

22 November 2016

To:

Members of the Joint Committee of the Knesset Constitution, Law, and Justice Committee and the Foreign Affairs and Defense Committee

Greetings,

Re: **Comments on the Proposed Laws to Regulate Unauthorized Israeli Construction on Private Palestinian Land in the West Bank**

The purpose of these proposed laws is to grant retroactive approval to unauthorized construction on privately-owned land in the West Bank, including the confiscation of the land from its lawful Palestinian owners. The proposals mark a new nadir in terms of the trampling of Palestinian personal rights and the disrespect for the rule of law in the Territories. Their effective meaning is the encouragement by the Knesset of the invasion and usurping of the private property of others, provided the “others” involved are Palestinian residents of the Territories.

The grave injury the proposed laws seek to promote does not exist in a vacuum. The Israeli occupation regime in these areas causes the mortal and ongoing violation of the individual and collective rights of Palestinians, despite the fact that they are considered a protected population in accordance with international law. However, even within the framework of the damaging regime created in the Territories, the Israeli authorities have at least officially maintained the prohibition against seizing private land for the purpose of establishing settlements. The adoption of the proposed laws will make the Knesset a partner directly liable in the act of usurping private land – an act that is contrary to both international and Israeli law. This will happen despite the fact that the Knesset is not the legal sovereign in these areas, and accordingly is not empowered to enact laws relating to this area. Thus the Members of Knesset seek to continue the process of blurring the distinction between the Occupied Territories and the sovereign State of Israel, by the back door and without any official decision to annex the territories.

The Proposed Laws are Improper in Accordance with Israeli Law and International Law

As is well known, the establishment of settlements of Israeli civilians in the territories Israel holds through a regime of military conquest (or “belligerent occupation”) is prohibited in accordance with international law. Such an act constitutes a clear violation of the provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War, to which Israel has been a party since 1951 (“the Fourth Geneva Convention.”) The legal advisor to the Foreign Ministry emphasized this fact as early as September 1967: “The prohibition is therefore categorical, and is

not dependent on the motive or goals of the transfer, and it is intended to prevent settlement in an occupied territory by members of the occupying state.”¹ Since the proposed laws seek to approve settlements of citizens of the occupying state in the territories, they clearly violate the above-mentioned prohibition.

However, this is not the only reason for the exceptional gravity of these proposed laws. The above-mentioned illegality does not relate solely to the approval of unauthorized outposts, but to the entire settlement enterprise throughout the West Bank – an enterprise to which all the Israeli governments over the years have been party (despite the fact that no government has disputed the status of these territories as administered territories under “belligerent seizure,” by means of a military regime, and neither have they acted to change this status).

The proposed laws take a grave additional step, providing for the confiscation of private property for reasons other than security needs and approving the invasion and usurping of private land for the purpose of establishing these settlements. In so doing, the proposed laws contradict one of the clearest prohibitions in international law – the prohibition against the confiscation of private property. Regulation 46 of the annexed regulations to the Hague Convention states, which undoubtedly forms part of international custom law binding on all countries, establishes regarding an occupied territory that “private property... is to be respected... the confiscation of private property is not to be permitted.” The contradiction between the provisions of the proposed laws and international law is diametric and irresolvable. There is no disagreement regarding the validity of this prohibition and its applicability to Israel’s actions in the West Bank. Since the ruling in HCJ 390/79 *Dweikat v Government of Israel*²(the Elon Moreh case), Israeli governments have never approved the establishment of settlements on private land.

The ramification of the above is that these proposed laws contradict international undertakings that Israel has never denied. Moreover, the confiscation on a large scale of private property not required for security needs may constitute a grave violation of the Fourth Geneva Convention. In accordance with the Statute of Rome, such violations are defined as a war crime (section 8(2)(a)(iv) of the statute).

¹ Opinion of Theodor Meron, Legal Advisor to the Foreign Ministry, September 1967, as submitted to the foreign minister, the minister of justice, and the prime minister at the time. It should be added that the violation of the prohibition against the transfer of population to the occupied territory is defined as a war crime in the Statute of Rome, the constitution of the International Criminal Court (section 8(2)(b)(viii)).

² *Piskei Din* 34(1) 1 (1979).

The proposed laws are also improper from the standpoint of Israeli law. They injure the right to property, as protected in the Basic Law: Human Dignity and Liberty, and do so retroactively and in a manner that is inconsistent with the tests established in the basic law. They also deviate in the extreme from the arrangements recognized in Israeli law. Even if the initiators of the proposed laws believe that they meet a proper purpose, by preventing the eviction of people from their homes, the Israeli legislator has, of course, established in many legal provisions that such a purpose cannot overrule the property rights of the owner of a property. The law maintains this position even in the case of individuals who have taken possession of property with the owners' permission; it applies all the more forcefully when the seizure of possession was effected without the owner's knowledge and through trespassing.

In addition to all the above, the proposed laws also mark a new nadir in terms of the discriminatory nature of the regime Israel maintains in the Territories. This regime grants absolute priority in all areas of life to the interests of Israeli citizens over those of the Palestinian residents, including the formalization of two separate legal systems. Thus, while the authorities every week demolish the homes of Palestinians in Area C on the pretext that they were build without construction – even when the construction took place on land owned by protected Palestinian residents – the Knesset is now working vigorously to grant retroactive approval to construction by Israelis executed without permit, while invading private land, and contrary to the rulings of the Supreme Court. The juxtaposition of two separate and discriminatory legal systems in a single unit of territory, one for Palestinians and the other for Jews, contradicts by its very essence the principles and underlying morality of the human rights approach.

Before closing, we should add that despite the inherent illegality of the establishment of unauthorized outposts, and despite the grave damage these cause to the human rights of the Palestinian residents of the area, the individuals who live in these outposts enjoy human rights. The authorities of the State of Israel are obliged to respect these rights in all their actions. By way of example, they are obliged to ensure that the procedure for the eviction of the outposts is a fair own that minimizes the injury to the evicted persons during the course of the eviction.

In conclusion, these proposed laws undermine the basic principles of our legal system and contradict obligations the State of Israel has assumed in accordance with international law and which it has never denied. Accordingly, we urge the Members of the Knesset to oppose these proposed laws and to remove them from the debating chamber.

Sincerely,

Dan Yakir, Atty.

Roni Pelli, Atty.

Legal Advisor

CC:

Dr. Avichai Mandelblit, Attorney General

Mr. Eyal Yinon, Legal Advisor to the Knesset