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UNDER THE GUISE OF LEGALITY

Israel's Declarations
of State Land in the West Bank

February 2012

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**Israel's Declarations of State Land in the
West Bank**

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B'Tselem wishes to thank Professor Oren Yiftachel of the Geography Department at Ben Gurion University and Co-Chair of B'Tselem's Board of Directors for his assistance in preparing this report.

ISSN 0792-8114

Table of Contents

Introduction	5
Part 1 The circumstances leading to the declaration policy	9
Requisition orders for "military needs"	9
Map 1: State land in the West Bank	10
From a static to a dynamic approach	12
Map 2: Spatial fragmentation by State land in the Salfit area.....	17
Map 3: Spatial fragmentation by State land west of Ramallah	18
Part 2 Local land laws	19
Types of land under the Ottoman Land Code	19
Acquisition of rights in <i>miri</i> land.....	23
Sketch 1: Structure of the village according to the Ottoman Land Code	24
Continued cultivation as a condition for maintaining private rights to land	26
Acquisition of rights in <i>mewat</i> land.....	29
Part 3 Land registration	31
Part 4 The declaration policy from the perspective of local law	35
Type of cultivation by which a person acquires rights to land	35
Declarations on land cultivated in the past	39
Disregarding the local population's rights in <i>matruka</i> land	42
Part 5 The declaration policy in practice.....	47
Table 1: Amount of State Land in Three Pairs of Villages in the West Bank.....	48
Map 4: State land in the village lands of Burka and Kafr 'Aqab	49
Map 5: State land in the village lands of Ein Qinya and Al Janya-Ras Karkar	50
Map 6: State land in the village lands of Habla and Azzun	51
Table 2: State Land in Villages near Ramallah that Underwent Land Settlements during Jordanian Rule	53
Map 7 Ramallah area: Land registered as state land during Jordanian rule	54
Summary and Conclusions.....	57

Introduction

In July 2011, Israel's Ministry of Construction and Housing published a tender for the construction of 294 housing units in the West Bank settlement of Beitar Illit. The tender stated that the Custodian for Government and Abandoned Property in Judea and Samaria (hereafter: "**the Custodian**") – an official of the Israel Lands Authority who operates in the framework of the Civil Administration in Beit El – would lease the land on which the housing units are to be built, since the land is "state land."¹ In previous tenders of this kind, the Custodian leased state land to Israeli individuals and businesses, on which thousands of housing units were built in settlements. Over the years, the Custodian has also allocated, without tenders, hundreds of thousands of dunams² of state land to the Settlement Division of the World Zionist Organization. Thousands more housing units have been built in settlements on these lands.³

The claim that the land allocated to settlements is mostly state land has been made by successive Israeli governments in order to counter criticism of their settlement policy. It is argued that since for the most part settlements are built on state land, they have not infringed on the property rights of Palestinians, and therefore have not harmed Palestinians at all. This claim is simplistic and ignores the fact that the location of settlements throughout the West Bank, the system of roads serving them, and the restrictions the army has imposed on Palestinians residing nearby on the basis of security claims – all severely affect the daily life of hundreds of thousands of Palestinians and greatly limit their opportunities for physical, economic, and agricultural development.

Yet, beyond this issue, a deeper question arises. What are those state lands on which most of the settlements have been built, and what are the procedures that led to their classification as government property? It might seem that land ownership is a factual matter that can be determined simply and unequivocally. In the West Bank, however, the situation is far more complex. State land in the West Bank generally falls into two categories. The first category is land that belonged to the Jordanian government and was transferred to the Israeli authorities when Israel conquered the area in 1967. The second category is land that Israel classified as state land, even though it did not have this status under Jordanian rule. This report focuses on land falling into the second category and examines whether the classification of these lands as government property was made in accordance with the local land laws, or whether some of them were taken from their private owners in breach of these laws.

This question is extremely important from a human rights perspective, since protection of property rights is an essential condition for other human rights, such as the right to

1 Ministry of Construction and Housing – Property and Housing Division, Central District, Tender No. 10006/2011, Beitar Illit.

2 10 dunams equal one hectare, or about 2.5 acres.

3 Talia Sasson, *Interim Report on Unauthorized Outposts* (2005), pp. 119, 122; State Comptroller, *Annual Report 56A* (2005), p. 216.

an adequate standard of living, health, education, and freedom of movement.⁴

In 2002, B'Tselem published a report entitled *Land Grab*, which investigated various aspects of the settlement policy in the West Bank.⁵ Among the issues examined were the mechanisms Israel used to gain control of land to build and expand settlements.⁶ The main mechanism Israel used to gain control of most of the land on which settlements were built was by issuing declarations of state land (hereafter: “**the declaration policy**”).

According to Israel, the declaration policy was based on the land laws applying in the West Bank in general, and on the Ottoman Land Code of 1858 (hereafter: “**the Land Code**” or “**the Code**”) in particular. Since the Code was in force at the time Israel occupied the West Bank, Israeli authorities claimed that they are required to respect it under international law, which stipulates that the occupying force may change existing legislation only if imperative military needs or the benefit of the local population necessitate such a change.⁷ Israel admits that the fact that “the Ottoman land laws constitute the broad foundation of the land laws in Judea and Samaria” creates “an anachronistic situation that is almost without precedent.” However, Israel argues that since the area is under military occupation, it is not allowed to apply new land laws that would be better suited to the modern era.⁸

Land Grab showed that the declaration policy was unlawful for two principal reasons. First, the policy was applied in breach of rules of natural justice and due process. In many cases the authorities did not properly publish the declarations and did not inform the people who might be harmed by the declaration, thereby denying them the right to appeal. Furthermore, the military appeals committees, which are the sole entity empowered to hear objections to the Custodian’s declarations of state land, have a built-in favoritism for the Custodian. Therefore, the chance of Palestinians’ winning appeals against their land being declared government property is negligible from the outset.⁹

Second, the main objective of the declarations of state land was to gain control of land to build or expand settlements. For this reason, Israel included the vast majority of declared state land within the jurisdiction areas of the settlement municipal bodies – the regional and local councils (see Map 1). Since the settlements themselves are illegal under international law, this objective is not legitimate.¹⁰ Indeed, to the best of our knowledge,

4 Article 17(2) of the Universal Declaration on Human Rights states: “No one shall be arbitrarily deprived of his property.” The right of property is also enshrined in international humanitarian law, which requires an occupying power to respect the private property of residents living in the occupied territory and prohibits confiscation or destruction of the property. See, especially, article 46 of the Regulations Annexed to the Hague Convention on the Laws and Customs of War on Land of 1907 and article 53 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 1949. The right of property is also enshrined in article 3 of Israel’s Basic Law: Human Dignity and Liberty, giving it constitutional status.

5 B'Tselem, *Land Grab: Israel’s Settlement Policy in the West Bank* (2002).

6 Ibid. chapter 2.

7 The obligation of the occupying power to respect the legislation in force at the time the occupation begins is enshrined in Regulation 43 of the Regulations Annexed to the Hague Convention on the Laws and Customs of War on Land of 1907.

8 Eyal Zamir, *State Land in Judea and Samaria – Legal Survey* (Jerusalem: Jerusalem Institute for Israel Studies, 1985), pp. 3, 7 [Hebrew].

9 For details, see *Land Grab*, chapter 2. See also B'Tselem, *By Hook and By Crook: Israeli Settlement Policy in the West Bank* (2010), pp. 27-28.

10 Article 49(6) of the Fourth Geneva Convention forbids the occupying power to transfer citizens from its own territory to the occupied territory. The establishment of settlements also violates fundamental principles of international law, which emphasizes the temporary nature of belligerent occupation. Establishment of permanent settlements for residents of the occupying power in occupied territory is fundamentally inconsistent with this principle.

the Custodian has rarely allocated state land for use of Palestinians.¹¹ Therefore, the policy was applied in a way that constitutes unlawful racial discrimination.¹²

These defects all relate to the administrative features of the declaration policy: the execution of the declarations and their publication, the procedures for objecting to the declaration, and allocation of the state land once the declaration is finalized. These defects are unrelated to the question of whether the declared state land is indeed government property under the local laws in the West Bank.

Unlike *Land Grab*, this report will analyze the declaration policy from the perspective of local law, with only limited reference to international law. The primary question we seek to examine is whether Israel's declarations of state land are consistent, in whole or in part, with local law in general, and with the Land Code in particular.

Part 1 of this report presents the historical and legal background that led to formulation of the declaration policy, and describes the main elements of the policy. Part 2 discusses the provisions of the Land Code and other land laws applying in the West Bank. Part 3 reviews the procedures for registering land in the West Bank and the connection between registration and ownership rights of private persons. Part 4 analyzes the declaration policy vis-à-vis local law. Part 5 examines the practical implications of the declaration policy. It presents a comparison between the amount of state land in villages whose lands were registered in the land registry during Jordanian rule, and the amount of land declared as state land in other villages where the Jordanians did not complete the registration process.

11 For details, see *Land Grab*, chapter 4.

12 The term "racial discrimination," as defined in article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, of 1966, refers, *inter alia*, to discrimination on the basis of national or ethnic background.

Part 1:

The circumstances leading to the declaration policy

During the first 12 years of Israel's military occupation of the West Bank (1967-1979), the issue of state land was not controversial or a focus of dispute between the military government and the Palestinian population. At the time, Israeli authorities took a static approach toward state land, maintaining that state land was the land registered as government property by the countries that previously controlled the area – Britain and Jordan. Israel considered land that had not been registered as state land prior to 1967 to be privately owned by Palestinians, or, at least, land whose ownership had not been clarified (in which case it could not be deemed government property). Accordingly, for the first 12 years of the Israeli occupation, no declarations of state land were made.

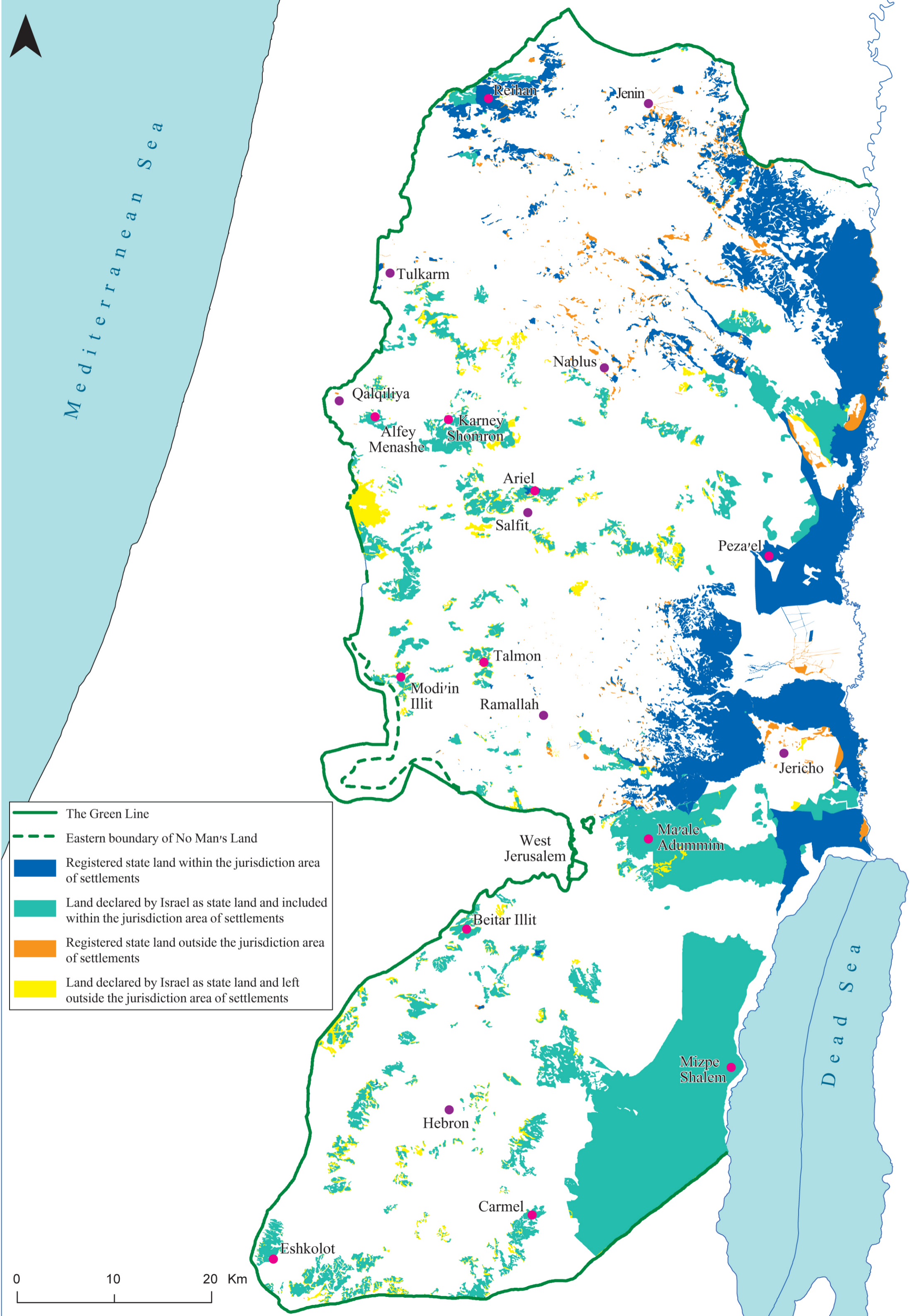
Requisition orders for “military needs”

In the period from 1967 to 1979, the principal mechanism Israel used to take control of land for the purpose of building settlements was by issuing requisition orders for military needs. During this period, Israel requisitioned 31,000 dunams, primarily for the building of settlements.¹³ When requisitioning the land, the military government forces the landowners to “lease” it to the state, which offers to pay for its use. In most cases, the Palestinian landowners rejected the offer for political and other reasons. Requisition of the land does not change its ownership status. The land remains the owner's property even while the state holds possession of the land. Since the state obviously does not need to requisition property that belongs to it, the use of requisition orders indicates that the state authorities recognize that the land is private Palestinian property.

International law allows an occupying country to *temporarily* requisition private land in an occupied territory, provided it does so to meet imperative military needs.¹⁴ In the 1970s, Israeli governments claimed that the settlements served a clear military need and that the authorities could therefore requisition privately-owned land belonging to residents of the occupied territory for that reason. In three cases, the Israeli Supreme Court sitting as the High Court of Justice (HCJ) accepted this claim, holding that “taking possession of private property in occupied territory to build a civilian settlement does not contravene the principles of international customary law that an Israeli court considers, if establishment of the settlement is required for military needs of the authorities

¹³ B'Tselem, *By Hook and By Crook*, pp. 22-23.

¹⁴ See, for example, article 52 of the Regulations Annexed to the Hague Convention on the Laws and Customs of War on Land of 1907.



Mediterranean Sea

Dead Sea

- The Green Line
- Eastern boundary of No Man's Land
- Registered state land within the jurisdiction area of settlements
- Land declared by Israel as state land and included within the jurisdiction area of settlements
- Registered state land outside the jurisdiction area of settlements
- Land declared by Israel as state land and left outside the jurisdiction area of settlements

0 10 20 Km

occupying the territory.”¹⁵ This practice came to an end in 1979, with the HCJ’s ruling in the Elon Moreh case.

On 7 June 1979, settlers accompanied by military forces came to a hilltop in the village land of Rujeib, southeast of Nablus, and began to build the Elon Moreh settlement. Two days earlier, the military commander had signed a requisition order for military needs for 700 dunams of the village land of Rujeib. Notice of the order was delivered to the Head of the village (*mukhtar*) only after the settlers had already moved onto the land. A week later, a petition was submitted to the HCJ by 17 residents of Rujeib who had 125 dunams of land registered in their name that was within the requisitioned area. The petitioners claimed that since the requisition was intended for the establishment of a civilian settlement and not for genuine military needs, it contravened international law.

In previous cases, the HCJ had rejected this argument, but the unique circumstances of the Elon Moreh case led the justices to change their opinion. First, senior officials in the defense establishment disagreed over the military importance of the settlement at that site. Second, the settlers, who were admitted as respondents, told the court that they had come to the site to live there permanently for religious and political reasons, and that they were not there temporarily pending the end of the military government in the area. In their opinion, the security argument “was inconsequential, one way or the other.”¹⁶

In its ruling, the court held that, *in the specific case of Elon Moreh*, the requisition of land was intended not to meet military needs but for settlement purposes, and therefore contravened international law. However, the HCJ did not forbid in principle requisition of private Palestinian land for the purpose of settlement. The court held that so long as the military or security consideration is dominant in the decision to issue the requisition order, the military commander may requisition private land to build settlements. But if the dominant objective is to build a civilian settlement, and the security objectives are secondary, if they exist, the military commander is not entitled to requisition the land.¹⁷

From a static to a dynamic approach

The HCJ ruling in the Elon Moreh case was the first and only time that the legality of a tool Israel used to provide land for the settlements was questioned. Paradoxically, within a few years, the ruling led to an unprecedented growth of the settlement enterprise. As stated by Maj. Gen. (res.) Shlomo Gazit, who served as the first Coordinator of Government Activities in the Territories, “the HCJ ruling in the *Elon Moreh* case only promoted the government’s policy. It brought an end to the process in which, for some 11 years, the government concealed its real intentions regarding settlement, under the guise of baseless security claims.”¹⁸

15 HCJ 258/79, *Falah Hussein Ibrahim 'Amira and 9 Others v. Minister of Defense* (requisition of land for Matityahu); see also HCJ 606/78, *Suliman Taufiq Ayub and 11 Others v. Minister of Defense and Two Others* (requisition of land for Beit El); HCJ 302/72, *Sheikh Suliman Hussein Udah Abu Hilu et al. v. Government of Israel* (requisition of land for Yamit). The expression “international customary law” refers to principles of international law that are binding on all countries, even if the countries did not sign the conventions in which these principles are outlined.

16 The comment appears in the judgment of Justice Bechor in HCJ 390/79, *'Azat Muhammad Mustafa Dweiqat and 16 Others v. Government of Israel et al.*

17 Ibid.

18 Shlomo Gazit, *Trapped Fools: 30 Years of Israeli Policy in the Territories* (Tel Aviv: Zemora Bitan, 1999), p. 246.

The court's ruling left the Israeli government with two options. The first, to stop building settlements, was contrary to government policy. In 1977, the Likud party took power in Israel. One of its objectives was to build settlements on the central mountain ridge, along the hills to the west of the ridge, and in the southern Hebron hills – all areas densely populated by Palestinians. The new government's policy differed from that of the Labor coalition that preceded it, which had established settlements primarily in the Jordan Valley. The second option for the Israeli government was to find new mechanisms to ensure the availability of land reserves for settlements, without violating the HCJ ruling.

The government chose the second option. The main mechanism it formulated to solve the legal complexity created by the court's judgment was by issuing declarations of state land.¹⁹ On 11 November 1979, about one month after the ruling in the Elon Moreh case, the government decided "to expand the settlement in Judea, Samaria, the Jordan Valley, the Gaza Strip and the Golan Heights by increasing the population of the existing communities and by establishing new communities *on state-owned land*."²⁰

The government's decision did not define what "state-owned land" was. This term was defined in the Order Concerning Government Property issued by the military commander of the West Bank in 1967, which has been amended several times since.²¹ This order is one of hundreds of orders that comprise the primary legislation that has been applied to the West Bank during the course of Israel's occupation. In its original wording, the order stated that government property, including state land, is property that "belonged... to an enemy country" (the Kingdom of Jordan) or was registered in its name, on the "determining day" (7 June 1967). Under article 2 of the order, "the Custodian may take possession of government property and take any measures he deems necessary for that purpose."

The wording of this order reflected the static perception of state land prior to the Elon Moreh ruling. According to this approach, only land that the British Mandate authorities and the Jordanian government classified as government property prior to 7 June 1967 was state land. However, this category included a limited amount of land. Furthermore, the state land inherited from the British Mandate and Jordanian governments was concentrated mainly in the Jordan Valley, while the Likud government wanted to build settlements primarily along the central mountain ridge and its western slopes.

According to an official report of the Ministry of Defense, in 1973, "there were 678,021 dunams of government-owned land [in the West Bank]. Only a small percentage of this is suitable for cultivation."²² This figure included two distinct types of land. Some 527,000 dunams of land were registered as state land during the British Mandate and Jordanian rule,²³ accounting for 9.1 percent of the entire West Bank (about 5,780,000

19 Ibid., p. 244.

20 Government Decision No. 145 of 1 November 1979 (emphasis here and thereafter was added).

21 Order Concerning Government Property (Judea and Samaria) (No. 59), 1967.

22 Unit for the Coordination of Activities in the Territories, Ministry of Defense, *The Occupied Territories 1972/1973 – Data on Civilian Activity in Judea and Samaria, the Gaza Strip and Northern Sinai*, p. 76.

23 Meron Benvenisti and Shlomo Khayat, *The West Bank and Gaza Atlas* (Jerusalem, The West Bank Data Base Project and The Jerusalem Post, 1988), p. 60.

dunams), excluding East Jerusalem.²⁴ The second type of land was 160,000 dunams of unregistered land, whose property tax ledgers ostensibly indicated it was government property.²⁵ However, property tax records do not constitute final proof of state ownership of land. In the absence of registration in the land registry, the ownership status of these 160,000 dunams remained uncertain.

Based on the above figures, at the time, state land in the area amounted to some 12 percent of the West Bank (this figure includes the 160,000 unregistered dunams but does not include East Jerusalem).²⁶ The state land was situated mainly in the Jordan Valley and the Judean Desert (see Map 1). In the central mountain ridge and along its slopes, where the Likud government wanted to establish most of the settlements, there were only two sites with a significant amount of state land (thousands of dunams): the Karney Shomron area (unregistered state land) and Reihan Forest (registered state land).²⁷

In 1980, the government ordered a land survey, which showed that apart from the sites mentioned above,²⁸ the West Bank did not contain sufficient state land to enable establishment of settlements.²⁹ As Shlomo Gazit wrote, "there was almost no place where state land was available in an amount needed for a new settlement. And in general, the land was not suitable for its designated purpose. Either the areas were too small and little bits of land were spread out, or the topography was unsuitable."³⁰

Thus, the situation regarding land ownership did not enable the establishment of settlements according to the scope and geographic layout envisioned by the government. In order to build new settlements without violating the HCJ ruling, a radical change in legal thought was required. Rather than relying on land that the British Mandate and the Jordanian government had classified as government property, Israel formulated a new mechanism intended to alter the ownership status of hundreds of thousands of dunams in the West Bank, re-classifying them as state land.

The principal legislative step taken to achieve this objective was the extension of definitions in the Order Concerning Government Property. In 1984, the military commander amended the order, establishing that "government property" includes "property which belongs to, is registered in the name of, or is vested" in the Kingdom of Jordan "on the determining day [7 June 1967] or thereafter." The amendment changed

24 The present report does not discuss the West Bank land that was unilaterally annexed to the municipal jurisdiction of Jerusalem in 1967, since Israeli local law was applied to this land (about 70,000 dunams). Consequently, in East Jerusalem Israel did not use the declaration procedure to gain control of Palestinian land and build settlements on it; rather, it used other measures such as expropriation.

25 Taxation of Land Law, Law No. 30 of 1955. According to Jordanian case law, abandoned rocky land that was classified for property tax purposes as Type No. 11 was considered government property. See Attorney General Me'ir Shamgar, "Industrial Zone in Jerusalem", 12 September 1974, 'Anatot-Ma'ale Adummim File, Vol. 3, State Archives, ISA/77/A/7134/10. As mentioned, the classification of a lot as Type No. 11 in the property tax records does not, on its own, establish that it is government property. Only an examination of the rights in the land under the local land laws can determine with certainty if the land is state land or is privately owned.

26 Aryeh Shalev, *The Autonomy – Problems and Possible Solutions* (Jaffe Center for Strategic Studies, Tel Aviv University, 1980), p.105. According to Shalev, the total amount of state land (both registered and unregistered) in the West Bank is between 700,000 and 760,000 dunams.

27 Ibid., p. 117; Danny Rubinstein, "Findings of Land Survey in the West Bank: Most State Land in the West Bank is in the Judean Desert", *Davar*, 2 May 1980.

28 A significant portion of the state land in the Jordan Valley is "Jiftlik land" – farmland that the Ottoman Sultan had purchased, which was later nationalized.

29 Rubinstein, Ibid.

30 Gazit, Ibid., p. 244.

the "original definition of government property," which "was a static definition that froze the situation that existed on the 'determining day'... [According to the amended order], even if rights of the enemy state were acquired or arose after the determining day (the day IDF forces entered the area), it became government property."³¹ The amendment clearly reflected Israel's adoption of a dynamic approach to the definition of state land in the West Bank, in place of the previous static perception. Land that had not previously been considered state land could now become government property under certain conditions.

Israel used the amended order to take control of large swaths of land by declaring them state land, and then allocated most of this land to settlements. According to the state comptroller, from 1979 to 1992, the Custodian declared 908,000 dunams in the West Bank – which had not been recorded in the land registry as government property – as state land.³² Hence, within a few years, Israel increased the amount of state land in the West Bank from about 527,000 dunams of registered state land in 1967 to some 1.44 million dunams in 1992 (from 9.1 percent to about 25 percent of the land in the West Bank, excluding East Jerusalem). Much of the declared state land was located along the central mountain ridge and on its slopes (see Map 1).

In 1992, when the second Rabin government took office in Israel and the Oslo process began, Israel ceased issuing declarations of state land in the West Bank. In 1996, when Benjamin Netanyahu from the Likud party became prime minister for the first time, the practice was resumed.³³ B'Tselem does not have data on the amount of land that was declared state property between 1997 and 2002. The Civil Administration rejected a request from the Israeli NGO Bimkom for those figures, claiming that it did not have the information. The Civil Administration only provided Bimkom with figures for the period 2003-2009, in which the Custodian declared 5,114 dunams in the West Bank as state land.³⁴

The large amount of state land, the location of much of it along the central mountain ridge, and the fact that most of it was included within the jurisdiction areas of the settlements have contributed significantly to the fragmentation of the West Bank.³⁵ For example, the town of Salfit and nearby Palestinian villages, which are home to tens of thousands of residents, are separated from Palestinian communities in the Nablus area (which lies only 15 kilometers north of Salfit) by broad swaths of land that were declared state land, on which the Ariel, Barkan, and other settlements are located. Completion of the planned route of the Separation Barrier (some of which has already been built) will create a contiguous physical barrier that will prevent Palestinians from travelling directly from the communities south of Ariel (around Salfit) to the communities to the

31 Zamir, *Ibid.*, pp. 28-29.

32 State Comptroller, *Ibid.*, p. 206. On the digital map that the Civil Administration provided to the Israeli NGO Yesh Din, declared state land in the West Bank amounted to only 797,930 dunams. However, the digital map has significant inherent inaccuracies.

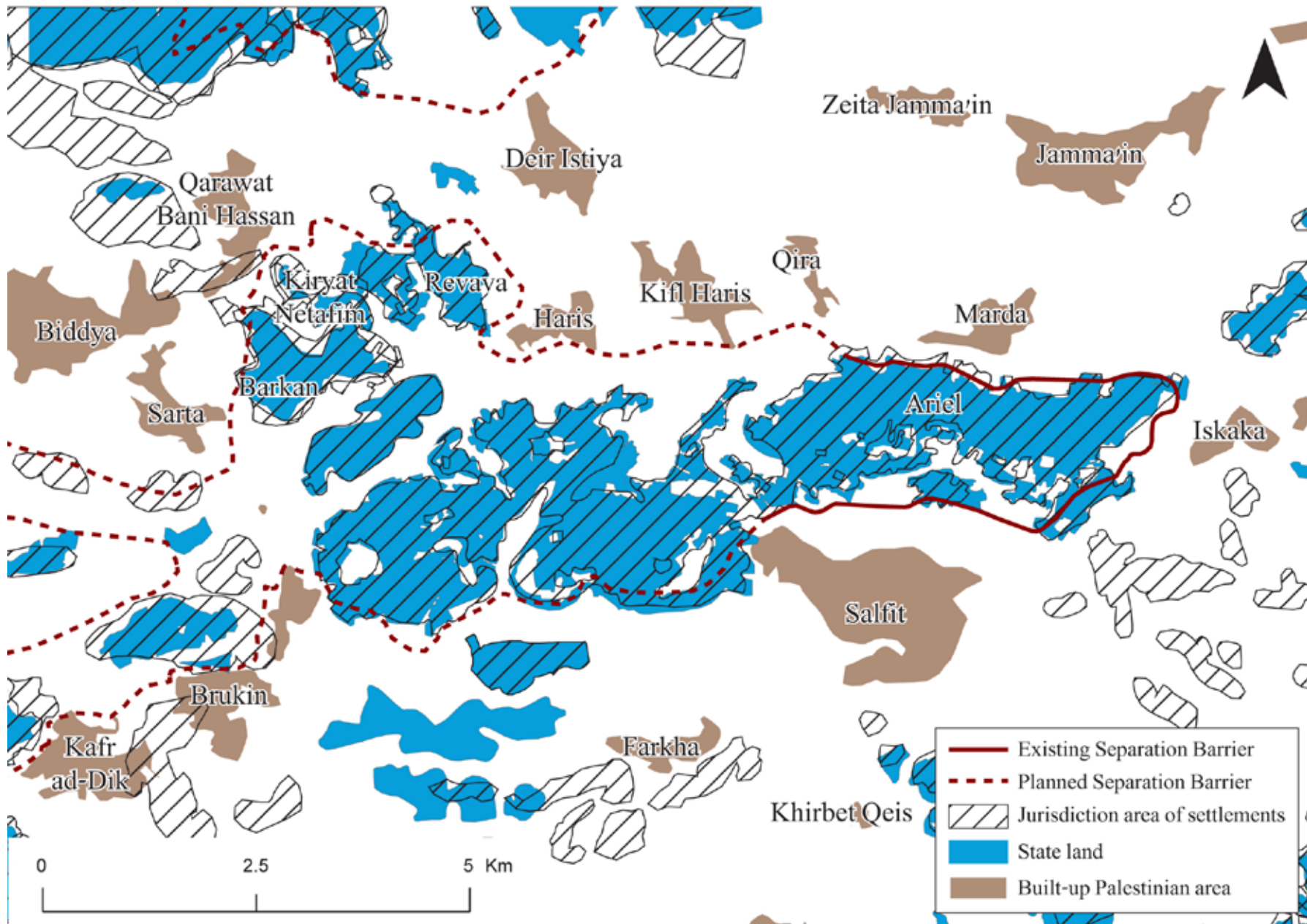
33 State Comptroller, *Ibid.*, p. 207.

34 (Partial) response of Second Lt. Inbal Lidan, monitoring and public relations officer in the office of the head of the Civil Administration, to a Freedom of Information request by Bimkom – Planners for Planning Rights, 27 July 2009. Since the Civil Administration did not provide most of the information requested, Bimkom and the Association for Civil Rights filed an administrative petition (Adm Pet (Jerusalem) 40223-03-10, *Bimkom – Planners for Planning Rights, Reg. Assoc. v. The Civil Administration in Judea and Samaria*). The claim that the Civil Administration does not have figures on the total area of declared state land appears in the amended response of the respondents, 12 May 2011.

35 Bimkom, *The Prohibited Zone: Israeli Planning Policy in the Palestinian Villages in Area C* (2008), p.34.

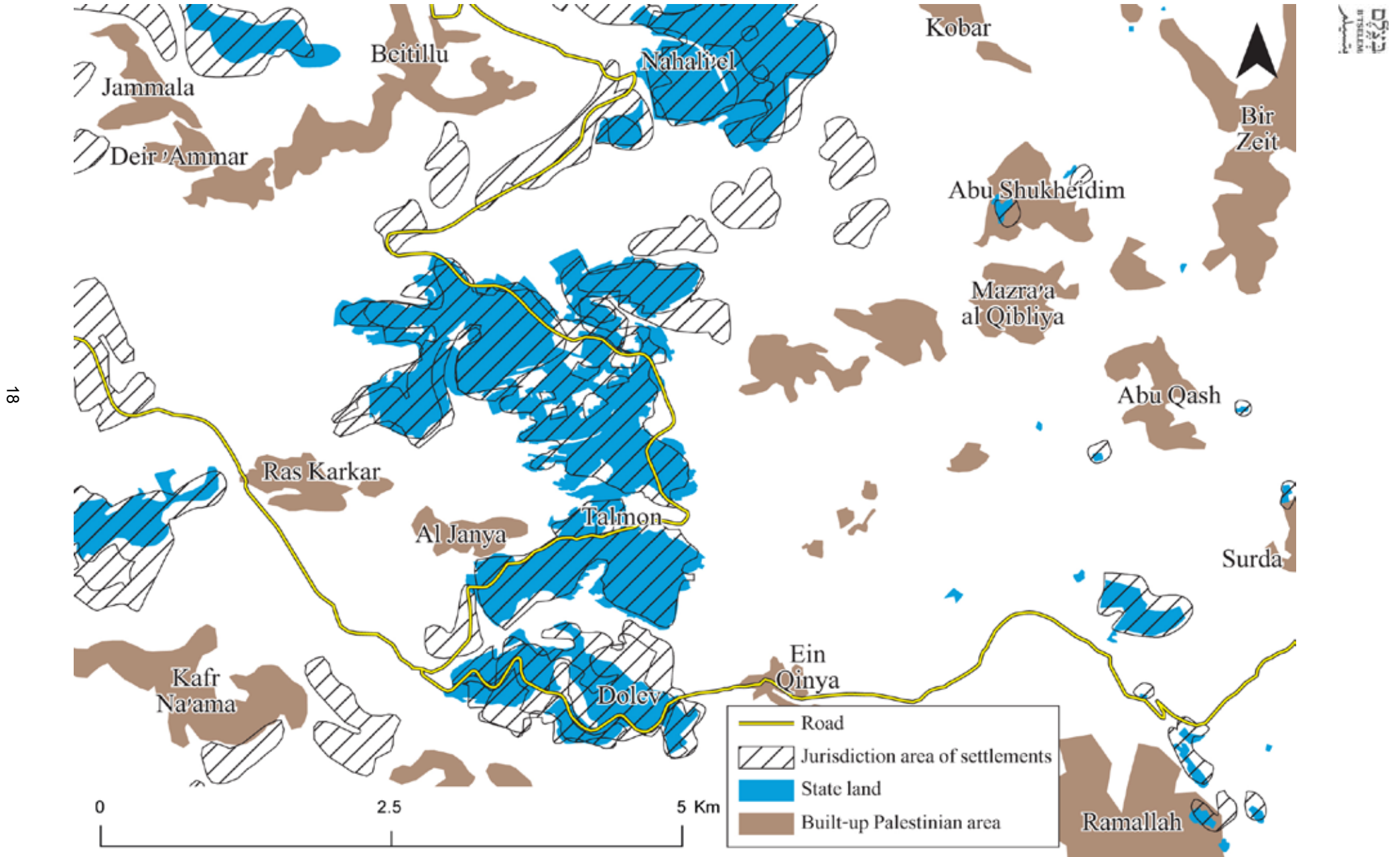
north of Salfit (see Map 2). Similarly, the settlements of Dolev, Talmon, and Nahali'el – which have been constructed on declared state land – form a partition cutting off the physical and functional space between Ramallah and Bir Zeit to the east and the Palestinian villages of Beitillu, Deir 'Ammar, Ras Karkar and al Janya to the west (see Map 3).

Map 2 Spatial fragmentation by State land in the Salfit area



Under the Guise of Legality: Israel's Declarations of State Land in the West Bank

Map 3 Spatial fragmentation by State land west of Ramallah



Part 2:

Local land laws

The declaration policy was based on the Israeli interpretation of the land laws in force prior to its occupation of the West Bank in June 1967. This part of the report will describe these laws, as a basis for the discussion in Part 4 of the legality of the declaration policy.

The binding local legislation in the West Bank includes the Jordanian land laws, which were applied to the West Bank between 1949 and 1967. Earlier laws, including laws from the British Mandate period and the Ottoman legislation, became part of the binding law only to the extent that they were incorporated in Jordanian legislation or were not repealed by it. In practice, the Jordanian legislator made only a few changes to the Land Code, whose principal provisions are still in force in the West Bank.

Types of land under the Ottoman Land Code

The Ottoman Land Code defines five main types of land: three principal types called *mulk*, *miri*, and *mewat*, which are distinguished by a combination of spatial features (geographic location) and functional characteristics (the nature of the land and its use), and two secondary types called *wakf* and *matruka* whose classification is based solely on land use. The Code establishes the rights held by the state and by private persons in each of the five types of land.

The Land Code defines *mulk* land as "yards within the city, parcels in towns and villages and lots near a city or a village, which are considered connected to houses, provided their size is not more than half a dunam."³⁶ *Mulk* land, therefore, is the built-up area of the community. It is considered the owner's "absolute private property."³⁷

This definition raises a question of interpretation. Since the Land Code came into force, the built-up area of Palestinian communities in the West Bank has increased by hundreds of percents, and many new villages have been established.³⁸ Does the Code imply that when the built-up area of a community expands, the mere act of construction renders the land *mulk*?

Most commentators reject this dynamic approach. The accepted interpretation is that only the land that was built-up in 1858, when the Land Code took force, is *mulk*. This interpretation is based on three principal reasons.

36 Article 2 of the Land Code.

37 Article 1 of the Land Code.

38 David Grossman, *The Arab Village and its Daughter Communities: Processes in Arab Settlement in Palestine in the Ottoman Period* (Jerusalem: Yad Yitzhak Ben Zvi, 1994) [Hebrew]; Moshe Braver, "Creeping and Spread of Villages in Judea and Samaria", in *Judea and Samaria: Study in Settlement Geography* (Avshalom Shmueli, David Grossman, Rechavam Ze'evi, eds.) (Jerusalem: Canaan Publishing House, 1977), pp. 367-382 [Hebrew]; David Grossman, "Development of 'Daughter Communities' on the Edge of Samaria", in *Judea and Samaria: Study in Settlement Geography*, *Ibid.*, pp. 396-410.

First, under the Ottoman legislation, re-classification of other types of land to *mulk* after 1858 required a special permit from the Turkish sultan.³⁹ Therefore, construction of buildings on land that was not *mulk* in 1858 did not turn the land into *mulk* after this date.

Second, the dynamic approach would allow an individual who built on land that had not been his private property to turn it into his own merely by doing construction work, with or without a permit from the authorities.

Third, the amount of land to which the state has rights is specified in the Land Code with respect to the boundaries of the *mulk* land. Therefore, the dynamic interpretation would result in privately owned land continuously expanding due to construction and development, while the amount of land vested to the state would gradually decrease in size.

A Supreme Court judgment during the Mandate period held that *mulk* land includes only land that was built-up in 1858.⁴⁰ According to the accepted view, this type of land is found only in communities that had existed in 1858 and, in most cases, encompassed only a few dozen dunams in each village or town. *Mulk* land therefore accounts for a small portion of West Bank land.

The Jordanian legislator expanded the definition for *mulk* that appears in the Land Code. In 1953, it passed a law stating that all *miri* land (see below) situated within the municipal boundaries of towns and cities automatically becomes *mulk*. The very need for the legislative change supports the interpretation that mere building on *miri* land does not turn the land into *mulk*. The Jordanian legislative change did not apply to rural lands, where most of the declarations of state land were made, so the change is of limited relevance to our discussion.⁴¹

The second type of land defined in the Land Code is *miri* land – extensive areas of land that lie around *mulk* land. From the spatial perspective, the term *miri* refers to all land within 2.5 kilometers (1.5 miles) from the houses at the edge of the community.⁴² From a functional perspective, *miri* land is intended for cultivation.⁴³

The definition of *miri* land in the Land Code is not cumulative. Either of the two conditions - spatial location or agricultural use - is itself sufficient to classify a given lot as *miri*. Thus, all land located within 2.5 km from the edge of the built-up area of the village is *miri*, whether cultivated or not. Cultivated land further away from the built-up area is also deemed *miri*.⁴⁴

As explained above, under the accepted interpretation of the Land Code, *mulk* land includes only land that was built-up in 1858. Does this mean that the border of *miri* land begins at the edge of the built-up area as it was in 1858, or does it run 2.5 km from the spatial border of the built-up area today, even if some of the new construction took place on *miri* land?

39 Moses Doukhan, "Testamentary and Waqf in *Miri* and Conversion of *Miri* Land to *Mulk*," *Hapraklit* (May 1943), pp. 9-11 [Hebrew].

40 CA 288/1943, *Hanneh Said Kattan v. Shukri Abdel Ahad Kattan*, **Law Reports of Palestine**, vol. 9, 1944, pp. 408-411.

41 Converting Land from *Miri* to *Mulk* Law, Law No. 31 of 1953.

42 Pliá Albeck and Ran Fleischer, *Land Law in Israel* (Jerusalem: self-published, 2005), p. 54 [Hebrew]. The law specifies the distance in miles, and 1.5 miles is equivalent to 2.414 kilometers. For the sake of convenience, Albeck and Fleischer rounded this to 2.5 kilometers, and we shall do the same.

43 Article 3 of the Land Code.

44 Moses Doukhan, *Land Law in the State of Israel*, 2nd ed. (Jerusalem, 1953), pp. 46, 48 [Hebrew].

Most commentators have not addressed this question. Plia Albeck, who headed the civilian department in the State Attorney's Office and was a primary driving force behind the declaration policy, contended that the borders of *miri* land should run from the edge of the built-up land in the village as it was in 1858, when the Land Code came into force.⁴⁵ The Israeli Supreme Court made a similar interpretation in 1984 in a case involving ownership of land in the Negev.⁴⁶

This interpretation – which freezes the boundaries of *miri* land according to its spatial location in 1858 – is not obvious from the provisions of the Land Code and is questionable. It appears that an alternative dynamic-developmental interpretation, according to which the spatial boundaries of *miri* extend 2.5 kilometers from the edge of the present day built-up area, better serves the purposes of the Code.

As mentioned above, *miri* land is intended for farming. The dispersion of the various types of land, as described in the Land Code, is primarily a function of the land's potential for cultivation, based on its distance from the village's built-up area: "The area that was cultivated was not determined by the physical features of the land, but by distance factors resulting from the social-security structure in the country in previous centuries. The poor security conditions forced farmers to return home to their villages every evening. Therefore, the boundaries of arable land were set at one-half the walking distance from the village, which still left reasonable time for cultivation."⁴⁷ Thus, the reasonable distance that enables cultivation is 2.5 km from the edge of the current built-up area, and not from the house that was on the edge of the village in 1858.

Furthermore, while *mulk* land is fully owned by a private individual, the Land Code stipulates that the state has rights in *miri* land. Also, the state has an economic interest in the cultivation of as much *miri* land as possible, since it benefits from the taxes collected on the crops that are grown there. Hence, the dynamic approach – in which *miri* land constantly expands in accordance with construction and development in the village – does not contradict the interest of the state in maintaining its rights to the land and the taxation imposed there.

Despite the above comments, and for the sake of caution, we shall apply Albeck's restrictive definition, whereby *miri* lands extend 2.5 km from the border of the village's built-up area, as it was in 1858.

The third category of land in the Land Code is *mewat* (dead) land. Functionally, this term applies to "wasteland" – abandoned land that cannot be cultivated, such as rocky land, sand dunes, and swamps, which belong to no one and which were not allocated "since ancient times to a specific town or village." From the spatial aspect, *mewat* refers to land situated far away from the edge of the adjacent community, so that "the loudest yell from a person standing at the closest inhabited place is not heard there. This distance is 1.5 miles [about 2.5 km] or a walking distance of half an hour."⁴⁸

45 Plia Albeck, "Land Use in Judea and Samaria for Jewish Settlement; Legal Aspects and the Test of Reality", in Avraham Shvut (ed.), *Mounting the Mountain: Renewed Jewish Settlement in Judea and Samaria* (Jerusalem: Sifriyat Beit El and the Judea and Samaria Academic College, 2002), p. 223 [Hebrew].

46 CA 218/74, *Salim 'Ali Algadi' al Hawashleh v. State of Israel*.

47 Zamir, *Ibid.*, p. 17.

48 Articles 6 and 103 of the Land Code.

This definition is unclear. The distance over which the loudest yell of a person can be heard varies according to the local topography. Under British Mandate legislation, which, to the best of our knowledge, the Jordanians did not change and therefore remains in force in the West Bank, *mewat* is land that meets *all* the following four conditions: one, it is wasteland; two, it is not registered in anybody's name; three, it was not assigned to residents of a specific locality or village; and four, when standing in *mewat* land, the loudest yell of a person cannot be heard in any inhabited place.⁴⁹ Land that does not meet even one of these conditions cannot be considered to be *mewat*.

In contrast, Israel's Supreme Court ruled that in light of the ambiguity in the definition of the term *mewat* in the Ottoman Land Code, the physical-distance criterion (2.5 km) should be used alone, and not the imprecise "loudest yelling distance," which as previously noted, varies depending on topography and other physical characteristics of the land.⁵⁰ Even according to this restrictive interpretation, abandoned and uncultivated land situated less than 2.5 km from the village's built-up area is not *mewat*, but *miri*. This is true since the definition of *mewat* in the Land Code is cumulative and refers both the functional characteristics of the land and its distance from the built-up area of the village as it was in 1858.

Under the Land Code, a private individual has no rights to *mewat* land, but may acquire rights if s/he changed its physical characteristics to such a degree that it became arable,⁵¹ thus effectively re-classifying it from *mewat* to *miri*.

In addition to the three principal types of land – *mulk*, *miri*, and *mewat* – the Land Code discusses two secondary types, which are defined according to their function alone, and not according to their spatial location.

Waqf (muqafa) is land that was dedicated by its owner for a specific purpose, such as a public purpose (charitable, religious, and so forth) or to relatives (such as children or grandchildren). The Code permits dedication of *mulk* and *miri* land. In the case of *miri* land, the possessor may dedicate, upon government approval, the taxes collected from it, but not the land itself.⁵²

Matruka land is public land, and includes two distinct categories: one, land intended for the public in general, such as roads. Second, land that was allocated since ancient times for the sole use of the residents of a specific village or villages, such as grazing land, woods, or plots on which public buildings serving the local population were erected.⁵³ *Miri* land allocated for grazing is not public land, and is subject to the orders relating to *miri* land used for agricultural production.⁵⁴ Ownership of *matruka* land remains always public, and private persons cannot acquire ownership rights, or even sole usage rights, to it.⁵⁵

Matruka land is classified solely on the basis of its use, regardless of its spatial location. Thus, a public road that connects two communities may cross some land that is *mewat*,

49 "Public Notice: Demarcation of Government Lands", in Moses Doukhan, *Laws of Palestine 1918-1925* (Tel Aviv: L.M. Rotenberg – Law Publisher, 1933), pp. 304-305.

50 CA 518/61, *State of Israel v. Salah Badran and 11 others*.

51 Article 103 of the Land Code.

52 Article 4 of the Land Code. See also: A. Ben Shemesh, *Land Law in Israel* (Tel Aviv: Masada Publishing House, 1953), pp. 32-36 [Hebrew].

53 Articles 5 and 91 of the Land Code.

54 Article 3 of the Land Code.

55 Articles 92, 93, 95 and 96 of the Land Code.

some that is *miri*, and some in the middle of the village, which is *mulk*. Similarly, grazing land designated for the use of a specific village may include land within the *miri* ring, but also *mewat* land further away. In this case, all the grazing land – even those parts that fall within the *mewat* area – would be classified as *matruka*. The Land Code thus distinguished between land that is situated far away from the village's houses but was allocated for the use of its residents (*matruka*), and wasteland that is at a similar distance from the built-up area of the village, but was not assigned to its residents (*mewat*).

Under the Land Code, the schematic structure of the village as it was in 1858 includes a built-up area which covers a few dozen dunams, which is *mulk*. It is surrounded on all sides by a 2.5 km strip of land classified as *miri*. Land further away that is not cultivated and is not assigned to residents of the village (individually or collectively) is *mewat* (see Sketch 1). The *mulk* and *miri* areas may contain *waqf* land, while *matruka* land may be found within each of the three principal types of land (*mulk*, *miri*, and *mewat*).

With the exception of the Judean Desert and Jordan Valley, there is hardly any *mewat* land in the West Bank.⁵⁶ By the time of the British Mandate period, most West Bank land was already considered *miri*.⁵⁷ This is due to the fact that "the land located more than 2.5 km from a village is not necessarily *mewat*, since there might be another village on the other side that is closer. Therefore, in areas where the distance between the built-up area of villages or towns from each other in all directions is not greater than five kilometers – twice 2.5 km – there is no *mewat* land at all, and all the land between the villages is *miri*."⁵⁸

Accordingly, most of the land that Israel has declared government property is *miri*, rather than *mewat*.⁵⁹ This was openly acknowledged by Plia Albeck.⁶⁰ The declaration policy, at least with respect to the major settlement area on the central mountain ridge and its slopes, should therefore be analyzed according to the provisions of the law relating to *miri* land.

Acquisition of rights in *miri* land

According to the Land Code, the ownership over *miri* land is divided into two aspects: The *raqaba* (absolute ownership or sovereignty) belongs to the sovereign, and the *tasarruf* (right to use the land) is held by the person who cultivates the land.⁶¹ A similar distinction exists in Israeli law, by which the state leases land it owns to its citizens through the Israel Lands Authority. Whereas the leasehold period under Israeli law is 49 years (but can be extended), under the Land Code, the lease is for an indefinite period of time. As long as the farmer who possesses the land meets the conditions specified in the Code, his right of possession (and that of his heirs) does not expire.⁶²

56 David Grossman, *The Arab Village and its Daughter Communities*, Ibid., p. 37.

57 Report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations on the Administration of Palestine and Trans-Jordan for the Year 1930, Section IV paragraph 24, 31 December 1930.

58 Albeck and Fleischer, Ibid., p. 54.

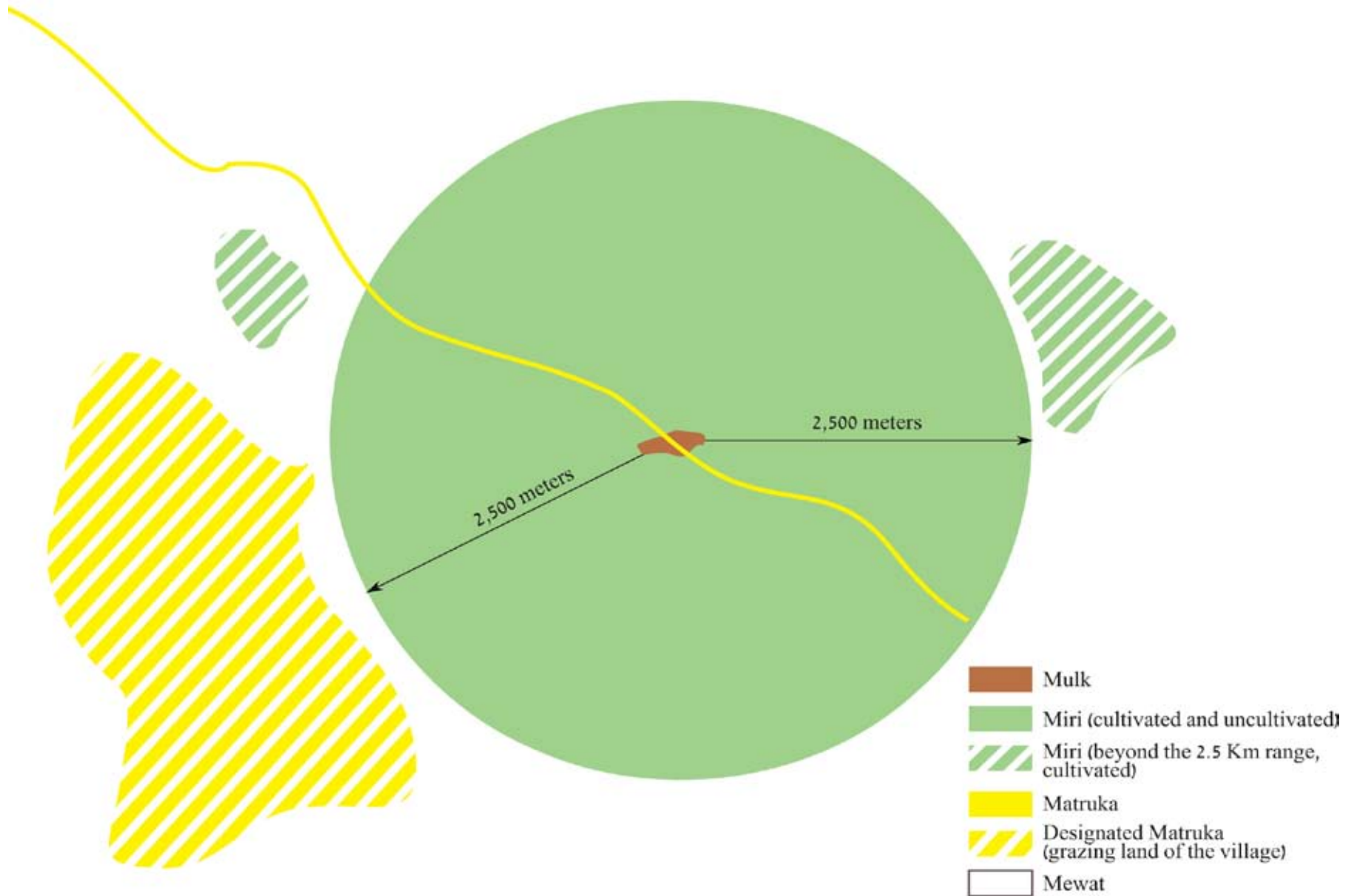
59 Jeremy Forman, "A Tale of Two Regions: Diffusion of the Israeli '50 Percent Rule' from the Galilee to the Occupied West Bank", *Law and Social Inquiry*, vol. 34, issue 3 (Summer 2009), pp. 671-711.

60 Conversation with Prof. David Grossman, a former member of the Department of Geography, Bar Ilan University, 20 September 2007.

61 Article 3 of the Land Code.

62 Doukhan, *Land Law in the State of Israel*, Ibid., p. 78.

Sketch 1 Structure of the village according to the Ottoman Land Code



The land system defined in the Ottoman legislation reflects the central government's economic interests. Under the Land Code, an individual who possess land must obtain a *kushan* (land deed) from a government official.⁶³ It is important to note that these terms refer to the Ottoman registration method, which documented the rights of the possessor of land. This method should not be confused with registration in the land registry, a procedure which began during the British Mandate period and includes a precise description of the lot and its borders, as recorded in the land registry (see part 3).

Under the Land Code, permission to possess *miri* land is granted against a dual payment: a leasehold fee that is paid in advance at the time the *kushan* is given, and an annual tithe on the crops grown on the land.⁶⁴ Hence, the state has a clear economic interest in allocating *miri* land for private use and that this land be constantly cultivated, since cessation of cultivation would mean that there is no tithe to be collected.

These economic interests of the central government are also the reason for the unique provision of article 78 of the Land Code:

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

The article includes an exception to the rule according to which a private person may hold land only if he was given a *kushan*.⁶⁵ The article states that a person who holds *miri* land and cultivates it for ten years "without dispute" may receive a *kushan* free of charge, and thus acquire *tasarruf* rights to it – *even though he took possession of the land without first obtaining government permission*. As said above, this unique provision is intended to encourage cultivation of land, so that the central government can benefit from the tithe on agricultural produce.⁶⁶

The British Mandate court ruled that the phrase "without dispute" in article 78 of the Land Code should be interpreted as absence of active objection by the government to the person's possession of the land, in the form of taking steps toward eviction. If the state wishes to prevent a farmer from acquiring rights to *miri* land that was not assigned to him, it must file a legal suit against him *before* ten years lapse from the day he took possession of the land and began cultivating it.⁶⁷ Failure to file a legal suit within the ten-year period removes the state's right to sue for eviction later. Moreover, possession and cultivation of *miri* land for ten years "without dispute" creates not only a *procedural limitation* that blocks the state from suing for eviction, but also a *prescriptive limitation*, pursuant to which the person acquires rights to the land and is entitled to obtain free

63 Article 3 of the Land Code.

64 Ben Shemesh, *Land Law in the State of Israel*, 32.

65 Article 3 of the Land Code.

66 Albeck and Fleischer, *Ibid.*, pp. 56-57.

67 Doukhan, *Land Law in the State of Israel*, *Ibid.*, p. 316.

of charge a *kushan*, an official document confirming that he has leasehold rights for an unlimited period of time.⁶⁸

Thus, with respect to *miri* land, the Land Code outlines two procedures whereby a private individual may obtain rights in the land: one, by direct allocation from the government through a *kushan*, given for a fee for perpetual leasehold (under article 3 of the Code); and two, by taking possession of the land and cultivating it for at least ten years, provided it is done "without dispute" (under article 78 of the Code).

Continued cultivation as a condition for maintaining private rights to land

Under the Land Code, the possessor's rights to *miri* land – pursuant to a *kushan* or to rights acquired on the basis of the conditions prescribed in article 78 – do not constitute complete ownership. The person has a right to use the land for an unlimited period of time, provided that he continues to work the land and grow crops from which a tithe can be collected.

Article 68 of the Code discusses *miri* land held pursuant to a *kushan*, whose cultivation has ceased for three years or more. Cessation of cultivation, as well as the death of a possessor who has no heirs, render the land *mahlul* (abandoned land). The Land Code recognizes several justifications for not cultivating the land, such as natural causes (e.g. flooding that prevents cultivation of the land), agricultural needs (e.g. not working the land for a period of time in order to improve it), or when the farmer is taken captive. The Mandate government added other justifications, including the inability to cultivate the land due to war (which is relevant in periods of security tension, such as during the first and second intifadas) or inability to obtain a loan for agricultural purposes.⁶⁹ Under any of these circumstances, the land whose cultivation ceased is not considered *mahlul* and the possessor's rights to it are not harmed.

Even when cultivation ceased without legal justification and the land becomes *mahlul*, the possessor does not completely lose his rights. Even though he failed to cultivate the land, he may redeem it upon payment of the *tapou* value (*bidal al mithl*), a sum equal to the gross value of the land in its original condition (not taking into account the betterment that resulted from the possessor's cultivation of the land), which is a relatively small sum.⁷⁰ "Only if this right is *not* exercised is the land then transferred to the state."⁷¹

Accordingly, a distinction must be made between *relative mahlul* and *absolute mahlul*. When cultivation of *miri* land ceases for three years or more without legal justification, the land becomes *relative mahlul*. If the possessor re-acquires the rights to the land by paying its *tapou* value, the land's legal status reverts to what it was previously. Only if the possessor forgoes re-acquisition of his rights does the land become *absolute mahlul*.⁷² In such a case, the Land Code stipulates that the authorities must offer the

68 Ben Shemesh, *Ibid.*, p. 133; Doukhan, *Land Law in the State of Israel*, *Ibid.*, pp. 314-315.

69 "Public Notice: Demarcation of Government Lands (1921)", in: Moses Doukhan (ed.), *Laws of Palestine 1918-1925* (Tel Aviv, L.M. Rotenberg – Law Publisher, 1933), pp. 304-305; Moses Doukhan, *Land Law in the State of Israel*, *Ibid.*, p. 333.

70 Article 59 of the Land Code.

71 Zamir, *Ibid.*, pp. 23-24.

72 Doukhan, *Land Law in the State of Israel*, *Ibid.*, p. 333.

land at public auction, so that the farmer who leases it will cultivate the land, thus allowing the government to collect tithes on the crops grown. In either case, under article 68 of the Land Code, the state is not allowed to hold *mahlul* land without allocating it for cultivation, since the guiding principle of the Code is that the right of use of *mahlul* land must be assigned to private persons and is not to remain in government hands.

These provisions of the Code were applied in the Ottoman period. Thus, tens of thousands of dunams of *miri* land in the Jordan Valley, which had been allocated for cultivation but had been abandoned and became *mahlul*, were offered at public auction and purchased by the Turkish sultan Abdulhamid as his private property. These lands are known today as "Jiftlik land."⁷³ Following the Young Turk revolution in 1908, the property of the sultan was nationalized and the Jiftlik land became government property.⁷⁴ To the best of our knowledge, the northern Dead Sea and Jordan Valley areas falling within the West Bank contain more than 200,000 dunams of Jiftlik land.⁷⁵

In 1920, the Mandate government enacted the *Mahlul Land Ordinance*, which requires persons holding *mahlul* land at the time the ordinance came into force to inform the authorities thereof within three months. Anyone who did so was entitled to lease the land from the state (but not to receive a *kushan*), while land holders who failed to inform the authorities were liable to a criminal penalty. The ordinance also required the *mukhtar* (head of the village) in each community to report to the authorities within three months on all *mahlul* land within the village land, over which private persons had illegally gained control prior to the day the ordinance came into force.⁷⁶ As far as we know, the *Mahlul Land Ordinance* was not repealed by the Jordanian authorities, so it still remains in force in the West Bank.

However, this ordinance has almost no practical significance in the area for two principal reasons. First, the ordinance applies only to *mahlul* land held by persons at the time the ordinance came into force, which was in 1920. Indeed, the ordinance does not apply to *miri* land that became *mahlul* – whether due to cessation of cultivation or to abandonment – after 1920.⁷⁷

Second, the ordinance does not repeal article 78 of the Land Code. Therefore, a person who held and cultivated *mahlul* land for ten years acquired rights under article 78, even if he breached the requirement in the *Mahlul Land Ordinance* to notify the authorities. In this case, the possessor would be subject to criminal penalty for his failure to report his possession, but the state could not prevent him from registering the plot he cultivated in his name. Therefore, the ordinance does not significantly alter the substantive law (the Ottoman Land Code) or harm the rights it grants to private persons.⁷⁸

73 Lee Cahaner, Arnon Sofer and Yuval Cana'an, *Future of the Jordan Valley: Keeping It under Israeli Sovereignty – Pros and Cons* (Reuven Haikin Chair in Geostrategy, University of Haifa, 2006), p. 15 [Hebrew].

74 Government of Palestine, *A Survey of Palestine* (1946), p. 256.

75 Roy S. Fishel and Ruth Kark, "Sultan Abdulhamid II and Palestine: Private lands and imperial policy", *New Perspectives on Turkey*, no. 39 (2008), pp. 129-166. According to Fishel and Kark, the sultan purchased about 114,000 dunams in the northern Dead Sea, some 77,000 dunams in the 'Ur al Far'a area of the Jordan Valley, 11,000 dunams in the Hamra area of the Jordan Valley, and smaller patches of Jiftlik land elsewhere in the Jordan Valley. See also Edna Zamonsky, "The Arabs in the Jordan Valley – Communities and Agriculture", in *Judea and Samaria: Study in Settlement Geography*, *Ibid.*, pp. 605-629.

76 *Mahlul Land Ordinance*, 1920.

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

78 R.C. Tute, *The Ottoman Land Laws* (Jerusalem, 1927), p. 78.

In 1913, the Ottoman legislature enacted the Transfer of Immovable Property Law. Among other things, this law eliminated the requirement in the Land Code that to maintain the rights of a private person to *miri* land held with a *kushan*, the land must be continuously cultivated. The 1913 law states that a person who possesses *miri* land by virtue of a *kushan* may transfer it, lease it to others, rent and mortgage it, cut the fruit trees and uproot the vines growing in it, use it for grazing, and erect buildings on it.⁷⁹ The 1913 law maintains the distinction between *raqaba* and *tasarruf*, and states that with respect to *miri* land, the rights on the *raqaba* continue to be held by the state. But in practice, the 1913 law, whose principal objective was apparently to accelerate economic activity by reducing bureaucracy and government supervision of holders of *miri* land,⁸⁰ turned the possessor of *miri* land pursuant to a *kushan*, who only had the right to use the land, into almost a complete owner of the land.⁸¹

According to Albeck and Fleischer, following enactment of the 1913 law, the right of a possessor of *miri* land pursuant to a *kushan* "was very close to ownership. Allocation of *tasarruf* is similar to granting of a leasehold right for 999 years upon full payment in advance... Article 68 of the Land Code [which requires continuous cultivation as a condition for maintaining the rights of the person in *miri* land]... has not been applied in Palestine at least since the British Mandate. The opposite is true: the allocation of *miri* land with a *kushan* was deemed a perpetual allocation, without the restriction of the obligation to cultivate it."⁸²

The Transfer of Immovable Property Law of 1913 was repealed by Jordanian legislation in 1953. However, the Jordanian legislator retained almost *verbatim* the language of the 1913 law regarding the absence of obligation to continue to cultivate *miri* land held pursuant to a *kushan*. The 1953 Jordanian law states:

A person who possesses *miri* or *muqafa* land under a title deed [*kushan*] may transfer his rights to the land absolutely. . . He may also cultivate it and benefit from the crops resulting from his work, and from everything that grows on it not as a result of work; he may cut down and uproot the trees and vines planted on the land, demolish the buildings situated on it, and use it as a field or farm, plant vines, fruit trees, and ornamental trees on it, turn it into citrus groves, vineyards, gardens, and woods, allocate part of it for use as a granary, erect on it buildings, shops, factories, and any building he needs for agriculture, provided that, in doing so, it does not expand to become a village or neighborhood.⁸³

Since these provisions apply only to *miri* land held with a *kushan* or registered in the land registry, they are irrelevant in most cases of *miri* land in the West Bank, which are not recorded in the land registry and are undocumented by a *kushan*. Lacking such registration, cessation of cultivation for three years or more will result, according to Israeli interpretation, in the land becoming *mahlul*, in accordance with article 68 of the Land Code.

79 Article 5 of the Transfer of Immovable Property Law of 1913.

80 Ben Shemesh, *Ibid.*, p. 196.

81 Doukhan, *Land Law in the State of Israel*, *Ibid.*, p. 330.

82 Albeck and Fleischer, *Ibid.*, pp. 48, 50. See also *Ibid.*, pp. 64, 66.

83 Possession (*tasarruf*) of Immovable Property Law, Law No. 49 of 1953, article 6.

Acquisition of rights in *mewat* land

Article 103 of the Land Code sets the conditions that enable a person to acquire rights to *mewat* land. While in the case of *miri* land it is sufficient that a person holds possession and cultivates the land to acquire rights to it, regarding *mewat* land, the person must revive the land – transforming it from unproductive land to arable land. In other words, the possessor must re-classify it from *mewat* to *miri*. The person does not have to cultivate the land for ten years as the Code stipulates in the case of *miri* land. Rather, upon reviving the land, the person immediately obtains rights in it, without having to cultivate it for any particular period.

Revival of the land pursuant to article 103 grants the person the right to receive a *kushan* free of charge only if revival of the land was done with approval from the government given *in advance*. If advance approval was not given, the possessor may obtain a *kushan* upon payment of the gross value of the land (*bidal al mithl*), not taking into account the betterment due to the work done by the possessor, and not free of charge, as is the case with *miri* land held and cultivated for ten years without advance permission from the government.

In 1921, the British Mandate government enacted the Mewat Land Ordinance, which changed article 103 of the Land Code. Under the ordinance, a person who revives *mewat* land and cultivates it without advance government approval does not obtain any rights to it, and is furthermore subject to a criminal charge of trespassing. However, the ordinance states that a person who cultivated *mewat* land prior to 1921 could obtain a *kushan*, provided that he so informed the government within two months of the day the ordinance took effect.⁸⁴

To the best of our knowledge, the Jordanian legislature has not repealed the Mewat Land Ordinance, so it continues to remain in force in the West Bank. However, its strict provisions are of limited significance, for two principal reasons. First, in most areas of the West Bank, there is little *mewat* land. Second, the Mewat Land Ordinance was rarely enforced by the Mandate authorities, who admitted full private ownership of *mewat* land revived by individuals even without advance permission, and registered it in the name of private persons in such cases. Furthermore, it appears that the Mewat Land Ordinance was never enforced by the Jordanian authorities. Israel adopted this approach, stating that in the West Bank, continuous cultivation of *mewat* land prevents it from being declared state land.⁸⁵

⁸⁴ Mewat Land Ordinance, 1921.

⁸⁵ Zamir, *Ibid.*, p. 18.

Part 3:

Land registration

An orderly system for land registration is necessary to enable the proper administration of land resources, land transactions, planning, and building. In the West Bank, such a system has additional, critical importance with respect to the land rights of private individuals. As stated above, according to the Land Code, allocation of *miri* land to a person is done with a *kushan*, which was the first form of land registration in the area. Registered land (registered with a *kushan* or in the land registry), with documentation proving its allocation to an individual or registration in his name, is private property, and cannot be declared government property, even in the opinion of Israeli authorities. This applies even if the land concerned is not presently being cultivated and had not been cultivated in the past.

For various reasons, most residents of the West Bank holding *miri* land do not have a *kushan*. This does not mean, however, that the land was not assigned to them. The British Mandate government believed that the Ottoman sultan had assigned significant amounts of *miri* land in the area to private persons for cultivation, and that the allocation was made by *kushan*, but with the passage of time and due to historical events, such as the First World War, the relevant documentation proving this was lost.⁸⁶

Registration based on *kushans* had many disadvantages. The original Ottoman registration referred to inheritable usufruct rights (*tasarruf*) to *miri* land, and not to the legal ownership of the land (*raqaba*), which at the time was invariably held by the sovereign. For this reason, registration in *kushans* documented the person who was assigned the right to use the land, rather than the land itself. Unlike registration of land in the land registry, which includes a surveyor's map showing the boundaries of the lot concerned, *kushans* do not include mapping. For various reasons, including mistakes and the desire of possessors of the land to pay low taxes, the area of the lot specified in the *kushan* is often substantially less than the area actually held. Moreover, the boundaries of the lot are described according to the features on the ground at the time the *kushan* was issued. Thus, in many cases, the boundaries of the lot are described in the *kushan* with reference to spatial elements such as trees or bushes, which were in existence at the time the *kushan* was issued, but were subsequently cut down. For all these reasons, the task of determining the precise boundaries of the lot to which the *kushan* refers is often difficult and complex, and sometimes it is impossible to reach clear-cut conclusions regarding this issue.⁸⁷

Given the difficulties involved in registration by *kushan*, the Mandate and Jordanian authorities initiated a systematic registration of land in a land registry by a procedure known as "land settlement" (not to be confused with Israeli settlements). In a land settlement procedure, a large area – usually the lands of an entire village (thousands to

⁸⁶ *A Survey of Palestine*, Ibid., p. 229.

⁸⁷ Pliia Albeck, "Land in Judea and Samaria", lecture given on 28 May 1985 at Beit Hapraklit [Attorneys' House] in Tel Aviv, p. 8.

tens of thousands of dunams) or a single block (hundreds to thousands of dunams) – is registered in the land registry after the rights in the land have been investigated, in line with the local law. Land settlements are funded primarily by the state and partially by registration fees imposed on the landlords.

The Mandate authorities were able to complete land settlements only in small parts of the West Bank, in the Jenin sub-district. The Jordanian government continued the process, and during its rule of the West Bank (1949-1967), the lands of various villages, primarily in the Jordan Valley and in the Nablus and Ramallah sub-districts, were settled.⁸⁸ By the time Israel occupied the West Bank in 1967, about one-third of the land in the West Bank had been registered in the land registry.⁸⁹ Although a substantial portion of the registered land is in desert area (the Jordan Valley) where it is hard for individuals to acquire ownership rights by way of possession and cultivation, and although the state land in the Jordan Valley includes some 200,000 dunams that were the private property of the Turkish Sultan (Jiftlik land, see. p. 27), about 74 percent of the land that underwent land settlement was registered as private property.⁹⁰

In 1968, the Israeli military commander issued an order freezing all land settlements in the West Bank. The order recognized the validity of registration done by the Mandate and Jordanian authorities, but stipulated that no new land settlements were to take place in the West Bank, and that land settlements initiated by the Jordanians but not finalized (i.e., the land concerned was not registered in the land registry) were to be discontinued.⁹¹

At the time, the military commander did not explain the decision to issue the order freezing land settlement. It was only retrospectively that Israeli authorities gave three main reasons for this. The first reason was the obligation to protect the rights of tens of thousands of Palestinian absentees who fled the West Bank during the 1967 war and left behind significant amounts of property. Conducting land settlements under such circumstances, the Israeli authorities claimed, would harm the property rights of many absentees, who would be unable to claim ownership before the registration committees.⁹²

The second reason given is related to the temporary nature of the occupation. Land settlements create permanent changes in terms of the legal and property rights. The West Bank is subject to belligerent occupation, which by its nature is temporary. Israel, as the occupying power, may not carry out permanent changes in the occupied territory.⁹³

The third reason was the heavy financial costs entailed in land settlements.⁹⁴

Given the various actions taken by Israel with respect to land since it took control of the West Bank, the first two explanations appear to be baseless. Had Israel felt an obligation

88 Forman, *Ibid.*

89 Sasson, *Ibid.*, p. 61.

90 This figure is based on the amount of land that has undergone land settlement and the amount of land registered as state land, which totals 527,000 dunams. See p. 13.

91 Order Concerning Land and Water Settlement (Judea and Samaria) (No. 291), 1968. Article 3 of the order states that "the validity of any settlement order and any procedure carried out under a settlement order is suspended."

92 Zamir, *Ibid.*, p. 27; Ministry of Justice, *Report of the Committee Appointed to Investigate the Issue of Land Registration in Judea and Samaria* (Jerusalem, 2005), p. 7 [Hebrew].

93 Section 10 of the petition in HCJ 9296/08, *Commander of IDF Forces in Judea and Samaria v. the Military Appeals Committee*, 5 November 2008; Ministry of Justice, *Ibid.*, p. 7.

94 Ministry of Justice, *Ibid.*

to protect the rights of absentees, it would not have made any change to the ownership status of land in the West Bank. In practice, Israel declared hundreds of thousands of dunams of unregistered land in the West Bank as government property, without giving the tens of thousands of Palestinian absentees any possibility of objecting to the declarations. It is unreasonable to argue that it is absolutely necessary to stop land settlements in order to avoid the possibility of registering land belonging to absentees in the name of others – while at the same time issuing declarations of state land on the very same unregistered land regarding which Israel itself argued that land settlements must be suspended so as not to harm the absentees' rights.

The claim that the land settlement process was stopped because it contradicted the temporary nature of the occupation is also unfounded. During its rule of the West Bank, Israel has established 124 official civilian settlements and 101 other settlements, known as "unauthorized outposts." It is hard to conceive of an action that creates permanent facts in the occupied territory more than the establishment of civilian communities for the population of the occupying state. It is unreasonable to argue that land settlements must be suspended because of the temporary nature of the belligerent occupation while, at the same time, establish dozens of Israeli settlements, which create permanent facts in the occupied territory.

Although it is almost certain that this was not the objective of the military commander when he decided to freeze land settlements in the West Bank, the practical result was that the status of two-thirds of West Bank land, that was not registered in the land registry prior to June 1967, remained unclear. This unregistered land was recorded only in the property tax ledgers, which do not have maps and do not describe the precise boundaries of each lot, and, in some cases, in *kushans* dating from the Ottoman period.

In the absence of registration in the land registry, and since most Palestinians do not have *kushans*, Israel subsequently claimed that much of the unregistered land was government property and declared it as state land. Though it was not intended for this purpose, suspension of land settlements was a prerequisite for implementation of the declaration policy.

The declarations of state land conducted by Israel deviate from the practice established during the British Mandate and Jordanian periods. Under both the Mandate government and Jordanian rule, the authorities did not actively seek out land that could be deemed state land. The land that was classified as government property was a result of land settlements, in which land to which private persons were unable to prove their ownership was recorded in the land registry as government property.⁹⁵

Mandatory legislation empowered the High Commissioner of Palestine to establish by official declaration, outside the framework of land settlement and without record in the land registry, that a given lot of *mahlul* land was public land – provided that if there is a possessor who is entitled by law to re-acquire the rights in the land for payment of its gross value, he be given the option to do so.⁹⁶ However, the High Commissioner

⁹⁵ Article 8(4) of the Land and Water Settlement Law, Law No. 40 of 1952. As mentioned, Israel issued a military order that froze the land settlement process that had been established in this Jordanian law.

⁹⁶ Land Law (Amendment) Ordinance, No. 25 of 1933.

used this authority only rarely in the Mandate area in general, and in the West Bank in particular. From 1933, when the ordinance granting the High Commissioner this power came into force, to the end of the Mandate in 1948, the High Commissioner made 11 declarations of this kind. Only two of these declarations involved land in the West Bank: one dealt with a parcel in Danaba, a village in the Tulkarm sub-district, while the other involved one-quarter of a 26 dunam parcel in Beit Safafa, a village in the Jerusalem District.⁹⁷ The other nine declarations applied to parcels inside the Green Line, primarily in Haifa and Jaffa. Hence, with only a few exceptions, also during the Mandate period, state land was the result of land settlements, and not of declarations.

In any case, the Mandatory ordinance empowering the High Commissioner to declare *mahlul* land as public land was repealed by the Jordanian legislator.⁹⁸ As a result, during the period of Jordanian rule, the only way to classify state land was by land settlements. When the Jordanian government needed land (to build military bases, for example) in unregistered areas, it expropriated the land and paid compensation.⁹⁹

Therefore, the law currently in force in the West Bank does not recognize the proactive declaration of state land. Declaration of state land is an Israeli invention – a shortcut around the registration procedures prescribed in Jordanian legislation. In most cases, Israel has not registered the declared state land as government property in the land registry.¹⁰⁰ In this respect, too, the declaration policy deviates significantly from the practice of the Mandate and Jordanian authorities, who registered in the land registry land that was classified as government property.

Upon freezing the land settlements in the West Bank, one procedure remained to allow registration of land in the land registry. This procedure is known as “first registration.” It is similar to land settlement, but initiated by private individuals, financed entirely by the person seeking registration, and applies to a small piece of land (usually a single lot or a small number of lots).¹⁰¹ Because of its cost and complexity, first registration is not a true substitute for land settlement – not with respect to the amount of land that can be registered or with respect to the pace of registration.

97 In order to clarify this issue, we examined all issues of the *Official Gazette* of the Mandate government, from 1933 to 1948. According to the Mandatory ordinance that enabled declaration of *mahlul* land as public land, each such declaration required publication in the *Official Gazette*.

98 Provisions on Immovable Property (Amendment) Law, Law No. 51 of 1958.

99 For example, in 1967 the Jordanian government expropriated some 1,450 dunams of unregistered land in Mishor Adummim in order to build a military firing range. The Jordanian authorities paid compensation to 57 claimants who owned 1,125 dunams (78 percent) of the land that was expropriated. See Bimkom and B'Tselem, *The Hidden Agenda: The Establishment and Expansion Plans of Ma'ale Adummim and their Human Rights Ramifications* (2009), pp. 25-30. See also Shamgar, *Ibid.*

100 Sasson, *Ibid.*, p. 13.

101 Registration of Previously Unregistered Immovable Property Law, Law No. 6 of 1964; Order Concerning Amendment of the Registration of Previously Unregistered Immovable Property Law (Judea and Samaria) (No. 1621), 2008. In principle, the state may also submit a request for first registration of land it contends belongs to it, but in practice, almost all cases of first registration were initiated by private individuals.

Part 4:

The declaration policy from the perspective of local law

In part 2, we described the main provisions of the Ottoman, Mandatory, and Jordanian land laws now applying in the West Bank, pursuant to which a person can acquire ownership rights to all types of land classified in the land law, except for *matruka* land, which is intended for public use. Ownership rights to *miri* land can be acquired by allocation in advance by means of a *kushan*, or by possession and cultivation of the land for ten consecutive years, provided that the state did not file an eviction suit against the farmer during that time. A person holding *miri* land pursuant to *kushan* or by registration in the land registry is considered to have full ownership of the lot. The requirement prescribed in the Land Code whereby the owner must continue to cultivate the land even after it is registered in his name was repealed in an Ottoman law of 1913.

This part of the report describes three principal aspects of the declaration policy, which we shall examine in light of the law and its application by the states that ruled the West Bank before Israel.

Type of cultivation by which a person acquires rights to land

Article 78 of the Land Code states that a person who holds *miri* land and cultivates it for ten years without dispute acquires rights to it. The article does not define “cultivation” and does not prescribe the degree of cultivation that grants a person rights to the land. The Land Code only states that cultivation means seasonal crops such as wheat and barley (“sowing”),¹⁰² and not fruit trees or grapevines, which are not allowed to be planted on *miri* land without prior government permission.¹⁰³ These restrictions were repealed by the Transfer of Immovable Property Law of 1913, which permits the possessor of *miri* land pursuant to a *kushan* to plant it with trees and grapevines and use the land as he wishes, without governmental permission.¹⁰⁴ However, this law too does not define the extent of the cultivation required to grant the farmer ownership rights to the land.

The reasonable cultivation doctrine

The Mandatory Supreme Court ruled that with respect to a person’s acquisition of rights to land, a distinction has to be made between *mewat* and *miri*. In the case of *mewat* land, a person who claims he has rights to the land by virtue of revival under article 103

102 Article 9 of the Land Code.

103 Article 25 of the Land Code.

104 Article 5 of the Transfer of Immovable Property Law of 1913; Article 6 of the Possession (*Tasarruf*) of Immovable Property Law, Law No. 49 of 1953.

of the Land Code must prove that he made a substantial change to the land, turning it from non-arable land into land that can be cultivated.¹⁰⁵

The *Mejelle*, the Ottoman Civil Code, drafted in the years 1869-1876, defines the type of actions that are considered revival of *mewat* land. In addition to sowing and planting, these actions include plowing without sowing, digging trenches, building a stone wall, or making a dike to protect against flooding in the rainy season.¹⁰⁶

The Mandatory Supreme Court ruled that these provisions of the *Mejelle* were consistent with the purpose of article 103 of the Land Code: to transform *mewat* land into land suitable for farming. This purpose could be achieved *either* by cultivating the land, where the land enables it, *or* by altering it physically to such a degree that it becomes arable. For example: according to Mandatory case law, planting ornamental trees, such as eucalyptus trees, to prevent erosion of sand dunes constitutes revival of *mewat* land because it physically alters the land and makes it arable. Even if the land is not actually cultivated, the underlying work that would eventually allow cultivation was carried out. Therefore, the conditions set by article 103 of the Land Code concerning revival were met, and the person who planted the ornamental trees there thus acquires rights to the land.¹⁰⁷

In contrast, under Mandatory case law, a person who claims rights to *miri* land pursuant to article 78 of the Land Code is *not* required to make physical changes in the land. The Mandatory court held that,

In order to redeem land from the category of Mewat it is necessary for the claimant to prove revival – that is to say – conversion from the unfruitful to the productive; but in order to set up a prescriptive title to Miri land, under Article 78 of the Ottoman Land Code, it is only necessary to prove occupation and cultivation for a period of ten years. Cultivation in this sense means, in my view, such regular cultivation as is reasonably possible, having regard to the nature of the land and the crops for which it is suitable.¹⁰⁸

The “reasonable cultivation doctrine” established by the Mandatory court holds that the cultivation necessary to grant the possessor of *miri* land rights under article 78 of the Land Code is cultivation that is consistent with the nature of the land and its natural conditions, *without requiring that the possessor change those conditions*.

The distinction made by the Mandatory court between the requirements specified in article 103 of the Land Code regarding revival of *mewat* land and the requirements specified in article 78 of the Code regarding *miri* land has clear practical consequences. The central mountain ridge in the West Bank is rocky. If it were *mewat* land, a person claiming rights to the land under article 103 of the Code would have to show that he removed the rocks and made the land arable. However, since almost all the land on the central mountain ridge is *miri*, a person who claims rights under article 78 of the Land Code would not, according to the reasonable cultivation doctrine, have to

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

106 Articles 1275-1277 of the *Mejelle*.

107 CA 153/46, *Mahmud Nadim Awwad el Habbab and 14 Others v. The Government of Palestine*, **Annotated Law Reports**, 1947, pp. 551-561.

108 CA 65/1940, *supra*.

make changes in the land, but only to prove cultivation of those pockets of arable land scattered between the rocks. Whenever the farmer can prove that he cultivated all those patches of arable land for ten years, he will be entitled to a *kushan* on the entire lot, and not only on the arable patches.¹⁰⁹

However, the Mandatory case law explicitly states that the requirement of cultivation set forth in article 78 is substantive, so a person cannot acquire ownership of *miri* land under this article if it is not arable. The Mandatory Supreme court held that grazing or cutting timber did not constitute cultivation under article 78.¹¹⁰

Therefore, in the case of rocky *miri* land, if the entire parcel is full of rocks and has no pockets of land that can be cultivated, a person cannot acquire rights to the parcel under article 78 of the Land Code. But when there are pockets of arable land that can be cultivated, a person may acquire ownership rights in the parcel, provided that he cultivated them for ten years.

The reasonable cultivation doctrine was summarized in a treatise written by R. C. Tute, who served as president of the Mandatory Land Court in Jerusalem:

It is sometimes difficult to say what constitutes effective cultivation in Palestine. Some of the *Miri* lands which are situated in rocky localities are only capable of being ploughed in small patches. Again there are lands which can only be cultivated in alternate years owing to their poverty. *Under these circumstances, the only test is whether or not the holder has made as much use of the land as its nature permits.*¹¹¹

The cultivation requirement according to the Israeli interpretation

In the context of the declaration policy, Israel applied a much stricter criterion than that of the reasonable cultivation doctrine that was set by the Mandatory courts and applied in the West Bank under Jordanian rule as well.¹¹² According to the Israeli interpretation, in the case of a parcel that is mostly rocky and the cultivated area is located in a distinct part, the cultivated area must be distinguished from the rest of the parcel. In such a case, the rocky part of the parcel will be declared state land, while the cultivated area will be defined as private property. In the common case where it is not possible to distinguish between the cultivated parts and the rocky land, the farmer must prove that he cultivated at least 50 percent of the total area of the parcel. If the combined area of all the cultivated patches is under 50 percent, the entire parcel is declared state land, leaving the farmer with no rights to it whatsoever.¹¹³

The requirement that 50 percent of the area of the parcel must be cultivated does not appear in the legislation applying in the region and contradicts the Mandatory Supreme

109 Ibid.

110 CA 125/1940, *Village Settlement Committee of Arabeen Nufei'at v. Aharon Samsonov and 73 Others*, **Law Reports of Palestine**, vol. 8, 1941, pp.165-167. This does not mean there cannot be a situation in which a person has ownership rights over grazing land. Article 3 of the Land Code allowed the sovereign to allocate *miri* land for diverse agricultural uses, grazing included. In the case of allocation of *miri* land by *kushan* for grazing purposes, the land is considered the private property of the possessor, although he did not cultivate it in accordance with article 78 of the Code.

111 Tute, Ibid., p. 68. Though these comments were made regarding article 68 of the Land Code, they are relevant also in interpreting article 78 of the Code.

112 Forman, Ibid; Attorney Elias Khoury, at a meeting with Prof. Oren Yiftachel on 4 August 2011.

113 Zamir, Ibid., p. 237.

Court's interpretation of article 78 of the Land Code. In applying this requirement to the West Bank, Israel relied on rulings of Israeli courts in the 1960s.

At that time, land settlements were undertaken within Israel. In the context of these land settlements, the government sought to maximize the amount of Jewish-owned land in the Galilee. As in the West Bank several decades later, the objective in the Galilee was to get hold of as much land as possible in order to enable Jewish settlement. In many cases, Arab residents of the Galilee claimed ownership of *miri* land based on possession and cultivation of scattered arable patches in rocky land.

In their rulings, the District Courts accepted the State Attorney's Office's interpretation of article 78 of the Land Code, whereby in the case of cultivation of scattered patches of land, the claimant for ownership of the parcel must prove that he cultivated a substantial portion of its area. Within a few years, this interpretation was adjusted and altered, until the Israeli Supreme Court ruled that under article 78 of the Land Code, at least 50 percent of the area of the parcel had to be cultivated.¹¹⁴ Subsequently, the Supreme Court applied the 50-percent rule to the West Bank as well, in rejecting a petition filed by a Palestinian from the village Beit Ijza contesting the Custodian's decision to declare a parcel that he held as state land.¹¹⁵ This action forms part of a broader phenomenon, whereby practices first formulated in the context of land settlements inside the Green Line were subsequently applied to the West Bank.

Without offering an opinion on the Israeli court's interpretation of article 78 in the context of the land settlements undertaken in the Galilee during the 1960s, it is highly doubtful whether its application to the West Bank is consistent with international law. The West Bank is under belligerent occupation, and Israel justified its use of the Land Code on the grounds that under international law, it must respect the local law in force in the occupied territory on the eve of its occupation.¹¹⁶

Local law includes not just the statute, but also court judgments made prior to the Israeli occupation and the interpretation of the law as applied by the states that ruled the West Bank before Israel.¹¹⁷ Thus, Israel is required to apply local law in a manner similar to the way in which it was applied by the states that preceded it, and to respect the rules established by the courts of those states with respect to the interpretation of local law.¹¹⁸ Interpretations by the Israeli court that contradict these rules is valid inside the sovereign territory of Israel, but should not be applied to the occupied territory.

This conclusion is further strengthened by the fact that, regarding the cultivation requirement in article 78 of the Land Code, the Israeli interpretation differs so much from

114 CA 423/61, *Muhammad Salah 'Ommar al-'Ommar and Three Others v. State of Israel*; CA 148/62, *State of Israel v. Sa'id Salah*. For further discussion on the emergence of the requirements to cultivate 50 percent of the area of the parcel and its application to the West Bank, see Forman, *Ibid.*

115 HCJ 277/84, *Sabri Mahmud A'riebe v. Custodian of Abandoned and Government Property, Judea and Samaria*. The ruling erroneously states that the case involves a parcel in the village land of Beit Iksa. See also Avraham Suchovolksy, *Eliyahu Cohen and Avi Ehrlich, Judea and Samaria: Land Rights and the Law in Israel* (Tel Aviv: self-published, 1986), pp. 29-35, esp. p. 34 [Hebrew].

116 Zamir, *Ibid.*, pp. 3, 7.

117 Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1993), p. 17.

118 Forman, *Ibid.*

the reasonable cultivation doctrine that *the 50-percent rule not only constitutes a new interpretation, but it alters the Land Code itself*.¹¹⁹ As mentioned above, international law forbids the occupying power to change the local law, unless this is necessary for security reasons or for the benefit of the local population. In the cases under discussion, the new interpretation arose from Israel's desire to take hold of land and thereby to facilitate the establishment of settlements in the West Bank. Since building settlements is in itself an illegal purpose, application of the 50-percent rule to the West Bank was not undertaken for an end recognized in international law as one that would justify change in local legislation.

The strict cultivation requirement – the 50-percent rule – applied by Israel to the West Bank contradicts the local law, as interpreted in the Mandatory case law and as applied under Jordanian rule. As a result of this strict requirement, Israel declared as state land broad swaths of land that would have been classified as private property under local law. In so doing, Israel severely infringed on the property rights of Palestinians.

Declarations on land cultivated in the past

Article 78 of the Land Code prescribes the conditions for acquiring rights to *miri* land by cultivating it for ten years. The article does not discuss the status of *miri* land that had been cultivated for ten years, but whose cultivation stopped later on.

As explained above, the Land Code requires a person possessing *miri* land to continue to cultivate it after the prescriptive period and following receipt of a *kushan*. However, these provisions of the Land Code were subsequently repealed. Under the law presently in force in the West Bank, a person who holds *miri* land pursuant to a *kushan* or registration in the land registry is not required to cultivate the land in order to preserve his property rights in it.

But what is the status of unregistered *miri* land, for which a *kushan* has not been given, that had been cultivated in the past throughout the prescriptive period, but whose cultivation ceased thereafter? The Mandatory Supreme Court considered this question and ruled that just as a person who holds *miri* land pursuant to a *kushan* or registration in the land registry does not have to continue cultivating the land, the same is true for a person who acquired the right to obtain a *kushan* after he held the land and cultivated it for ten years – even if his rights to the land had not been registered. According to Mandatory court case law, in both cases cessation of cultivation would not result in revocation of the person's rights to the land, would not make the land abandoned (*mahlul*), and would not allow the government to take hold of it:

It is true that possession alone under Article 78 is not sufficient; the possession must also be coupled with cultivation; but once the prescriptive title is vested in a person by reason of ten years possession with cultivation it is not necessary, in order that title may be confirmed at settlement, to establish that the claimant continuously cultivated it after the prescriptive period.¹²⁰

119 Ibid.

120 CA 230/1945, *Mahmoud Nayef v. Government of Palestine*, **Law Reports of Palestine**, vol. 13, 1946, pp. 37-39.

The logic underlying this interpretation by the Mandatory Supreme Court was explained by Attorney Moses Doukhan, who worked in the land department of the Mandate government and represented it in various court cases on land issues:

If possession is lawful – the holder is only lacking registration, and article 78 of the Code permits him to receive this registration from the authorities... a possessor of *miri-mahlul* land for ten consecutive years who cultivated it in accordance with the requirement of article 78 does not have to cultivate it continuously after he acquired the right of *Usuacapio* [acquiring rights through possession and cultivation], and may demand registration of the land on his name in the land registry.¹²¹

The Mandatory court ruling is based on the distinction between the *substantive* and *procedural* requirements prescribed in article 78 of the Land Code. The substantive requirement is possession and cultivation for the prescriptive period, fulfillment of which makes the land the farmer's private property. Once he meets this requirement, there is no meaningful difference between him and a person possessing *miri* land pursuant to a *kushan* since, in both cases, the conditions for a prescriptive right to the land are met.¹²²

The only difference between the two is that the rights of the latter are registered in a *kushan* (or in the land registry), while the rights of the former have not yet been registered. But registration is a procedural issue – an administrative-technical matter – and even without registration in the land registry or in a *kushan*, the farmer's rights to the land acquired by meeting the substantive requirements of article 78 cannot be revoked.

This ruling of the Mandatory court was not repealed in Israeli case law. The Israeli Supreme Court confirmed, albeit with reservations, the Mandatory ruling. In a 1962 judgment, in a case involving land settlement inside the Green Line, the Israeli Supreme Court held that "it cannot be ruled out that under article 78 of the Ottoman Land Code... a person would be entitled to be registered as owner after he possessed and cultivated the land for the required period, even if he later ceased cultivating it, provided that he proves that he or his heirs once cultivated the land for the prescriptive period."¹²³

Nevertheless, Israel interpreted the Land Code and applied it in the West Bank differently. According to the Israeli position, unregistered *miri* land for which no *kushan* was given, which was cultivated for the prescriptive period and whose cultivation later on ceased for ten years or more, is government property and can be declared state land.

During its rule of the West Bank, Israel has made declarations on land that the Custodian knew with certainty was cultivated in the past for ten consecutive years. For example, in 1983, the Custodian declared some 1,000 dunams of the village lands of Ras Karkar, Kafr Na'ama and Kharbata Bani Harith in the Ramallah sub-district as government property. Documents obtained by B'Tselem indicate that prior to the declaration, the Custodian studied aerial photographs of the land taken from 1944 to 1982. The aerial photographs showed that most of the land had been partially or fully cultivated in 1944. In 1969, large sections

121 Doukhan, *Land Law in the State of Israel*, Ibid., pp. 316-317.

122 The Mandatory Supreme Court's interpretation is also based, of course, on the Transfer of Immovable Property Law of 1913, which repealed the Land Code's requirement that a possessor of *miri* land under a *kushan* must continue to cultivate it.

123 CA 314/61, *Sa'ud Hamed Ahmad al-Khatib v. State of Israel*.

of land that had been worked in 1944 were still being cultivated. The cultivated area shrank over the years, and by 1982, only a few patches of land were still cultivated.¹²⁴ Therefore, the aerial photographs proved that large sections of the declared land were cultivated for at least 25 years (from 1944 to 1969), a period much longer than the prescriptive period. Under Mandatory court case law, the land should be considered private property. Following the Custodian's declaration, the land was allocated to the World Zionist Organization to build a new settlement, which was not established for various reasons. Despite this, the land is included in the jurisdiction area of the Mate Binyamin Regional Council.

Israel military legislation formalized the practice of making declarations on land that was once cultivated for the prescriptive period, but where cultivation ceased at some subsequent point. As previously noted (p. 14), in 1984, the military commander amended the Order Concerning Government Property to include within the category of "government property" not only property that was under the ownership of the enemy state (Jordan) on the determining day (7 June 1967) as stated in the original order, but also property that the enemy state gained rights to after that time. Eyal Zamir, who served at the time of the amendment as assistant to the legal advisor for Judea and Samaria, explained the objective of the change:¹²⁵

A person who worked the land for ten or more years, and then abandoned it completely without have first registered it in his name – ostensibly has no right in the land. In practice, this rule was never applied in all its severity. The practice is to regard the rights of a person who cultivated *miri* land for a sufficient period as expired if he abandoned and discontinued cultivation of the land for at least ten years... Therefore, if he ceased cultivating the land for at least ten years, it is regarded as having become the state's property by prescriptive right. *In the past, a difficulty arose regarding land which, under the above criterion, was not considered state land on 7 June 1967, but became such at a later time. This difficulty, which would lead to the conclusion that there are many properties over which nobody held rights, was eliminated by Order No. 1091 [the 1984 amendment to the Order Concerning Government Property].* The order states that assets that became government property *after* the determining day would also be administered by the Custodian of Government Property.

The practice regarding unregistered *miri* land whose cultivation ceased is very important nowadays. Judea and Samaria contain large sections of hilly areas that were cultivated by terrace farming... A gradual process of abandonment of terrace land began in Palestine, and already by the 19th century many terraces had been dismantled. This process accelerated rapidly after the Second World War... The higher cost of workforce in the economy, the general rise in the standard of living and urbanization appreciably reduced the amount of cultivated land. This process is clearly seen by study of aerial photographs taken between 1945 and 1967 and in recent years.¹²⁶

124 Declaration of state land made by the Custodian on 10 May 1983; Custodian of Government and Abandoned Property, "Land – N'ama Area."

125 According to the homepage of Prof. Eyal Zamir, he served in this position from 1982 to 1987. See http://law.huji.ac.il/segel.asp?cat=409&in=409&staff_id=44&staff_page=82 (visited on 18 June 2010).

126 Zamir, *Ibid.*, 20.

Thus, even in its original form, the Order Concerning Government Property authorized the Custodian to issue declarations on *miri* land that had been cultivated for the prescriptive period in the past but whose cultivation ceased afterwards, provided that a ten-year period of non-cultivation had been documented *before* the determining day. Under Israeli interpretation, in such a case the land already became government property at that time.

The 1984 amendment to the order was intended to enable declarations regarding *miri* land that had been cultivated for the prescriptive period in the past, where a ten-year period of non-cultivation was completed only *after* the determining day. The incorporation of the provision in primary legislation (a military order) suggests that declarations regarding land that had once been cultivated, but their cultivation ceased for ten years only after 1967, were common.

As was the case with the 50-percent rule, here too Israel interpreted the law contrary to the ruling of the Mandatory court. In this case, Israeli interpretation was also contrary to the ruling of the Israeli Supreme Court.¹²⁷ This interpretation undermines the substantive provisions of the Ottoman and Jordanian land laws, which stipulate that after a person obtained rights to *miri* land by possession and cultivation for the prescriptive period, the land becomes his private property. Under international law, the Israeli military commander cannot change the local legislation other than to meet security needs or for the benefit of the local Palestinian population. The amendment to the Order Concerning Government Property, which altered the perception of state land from static to dynamic, was intended for neither of these purposes. Therefore, it was made without authority.

Hence, the declarations regarding land that had been cultivated for the prescriptive period but whose cultivation ceased afterwards were made in violation of the law, in contradiction to the interpretation of the authorized courts, and in an illegal manner. In this way, Israel turned broad swaths of land that were considered Palestinian private property into state land.

Disregarding the local population's rights in *matruka* land

As noted in part 2, *matruka* land includes two types of public land: (1) land intended for general public use; (2) designated land allocated for the use of a specific, defined community. Since it is public land, private persons cannot acquire ownership rights to *matruka* land,¹²⁸ even if they held it and cultivated it for many years.¹²⁹ According to Tute, who served as president of the Mandatory Land Court in Jerusalem, this principle also applies to the state: the community's right to use designated *matruka* land

127 Even the State Comptroller erroneously accepted the position of the Israeli authorities in this matter. In his report on activities of the Custodian, the Comptroller noted that "in the West Bank, government property includes not just the property that belonged to the government on the determining date [7 June 1967], but also property that became governmental afterwards. This is possible under the land laws in force in the area, according to which the right of private ownership of land (*miri*-type land) is conditioned on possession and cultivation of the land. The absence of possession and cultivation or their cessation for a long period transfers the rights in the land to the state, even if in the past land concerned did not belong to the state." State Comptroller, *Ibid.*, pp. 215-216.

128 Articles 92, 93 of the Land Code.

129 Article 102 of the Land Code.

is protected, and the state is not allowed to take hold of the land or claim ownership of it.¹³⁰

Regarding grazing *matruka* land designated for the use of a defined community, article 97 of the Land Code states:

Places that had, from ancient times, been allocated as grazing land for residents of one village may not be used for grazing by animals other than those belonging to residents of that village, whereas residents of another village are not allowed to graze their animals there.¹³¹

Designated *matruka* land is therefore public land which is not privately owned, whose use is limited to a specific purpose (such as grazing) and for a specific, defined group: residents of one village or a certain group of villages.

According to Albeck and Fleischer, designated *matruka* land is given only by allocation in writing. In the absence of the allocation documents, a claim by residents of a village that they hold rights to grazing land or other public land has no legal foundation or validity.¹³²

The basis for Albeck's and Fleischer's categorical statement is unclear. Mandatory case law explicitly holds that official documents of allocation are not necessary to establish designated-use rights of the village's residents to *matruka* land and classification of the land as such. The Mandatory Supreme Court held that if there is testimony – for example, of the village elders and elders from nearby villages – proving that the land was used by the village residents for grazing or another public use for many years, then the land should be classified as designated *matruka*.¹³³

Israel's Supreme Court adopted the opinion of the Mandatory court and held that for the purpose of establishing the rights of a specific, defined community in *matruka* land, an allocation document is not required. Rather, proof that the residents of this community had used the land for a long period is sufficient.¹³⁴ The case involved a dispute between the Tel Aviv Municipality and the state over registration of a parcel of land along the coast, within the city's borders. The state argued that it was *mewat* land that was government property. The municipality contended it was designated *matruka* land. The land settlement officer found that "the parcel is used by Tel Aviv residents and their guests for their enjoyment," and should therefore be deemed designated *matruka* and registered in the name of the municipality, and not in the name of the state, even though the municipality had no allocation documents.

The state appealed the official's decision to the Supreme Court, but the judges upheld the original decision. This ruling by the Israeli Supreme Court reinforced the rule that had been set by the Mandatory court, and even expanded it with respect to the dimension of time. The Mandatory court held that land used for grazing by

130 Tute, *Ibid.*, pp. 93, 96.

131 Article 97 of the Land Code.

132 Albeck and Fleischer, *Ibid.*, p. 88.

133 Land Appeal 72/1934, *Mahmoud Abu Hana et al. v. The Attorney General*, **Law Reports of Palestine**, vol. 5, 1938, pp. 221-225.

134 CA 4/50, *Attorney General v. Tel Aviv Municipality*.

the residents of a certain village for generations was designated *matruka* and not government property. In the Tel Aviv case, the period of designated public use of the parcel concerned was much shorter. Tel Aviv was founded in 1909 and the decision by the land settlement officer was made in 1949 and dealt with a parcel located in the north of the city, an area that was developed only during Mandate time. Thus, according to the Israeli Supreme Court, designated use of a parcel of land by a local community for only a few dozen years is sufficient to classify it as designated *matruka* and to lead to its registration in the name of the local authority, and not in the name of the state.

In 1928, the Mandate government enacted the Land Settlement Ordinance, which prescribed the procedures for registering land in the land registry. The ordinance states that within the framework of land settlements, "land used for general public purposes that falls within the category of *Matruka* shall be registered in the name of the government; any land in the category of *Matruka* which is used for the purpose of a village shall be settled and registered in the name of the village."¹³⁵ Hence, Mandatory legislation says that during registration, the usage rights of the community to designated *matruka* land must be protected, and such land should be registered in the name of the local municipal authority, not in the name of the state.

The Land Settlement Ordinance was repealed by the Jordanian legislator, which replaced it with the Land and Water Settlement Law. The Jordanian law, which applies to the West Bank, similarly states that designated *matruka* land is *not* state land:

Miri land or *matruka* lands that are used for a long period of time by residents of the village or by some of them, will be registered in the name of the treasury on behalf of the persons who benefit from them. But if these lands lie within the municipality's or the village council's borders, they will be registered in the name of those who used them.¹³⁶

Thus, under the law applying in the West Bank today, there are two options for the registration of designated *matruka* land: one, in the name of the state as a trustee for the residents of the community using the land, in which case the state must protect the residents' rights to the land and may not assign it for cultivation by others, certainly not for the construction of Israeli settlements. The second possibility is to register designated *matruka* land situated within the municipal borders of the towns or village councils in the name of those who used it, and not in the name of the state. One way or the other, the law does not consider designated *matruka* land that was used for a long time by residents of a village or of a group of villages to be government property.

In issuing declarations of state land, Israel ignored these provisions of the law, and indeed ignored the very existence of designated *matruka* land. To the contrary: in many cases, the state based the declarations on the claim that the land is not suitable for cultivation and the village residents used it over a prolonged period of time for grazing.

135 Article 28(2) of the Land Settlement Ordinance, 1928.

136 Article 8(3) of the Land and Water Settlement Law, Law No. 40 of 1952. The mention of *miri* land in this article apparently relates to *miri* land that had been used collectively by the village residents, in contrast to *miri* land that was cultivated by a particular farmer, to which article 78 of the Land Code applies.

Although we cannot accurately estimate the amount of designated *matruka* land that Israel has declared government property, it is certainly substantial. As explained in part 2, *matruka* land is defined according to the use of the land, not on its spatial location. In the West Bank, much of the land on the periphery of the *miri* ring and further away, in the spatial strip of *mewat* land, has been used for grazing for generations and is ostensibly *matruka*. In general, land used for intensive farming which requires daily attention (e.g. for growing vegetables) is situated relatively close to the built-up area of the village. Land for extensive agriculture (e.g. olive groves or wheat fields) is often situated further away from the built-up area. In most cases, grazing land is located furthest away from the built-up area of the village.

In 1976, the Volcani Institute of Agricultural Research in Beit Dagan, in coordination with the Judea and Samaria military headquarters, conducted a survey on the natural grazing areas in the West Bank. The researchers concluded that there are two kinds of grazing areas in the West Bank: "(a) Permanent natural grazing areas that cannot be cultivated, primarily due to limited rainfall, steep slopes, rocky lands, or poor soil; (b) Stubbles [fields that were harvested but not yet plowed] of non-irrigated crops or remains of other crops."¹³⁷ The researchers noted that 3.6 million dunams in the West Bank (about 65 percent of its total area) are regularly used for grazing, of which almost two million dunams are grazing areas not suitable for cultivation.¹³⁸ According to the survey, many of the grazing areas "extend from the Judean Desert to the Beit She'an Valley, from the Jordan River to the mountain ridge"¹³⁹ – or in other words, are on land situated mainly in the *mewat* areas to the east of the central mountain ridge. Thus, the survey found that in 1976, the Bethlehem sub-district, which includes extensive swaths of land in the Judean Desert and covers a total of 600,000 dunams, had 140,000 dunams of cultivated land (23 percent of the total area) and an additional 373,000 dunams (62 percent of the total area) were natural grazing lands.¹⁴⁰

It is likely that in many locations, grazing was not undertaken continuously by the residents of a particular village or community. Accordingly, we do not suggest that *all* the natural grazing land in the West Bank was necessarily designated *matruka*. At the same time, it appears that a substantial percentage of this natural grazing land ostensibly meets the definition of designated *matruka*. Indeed, in many Palestinian villages in the West Bank, the residents have been using land that cannot be cultivated for grazing purposes for decades or even centuries.

Where residents of a given village have proved use of land for grazing or for other communal public purposes for many years and even generations, the Land Code does not consider this land to be state land and does not allow it to be declared government property. Obviously, the law does not permit such land to be allocated for use of others, such as Israeli settlers.

137 N. Seligman, and I. Katzir, *Quantity and Character of Natural Grazing Areas in Judea and Samaria – Special Publication No. 66* (Beit Dagan: Division of Scientific Publications, Volcani Institute, 1976), p. 6 [Hebrew].

138 *Ibid.*, p. 1.

139 *Ibid.*, p. 3.

140 *Ibid.*, p. 7.

Israel's disregard for the collective grazing rights of Palestinian communities in the West Bank, as defined in the Land Code, and the declarations of designated *matruka* used by the residents of these communities for grazing and other communal purposes as government property are both contrary to the law and grossly deviate from the manner in which Britain and Jordan, the states that previously ruled the region, applied the Land Code.

Part 5:

The declaration policy in practice

So far we have examined the declaration policy primarily on the legal-theoretical level, comparing it with the law, the way it was applied by the Mandatory and Jordanian governments, and its interpretation by the authorized courts. The conclusion reached is that the declaration policy contradicts principal aspects of the law as it was applied in the West Bank up to 1967.

Israel contends that although the declaration policy was not adopted by the states that ruled the West Bank before 1967, in practice, its results were not different from the outcome of land settlements undertaken by the British and Jordanian authorities. Zamir pointed out that "the requirement concerning cultivation... was not repealed during Jordanian rule... Also, registrations undertaken following land settlement procedures show that cultivated *miri* land was registered in the name of the farmers, while uncultivated land was registered in the name of the state."¹⁴¹ Similarly, Plia Albeck contended that "about 40 percent of Judea and Samaria land is state land, and this fact is reflected also in registrations of land that underwent land settlement, English or Jordanian... Of course, the 40-percent figure is not a scientifically precise number, but rather a rough general estimate based on the registered and unregistered details. But it is true with respect both to areas that underwent land settlement and those that did not."¹⁴²

However, a random examination by B'Tselem contradicts these claims. The examination was made by means of a digital map of the Civil Administration that was provided to the NGO Yesh Din in response to a Freedom of Information request, filed by a staff-member at the time, Mr. Dror Etkes. In the examination, we selected three pairs of neighboring villages, and in each pair compared the amount of land that was registered in the land registry as government property in the course of land settlements carried out by the Jordanians with the amount of land declared by Israel as state land.

Since we examined three pairs of adjacent villages with similar climate and spatial conditions, it would be unreasonable to assume the existence of an appreciable difference within each pair in terms of the amount of cultivated land or some other relevant parameter that would affect land ownership. Thus, similar application of the law by the Jordanian government and the Israeli authorities should lead to similar amounts of state land in each pair of villages. The three pairs of villages chosen are 'Ein Qinya and al Janya (Ramallah sub-district), Burka and Kafr 'Aqab (Ramallah sub-

141 Zamir, *Ibid.*, p. 19.

142 Albeck, *Land in Judea and Samaria*, *Ibid.*, p. 8.

district), and Habla and Azzun (Qalqiliya sub-district). Table 1 shows the results of our comparative analysis.

Table 1: Amount of State Land in Three Pairs of Villages in the West Bank, in Dunams

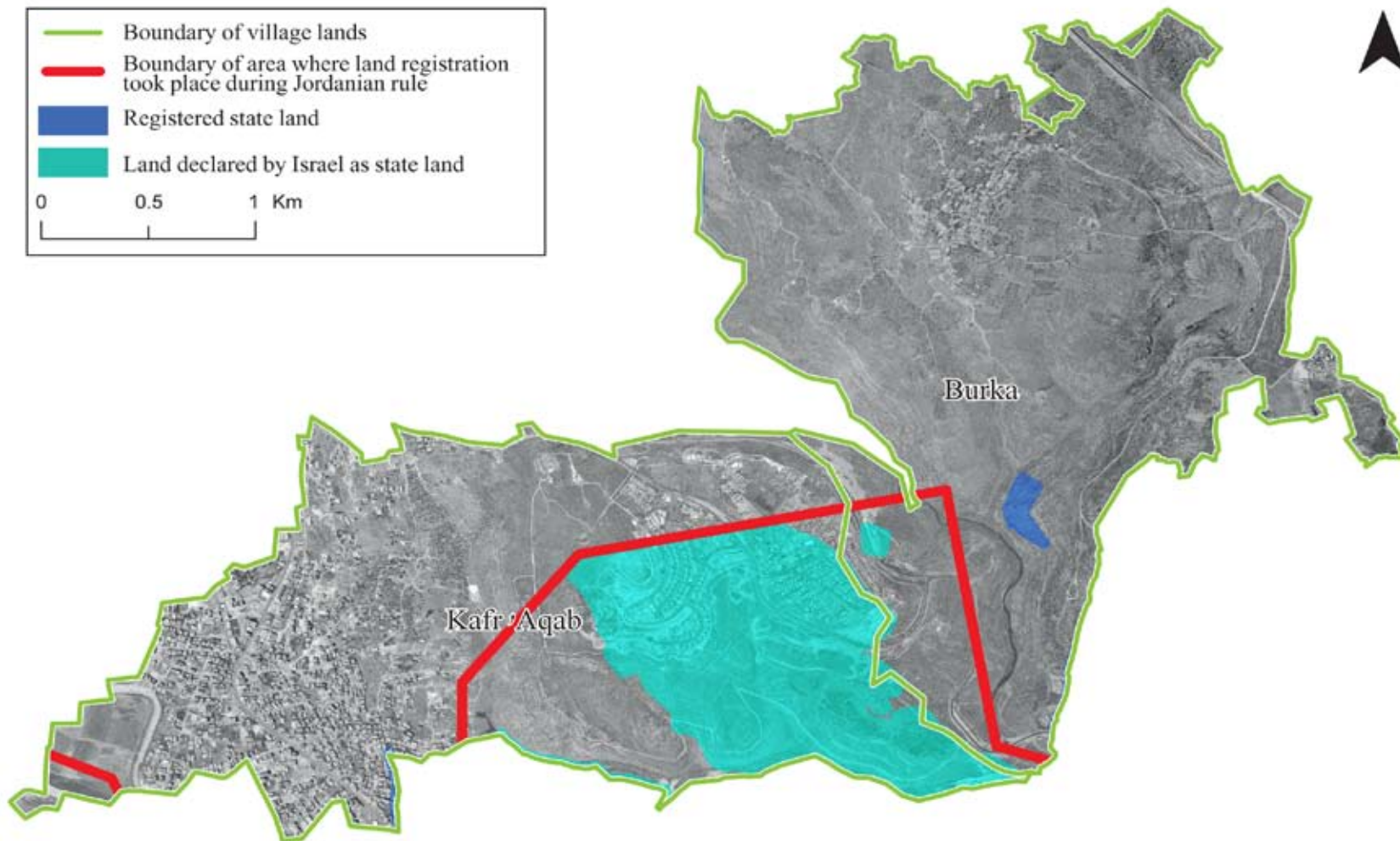
Village name	Total village land area¹⁴³	Registered village land	Registered state land (in parentheses: as a percentage of registered village land)	Unregistered village land	Declared state land (in parentheses: as a percentage of unregistered village land)
'Ein Qinya	2,468	1,238	0 (0%)	1,230	110 (9.4%)
Al Janya, Ras Karkar ¹⁴⁴	13,538	0	0 (0%)	13,538	4,633 (34.2%)
Burka	6,097	5,550	22 (0.4%)	547	20 (3.7%)
Kafr 'Aqab	5,484	3,239	2.4 (0.1%)	2,245	1,415.4 (63%)
Habla	6,472	4,821	9 (0.2%)	1,651	1.5 (0.1%)
Azzun	23,678	1,254	0 (0%)	22,424	3,505 (15.6%)

The table reveals dramatic differences in the amount of land that was classified as government property by Jordan (through land settlements) and by Israel (through declarations of state land). The amount of land declared by the Custodian as state land is several times higher than the areas registered in the land registry as government property in Jordanian land settlements. In Kafr 'Aqab, for example, the Custodian declared as state property 63 percent of the unregistered area, compared with only 0.4 percent of the registered area that was registered in the land registry as state land in the course of Jordanian land settlement undertaken in the village land of the bordering village of Burka (see Map 4). The extent of land declared as

143 The term "village land" refers to the boundaries of the villages in Palestine as defined by the Mandate authorities on maps prepared for administrative purposes, primarily to enable collection of property taxes. These are not boundaries of ownership and in most cases, the village land of a given village includes privately-owned land alongside land belonging to the local authority (such as designated *matruka*) and state land. The figures in this table and in Table 2 concerning the total area of village land are based on a digital map of the boundaries of village lands in the West Bank, which B'Tselem purchased from the Civil Administration.

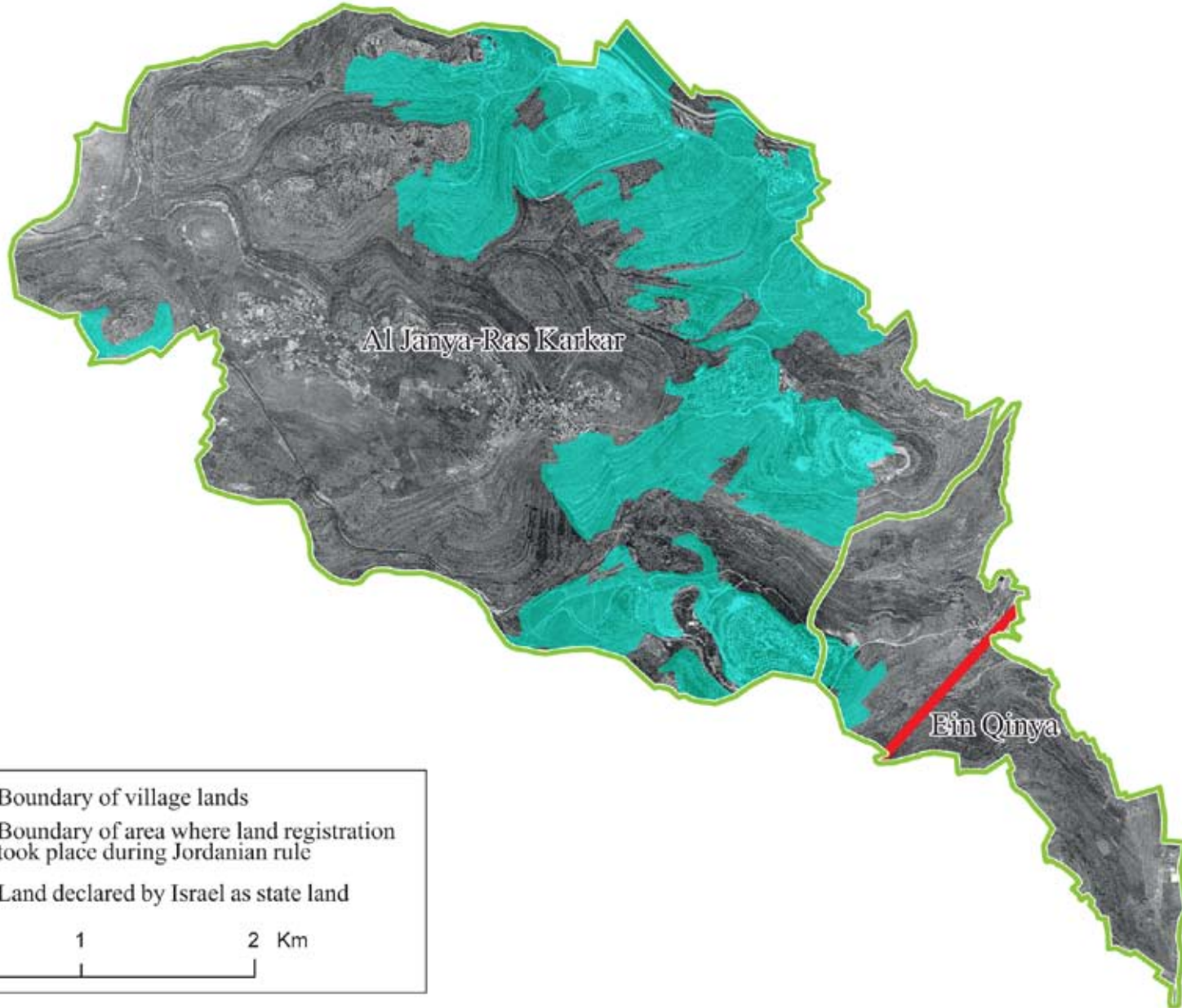
144 The village lands of these two villages are included in one map which was made during the Mandate period. Therefore, we calculated the figures concerning Al Janya and Ras Karkar as if both villages comprised a single land unit.




Map 4 State land in the village lands of Burka and Kafr 'Aqab



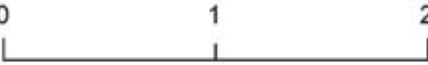
Maps 4-7 are based on digital layers showing the boundaries of village lands in the West Bank, which B'Tselem purchased from the civil administration. The limits of the area that underwent land settlement during Jordanian rule were marked on the basis of a map used by Forman (see footnote 59). Due to inherent inaccuracies in these sources, errors could appear in the maps. In some cases, plots declared as state land appear within the settled area, while some registered state land appears in the unregistered area - apparently due to errors in the digital layer. B'Tselem deleted these erroneous polygons.

Map 5 State land in the village lands of Ein Qinya and Al Janya-Ras Karkar

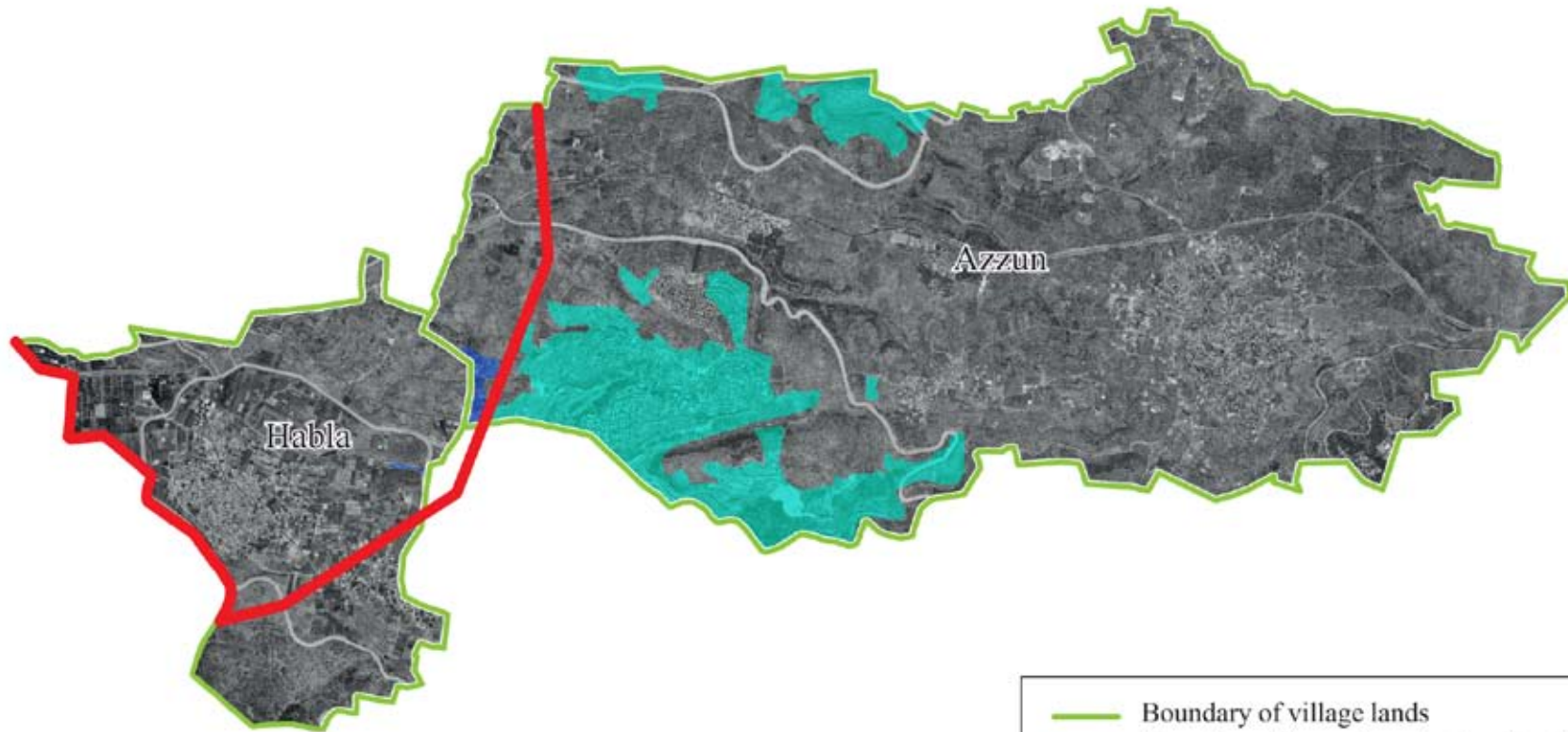


-  Boundary of village lands
-  Boundary of area where land registration took place during Jordanian rule
-  Land declared by Israel as state land

0 1 2 Km



Map 6 State land in the village lands of Habla and Azzun



- Boundary of village lands
- Boundary of area where land registration took place during Jordanian rule
- Registered state land
- Land declared by Israel as state land

0 1 2 Km

government property in Kafr 'Aqab is therefore 157 times greater than the extent of land registered in the land registry as state property in the village land of Burka. Even within the village land of the same village, the area of the unregistered part of the land that was classified as state land by Israel tends to be substantially higher than the percentage of land registered in the land registry as state property in the parts of the village land where land settlement was completed by the Jordanians. For example, in the village of 'Ein Qinya, where some 50 percent of the village land was registered during Jordanian rule, not a single dunam of the village land that underwent land settlement was registered as government property. In contrast, of the other half of the village lands where land settlement was not undertaken, Israel declared 110 dunams (9.4 percent of the unregistered area) as government property (see Map 5).

When the villages concerned are neighboring ones – and certainly in the case of the lands of the very same village – it seems that these dramatic differences are the outcome of a radically different implementation of the local land laws, primarily the Ottoman Land Code. It should be noted that the computerized digital map on which the examination was made has inherent inaccuracies. Therefore, certain inaccuracies and mistakes in the table figures can be expected. Having said this, we crosschecked the figures in the table with maps of the municipal boundaries of the settlements, which were set primarily in line with spatial layout of declared state lands. This crosscheck reinforces the picture arising from the digital map and strengthens the conclusion that the table's figures are reliable.

Indeed, almost all the areas in these village lands, that were declared as government property, were subsequently included within the jurisdiction area of the settlements that were established there. Thus, of the 3,505 dunams of the village land of Azzun that were declared government property, 3,407 dunams (97 percent) were included within the municipal boundaries of Alfey Menashe, Zufin, and Ma'ale Shomron and in the jurisdiction area of the Shomron Regional Council. Only 98 dunams of the village land of Azzun that was declared government property were not included within the municipal area of Israeli settlements. Similarly, of the 4,633 dunams of the village land of Al Janya and Ras Karkar that were declared government property, 4,090 dunams (88 percent) were included within the municipal boundaries of the settlements Talmon and Dolev and in the jurisdiction area of the Mate Binyamin Regional Council.

In addition to the examination of specific villages, we analyzed the results of land settlements carried out by the Jordanians in a whole region: the village lands on the central mountain ridge around Ramallah. The examination included only villages in which land settlement had been completed and all the village land was registered in the land registry. The results are presented in Table 2.¹⁴⁵

145 As with Table 1, here, too, the figures are based on the Civil Administration digital map provided to Dror Etkes, and the digital map of the borders of village lands in the West Bank, which B'Tselem purchased from the Civil Administration. All the reservations stated above regarding the built-in inaccuracies of the digital map and the data based thereon also apply to the figures in Table 2.

Table 2: State Land in Villages near Ramallah that Underwent Land Settlements during Jordanian Rule, in Dunams

Village name	Total village land area	Land registered in the land registry as government property within the framework of land settlement	Registered state land as percentage of total village land area
Khirbet Abu Falah	8,243	1.8	0.1%
Mazra'a ash-Sharqiya	16,653	124	0.7%
Silwad	18,889	167	0.9%
Deir Jarir	32,970	15,436	46.8% ¹⁴⁶
At-Tayba	20,649	3,489	16.9% ¹⁴⁷
Rammun	29,781	12,257	41.2% ¹⁴⁸
Beitin	4,948	1.4	0.1%
Ein Yabrud	11,503	83.4	0.7%
Yabrud	2,375	0	0%
Ein Sinya	2,963	0	0%
Jifna	5,889	11.8	0.2%
Dura al Qar'a	4,225	15.3	0.4%
Surda	3,959	9.3	0.2%
Total	163,047	31,596	19.4%

The above data cover a large and mostly contiguous area with the village lands of several communities (see Map 7). Therefore, it is reasonable to regard them as a representative sample of the amount and scope of state land on the central mountain ridge and its eastern slopes throughout the West Bank.

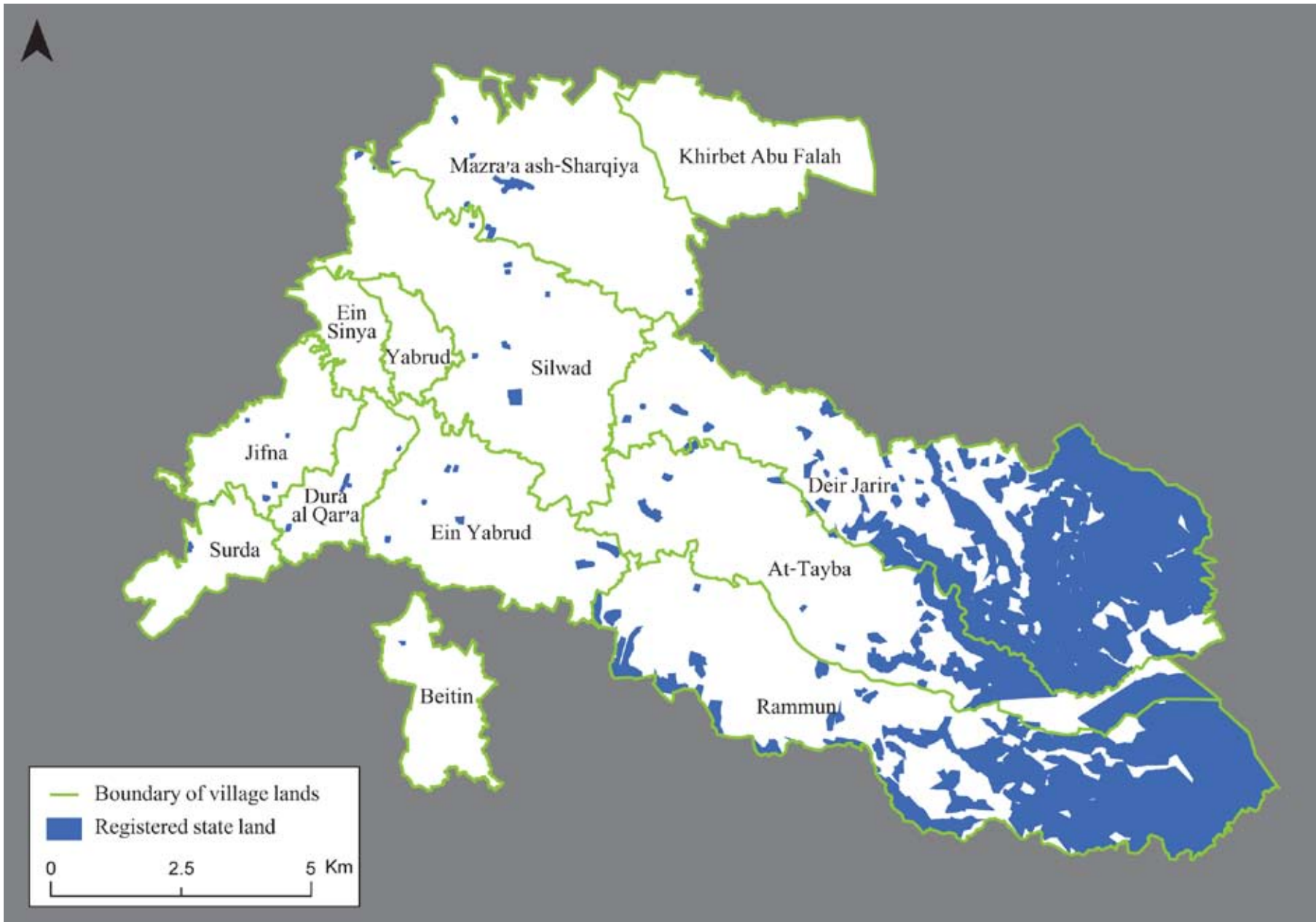
Contrary to Albeck's claim, the amount of land registered as government property in Jordanian land settlements was far from 40 percent. The table shows that in villages whose lands are on the central mountain ridge, almost all village lands were classified in Jordanian land settlements as private property and registered in the land registry in the name of private persons. The amount of land registered as state property in these land settlements ranges from 0 to 0.9 percent of the total village land area. The exceptions are the village lands of Deir Jarir, Rammun, and at-Tayba, where a significant percentage of the total village land was registered as government property. This is so since the land of these villages lies partially or wholly on the eastern slopes of the mountains that descend to the Jordan Valley, where the amount of precipitation does not enable ongoing non-irrigated agriculture. If we ignore these villages, the registered land in the table amounts to 79,647 dunams, of which only 414 dunams

146 Most of the village land of Jarir that is registered as government property lies in the Jordan Valley and on the slopes of the adjacent mountains.

147 Most of the village land of at-Tayba that is registered as government property lies in the Jordan Valley and on the slopes of the adjacent mountains.

148 Most of the village land of Rammun that is registered as government property lies on the mountain slopes descending to the Jordan Valley.

Map 7 Ramallah area: Land registered as state land during Jordanian rule



(approximately 0.52 percent) were registered in the course of land settlements as state land.

Furthermore, contrary to assumptions made by Albeck and her colleagues – according to which uncultivated rocky land is by definition government property – a tour we conducted to the village lands of Ein Yabrud and Silwad showed that many rocky parcels were registered during Jordanian land settlements as private Palestinian property and not as state land.¹⁴⁹

In this context, the comments written in 1979, on the eve of the birth of the declaration policy, by Brig. Gen. (res.) Aryeh Shalev who served in 1974-1976 as military commander of Judea and Samaria, are appropriate: "It must be made clear that rocky terrain is not necessarily state land, both because some such areas are registered to private ownership in areas where land settlement was done, and also according to the Turkish and English lists in areas where such a settlement was not done."¹⁵⁰

We do not know the reasons that led the Jordanian land settlement officer to register these rocky parcels in the name of private persons, but in light of the findings of this report, it is to be assumed that this decision was the outcome of several considerations. One was the existence of patch cultivation in some of these rocky parcels, which under Mandatory case law and Jordanian practice grant the farmer the ownership rights on the entire area of the parcel, and not just on the cultivated pockets of arable land. Another possible reason for registering rocky parcels on the name of private persons was cultivation for the prescriptive period after which cultivation stopped.

It is also reasonable to assume that the registered lands include some designated *matruka*, which was registered in the name of the relevant village council. Since the digital map we used does not distinguish between public land that is not government property and privately owned land, we were unable to estimate what percentage of the land which was registered in land settlements carried out by the Jordanians was classified as designated *matruka*. Furthermore, it could be that some land registered by the Jordanians as state land is actually designated *matruka* land, which under the Jordanian Land and Water Settlement Law (see p. 44) was registered in the name of the state as a trustee for villagers who used the land for grazing and other purposes. Therefore, the table's figures on the amount of state land registered in Jordanian land settlements, especially in villages whose lands slope to the Jordan Valley, might be higher than the actual value, since they may also include designated *matruka* land held by the state as trustee, although it is not government property. One way or the other, there is a great disparity between the results of land settlements made by the Jordanians and the Israeli declaration policy.

149 The tour was conducted on 5 July 2007.

150 Shalev, *Ibid.*, p. 105.

Summary and Conclusions

A few months after release of the ruling in the Elon Moreh case, Attorney Elyakim Haetzni, a resident of Kiryat Arba and one of the leaders of the settlers at the time, wrote an article entitled "The Land Impasse: The Legal Status." In the article, he called on the government to expropriate private Palestinian land for settlement purposes and to pay the landowners for their land. Haetzni concluded that the government's plan to build settlements solely on state land could not be realized:

Again and again, we repeat and emphasize: *on the central mountain ridge (which covers some 4.8 million dunams)¹⁵¹ of Judea and Samaria –excluding the Jordan Valley and the Judean Desert – there is no state land.*

There are a few woods here and there (Karney Shomron, Neve Zuf, Mt. Kabir), and indeed, in the absence of other land, settlements were built there after the woods has been cleared.

Other than this, there are several hundred dunams, scattered around, but nowhere is there enough land for a settlement deserving this name and for future reserves – without expropriating land to create concentrated blocks.¹⁵²

These comments by one of the settlers' leaders accurately reflect land ownership on the ground in the early 1980s. The central mountain ridge and its slopes, which the government designated for the establishment of Israeli settlements, contained almost no state land. To build settlements there, some mechanism was needed to produce additional state land.

In his article, Haetzni also discussed the possibility raised by some government officials of classifying uncultivated land that was not registered in the land registry as state property. Haetzni dismissed this option, noting that "most other lands [those lands that are not registered in the land registry] are registered in property tax ledgers in the name of Arab owners. The government's claims that *miri* rocky land is state land even if private owners paid property tax on them have not yet undergone review by the HCJ... The settlement enterprise... if its legality is to be based solely on this claim (on which the Ministry of Justice relies) will face great danger."¹⁵³

In retrospect, one may conclude that Haetzni underestimated the government's improvisational abilities in the West Bank and the readiness of the HCJ to grant it freedom of action. Since its ruling in the Elon Moreh case, the Supreme Court has not intervened in the steps taken by the government to gain control of West Bank land, and has refrained from ruling on the legality of most of the substantive components of the declaration policy. Several petitions filed with the HCJ have dealt mainly with the

151 Actually, the area of the central mountain ridge is only approximately two million dunams. Haetzni apparently was referring not only to the central mountain ridge, but also to its slopes and other regions of the West Bank, excluding the Jordan Valley and the Judean Desert.

152 Elyakim Haetzni, "The Land Impasse: The Legal Status," *Nekuda*, Issue No. 6, 17 March 1980, pp. 4-6.

153 Ibid.

procedural and administrative aspects of the declaration procedure, and all of them were rejected.

As early as 1981, the HCJ rejected a petition by Palestinians from Tarqumiya against a declaration of state land. The court ruled that "when a dispute arises over the question of whether a given parcel of land is public property or private property, the accepted rule is that the property should be considered public property until the question of ownership is finally decided."¹⁵⁴ The court also rejected the claims of the petitioners against granting military appeals committees the authority to hear appeals against declarations of state land. In reference to these claims, the court ruled that had the military appeals committees not been founded, the residents of the West Bank would have no ability to object to the Custodian's decisions.¹⁵⁵

In another judgment, given in 1986, the HCJ denied a petition by a resident of Beit Ijza against a declaration of state land. As for the procedural aspects of the declaration, the HCJ, the court ruled that, sitting as an appellate court, the HJC would not interfere in the factual findings' of the military appeals committee. On the merits of the case, the HCJ ruled that the Custodian and the appeals committee acted properly in applying the 50-percent rule, according to which the farmer must prove cultivation of at least one-half of the total area of the parcel in order to acquire rights in the land. Therefore, the justices held, the Custodian and the appeals committee applied article 78 of the Land Code and interpreted it "according to its meaning and interpretation from time immemorial." The court reached this conclusion even though the 50-percent rule substantially deviated from the meaning and interpretation article 78 of the Land Code was given in the Mandatory court ruling (which was cited in the Israeli court judgment), and from the practice during the Mandatory period and under Jordanian rule. In ruling as it did, the Israeli court gave the appearance of continuity in the case law, while in fact, dramatically deviating from the case law established by Mandatory courts.¹⁵⁶

The HCJ ended its judgment of the Beit Ijza case with reference to the purpose for which the declaration of state land had been made: the establishment of the settlement of Givon Ha-hadasha. On this issue, the court ruled that "there is no need for us to discuss this issue here, since this question does not relate at all to the issue before us, and in any case, the petitioner has no standing on this question."¹⁵⁷ In making these statements, the court ignored the substantive aspects of local law and the restrictions placed on the occupying power under international law with respect to the use of public land in the occupied territory.

Since the release of these two judgments, very few HCJ petitions have been filed on this issue. The court has clearly indicated it does not intend to intervene in decisions of the Custodian and the military appeals committees, except in extreme cases of serious defects in the administrative procedure. As a result, most of the substantive arguments discussed in this report were not brought before the court, hence the court did not have to rule on them.

154 HCJ 285/81, *Fadil Muhammad Nazer v. Commander of Judea and Samaria et al.*

155 Ibid.

156 HCJ 277/84, *Sabri Mahmud A'rieb v. Custodian of Abandoned and Government Property, Judea and Samaria.*

157 Ibid.

Israel acknowledges that the West Bank is under belligerent occupation and is not part of its sovereign territory. This admission implies acceptance of the obligation to act in accordance with international law, which forbids the occupying power to change the local law in force in the occupied area on the eve of its occupation, unless such a change is necessary for security needs or for the benefit of the local population. The obligation to respect local law refers not only to local legislation, but also to the rulings made by the courts of the states that ruled the area prior to its occupation.

Israel's declaration policy does not meet these requirements. It contradicts the law as interpreted and applied by the British Mandate and the Kingdom of Jordan. This contradiction is evident in three principal aspects:

1. *The type of cultivation that allows a private individual to acquire ownership rights in land.* The Mandate authorities and the Jordanian government considered patch cultivation of rocky land to meet the requirements of article 78 of the Ottoman Land Code. Both concluded that such patch cultivation grants the farmer ownership of the entire parcel. This interpretation of article 78 was also established in a ruling by the Mandatory Supreme Court. In contrast, Israel applied in the West Bank a strict reading of article 78. According to its interpretation, in rocky areas, only cultivation encompassing at least 50 percent of the total area of the parcel will grant ownership rights to the farmer. By changing the interpretation of article 78 of the Land Code, which had been customary in the West Bank before 1967, Israel justified its decision to declare large areas of rocky mountain land that were under patch cultivation as government property, despite the position of the states who ruled the West Bank prior to 1967, who considered these lands to be private Palestinian property. In this case, Israel's interpretation deviated so much from that applied in the area prior to its occupation, that it constitutes a change in the statute itself.

2. *Cessation of cultivation after continuous cultivation for the prescriptive period.* Israel also disregarded the judgments of the Mandatory Supreme Court and of Israel's Supreme Court, whereby a person who cultivated unregistered *miri* land for ten years acquired ownership rights in the land, so that cessation of cultivation afterwards does not prejudice his rights, even if the land was not registered on his name in the land registry. By amending the law, within the framework of a change to the Order Concerning Government Property, Israel created a legal situation in which cessation of cultivation for several years completely nullified the person's rights in the land, even if he or his family had cultivated it for decades before.

3. *Classification of designated *matruka* land as government property.* With respect to designated *matruka* land – primarily grazing land used by residents of a specific village for many years – Israeli declaration policy deviated from the way the states that previously ruled the West Bank had applied the law, and disregarded the binding court judgments. Unlike the situation with *miri* land to which private persons can acquire rights, designated *matruka* is by definition public land assigned for the specific use of members of a particular community and is not government property. Certainly it cannot be declared state land and allocated for the development of settlements. These statutory provisions did not prevent Israeli authorities from declaring designated grazing lands as government property, thereby revoking the public rights of residents of Palestinian communities that had used these lands for long periods of time.

Since the beginning of its rule in the West Bank, Israel has declared hundreds of thousands of dunams as state land. We do not claim that *all* these lands were private Palestinian property. Clearly, declarations of state land *also* included land that according to the law was government property. Indeed, in many cases – particularly of declarations involving *mawat* land in the Judean Desert – it is to be assumed that, had the land undergone land settlement during the Mandate or Jordanian period, some or most of the land would likely have been classified as government property. In contrast, in the central mountain ridge, where most of the land is *miri*, it is to be assumed that only a small portion would have been registered as government property; indeed, this was the result in those villages whose lands underwent land settlement during Jordanian rule.

The analysis we made of several pairs of villages, some of whose lands underwent land settlement, shows that the percentage of land defined as state land in declarations made by Israel was dozens of times greater than the percentage of area registered as government property in Jordanian land settlements. This fact alone suggests that Israel applied the law very differently from the way the Jordanians had applied it. However, this report does not profess to specify the amount of state land that was improperly and illegally declared as government property, but merely points out fundamental problems in the declaration policy and emphasizes the elements in it that contradict local land laws.

The declaration policy therefore has three fundamental defects: it contradicts fundamental relevant provisions of substantive law; it conflicts with the way the states that previously ruled the area applied the law; and it is incompatible with the rulings of the authorized courts that interpreted the law. In many cases, declarations made by the Custodian were not merely technical actions of taking possession of land that was government property anyway. Rather, they involved changing the ownership status of the land, from Palestinian private or designated public property to state land.

The situation is aggravated by the fact that these declarations were made in order to enable Israel to establish settlements in the occupied territory – an action prohibited under international law. Thus, not only were the declarations unlawful, but their motive was also illegal: to prevent Palestinian use of the land and to transfer it to the sole use of Israeli citizens. Even had all the declared state land been government property under the substantive law, the Custodian was not authorized to allocate it for Israeli settlements.



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