האגודה לזכויות האזרח בישראל
جمعية حقوق المواطن في إسرائيل
The Association for Civil Rights in Israel

19 April 2012

The Honorable Justice (ret.) Edmund Levy
Chair, Committee to Examine the State of Construction in Judea and Samaria

Re: **The Position of the Association for Civil Rights in Israel (ACRI)**

Dear Justice Levy:

In light of your appointment as head of the Committee investigating the possibility of legalizing unauthorized Israeli settlement in the Occupied Territory, we would like to present you and the other Committee members – Justice (ret.) Tehiya Shapira and Atty. Alan Baker – with the position of the Association for Civil Rights in Israel (ACRI) on this matter.

Since 1972, ACRI has been engaged in efforts to safeguard human rights in Israel, in the territories under Israeli control, and everywhere that rights are violated by the Israeli authorities or their representatives. As part of its ongoing efforts, ACRI has worked for years vis-à-vis the Israeli authorities to bring the occupation to an end, and – until this happens – to reduce human rights violations in the Occupied Territories, including the many violations resulting from Israeli settlement there, whether "authorized" or not.

We agree with the position expressed by Yesh Din in its open letter to the Committee from 5 April, which points out that establishing a legal committee without the agreement of the Attorney General – and despite his explicit opposition – undermines both the authority of the Attorney General and the rule of law. We believe the Committee should give serious consideration to this point and address it in the formulation of its conclusions and recommendations.

Nevertheless, because it is not the Committee that defined its mission, we chose not to stop here, but to present our position for your consideration as you form your **legal and professional** opinion of the critical matter at hand.

The distinction between settlements and unauthorized outposts

The Israeli government has generally distinguished, even in its Letter of Appointment, between "illegal" or "unauthorized" construction in the Occupied Territories, which are mainly outposts, and "legal" construction, i.e., the settlements established by government decision. The Supreme Court has not ruled

on the question of the legality of the settlements – not when it was directly asked to do so[1] and not when its opinion on the matter was needed for purposes of deciding relevant questions, such as the legality of the route of the Separation Fence.[2]

Nevertheless, it is important to reiterate that under International Humanitarian Law, the question of the legality of Israeli settlement in the Occupied Territories – in all its forms – is answered unequivocally: Article 49(6) of the Fourth Geneva Convention *absolutely prohibits* the transfer of population of the occupying power into the territory it occupies. This article forbids the taking of any measures by the occupying power to organize or encourage the transfer of any of its civilian population into the occupied area. This provision, it should be emphasized, was intended to protect the civilians of the occupied territory, and does not deal with relations between citizens of the occupying power and their state. Indeed, from the perspective of the local population in the occupied area, whether the foreign population was moved there forcibly or not is irrelevant.[3] No exceptions are cited for Article 49(6) of the Geneva Convention. In other words, there are no circumstances in which action of this kind could be construed as legal. **As made clear by the Legal Advisor to the Foreign Ministry as early as September 1967, "It is therefore a categorical prohibition and not dependent upon the motivations or goals of the transfer, and is intended to prevent settlement in an occupied territory by the conquering state."**[4]

Furthermore, Article 8(2)(b)(viii) of the Rome Statute, the charter of the International Criminal Court, states that transfer of the population of the occupying power into the territory it occupies, whether direct or indirect, constitutes a war crime.[5]

Beyond the fact that Israeli settlement in the Occupied Territories violates an explicit prohibition that is binding on Israel, it also patently exceeds the authority of the military commander according to international law. This is because the two interests that circumscribe the authority of the military commander are the security of the occupying troops (within the occupied area) and the needs of the local population ("public order and civil life"[6]). Israeli settlement in the Occupied Territories cannot be said to

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[1] HCJ 606/78 *Ayub v. Minister of Defense,* PD 33(2) 113(1979); HCJ 390/79 *Duikat v. Government of Israel*) PD 34(1) 1 (1979); (HCJ 4481/91 *Bargil v. Government of Israel*, PD 47 (4) 210 (1993).

[2] HCJ 2056/04 *Beit Surik Village Council v. Government of Israel*, PD 58 (5) 807, 827 (2004); HCJ 7957/04 *Mara'abe v. Prime Minister of Israel*, PD 60 (2) 477, 492 (2005).

[3] D. Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", 99 AJIL (2005), pp. 63, 66.

[4] Legal opinion of T. Meron, Legal Advisor of the Ministry of Foreign Affairs, dated September 1967, submitted to the Foreign Minister, Justice Minister, and Prime Minister at the time. Copy of the original memorandum can be viewed on the blog of journalist Gershom Gorenberg at: http://southjerusalem.com/wp-content/uploads/2008/09/theodor-meron-legal-opinion-on-civilian-settlement-in-the-occupied-territories-september-1967.pdf (Hebrew).

[5] In the document "Elements of Crime" of the International Criminal Court, the following comment was inserted with regard to this article: "The term 'transfer' needs to be interpreted in accordance with the relevant provisions of International Humanitarian Law" (footnote 44).

[6] E. Benvenisti, *The International Law of Occupation* (Princeton University Press, 1993), pp. 140-141. See also D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York Press, 2002), 187.

promote these interests. A policy of settlement also exceeds the authority of the military commander in that it creates permanent facts on the ground. It is a substantive deviation from a period of military rule that contradicts the temporary essence of this rule – the administration of occupied territories as a deposit held in trust.

Israeli residence in the Occupied Territories, whether in settlements or outposts, has had a profound effect on the fabric of life in the West Bank, altering it beyond recognition and dealing a blow to the local population and their human rights, collectively and individually.

The settlement enterprise has exploited the resources of the occupied area, including land and water, which are meant to serve the local inhabitants; it has restricted access to farmland, particularly plots located near settlements; it has imposed harsh constraints on freedom of movement within the West Bank; personal security has been undermined due to settler violence, which has not been addressed by the law enforcement authorities; and it has limited the development and construction of Palestinian towns and villages.

The violation of Palestinian human rights perpetrated by Israeli settlement in the Occupied Territories is exacerbated by the institutionalized discrimination of Palestinians in the West Bank in favor of Israeli residents of the area. Two systems of law apply to West Bank residents based on their nationality – Israelis are subject to Israeli law almost entirely, and Palestinians are subject to military laws enacted by the military commander of the region.[7] Thus, Palestinians and Israelis who live in the West Bank are tried in different courts – the Israelis in Israeli courts and the Palestinians in military tribunals. The incarceration terms of Palestinians are twice as long as those of Israelis, and sentences differ and are more severe for the same wrongdoing, whether a criminal offense or traffic violation. Freedom of expression and demonstration is guaranteed to Israeli residents of the Occupied Territories by Israeli legislation and court rulings, but denied to Palestinians through the use of military orders and violent methods to thwart or break up demonstrations. In Area C, two separate planning systems prevail. Settlements benefit from detailed town plans, construction permits, and an abundance of space for development, while planning in Palestinian towns has been halted for over four decades, and every structure outside the narrow boundaries set by the Civil Administration is marked for demolition.

This legal divide and the institutionalized discrimination have created a situation in which the interests of the Israelis who live in the settlements and outposts are given outright preference in all matters over the interests of the Palestinians. This is the absurd reality, even though the Palestinian inhabitants are supposed to enjoy the special protection of the military commander by virtue of being protected persons,[8]

[7] A description of the increasing application of Israeli law on Israelis and Jews who live in the Occupied Territories, beginning with enactment of the Emergency Regulations (Judea and Samaria – Criminal Jurisdiction and Legal Assistance) 1967, can be found in Amnon Rubinstein, "The changing status of the 'territories': From a deposit held in trust to creation of a legal hybrid", *Iyunei Mishpat*, 11, 439, 450 (1986).

[8] Article 4 of the Fourth Geneva Convention.

while the Israelis living in the Occupied Territories are not entitled to this status or its concomitant protections.[9]

Authorized settlements and unauthorized outposts are not distinguishable from each other on the grounds of illegality under International Humanitarian Law or by the severe harm they each inflict upon a range of human rights of the Palestinian residents of the West Bank. In fact, they are also not entirely distinguishable from each other in terms of the support they receive from state authorities. "Unauthorized" outposts, which began to crop up after Israel's pledge in the mid-1990s not to establish new settlements, have so far not been given official approval by Israeli governments, but their existence has relied on government aid in matters of security, infrastructure, and even planning.[10]

Therefore, we reject the underlying legal position of the Letter of Appointment of the Committee, which distinguishes between "legal" and "illegal" Israeli construction in the Occupied Territories. This position, in our opinion, contravenes the essential matter – that, as noted, all Israeli settlement in the Occupied Territories violates international law, especially considering how they were established and made permanent through 45 years of occupation.

The distinction between private land and "state land"

Another distinction made in the Letter of Appointment is between construction on Palestinian land that is privately owned and construction on public, so-called "state", land. The basic assumption is that "As a rule, illegal construction on private land will be removed, while the appropriate professional echelons were instructed to take measures to legalize the planning status of structures located on state land…"[11] We view this distinction as invalid for several reasons. First, as noted, all Israeli settlement in the Occupied Territories, whether built on public or private land, contravenes the fundamental principles of International Humanitarian Law – in particular, the laws of belligerent occupation.

Second, the effort to whitewash Israeli construction undertaken without Israeli government authorization, without permits, and in contravention of international law sends a negative message about the "flexibility of the law" in this context, opening the door to other attempts to legalize the theft of Palestinian property, as seen in recent bills proposed, such as the Protection of Landholders in Judea and Samaria Bill – 2011.[12]

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[9] Parag. 36 of the Respondents' response to petition HCJ 1661/05 *Gaza Coast Regional Council v. Israeli Knesset*, quoted on page 517 of the Gaza Coast ruling. Note that the most substantive distinction between a protected resident of an occupied area and a citizen of the occupying state concerns the right to live in and settle the occupied area.

[10] Legal Opinion Concerning Unauthorized Outposts written by Atty. Talia Sasson and submitted to the Prime Minister on 9 March 2005, Chapter 2. This report surveys state involvement in the construction of the unauthorized outposts in the West Bank – the report and an English summary of it appear on the website of the Prime Minister's Office: http://www.pmo.gov.il/PMO/Communication/Spokesman/2005/03/spokemes090305.htm (Hebrew).

[11] Opening paragraph of Letter of Appointment of the Committee

[12] Bill tabled by MK Zevulun Orlev, 3632/18/P.

In addition, establishing settlements in the Occupied Territories contravenes other provisions of international law pertaining to the use of land in occupied areas, regardless of whether the settlement is built on private or public land:

If the settlement is built on private land, it is also a violation of the prohibition on confiscating private property, one of the clearest prohibitions in international law. Article 46 of the Hague Convention – which no one disputes is a reflection of customary international law that obligates all states – asserts with respect to occupied territory that "…private property…must be respected. Private property cannot be confiscated." No one denies the validity of this prohibition or its applicability to Israel's actions in the Occupied Territories. Article 8(2)(a)(iv) of the Rome Statute avers that the extensive appropriation of the property of protected persons is a war crime. And clearly the usurpation of private Palestinian land harms property rights that are protected in the Basic Law: Human Dignity and Liberty.

If the settlement is built on public land, it constitutes a violation of the prohibition on exploiting resources of the occupied area for advancing the interests of the occupying state:

> We have seen that the considerations of the military commander are to ensure his security interests in the area and, on the other hand, to safeguard the interests of the civilian population in the area. Both are directed toward the area. The military commander may not weigh the national, economic, or social interests of his own country, insofar as they do not affect his security interest in the area or the interest of the local population. Even military necessities are his military needs, and not national security needs in the broad sense (HCJ 390/79 *Duweikat v. Government of Israel*, PD 34(1) 1, 17). A territory held under belligerent occupation is not an open field for economic or other exploitation. For example, a military government is not permitted to levy taxes on the residents of an area held under belligerent occupation if these are intended only for the coffers of the state for which it acts (HCJ 69/81, *Abu Aita v. Regional Commander of Judea and Samaria*, 493(5); HCJ 493/81 *Kanzil v. Officer in Charge of Customs, Regional Commander of the Gaza District*, PD 37(2) 197, 271). Therefore, the military government may not plan or build a road system in an area held under belligerent occupation if the purpose of this planning and building are simply to provide a "service road" for its own state.
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> HCJ 393/82 *Jam'iat Iskan v. IDF Commander in Judea and Samaria*, PD 36(4) 785, 794-795, (1983)

State representatives attest in various forums, including the Supreme Court, that Israeli settlement in the Occupied Territories is temporary and should be seen as usufruct, as stated in Article 55 of the 1907 Hague Convention on the Laws and Customs of War on Land. The Court addressed this argument in HCJ 285/81 *al-Nazer v. Commander of Judea and Samaria*[13], ruling that "administration" of the territory and "usufruct" of its resources may include renting, leasing, or temporary working the land, but not any permanent activities such as its sale or the transfer of ownership.

In *Duikat*, the Court insisted that establishment of a permanent settlement cannot be seen as a "temporary" act equivalent to rental of a property or farming the land. "The decision to establish a

[13] PD 36(1) 701, 704 (1982).

permanent community that was designated, from the outset, to remain permanently in place, even beyond the period of the military administration established in Judea and Samaria," states the Court, "faces an insurmountable legal obstacle." Adding:

> Because a military administration cannot create facts on the ground for its military needs that are intended to exist even after military rule comes to an end in that area, when the fate of the territory following the termination of military rule is unknown… Under these circumstances, even a legal declaration of seizure rather than expropriation of the property cannot change the nature of this – taking possession, which is the crux of ownership, of property, permanently.

Hence, we reject the view underlying this Letter of Appointment to the Committee, which creates a dichotomy between private and public property in the Occupied Territories and perceives the latter to be a resource available to the occupying power and its citizens. Private Palestinian property and public Palestinian property are both prohibited for permanent Israeli settlement. We again note that the occupying power serves as a temporary trustee of the occupied territory. The lands of this area do not belong to the military commander, and certainly not to the country served by the commander.

We should add that in *Gaza Coast Regional Council v. The Knesset of Israel*, Supreme Court Justice Levy explicitly addressed the fact that Jewish settlement in the territories was never meant to be "temporary." He opined that settlers built their lives in the territories based on the principle of reliance.[14] *Ex post facto* law that legitimizes unauthorized construction in the territories creates a false impression of permanence and reinforces settlers' expectation of reliance that the settlements are indeed permanent, in complete contravention of the provisions of international law, as stated above.

In light of the foregoing, the Committee can only state unequivocally that Israeli construction in the Occupied Territories that was built illegally cannot be retroactively legalized and regulated.

We also believe that the Committee should take a broader view of the implications of this construction for the Palestinian population in the Occupied Territories and the violations of Israeli and international law entailed by it.

Respectfully yours,

Atty. Tamar Feldman
Director, Human Rights in the Occupied Territories Department
Association for Civil Rights in Israel (ACRI)

[14] HCJ 1661/05 59(2) 481 (2005), para. 15-16, minority opinion of Justice Levy