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The Legal Implications of Land Registration Procedures Implemented by Israel in East Jerusalem

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The Land Registration Bureau (Tabu), a department within the Israeli Ministry of Justice, has published several announcements over the past year regarding the renewal of land title registration procedures in East Jerusalem.[1] The move to resume land registration procedures in East Jerusalem follows a governmental decision to "reduce socio-economic disparities and advance economic development in East Jerusalem",[2] which designated approximately NIS 50 million (approx. USD$15.5 million) for the registration of land rights in East Jerusalem. The land registration process was initiated by the Jordanian authorities in the 1950s, during the period of Jordanian rule over East Jerusalem, prior to Israel's occupation of the area in 1967. This decision therefore represents a fundamental shift in policy and appears to end a long-standing freeze on the process of settling land rights disputes in East Jerusalem, which has remained in place since 1967.

The instigation and implementation of procedures for settling land rights are sovereign acts that have a permanent impact on the land regime in affected areas. Indeed, the purpose of such procedures is to settle land rights in a definitive manner. Given the clear status of East Jerusalem as Occupied Territory under international law, and the recognition of this status by the vast majority of states, the State of Israel, as the Occupying Power, is constrained under international humanitarian law from taking any action that may permanently alter the status of the territory it occupies, except where such actions may be

[1] There are approximately 360,000 Palestinian residents in East Jerusalem, which is part of the West Bank. The majority hold Israeli residency status, granted by Israel to Palestinians in the area after it occupied, illegally annexed and incorporated it into the Municipality of Jerusalem in 1967.

[2] Governmental Decision #3790, dated 13 May 2018, aims to fulfil objectives set forth in The Basic Law: Jerusalem, Capital of Israel, that "Jerusalem will be given special priority in the activities of the state authorities for the development of Jerusalem in economic and economic matters and in other matters" (Article 4(b) of the Basic Law). For follow-up reports on the implementation of the decision, see Ir Amim at the following link: https://www.ir-amim.org.il/en/node/2508

absolutely required to protect the well-being of the population under occupation. Thus, Israel is prohibited from implementing its recently-announced East Jerusalem land registration procedures, which are in contradiction of this principle. Indeed, as elaborated below, Israel's adoption and implementation of these new procedures appears to be animated not by a motivation to protect the well-being of the population under occupation, as international law requires, but, rather, to further entrench the illegal expropriation of that population's land and resources.[3]

The new land registration procedures raise legal concerns at two main levels:

a. No procedural accessibility for most Palestinians

The nature of the new land registration procedures and the framework in which they are implemented under Israeli law, as imposed on East Jerusalem, are inaccessible to a significant portion of the affected Palestinian population. Therefore, the new procedures are inherently unfair, prejudicial and have clear, serious and permanent implications for the property rights of large numbers of Palestinians.

The first group to be affected are Palestinians who own land in East Jerusalem and who were made refugees in the 1967 War, or otherwise departed, and who currently live outside the West Bank, East Jerusalem and Israel. The second group are landowners who currently reside in the West Bank or Gaza Strip. Landowners who fall into these two groups are denied participation in the registration process, which has been made inaccessible to them. The State of Israel has not taken any measures to make these landowners aware of the existence of the new procedures, despite the fact that they will have a direct impact on their land and property in East Jerusalem. Moreover, Palestinians in these two groups have no access to the relevant Israeli authorities engaged in the procedures, and thus have been specifically excluded from claiming, proving or defending their rights to properties in East Jerusalem that belong to them.

[3] In the Advisory Opinion of the International Court of Justice, dated 9 July 2004, regarding the Separation Wall being built by the Government of Israel, the Court referred, *inter alia*, to the status of East Jerusalem in international law and stated unequivocally that the status of East Jerusalem is Occupied Territory (see paragraphs 78, 89 and 101 of the Advisory Opinion). And in its "Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'" of 5 February 2021, the ICC Pre-Trial Chamber found that, "The Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem" (paragraph 118 of the Decision).

These landowners have a direct interest in any procedure concerning their real estate property in East Jerusalem, and therefore the very fact that they are specifically excluded from these proceedings alone renders them illegal. Denial of access to these land registration procedures for these landowners will irreparably violate their property rights and, ultimately result in the *de facto* confiscation of their property, which will in turn be registered by the State of Israel as Israeli state property, in breach of international law, as detailed below.

b. Changes to Israeli domestic law

For Palestinians living in East Jerusalem, the new land registration procedures are problematic, illegitimate and illegal for the following three main reasons.

1. The registration process relies on the normative framework of Israeli law – which replaced the domestic legal regime that existed in East Jerusalem on the eve of the occupation – contrary to the interests of the Palestinian population, which has a subordinate civil and political status within it. The imposition of Israeli law on East Jerusalem arrived in tandem with Israel's illegal annexation of East Jerusalem, a fact that has significance in terms of both politics and international law, given that almost no state has recognized Israel's annexation of the area. In practical terms, however, it is exceedingly difficult for Palestinian owners of East Jerusalem properties to prove their ownership under Israeli domestic law, and the latter legal regime greatly expands the means by which the State of Israel is able to expropriate Palestinian land by 'acquiring ownership' under Israel's illegal annexation.

Changes brought about by the imposition of Israeli law include the introduction of higher thresholds for demonstrating property rights, e.g. increasing the number of years during which a property owner needs to have cultivated the land in question; denial of the possibility of claiming ownership on the basis of possession without agricultural cultivation; the registration of sparsely-cultivated plots in the name of the state; and altering the forms of evidence that are necessary to prove ownership.[4]

[4] See Alexander (Sandy) Kedar, "Majority Time, Minority Time: Land, nationality and adverse possession law in Israel" *Iyunei Mishpat* 21 (1998) 665-746 (Hebrew); Geremy Forman, "A Tale of Two Regions: Diffusion of the Israeli '50 Percent Rule' from the Galilee to the Occupied West Bank" 34 *Law & Soc. Inquiry* 671 (2009).

These changes in local law violate Section 43 of The Hague Regulations and fail to meet the exception within it of "unless absolutely prevented" – or "necessity", as it is commonly referred to – security-based necessities, the duty of the Occupying Power to discharge its duties under the Geneva Convention, and the necessity to ensure the "orderly government" of the Occupied Territory (Section 64 of The Hague Regulations).

2. Past experience has demonstrated that land registration procedures in East Jerusalem mainly serve Israel's political and economic interests, in particular its settlement construction and expansion in East Jerusalem, which is patently illegal under international law. Land registration procedures have been initiated without the knowledge of affected Palestinian landowners on more than one occasion, and with the involvement of Israel's Custodian of Absentee Property. Palestinian land title holders have thus unexpectedly found themselves in eviction law proceedings instigated by Israeli settlers, as is currently the case in the Sheikh Jarrah and Silwan neighbourhoods.

3. The new registration procedures mandate, in many cases, for the party claiming land rights to obtain certified documents from Jordan or Turkey, something that requires legal resources that the majority of the population in East Jerusalem lacks and cannot afford. Moreover, the lengthy passage of time since Jordan was ousted from Jerusalem (55 years), and since the demise of the Ottoman Empire (over a century), enormously complicates the process of obtaining the documents required under the Israeli legal system. These often-insurmountable barriers give Israel an unassailable advantage in terms of evidence.

c. Extensive land confiscations

An Israeli law with especially far-reaching implications in this context is the Absentee Property Law – 1950 (hereinafter: APL), a notoriously arbitrary, discriminatory, sweeping and draconian law for land confiscation. It was applied to East Jerusalem as part of Israel's unilateral annexation of the area and the assertion of its jurisdiction therein. The APL stipulates that Palestinians who live under Israeli occupation in the West Bank or Gaza Strip, as well as Palestinians who were, or are, nationals or citizens of 'enemy countries' Lebanon, Egypt, Syria, Saudi Arabia, Jordan, Iraq or Yemen, and who owned property in the annexed area, are deemed 'absentees'. Thus these groups of Palestinians were formally designated as 'absentees' under the APL for the mere fact that they own property in illegally-annexed East Jerusalem.

The arbitrariness of the APL and the absurdity of the scenarios to which it applies have led former Israeli Attorney Generals to freeze its application to Palestinian properties in East Jerusalem. For example, in 1968, then-Attorney General Meir Shamgar instructed the relevant authorities not to apply the law to the properties of residents of the West Bank in East Jerusalem. Such was again the case in 2005, when then-Attorney General Menachem Mazuz unequivocally ordered "an immediate halt of the use of the Absentee Property Law for properties in East Jerusalem belonging to residents of Judea and Samaria [the West Bank]."

However, this policy gradually shifted over the years, and the APL has increasingly been applied in the service of the efforts of settler organizations to seize East Jerusalem properties from Palestinians. Then, in 2015, the Israeli Supreme Court formally affirmed the applicability of the APL to properties in occupied East Jerusalem belonging to Palestinians who reside in the West Bank. The court's decision further stated, however, that future seizures of properties by the State of Israel would require the approval of a ministerial committee, in addition to the Attorney General, while also noting that the APL should be activated with respect to East Jerusalem properties owned by Palestinians living in the West Bank only in "the most exceptional circumstances".[5] Needless to say, the State of Israel has not applied the APL to Israeli settlers living in the West Bank, although, formally speaking, they fall under its definition of 'absentees'. This Supreme Court ruling from 2015 did not address the APL's applicability to Palestinians now living outside the West Bank, East Jerusalem and Israel, or to those living in the Gaza Strip.

In practice, where the APL is implemented as part of a land registration proceeding in East Jerusalem, its operation typically works against the interests of Palestinian rights holders, in violation of their rights to property, equality, and dignity.

Based on the foregoing analysis, the outcome of the recent resumption of Israel's East Jerusalem land registration procedures will inevitably be the expropriation of Palestinian land in East Jerusalem on a large scale, and the registration of these private properties as public land owned by the State of Israel.

These land registration procedures, and the drastic consequences of their implementation, patently violate international humanitarian law and international human rights law, to the

[5] Civil Appeal 2250/06, *Custodian of Absentee Property et al. v. Daqaq Nuha et al.* (decision delivered 15 April 2015).

extreme prejudice of Palestinian residents of East Jerusalem, the West Bank and the Gaza Strip, as well as other Palestinians residing outside these territories. These procedures will fundamentally alter the character of East Jerusalem, both for those living in the Occupied Territories and for those who have become refugees or otherwise moved outside these territories. Among other breaches, these land registration procedures:

a. Violate Section 55 of The Hague Regulations, which provides that the occupying power "shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."
b. Contravene the obligation stipulated in various articles of the Geneva Conventions IV and The Hague Regulations not to harm the property of the civilian population except in case of immediate military necessity, which does not pertain here.
c. Violate Section 46 of The Hague Regulations, which requires an occupying power to respect the right to property and expressly prohibits the confiscation of private property.
d. Fall under the definition of 'plunder' as the term was used in the Nuremberg trials, for example, in the case of the *US Military Tribunal at Nuremberg, US v. Alfried Krupp et al.* In a reference to the expropriation of assets after the cessation of fighting in World War II, the Court stated, *inter alia*, that the expropriation of private property violated Articles 43 and 46 of the Hague Regulations.[6]
e. Violate Article 147 of the Fourth Geneva Convention of 1949, which provides that the extensive appropriation of property from the protected population constitutes a grave breach of the Convention.
f. Constitute a war crime: extensive appropriation of property not justified by military necessity amounts to a war crime under Article 8(2)(a)(iv) of the Rome Statute (Rome Statute) establishing the International Criminal Court.

[6] US Military Tribunal at Nuremberg, *US v. Alfried Krupp et al.* pp. 1351-1352. Available at the following link: http://werle.rewi.hu-berlin.de/KRUPPCase%20Judgment.pdf