



Position Paper

**The State of Israel's Use of the 'Good Faith' to Confiscate Private Palestinian
Land in the Occupied West Bank – in Bad Faith**

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Introduction

The Israeli government uses many legal tools to confiscate land and build and expand settlements in the occupied West Bank. This paper discusses a new practice to retroactively legalize the confiscation of private Palestinian land: the exploitation of the principle of 'good faith' in law – in bad faith.

While Israel has been confiscating private Palestinian land for decades, constructing settlements and other civilian and military infrastructure upon it, in recent years it has been taking steps to legalize these confiscations – under Israeli domestic law – with a view to keeping it in permanent Israeli possession. The process of 'legalization' takes several forms, such as outright confiscations, "expropriation for public purposes", and the Settlements Regularization Law – 2017, according to which Israeli settlements built on private Palestinian land in the West Bank can be 'regularized' or rendered 'legal' under Israeli domestic law.

This paper focuses on the state's deliberate exploitation of the 'good faith' argument from contract law (among other areas of law). In these cases, the State of Israel transferred private Palestinian land to the World Zionist Organization (WZO), a quasi-governmental agency acting on the state's behalf. Rather than returning the land to its owners, however, the state made the claim that it did not know that the land was held in private hands, and thus that it had acted in 'good faith' in transferring the land in question, in order to retroactively legalize the confiscation. In these cases, the state is deliberately co-opting the concept of 'good faith', typically intended to protect private parties to contracts. Indeed, here the state is acting in bad faith: it has deliberately seized private Palestinian land as part of its open but illegal policy of settlement construction and expansion. It has acted in a dishonest and disingenuous manner by exploiting a legal exception that was designed to protect ordinary individual parties to contracts, and not state entities or actors who are, as in this case, transferring land between themselves. It has, moreover, done so while committing serious violations of international humanitarian law (IHL) and international human rights law, including

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breaching the basic right to property of Palestinians in the West Bank, as protected persons living under Israeli occupation.

The state's resort to the doctrine of 'good faith' in these cases constitutes a deliberate attempt by the AG to relieve the "Custodian of Governmental Property" in the West Bank (hereinafter: the Custodian) of his responsibility towards the Palestinian population in the West Bank under international law. Where the Occupying Power *is* obliged to act in good faith is in its duty to administer the occupied territories in accordance with its international obligations, including those stipulated in IHL, as well as the interests of the Occupied Population; instead, however, it is acting in the interests of the settlers, who are living in the territory illegally.

Article 5 of Military Order 59: "In Good Faith"

The state invokes the 'good faith' exception via Article 5 of *Military Order 59 Concerning State Property (Judea & Samaria) (1967)*, which states that:

"Any transaction made in good faith between the Custodian of Government Property and any other person in any property which the Custodian thought at the time of transaction as governmental property, shall not be disqualified and shall be valid even if it is proven that the property was not governmental at the time."

There are no clear written procedures to govern the process of activating Article 5; the activation of Article 5 is generally initiated by the Attorney General (AG), and in some cases by the settlers themselves or their representatives, and their request is subsequently backed by the AG. There is also no specifically-designated process of appeals. While regular legal procedures that govern appealing against decisions by lower courts apply, the affected Palestinian landowners in some cases are not even aware that the process is taking place, since they are not notified and are not included in the initial legal procedure.¹ The direct result of the activation of Article 5 is the confiscation of privately-owned Palestinian land in the OPT for the benefit of settlements and settlers, in clear violation of basic tenets of IHL.

Article 5 and the Settlements Regularization Law

¹ Civil Case (Jerusalem) 41998-04-16, *Shai Katzir v. A'Li Zahav Ltd.*; Civil Case (Jerusalem) 5493-01-17, *Orly Ashkenazi v. The Ministry of Defence*.

The 2017 *Law for the Regularization of Settlement in Judea and Samaria* establishes a mechanism through which illegal Israeli settlements built on privately-owned Palestinian land in the West Bank can be retroactively ‘regularized’ or ‘legalized’ under Israeli domestic law. In response to petitions submitted to the Israeli Supreme Court challenging the constitutionality of the Law,² and in a separate opinion submitted to the Court in November 2017, the AG supported the annulment of the law on the ground that it has a sweeping effect and is disproportionate.

However, the AG simultaneously expressed what he saw as a need “to provide a meaningful response to this problem [the plight of settlers whose homes are not located on state land], in cases in which innocent settlers were caught up in situations that were not to their advantage, is a proper purpose.”³ He cited a number of other legal tools at the state’s disposal that, in his view, enable the ‘authorization’ of settlements on privately-owned Palestinian land that was transferred to settlers in ‘good faith’. One of these tools is Article 5 of *Military Order 59 Concerning State Property*. In the past year, the ‘good faith’ doctrine has been invoked in at least four cases, and the use of this legal tool is currently being challenged before the Israeli Supreme Court.⁴

According to the AG, the so-called “authorization agreements” for settlement development between the Custodian of Governmental Property in the West Bank and the WZO on privately-owned Palestinian land will be assessed based on the ‘good faith’ provision in Article 5 of Military Order 59. If such “good faith” is found to exist, then the WZO’s ‘reliance interest’ overrides the right to property of the Palestinian owner, in the AG’s view. In such circumstances, the AG posits that the property would no longer be bound by any restrictions on further transactions.

The relationship between the Custodian and the WZO from the perspective of international law

Under international law, both the Custodian of Governmental Property and the WZO operate as ‘state actors’, or as bodies that act on behalf of the state. Both perform functions that serve Israel, as the Occupying Power, and the overall regime of occupation. For decades, the WZO has operated and continues to operate as a ‘settling body’ in the West Bank on behalf of the Israeli government,

² Including a petition submitted by Adalah, together with the Jerusalem Legal Aid Center and Al Mezan Centre for Human Rights, on behalf of on behalf of 17 Palestinian West Bank village councils. HCJ 1308/17, *Silwad Municipality, et. al v. The Knesset, et al.* (case pending).

³ Article 5 of the AG response to HCJ 1308/17, *Silwad Municipality, et. al v. The Knesset, et al.* dated November 2017.

⁴ HCJ 419/14 *Silwad Municipality v. Ministry of Defence* (pending). Note that Adalah's request to submit an amicus opinion in this case was denied by the Supreme Court in May 2019. See also CA 7668/18 *Salhah v. Etzik Angel* (pending).

through its designated Settlement Division. According to a legal opinion penned by the Deputy Attorney General in 2015, a significant portion of land in the West Bank has been allocated to the WZO's Settlement Division by the Custodian.⁵ The Settlement Division allocates properties to Israeli settlers and oversees the registration of these properties. In this area, therefore, the functions performed by the Settlement Division in the West Bank are core governmental functions,⁶ and the WZO's settlement work in the West Bank is carried out via an official delegation of governmental authorities, under Israeli law.⁷ Moreover, the entire budget of the Division is covered by public funds.⁸

Accordingly, the WZO is regarded as a "dual body" by the Supreme Court, and "a high-level, major public institution".⁹ According to the WZO, the Settlement Division functions as "part of the governmental framework and not a private body".¹⁰ Furthermore, the Supreme Court has determined that, in the case of such a delegation of governmental authority, the Israeli government continues to bear responsibility for the exercise of this authority even *after* its delegation.¹¹

Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (hereinafter: DARS),¹² part of the body of customary international law, both the Custodian (under Article 4 of the DARS), and the WZO (under Article 5 of the DARS), are considered state entities liable for any wrongful acts. Article 5 of the DARS states that:

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."¹³

⁵ Dina Zilber, An opinion by the Deputy Attorney General (consultation), 2015. "This is not the way to build a wall: Anomalies have accumulated in the connection between the Settlement Division and the State and the necessary amendments," pp. 4-5. On file with Adalah (Hebrew).

⁶ Ibid.

⁷ The status of the World Zionist Organization was recognized in two main Israeli laws: Candidates for Agricultural Settlement Law - 1953, which establishes the Zionist Organization as a settling body; and The World Zionist Organization – Jewish Agency (Status) Law - 1952, which also grants special quasi-governmental status to the WZO. In 2015, The World Zionist Organization – Jewish Agency (Status) Law was amended in 2015, with the addition of Article 6B(b)(1), which authorizes the government to delegate its powers to the World Zionist Organization in matters of settlement.

⁸ HCJ *Galon v. The Likud Party the 20th Knesset* (decision delivered 29 June 2015).

⁹ HCJ 9518/16 *Harel v. Israeli Knesset* (decision delivered 5 September 2017), pp. 30, 37.

¹⁰ Id., p. 16.

¹¹ Id., p. 26.

¹² Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, available at:

http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

¹³ As mentioned in the explanatory notes to article 5, it "deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise

Article 8 of the DARS further extends an act of state under international law to include, “the conduct of a person or group of persons [...] if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

Under the circumstances, the Custodian, as an agent of the state, cannot rely on the doctrine of good faith under Article 5 in order to validate acts that entail violations of international law. In the Attorney General’s view, the alleged ‘reliance interest’ of the WZO or of other bodies that promote settlement building outweighs the interest of Palestinian landowners, despite the fact that they are protected persons under IHL and have a protected right to property.

The relationship between the Custodian and the WZO cannot limit the applicability of international law, and thus the “authorization agreements” cannot sanction the confiscation of private Palestinian land. As long as these agreements infringe upon the protected rights of the Palestinian population, the results must be held up to the standards of international law.

Additional violations of international law

In addition to the violations noted above, the application of Article 5 of Military Order 59 also violates Palestinians’ rights to dignity and property, as protected by IHL, as well as the principle of the undisputed sovereignty of the occupied people, and Israel’s obligation to protect the interests of the protected population. These violations include: the right to property and the prohibition under Article 46 of the Hague Regulations on the expropriation of private property, as well as Article 52 of the Hague Regulations; Article 49 of the Fourth Geneva Convention, prohibiting the transfer of civilian population of the Occupying Power to the Occupied Territory, which is also considered a war crime under the Rome Statute of the International Criminal Court (Article 8 (2) (b) VIII) and part of

governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.”

the ICC's preliminary examination concerning the OPT;¹⁴ the principle of temporariness of occupation; and the principle of the inalienable sovereignty of the occupied people, which is one of the pillars of the laws of occupation and constitutes the basis for the limitations on the powers of the Occupying Power.

Call to the International Community

Adalah calls on the international community to urge the Israeli government to fulfill its obligations under international law and to cease its confiscation and annexation of private Palestinian land in the West Bank, including via the disingenuous use of the principle of 'good faith' in an attempt to retroactively legalize the confiscation process; outright confiscations, including for the "wellbeing of the Israeli settler community in the West Bank"; "expropriation for public purposes"; and the application of the 2017 Settlements Regularization Law.

¹⁴ On 20 December 2019, the ICC's Chief Prosecutor made an announcement that Israel has been and is continuing to commit war crimes in the West Bank and in the Gaza Strip, and that, in the opinion of the Prosecution, potential cases would be admissible before the ICC. The Chief Prosecutor additionally filed a brief to the ICC's Pre-Trial Chamber to request a ruling on the issue of jurisdiction, in which it is stated that, "There is a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, inter alia, to the transfer of Israeli civilians into the West Bank since 13 June 2014. The Prosecution has further concluded that the potential case(s) that would likely arise from an investigation of these alleged crimes would be admissible pursuant to article 17(1)(a)-(d) of the Statute." Para. 95 of Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 December 2019, ICC-01/18-9, Situation in the State of Palestine, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-9>