanent changes to the land, including the establishment of settlements. These provisions have not been addressed at all by the Court. Recently, Chief Justice Hayut even stressed that “this Court has already ruled more than once over the years that the issue of the very lawfulness of the settlements in terms of customary international law is primarily a diplomatic, state question which this Court does not address on the grounds of institutional non-justiciability.”⁹⁹

Particularly blatant is the justices’ disregard of the fact that the Israeli planning policy involves violating the absolute prohibition on forcible transfer, even though allegations regarding the violation were brought before the Court.¹⁰⁰ This is no minor breach of international law. It is a violation which means commission of a war crime. IHL provisions prohibit the forcible transfer of protected persons, unless “the security of the population or imperative military reasons so demand.”¹⁰¹ Obviously, these exceptions have no bearing when the state tries to take over

98. HCJ 393/82 *Jam’iat Iscan al-Ma’almoun v. IDF Commander in the Judea and Samaria Area*.

99. HCJ 9949/08 *Hammad v. The Minister of Defense*.

100. See, for example, Prof. Eyal Benvenisti, Prof. Mordechai Kremnitzer and Prof. Yuval Shany, “Expert Opinion in the Matter of the Petition by the Residents of the Villages in Firing Zone 918 against the Intention of Evicting Them,” submitted in HCJ 413/13 *Abu ‘Aram v. The Minister of Defense*, especially paragraphs 2-12; and Prof. Eyal Benvenisti, “Expert Opinion on the Matter of the Prohibition on Forcible Transfer in the Village of Susiya,” submitted in HCJ 1420/14 *Susiya Village Council v. The Minister of Defense*.

101. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), Article 49(1).

land for the future expansion of settlements, or any other such similar purpose.

The fact that the military does not necessarily intend to implement the forcible transfer directly and flagrantly – for example, by getting trucks to cart away residents – is of no account. The prohibitions stand even if people leave their homes not of their own free will, or leave as a result of their or their

family being pressured. Creating circumstances that cause protected persons to leave their homes due to impossible living conditions generated by the authorities – for example, by cutting them off from water and power grids, turning their living area into a military training zone, or repeated demolition of their homes – has been defined as prohibited forcible transfer.¹⁰²

102. For further details, see the opinions listed in note 100 above.

E. The upshot: Keeping life arrested in prolonged limbo and engendering a coercive environment

The legal proceedings on the basis of the planning and construction law do not prevent the demolition of homes, nor do they make it possible for residents to legalize the buildings' status and lead a normal routine. The only benefit of these proceedings for Palestinians with homes facing demolition is that they make it possible to get an interim injunction that places a freeze on the situation, pending a ruling in the petition. The petitioners can go on living in their homes, secure in the knowledge that the structures will not be demolished until the ruling is handed down, a period that can last months and even years.

However, there is a high price to pay for this fossilized state. The Court often issues orders nisi that not only prohibit demolition by Israel, but also do not allow Palestinian residents to build homes or public buildings, connect to infrastructure or make repairs – even essential ones – to existing buildings. Consequently, Palestinians are consigned to a prolonged state of limbo and uncertainty.¹⁰³

In some cases, the Court handed down sweeping orders nisi, which include “conditional freezing.” For the Palestinian villages in the area of the South Hebron Hills declared as Firing Zone 918, whose case has been before the Supreme Court for nearly twenty years, Justices Rubinstein, Melcer and Danziger ruled that the interim injunction would remain in effect and the state not demolish the structures “so long as no construction whatsoever is undertaken in or near the structures which have been issued

demolition orders. If the said condition is not upheld, the freezing will terminate, and the interim injunction will become null and void.”¹⁰⁴

A similar order nisi was given in the case of Khirbet Zanutah. At first, an interim injunction was issued, prohibiting demolition of the structures by the state “so long as the present situation on the ground is frozen, in terms of both the construction and the habitation of the said structures, pending a ruling on the petition.”¹⁰⁵ After years of hearings – during which time the Court made the extremely rare demand that the state explain what would happen to the residents if their homes were demolished, and even obliged the state to negotiate with the petitioners to try to reach an agreement amenable to both parties – the state gave notice in January 2017 that it is considering making a change to one of the planning criteria and that it guarantees it will not demolish the structures until it completes debating the matter. The justices then made a ruling that froze life in the village:

*The notice submitted by the State on 18 January 2017 stated that the Supreme Planning Council was expected to hold a meeting that might impact the possibility of retroactively approving the cluster that is the subject of the petition. Following negotiations and the statements made in the State's notice, it is hereby clarified that the orders that are the subject of this petition will not be enforced until the issue of potential retroactive approval for the cluster in the area is resolved. This, on condition that no further construction takes place in the compound.*¹⁰⁶

103. See, e.g., 7151/05 *a-Najada v. Commander of IDF Forces in the West Bank*, ruling dated 31 August 2006; HCJ 5043/12 *Jaber v. Subcommittee for Building Supervision in Judea and Samaria*, ruling dated 4 July 2012; HCJ 7229 *Muhammad v. Subcommittee for Building Supervision in Judea and Samaria*, ruling dated 14 November 2010; HCJ 10299/09 *Rashaydah v. Subcommittee for Building Supervision*, ruling dated 2 February 2010.

104. HCJ 5901/12 *Dababseh v. Head of the Civil Administration in the Area of Judea and Samaria*, ruling dated 11 January 2017.

105. HCJ 9715/07 *Batat v. Subcommittee for Building Supervision in the Judea and Samaria Area*, ruling dated 20 March 2008.

106. HCJ 9715/07 *Batat v. Subcommittee for Building Supervision in the Judea and Samaria Area*.

The trouble with these orders nisi is not only the limbo they impose on life for a prolonged, indeterminate period of time, but also that they make the residents' fates completely dependent on one another. If just one resident builds in breach of the order, all residents will suffer the consequences.

In instances in which the Court approves the demolition, residents are faced with a choice between two evils: either stay where they are, rebuild their homes (still without permits) and risk repeat demolition, or leave and build their home elsewhere. The first option means the residents continue to live a state of uncertainty; the second, that they are expelled from their homes.

Testimony by Sliman Hadhalin, 62, a married father of 19 from Khirbet Um al-Kheir, the South Hebron Hills¹⁰⁷

I'm a farmer and I raise livestock. Thirty families – altogether about 200 people – live in our village. The settlement of Carmel was built right by us, and we've suffered every type of harassment ever since. We're harassed by both the military and the settlers, who attack shepherds, prevent them from getting to their land and arrest them, and also by the Civil Administration, which keeps issuing demolition orders for structures in the village and demolishing homes, over and over again.

We've lived here since 1960, in tents and in covered shelters. My father bought the land off residents of Yatta. The Civil Administration refuses to issue us building permits and doesn't let us expand. We've been living here under virtual siege for more than fifty years. I can't even remember how many demolition orders we've been served. We appealed them to the Appeals Committee in Beit El and before the courts, via lawyers, and got all the way to Israel's Supreme Court. It made no difference. The orders and the bulldozers keep on coming.

Every covered shelter you can see faces the threat of demolition. Our lives here, our very existence, are under threat. We feel that just being here, in the place we've lived in for decades, is considered illegal. We're being harassed in order to force us out. We're stuck living in primitive conditions, with no way to develop.

I used to believe that the High Court would give us a fair trial and reach just decisions, but our experience with the Israeli court system has been extremely frustrating. The court never once made a decision that would give us security. Either the decisions were not in our favor, or the hearings kept getting postponed.

My family and I live in daily anxiety, as do all the other residents of Um al-Kheir. When we go to sleep at night, we never know what the following morning has in store for us. The bulldozers show up suddenly, with no prior warning, and start their merciless demolition.

After so many years of experience with the Israeli courts, I've given up all hope. I can only hope for God's help. I don't trust anyone – neither the human rights organizations nor the journalists. The media don't let up, but they're useless. I tend to my sheep and live in fear of the military, the settlers and the Civil Administration. The worst thing is to lose your hope and your trust in the system that is supposed to promote justice, the judicial system.

I'm following what's happening at Khan al-Ahmar and I'm terrified that the same thing will happen here. I worry that the settlers from Carmel will decide, one fine day, that our village is keeping them from expanding, and demand that we be kicked out. As it is, they already constantly complain that we're a nuisance. They say that the smoke from our outdoor bread-baking ovens pollutes their environment. The Civil Administration has

107. The testimony was given to B'Tselem field researcher Musa Abu Hashhash on 31 October 2018.

demolished one of our ovens three times already, to indulge them.

We're afraid of everything, even of the weather. Our shelters can't withstand the wind and rain, but we're not allowed to build anything sturdier. By withholding building permits, they're keeping us from being able to live in dignity and peace. The settlers next door enjoy every benefit and expand the settlement without any hindrances. They have electricity, water and green gardens. We, on the other hand, wait for the bulldozers that may arrive at any time, demolish our shelters and drive us off our land. There's nothing worse than living with daily fear and worry.

Testimony by Ahmad Jahalin, 60, a married father of 16 from Khan al-Ahmar¹⁰⁸

I was born and raised in the area of Khan al-Ahmar. In 1979, I got married and built a shack for my wife and me. Back then, there were no restrictions on construction or expansion. Several years later, I married my second wife. I have sixteen children and I also put up two tents without running into any problems.

After the settlement of Kfar Adumim was established, they started limiting our access to pastureland. The Civil Administration also declared a lot of our pastureland "closed military zones." They started fining shepherds who went into these areas and confiscating their sheep. So we had to start taking our sheep down to the valley that runs between where I live in and the settlement. But the pastureland wasn't enough, and we had to buy animal feed. Until then, we had been financially comfortable, but all these changes made raising livestock very expensive and hurt our finances.

My eldest son, Yusef, got married in 1997 and built a shack next to ours. He and his wife now have four

kids. Then my son Naser got married and built a shack; they have five kids. After that, my sons Jamal and Musa got married, but they couldn't build shacks of their own because as of 2009, after the school was built (out of tires), the Civil Administration started issuing us demolition orders. So Jamal and Musa moved into the shack of my late parents. The shack is about 12 square meters, and we put a wooden partition down the middle.

Soon after that, Muhammad and Hassan also got married. Hassan and his wife moved in with Naser and his family, in the same part of the shack. Muhammad and his wife moved in with my wife and me. Now, Hassan's wife is pregnant and Muhammad and his wife already have three kids. We divided our shack with a wooden partition, too. My wife and I live in one part with four of our children, who are not yet eighteen, and another son who is 25 – and Muhammad and his family live in the other part. It's very crowded and makes our lives very difficult. You can't lead a normal life without privacy.

We don't have any room to host people, either. Where would they sit? There's no room for guests. There's another problem. We only have one toilet, which serves my nuclear family, Muhammad's family and Yusef's family. All in all, eighteen people who have to await their turn. Mornings are especially tough. We stand in line in front of the toilet as if we were in prison. Of course, we're not allowed to add any new structure, because the Civil Administration would immediately demolish it. I often see my children or grandchildren relieving themselves behind the shack. They're young and they can't hold it in long enough to wait for their turn at the toilet.

To bathe, we have to heat water on the stove and fill a tub. There's no bathroom, so whenever someone bathes, we all have to go outside. It's awkward and unpleasant. What kind of life is this, to be denied basic living conditions? Why aren't we given permits

108. The testimony was given to B'Tselem field researcher 'Amer 'Aruri on 13 November 2018.

to build more homes? My son Mahmoud is 25. He can't get married because he'd have nowhere to live with his wife. There's no room for another family here.

Despite these hardships and the poor living conditions, I love the Bedouin way of life. Everyone in the community, including me, wants to continue raising and selling livestock and roaming with our flocks from one pastureland to another. But that doesn't mean I don't want to live in a house like other people do, with bedrooms, a kitchen, a bathroom, a living room and everything else.

I have 130 head of sheep. They're all in one small 50-square meter pen because I'm not allowed to build another. I'm forced to sell sheep in order to make room for new lambs. Also, the shack isn't suitable for lambs that are born in winter and need heating. It would require certain renovations and improvements, but the Civil Administration won't even allow us that. So, in winter, I have to move the newborn lambs several hundred meters from our home, into caves we can heat. In other words, the occupation authorities come down hard both on our living arrangements and on our sources of income.

We live under constant stress because of the demolition orders, and especially because the Civil Administration won't leave us alone. They keep an eye on every breath we take.

Since the High Court gave the occupation authorities the go-ahead to demolish our homes, we've been in a state of constant anxiety, waiting for the demolition to begin. My wife phones me any time she sees a military patrol or Civil Administration vehicle on the hill opposite our home. She bursts into tears and says: "Come home right away, maybe they're coming to tear it down." I rarely leave our living area, because I'm afraid they'll demolish it while I'm gone and won't let me come back to help my family and support them through the demolition.

Even my children and grandchildren ask every morning, as soon as they wake up: "Did they demolish the school?" They're convinced the school will be torn down one night and will simply be gone when they wake up.

The stress is also taking a toll on our relationships. My wife and I have started losing our temper over every little thing. We don't listen to each other any more. Our minds are only on the coming demolition and expulsion from our home. I'm afraid that I'll have to relive what happened to my father and my grandfather in the 1950s, when they were expelled and forced to find a new home.

We've gradually lost the simple, quiet life we used to lead in this modest Bedouin community. Our spirit is troubled. The community is now ruled by anxiety and worry.

Testimony by Muhammad Ka'abneh, 71, a father of nine from Um al-Jammal, east of Taybeh¹⁰⁹

Our community is part of the al-Ka'abneh tribe, which was expelled from Tel Arad in 1948. At first, we moved to the area of al-'Auja. Then they moved us out of there, too, on account of the area supposedly being on the route of the *fedayeen* coming from Jordan. We moved to an area east of Taybeh, to the hills and rocky ground between Taybeh and the Jordan Valley. Dozens of families came and each picked a spot, rebuilt their shacks, shelters and tents, and carried on with their lives.

I was 22 then. Our family settled about three kilometers east of Taybeh. We also built shacks in the area of al-Mu'arrajat, and we stay there in winter.

When I got married, I stayed put. I have nine children, all married. My six girls moved in with their husbands. The boys live here, with me. Our extended family here, in the community, now numbers 24

109. The testimony was given to B'Tselem field researcher Iyad Hadad on 16 September 2018.

people. This includes me, my wife and our sons: 'Odeh, who was born in 1984, his wife and their six children; Salem, who was born in 1986, his wife and their six children; and Ghaleb, who was born in 1988, his wife and their four children. We have two livestock pens. One is 300 square meters and the other is 150 square meters. We also have another four residential shacks, each 60 square meters. We make our living off our livestock; we have 350 head of sheep.

At first, we lived here peacefully. But after the Oslo Accords, the Israeli government started treating the land in this area as if it belongs to Israel, even though the land we live on is owned by Palestinians from Taybeh and we lease it from them.

The first wave of demolition orders came in 1996 or 1997, I don't remember the exact dates. The orders were issued for our seven shacks in al-Mu'arrajat, where we spend our winters. We hired an Israeli lawyer and he managed to get an interim injunction. Since then, the Civil Administration has issued more orders. We also got demolition orders for our homes here. Almost every year, new orders were issued. Every time, we went to a lawyer who managed to stay them.

We live in a constant state of anxiety, expecting the worst. Every time people from the Civil Administration show up, we're sure they've come to carry out the demolitions. The moment we spot their white pickup truck with its escort of military jeeps heading onto the mountain path that leads here, we start shaking. We panic and start gathering our things, to prepare for the eviction. We all try to quickly grab whatever we can. But how much can we save this way? We only take personal items, because we know we won't have time to move furniture or larger items.

Every time this happens, we all start running around, panicked and confused, trying to quickly round up the kids and collect documents and anything else

important we can carry. You hear shouting from every which way. Everyone tries to warn everyone else. I start making phone calls. First of all, if my sons aren't home, I call them and tell them to come quick and look after their wives and children, or the sheep. Then I call the organization that's legally representing us, or call the lawyer directly, to find out if there are any new developments concerning the demolition. I also call people from neighboring communities to find out if they know anything about the Civil Administration's plans.

In the end, whenever they've come, it was just to serve us orders and leave. That's after they got us all running around and caused us stress so bad that I can't even put it into words. Sometimes, after all the tension and confusion, we see that they're heading to another community to serve their orders there. We live on constant alert and can never relax. Our lives are unstable.

We can't expand our existing homes or build new ones; for instance, when someone wants to marry off his children and build them a new home. We can't even add another sheep-pen. There are entire families here, six or eight people, who live in small shacks of just 60 square meters. We live crowded together like sardines. We're waiting for the court to pass its ruling and can't plan anything for our future or for our children. Can you call this living? Why can't we be left alone to live in peace and make a dignified living?

Testimony by Nu'emah Bsharat, 74, a mother of 13 from Khallet Makhul, the Jordan Valley¹¹⁰

My family is originally from Tammun. In 1964, I married a relative of mine. When the occupation began, I already had a son and daughter. We moved from one spot to another near Tammun, because we make our living as shepherds. The soldiers were everywhere and we had to move again and again,

110. The testimony was given to B'Tselem field researcher 'Aref Daraghmeh on 5 December 2018.

with no permanent home, because every time we put up a tent they tore it down, and also took away some of the sheep.

About 25 years ago we settled here, in Khallet Makhul. Our lives weren't simple here either, but they were calmer. We mostly eat bread. We use gas lamps for lighting and burlap sacks for insulation. Living in these conditions, I married off all my children and we lived relatively peacefully, even though life was tough.

In recent years, our lives have become hell again. Soldiers simply show up and carry out demolitions, leaving nothing. They say we need permits, but I don't live in a house. What sort of permit do they want? We're living on the ground! We're afraid to build anything at all here, no matter how small. They even demolished our toilet and outdoor bread-baking oven. They left nothing. It was a metal toilet we had received as a donation, and now all we have is a cloth partition for privacy. Our life here now is more like death, but what can we do? We have nowhere to go.

You can see what we set up here after the demolition. A miserable excuse for a tent. See where I sleep? Our lives are up in the air, we can't even pour a concrete floor because we're terrified they'll come and demolish it. Last year, I killed two snakes here and more than ten scorpions. What kind of a life is that?

We share a water container with the sheep and it costs us a lot, so we try to economize. There's an Israeli water pipe running right under our tents, but if we touch it we'll be expelled. There's almost no one left in Khallet Makhul: just my husband and me and our married children – Barhan, Yusef and Ashraf – and our neighbor, Abu Khalaf. Everyone else has fled this place like the plague.

I live in fear of another demolition. Any time I see a military vehicle approaching, I say to myself "Here they come to tear down our home again, and in wintertime, yet." You see how we live here in the winter, even when things haven't been demolished. I don't know how we can carry on living here if there'll be another demolition. Last month, there were floods and strong winds. The tin plates started flying off the shack, over our very heads, and the rain pounded down right into our tents. There was mud everywhere.

I have diabetes and high blood pressure. Sometimes, when I don't feel well at night, I wait until morning and only then ask my children to take me to the doctor because it's dangerous here at night, on account of the military and the settlers. Our world is growing narrower by the day, because of the settlers and the military.

It's a bitter life we live here. I'm over seventy years old, and there is nothing in my life that gives me pleasure. A year ago, I said to my husband: "How about we get a shepherd to tend the sheep, and we take a few months to rest in Tammun?" And that's exactly what we did. We came back after four months. We're not used to living in a house, inside a village. Our lives are here, this is how we make a living. At least it's quiet and we get by. I've never asked anyone for help, and I want to make a living from my own labors. But we know it's likely they'll carry out another demolition. My kids told me that the matter is under review at court. The occupation authorities still want to demolish our things.

I want to live out my life here. I don't want anyone to feel sorry for me. I just want us to be allowed to build houses and live like anyone else.

Conclusions

In Area C, which constitutes about 60% of the West Bank, Israel prohibits virtually all Palestinian building and development, including residential and public construction and developing infrastructure. This policy affects not only the people living in Area C, but all Palestinian residents of the West Bank. Their land reserves were stolen and they are forced to live crowded into the boundaries of their communities, without any way to develop economically or agriculturally. The planning apparatus, by design, operates unfairly and unreasonably to deny Palestinians construction permits from the Israeli authorities. As a direct result, and given that a home is not a luxury one can do without, Palestinian are forced to build without permits.

Israeli institutions overlook the state's responsibility for this state of affairs, focusing only on the end result: Palestinians building without permits. They consider this action simply as lawbreaking or even as "terrorism by construction"¹¹¹ that should be handled with "more effective law enforcement." Innocuous labels such as "planning policy," "the rule of law" or "maintaining public peace" are used by the state to consign West Bank Palestinians to a bare-bones standard of living, without a future or any opportunity to develop.

The justices of the Supreme Court have accepted in full the framing of the issue as "offenses of construction," after determining – as described below – that the policy Israel implements in the West Bank is legal, reasonable and reflects the residents' needs. However, as Prof. Mordechai Kremnitzer put it after the ruling in the matter of Khan al-Ahmar was handed down, "the entire legal construct the state has built to justify its actions in the West Bank doesn't have a leg to stand on."¹¹²

In terms of the principle of the matter, the justices found the change Israel made to the Jordanian Planning Law to be lawful and necessary, ignoring the fact that it enabled Israel to consolidate and take over the entire planning system, remove Palestinians from all the committees and keep Palestinians from taking part in determining their future. This change paved the road for the later establishment of two parallel planning apparatuses: one for Palestinians and another for settlers. Nor do the justices see anything wrong with areas being declared "state land" and allocated to settlers, or West Bank land being declared "training zones." Despite hearing arguments that challenged the lawfulness of these proceedings, they approved the demolition of Palestinian homes built in areas so declared.

Moreover, the justices determined that the planning system for Palestinians addresses the residents' needs. The judges were perfectly willing to accept that plans drafted over eighty years ago by the British Mandate still apply in Palestinian villages, but not to Israeli settlements; they determined that the outline plans the Civil Administration drafted for Palestinian communities are reasonable and meet the residents' needs. It mattered not that the plans are identical and inflexible, do not have any public spaces, and that any future development must be undertaken within the already built-up area of the village. They also ruled that the Civil Administration's planning committees consider Palestinians' applications for building permit properly and professionally, despite there being no Palestinian representative on the committees, and taking no notice of the negligible number of applications granted.

111. Amira Hass, "Israeli Lawmakers Debate 'Construction Terror' by Palestinians in West Bank," *Haaretz*, 29 January 2018.

112. Mordechai Kremnitzer, "The Demolition of Khan al-Ahmar: Liberman's Recipe Fans the Flames in the Region," *Haaretz*, 13 July 2018 [Hebrew].

The Court has considered the planning apparatus Israel established for the Palestinian population in the West Bank indistinguishable from the one established for the settlers, in spite of overwhelming differences between the two systems. In one of the hearings held in 2018 on the matter of the petitions against the demolition of Khan al-Ahmar, Justice Hanan Melcer even said – in reference to the enforcement of planning laws vis-à-vis Palestinians and settlers – “the same law applies to all.”¹¹³

Nevertheless, as shown in this report – and in dozens of others, in media reports and HCJ petitions – Israel’s planning and construction policy for settlers is the very reverse of that applied to Palestinians. Despite settlers sometimes playing the victim – wolves in sheep’s clothing – the planning apparatus for the settlement enterprise was constructed expressly to benefit the present and future needs of the settlers and does not balk at violating Israeli or international law. This is all done in the service of the political project that the Israeli governments have promoted in the West Bank: the takeover of as much Palestinian land as possible and ever-increasing settlement expansion. It would seem, given a state policy that is generous and encouraging, that there would be no reason to justify the building of structures without permits in settlements. Yet, not only does the state not rush to demolish these structures, it often even helps build them, hooks them up to infrastructure and takes action to legalize them retroactively. Only in rare cases – in which structures are built on privately owned Palestinian land, an HCJ petition filed and a ruling handed down that the structures must be demolished – only then does the state reluctantly comply and enforce the law. Even that is only achieved after numerous postponements in an attempt to “regulate” the construction.

Just looking at the reality on the ground is enough to see the immense gulf between planning for settlers and planning for Palestinians. Since occupying the West Bank over fifty years ago, Israel has built nearly 250 new settlements but only one Palestinian community. And that one community was built to transfer Bedouins living on land that Israel earmarked for the expansion of the settlement of Ma’ale Adumim. In other words, even the establishment of this one community was designed to serve Israeli needs. At the same time, Israel established an apparatus that does not enable Palestinians to obtain building permits, and expends considerable efforts imposing and enforcing rigorous restrictions on any and all construction or development for the Palestinian population.

The gulf between this reality and that described in thousands of HCJ decisions – in which justices wrote about “clean hands” and “exhausting remedies,” accepted each and every argument by the state regarding planning for the Palestinian population, and summed up by allowing the state to demolish the petitioners’ homes and consign them to abysmal living conditions – is unfathomable. While the Court does not write the laws, make the policy or implement it, the justices have both the authority and the duty to find Israel’s policy unlawful and prohibit the demolition of homes. Instead, time and time again, they have chosen to give the policy their stamp of approval and validate it publicly and legally. In so doing, not only do the Supreme Court justices fail to discharge their duties, they also play a pivotal role in further cementing the occupation and settlement enterprise, and in further dispossessing Palestinians of their land.

It stands to reason that the judges are well-aware, or ought to be, of the judicial foundations they are cementing in their rulings, and the devastating

113. The hearing took place in the Supreme Court as part of HCJ 5193/18 *Residents’ Committee of the Village of Khan al-Ahmar v. Commander of IDF Forces in the West Bank*.

implications of these rulings, including the violation of the IHL prohibition on forcible transfer. Therefore, they too – along with the prime minister, senior ministers, the chief of staff and other senior military officers – bear personal liability for the commission of such crimes.

The Israeli government recently passed an amendment to the Administrative Courts Law, whereby cases of planning and construction in the West Bank will be heard by the Administrative Courts.¹¹⁴ The Supreme Court will no longer hear cases on this matter as a court of first instance and will only hear appeals. Yet this change is of but little significance. The nature of the hearings may change and they may take less or more time, but the underlying essence will remain unchanged. The justices of the Jerusalem District Court will simply join their counterparts on the Supreme Court in validating the dispossession of Palestinians of their lands and the demolition of their homes.

For Israel, the chief advantage in maintaining a planning apparatus for the Palestinian population is that it lends the system a semblance of being proper and functional, ostensibly operating in accordance with international and Israeli law. This allows the state to argue that Palestinians choose to build “illegally” and choose to take the law into their own hands – as if they even have a choice – thereby justifying the home demolitions and the continued planning restrictions.

However, the attempt to cloak the planning apparatus in the occupied West Bank in a guise of propriety is no more than a propaganda ploy. A planning system should reflect residents’ interests and serve their needs. Yet, by definition, the balance of power under an occupying regime is unequal. The officials of the occupation regime do not represent the occupied population, whose people cannot participate in the

systems that regulate and govern their lives: not in the planning and legislative proceedings, nor in issuing the military order, nor in the committee that appoints judges.

It sometimes seems that the state itself has had enough of the effort involved in maintaining the façade. Mapping buildings, proceedings in committees, writing responses to petitions and so on and so forth, all take precious time, effort and resources, even if Israel does have at its disposal leagues of lawyers, immense financial resources, planning apparatuses to do its bidding and a legal system that willingly devotes itself to the charade. Pitted against this combined powerhouse is a population with little representation and few resources, people who have been living for over half a century under a military regime in which liberty and livelihood are precarious. Nevertheless, the state’s leaders are dissatisfied with the pace and rate of the dispossession, finding it frustrating to have to wait months and years for the courts to reach the outcome the state seeks.

Therefore, in recent years, Israel has stepped up its attempts to bypass – or even cancel – legal proceedings regarding the demolition of Palestinian structures. Israel’s willingness to forgo appearances attests mostly to the state’s confidence that it will not be called to bear significant domestic or international consequences for breaking the law. The lawfulness of the new orders is being debated by the HCJ at this very time. This means that, paradoxically, the Supreme Court is now being asked to consider the cancellation of the façade it has played a major role in generating.

Regardless of whether the justices of the HCJ choose to validate the cancellation of the façade, they have constructed a sturdy edifice to support

114. Law of the Courts for Administrative Matters (Amendment no. 117), 5778-2018.

the legal validation of the dispossession of lands of the Palestinian people. How much care will they take in adding a nice coat of paint to this structure in the days to come? Will they insist on maintaining the façade? Ultimately, that is just a minor question

of image. It must not deflect attention from the reality of theft and dispossession that Israel has created, and which the justices continue to enable, excuse and validate.

