

An aerial photograph of the Ofra settlement, showing a cluster of yellow buildings with red roofs situated on a hillside. The surrounding landscape is arid and rocky, with sparse vegetation. In the foreground, there is a large, open field with scattered trees and a dirt road. The sky is clear and blue.

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# The Ofra Settlement

## An Unauthorized Outpost

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## Introduction

Ofra, the first settlement that was established by the Gush Emunim movement,<sup>1</sup> is viewed by many as the flagship of the settlement enterprise in the West Bank. The special circumstances of its founding and the political significance of building a settlement in the heart of a densely-populated Palestinian area, some 24 kilometers east of the Green Line, among other things, gave Ofra this status.<sup>2</sup> Although Ofra is one of the most blatantly ideological settlements, its members have managed to successfully integrate into Israeli society, and many political and ideological leaders of the settler population have established their homes there. In the words of Idith Zertal and Akiva Eldar, "Ofra..., which was established in trickery and on false pretexts, flourished into the heart of the Israeli consensus because of its respectable appearance, the settlers' flagship institutions that were established there, and the mellifluous discourse of some of its better-known inhabitants."<sup>3</sup>

However, this respectable facade conceals a problematic reality. As this report will show, some 60 percent of the built-up area of Ofra lies on land that is registered to Palestinians in the Land Registry. In addition, an area of jurisdiction has never been defined for Ofra, nor has a detailed outline plan been approved for it. Thus, the hundreds of housing units existing in Ofra were built without permits and in violation of the planning and building laws effective in the West Bank. Based on criteria adopted by the government of Israel in 2005, these facts render Ofra the largest unauthorized outpost in the West Bank.

In July 2007, *Ha'aretz* reported that "almost every third house in Ofra is built on privately-owned Palestinian land."<sup>4</sup> Almost a year later, the newspaper quoted Vice-Prime Minister Haim Ramon as commenting that "all 450 houses of Ofra... are built on privately-owned Palestinian land."<sup>5</sup> Claims of this kind – precisely because of their sweeping and inclusive nature – do not give a complete picture of the legal

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1. Hagai Segal, *Dear Brothers: History of the Jewish Underground* (Keter Publishing, 1987), 34 [in Hebrew]. The Gush Emunim movement (Bloc of the Faithful), was founded in 1974 by Israeli settlers who claim a divine Jewish right to the West Bank and the Gaza Strip.

2. Gershon Shafat, a member of Gush Emunim, wrote that "Ofra symbolized for us the breakthrough to the Beit El and Samaria mountain ridge. Its location in the heart of the Arab villages north of Ramallah had great political significance, in that it deviated from the settlement conception that lay at the foundation of the Allon Plan." Gershon Shafat, *Gush Emunim: The Story Behind the Scenes* (Beit El Library, 1995), 160 [freely translated]. See, also, Yehiel Admoni, *A Decade of Discretion: Settlement beyond the Green Line 1967-1977* (Israel Galili Institute for the Study of Defensive Power – Yad Tabenkin/ Hakibbutz Hameuchad, 1992), 150 [in Hebrew].

3. Idith Zertal and Akiva Eldar, *Lords of the Land: The War over Israel's Settlements in the Occupied Territories, 1967-2004* (Nation Books, 2004), 33.

4. Akiva Eldar, "Demolition by Rapid Procedure," *Ha'aretz*, 3 July 2007.

5. Akiva Eldar, "Ramon: All Houses of the Ofra Settlement were Built on Privately-Owned Palestinian Land," *Ha'aretz*, 8 April 2008.

failures pertaining to Ofra. The present report provides a detailed analysis of the legal status of the built-up area of Ofra, and, as such, is the first to address this issue regarding the built-up area of an entire settlement.

The point of departure for the following discussion is that all the Israeli settlements in the West Bank are illegal under international humanitarian law. Over the years, Israeli governments have ignored this prohibition in choosing to establish settlements. However, they have always declared their commitment to complying with the local law that applies in the West Bank, which, they claim, lays out different principles.

The objective of the report is to put this declaration to the test. Accordingly, whereas previous reports by B'Tselem have addressed the legality of settlements under international humanitarian law, this report examines the legality of Ofra under the local law that applies in the West Bank, a combination of the Jordanian legislation, which is still in effect in the West Bank (hereafter: "the statute"), and the orders issued by the Israeli military commander (hereafter: "the military legislation").

Testimonies given to B'Tselem indicate that, in recent years, settlers and the army have imposed harsh restrictions on access of Palestinian farmers to their land nearby Ofra, which controls hundreds of hectares in addition to its built-up area.<sup>6</sup> However, the report focuses on the built-up area and only briefly discusses the extensive areas of farmland nearby.

The report opens with a short discussion of the illegality of all Israeli settlements under international humanitarian law, followed by a short overview of Ofra's history and of the settlement's nature and characteristics today. The second, and major, part examines various questions relating to the settlement's legality under the local law.

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6. For an extensive discussion on this subject, see B'Tselem, *Access Denied: Israeli Measures to Deny Palestinians Access to Land around Settlements* (September 2008), especially pp. 35-38, which deal with Ofra.

## The settlements under international law<sup>7</sup>

International humanitarian law prohibits an occupying power from transferring its civilian population to occupied territory. The prohibition applies not only to the expulsion or forced transfer of civilians, but also to governmental support and encouragement of their relocation to the occupied territory. This prohibition is absolute and its breach cannot be justified under any circumstances.<sup>8</sup>

In addition, one of the fundamental principles of international humanitarian law is the temporary nature of occupation, from which is derived the prohibition on creating permanent facts in occupied territory. Based on this principle – which Israel accepts, at least declaratively – the occupying power is restricted in its use of land in the occupied territory.<sup>9</sup> Thus, the occupying power is forbidden to confiscate privately-owned land for its own purposes, and is, at most, allowed to seize it temporarily for military purposes. Regarding publicly-owned land, the occupying power must hold it in usufruct, on behalf of the sovereign or the public, and is not allowed to alter its character. Permanent changes in the occupied territory are permissible only if done, in accordance with the local law, to benefit the local population or for clear security reasons.<sup>10</sup>

It is hard to conceive of an activity that is not included in these exceptions and that creates permanent facts on the ground more than building settlements. Yet there are now 121 settlements in the West Bank and 12 settlements in territories that Israel annexed and added to Jerusalem's area of jurisdiction, all officially recognized by the State of Israel. In addition, there are some 100 settlements located throughout the West Bank that the Israeli authorities do not officially recognize (terming them "unauthorized outposts"), but nevertheless provide most of them with various services. According to the Israeli Central Bureau of Statistics, the settler population in the West Bank and in the areas annexed to Israel is currently almost half a million persons.

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7. For an extensive discussion on this subject, see B'Tselem, *Land Grab: Israel's Settlement Policy in the West Bank* (May 2002), 37-44.

8. See Article 49 of the Fourth Geneva Convention Relating to the Protection of Civilian Persons in Time of War. See, also, International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2005.

9. For example, in response to the petition filed by residents of Bil'in against the decision of the Israeli Civil Administration to approve a detailed plan for a new neighborhood in the settlement of Modi'in Illit, the State Attorney declared that, "during the years of the military government in the area, the authorities in the area were required to maintain a delicate balance between the temporary nature of the belligerent occupation regime in the area and the status of Israeli civilian communities in the area." HCJ 1526/07, *Ahmad 'Issa 'Abdullah Yassin and Sixteen Others v. Head of the Civil Administration et al.*, Supplemental Response on behalf of Respondents 1-5, 5 July 2007.

10. See HCJ 393/82, *Jam'iyyat Iskan al-Mu'alamoun al-Mahddudat al Mas'uliyah v. Commander of IDF Forces, Piskei Din* 37 (4) 785, 794.

Over the years, Israel's various governments have initiated, approved, planned, and funded the establishment of the vast majority of settlements in the West Bank and have created a variety of financial incentives to encourage Israeli civilians to move there. When the initiative to build certain settlements came from non-governmental bodies or private entities, the state took part in building and developing them, too, even when this contradicted its professed policy.

Although the settlers in the West Bank do not live inside Israel's sovereign territory, they enjoy the same rights given to Israeli citizens who live within the Green Line. To enable this situation, Israel has established a legal and bureaucratic system whereby the settlements and their residents function as civilian enclaves inside the occupied territory, which itself is under a military regime.<sup>11</sup>

The existence of the settlements directly and indirectly infringes a long list of human rights of Palestinians. Among them are the right to equality, the right of property, the right to an adequate standard of living, the right to housing, the right to gain a livelihood, and the right to freedom of movement.<sup>12</sup>

Israel is obligated to dismantle all the settlements in the West Bank, including those recognized by the government as legal under the local law. This obligation derives from the severe and ongoing violation of Palestinians' human rights resulting from their existence and from the prohibition on the establishment of settlements elaborated in international humanitarian law.

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11. B'Tselem, *Land Grab*, 65-69.

12. *Ibid.*, 41-44.

## Ofra: Past and present

Ofra was established within the context of an ongoing struggle between the Gush Emunim movement, which was founded in February 1974, and the Israeli Labor government, which opposed establishment of settlements on the Samaritan mountain ridge that was densely populated by Palestinians.<sup>13</sup> Previous attempts to establish settlements in the northern West Bank had failed, as the Israeli army had removed the settlers. In light of this, Hanan Porat and Yehuda Etzion, two of the movement's leaders, decided to try a different tactic: rather than directly confronting the government, carrying out settlement out cunningly and with no media coverage.

In 1974, the army began to construct a base on Ba'al Hatzor Mountain, northeast of Ramallah, on village lands of Silwad. In December 1974, Porat and Etzion convinced the building contractor, Zalman Barashi, who was in charge of fencing the base, to hire a group of Gush Emunim members. According to Hagai Huberman, "there was now a possibility to sneak into Samaria 'through the back door,' by belonging to a work group that was building the base on Ba'al Hatzor Mountain."<sup>14</sup>

On 20 April 1975, after five months of traveling daily to Ba'al Hatzor Mountain and back, the workers from Gush Emunim did not return to Jerusalem when the day's work was over, but remained in the abandoned houses of the Jordanian 'Ein Yabrud army base, some three kilometers southwest of the mountain.<sup>15</sup> The same evening, Porat met with the defense minister at the time, Shimon Peres, and asked him not to evict the settlers. Peres agreed, provided that the site be considered a "work camp" and not a "community," and with the understanding that the state would not allocate any budget for it. In other words, "The IDF will neither help them – nor hinder them."<sup>16</sup>

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13. Zertal and Eldar, *Lords of the Land*, 30-33. It should be mentioned that the government supported the settlement enterprise during this period, too, but restricted it to areas that it perceived as having strategic and national importance for defense, such as the Jordan Valley and the Etzion Bloc.

14. Hagai Huberman, "Ofra – From Work Village to Recognized Community: The Victory of Quiet Action," in Avraham Shvut (ed.), *Gaining the Mountain: The Renewed Jewish Settlement in Judea and Samaria*, (Jerusalem: Beit El Library and Judea and Samaria Academic College, 2002), 61 [freely translated, in Hebrew].

15. Hagai Segal, *Dear Brothers*, 26-35; Hagai Huberman, *ibid.*, 62; Yehuda Litani, "Ofra on Ba'al Hatzor is not a Work Camp but a Community," *Ha'aretz*, 15 July 1975; Yehuda Litani, "Ofra – From 'Night Lodging' to Permanent Community," *Ha'aretz*, 29 December 1976; Hemdat Shani, "From the History of the Ofra Community," Ofra settlement website, available at [www.muni.tik-tak.co.il/web/about/index.asp?CodeClient=1350&CodeSubWeb=0&id=692](http://www.muni.tik-tak.co.il/web/about/index.asp?CodeClient=1350&CodeSubWeb=0&id=692) [in Hebrew].

16. Huberman, "Ofra – From Work Village to Recognized Community," 62.

The government's silent consent was exploited by Gush Emunim, which brought more settlers to the site and named it Ofra. In December 1975, the Defense Ministry recognized Ofra as "a workers' camp for purposes of regional defense," and approved connection of the buildings on the site to the electricity grid.<sup>17</sup> Shortly afterwards, Peres visited the site and stated that, "the time has come to stop this charade about it being a work camp" and that Ofra should be given the official status of a community. These comments appear to have been made with the approval of then-Prime Minister Yitzhak Rabin.<sup>18</sup> However, official recognition of Ofra as a community was given only following the political revolution in Israel, with the ascendancy of the Likud government in 1977.<sup>19</sup>

Ofra set an important precedent for the settlers. As the first settlement in the northern West Bank, it broke "the barrier that blocked settlement attempts in the heart of the Palestinian population in the West Bank."<sup>20</sup> It was also a tactical victory for quiet, inconspicuous action that focused on establishing facts on the ground.<sup>21</sup> This tactic was subsequently used again and again to establish settlements in opposition to the government's professed official position.<sup>22</sup>

Thirty-three years after it was founded, Ofra is well established and home to some 2,700 residents.<sup>23</sup> Over the years, the built-up area of the settlement has grown, from the abandoned buildings of the Jordanian army base to extensive areas beyond it. Ofra now has two built-up areas joined by roads: the northern neighborhood, which includes the houses of the Jordanian army base and adjacent lands, and the southern neighborhood, which was established southeast of the Jordanian base (see map).

Ofra's residents enjoy developed local services: a day-care center, several kindergartens, three schools, a field school of the Israeli Society for the Protection of Nature, women's religious schools, various public institutions, businesses, and light industry.<sup>24</sup>

Ofra is registered as a cooperative society, an Israeli legal-organizational entity that provides many advantages. Cooperative societies are defined as private

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17. Ibid., 64.

18. Zertal and Eldar, *Lords of the Land*, 39-40.

19. Huberman, "Ofra - From Work Village to Community," 66.

20. Zertal and Eldar, *Lords of the Land*, 32-33.

21. Ibid., 36-37.

22. See Talia Sasson, *(Interim) Report on Unauthorized Outposts* (Jerusalem, 2005), 24-25 [in Hebrew].

23. As of 30 June 2008, according to the Israeli Central Bureau of Statistics. See [www.cbs.gov.il](http://www.cbs.gov.il).

24. See the settlement's website: [www.muni.tik-tak.co.il/web](http://www.muni.tik-tak.co.il/web).



bodies, and the public is not entitled to inspect their documents and files.<sup>25</sup> In addition, registration of a community as a cooperative society enables its members to establish strict conditions for membership, thus preventing the entry of new residents who do not share the community's ideology.

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25. Response of 23 August 2007 from Raphael Ben Zikri, senior supervision coordinator in the Department of Cooperative Societies, Ministry of Industry, Trade and Labor, to Nir Shalev, rejecting the latter's request to inspect the file of the Ofra Cooperative Society in the office of the Registrar of Cooperative Societies, in Jerusalem.

## Ofra from the perspective of the local law

In March 2005, the government of Israel adopted the opinion it had commissioned from Attorney Talia Sasson, former head of the Special Tasks Department in the State Attorney's Office, regarding unauthorized outposts in the West Bank.<sup>26</sup> In doing so, it set, for the first time, detailed criteria for examining the legality of Israeli settlements in the West Bank according to the local law that applies in the Occupied Territories.

The mandate given to Attorney Sasson did not include reference to the relevant provisions of international humanitarian law, which prohibit establishment of settlements in occupied territory. Consequently, neither her recommendation nor the government's decision relate to this body of law. Referring only to the narrow limitations of the local law masks both the illegality of all the settlements under international humanitarian law and the fact that their existence severely violates the human rights of Palestinians in the West Bank.<sup>27</sup>

Despite these reservations, the present report puts the government of Israel to its own test and examines the legality of Ofra only from the perspective of the local law – a combination of the Jordanian legislation and the orders issued by the Israeli military commander.

According to the position that the government of Israel adopted, a settlement is legal under local law only if it meets each and all of the four criteria that Sasson specified in her opinion:

1. the Israeli government issued a decision to establish the community;
2. the military commander issued an order defining the community's area of jurisdiction;
3. the community has a valid, detailed outline plan lawfully approved by the planning authorities in the Civil Administration;
4. the community was established on state land and/or on land that was purchased by Israelis and registered to them in the Land Registry.<sup>28</sup>

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26. Cabinet Decision No. 3376 – Opinion of Attorney Talia Sasson on the Subject of Unauthorized Outposts, 13 March 2005.

27. B'Tselem, *Land Grab*, 41-44.

28. Talia Sasson, *(Interim) Opinion*, 13-14, 19-20.

## 1. Government decision

In 1975, when the first settlers of Ofra grabbed the land, no government decision had been made to establish the settlement. Even after the settlers had established facts on the ground, the government only authorized the establishment of a work camp on the site, not a permanent community. However, on 26 July 1977, the Ministerial Committee for Settlement, which was so authorized by the government, recognized Ofra as a civilian community.<sup>29</sup> Therefore, Ofra meets the first criterion adopted by the government of Israel.

## 2. Area of jurisdiction

In response to B'Tselem's request made under the Freedom of Information Law, the spokesperson of the Civil Administration wrote that "no area of jurisdiction has been defined for Ofra, which is one of the communities of the Mateh Binyamin Regional Council in accordance with the schedule to the Order Concerning Administration of Regional Councils (Judea and Samaria) (Number 793), 5729 – 1979."<sup>30</sup> Since Ofra has no official area of jurisdiction, it fails to meet the second criterion adopted by the government of Israel.

## 3. Planning and building

The Jordanian planning law, which is in force in the West Bank, states that construction of any building (including an addition to an existing building) requires a building permit. The permit may be issued only in accordance with a lawfully approved, detailed outline plan, in declared planning areas and by a local planning and building committee that was given powers in that planning area.<sup>31</sup>

In 1971, the Israeli military commander signed Order No. 418, which left most of the provisions of the Jordanian planning law intact but made significant changes to the structure and composition of the planning institutions. Under international

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29. Mati Golan, "The Government will Reject Washington's Protest regarding the Three Communities," *Ha'aretz*, 27 July 1977. The day after the Ministerial Committee for Settlement's decision, Prime Minister Menachem Begin stated that, in its decision of that day, "the government again authorizes the Ministerial Committee for Settlement to decide on the establishment of new communities. The decision of the Ministerial Committee will be with the approval of the government and its decision will have the effect of a government decision." See Y. Tira, "Begin Expresses Profound Regret and Disappointment before the Knesset over Vance's Statement regarding the Three Settlements," *Ha'aretz*, 28 July 1977.

30. Letter of 12 August 2007 from Captain Zidki Maman, Civil Administration spokesperson and official in charge of freedom of information, to Yehezkel Lein, of B'Tselem [freely translated]. The letter contains a typo: the number of the referenced order is 783 and not 793.

31. Sections 34 and 35 of the Towns, Villages and Buildings Planning Law (Temporary Law) (No. 79), of 1966. The references here and below are taken from the Hebrew translation of the law, as published by Captain Aharon Mishnayot (ed.), *Planning, Building and Land Law in Judea and Samaria; Statute, Military Legislation, and Case Law* (Beit El: Civil Administration for Judea and Samaria, 1996).

humanitarian law, the occupying power is permitted to change the existing laws in the occupied area only if military necessity or decisive needs of the local population necessitate such an action.<sup>32</sup> Israeli officials argue that the changes in the Jordanian planning law in the West Bank were required because the planning institutions – as were specified in the statute – included representatives of the Jordanian government, who, naturally, could not be appointed under an Israeli military government. However, the changes Israel made went further, and it appears that they do not comport with international humanitarian law.

The order cancelled the local planning and building committees in Palestinian villages and transferred all their powers, including the authority to issue building permits, to subcommittees of the Higher Planning Council that currently operate in the offices of the Civil Administration in the Beit El army base. In addition, the order made it possible to appoint special local planning committees for settlements. These committees have powers in planning areas declared by the military commander. The order states that in these planning areas, and only there, the special local committees are permitted to issue building permits, pursuant to valid detailed outline plans.<sup>33</sup> Furthermore, Order No. 418 granted the Higher Planning Council the far-reaching power “to exempt any person from the obligation to obtain a license [building permit] required by the statute.”<sup>34</sup> To the best of B’Tselem’s knowledge, the Higher Planning Council rarely, if ever, uses this power.

To examine the planning process in Ofra, B’Tselem submitted a request to the Civil Administration under the Freedom of Information Law. The Civil Administration spokesperson replied as follows:

The built-up area of Ofra is not located in the planning area of a local or special committee.

There are no approved or deposited planning schemes concerning the built-up area of Ofra.

No building permits or exemptions from building permits were given to buildings in Ofra.<sup>35</sup>

In order to still enable “approval” of construction in the settlement, the leaders of Ofra created procedures to bypass planning, in contravention of the statute, by preparing “building rules” that include detailed building provisions. According

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32. Article 43 of the Regulations Attached to the Hague Convention Respecting the Laws and Customs of War on Land of 1907.

33. Order Regarding the Planning of Cities, Villages, and Buildings (Judea and Samaria) (No. 418), 5731- 1971, sections 2 and 2A.

34. *Ibid.*, section 7(4).

35. Letter of 12 August 2007 from Captain Zidki Maman, *supra*.

to these rules, requests for building permits are to be submitted to “the Ofra building committee”; following the committee’s approval, the request is sent “to be approved by the local building and planning committee of the Mateh Binyamin Regional Council, which issues a building permit.”<sup>36</sup>

However, these rules do not constitute an outline plan and cannot serve as a lawful substitute for such a plan. Under the statute, approval of a detailed outline plan entails depositing it for 60 days, during which any interested party – including Palestinians whose lands are located in, or near, the area intended for the plan – may file an objection.<sup>37</sup> Ofra’s “building rules”, which, as noted, are not a statutory plan, were “approved” only by the leaders of Ofra, without having first been deposited and without giving Palestinian residents the opportunity to object. This being the case, the rules have no legal validity and issuing building permits pursuant to them is not possible.

Furthermore, as the response of the Civil Administration indicates, Ofra is not situated within the boundaries of a planning area where a local or a special local committee has powers. Hence, the Mateh Binyamin special local committee does not have any planning powers regarding the settlement of Ofra. Despite this, Ofra’s “building rules” state that this committee will issue approvals to erect buildings in Ofra. This is comparable to a situation in which the local planning and building committee in Jerusalem were to approve construction within the planning area of Tel Aviv-Jaffa.

An aerial photo taken in May 2008 shows that Ofra has some 570 buildings, at least 400 of which are detached residential houses (see map). Some of the buildings include more than one housing unit. The Civil Administration’s response and the above comments make it clear that all these buildings were built without a permit. In other words, the Ofra settlement is a case of an entire community built illegally.

Thus, Ofra fails to meet the third criterion that Sasson set and the government adopted.

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36. See the “Updated Building Rules” of 18 May 2007, on Ofra’s website, available at <http://muni.tik-tak.co.il/web/project/katava1.asp?codeClient=1350&CodeSubWeb=0&id=54320&projId-13514> [in Hebrew].

37. Sections 20 and 24 of the Jordanian Planning Law, *supra*.

## The Mandatory outline plan

The only way to issue building permits lawfully in Ofra is under Mandatory Regional Outline Plan RJ/5. This plan was approved in 1942 and is still in force, as it was not repealed by the Jordanian government or by Israel. It applies, amongst others, to the land on which Ofra was built.

The Mandatory Plan designates the land on which Ofra was built for agriculture. It allows for construction of residential buildings in the agricultural zone, but subject to various restrictions:

- the approval of the landowners must be obtained;<sup>38</sup>
- only one residential building may be built on an original lot, provided its area is at least 1,000 square meters (one tenth of a hectare). Even if the lot is much larger, only one residential building is permitted;
- the building lines (the distance between the building and the lot's boundaries) are at least five meters.<sup>39</sup>

Examination of the built-up area of Ofra indicates that the buildings erected therein fail to meet these requirements: the construction is not within the lots' boundaries; in some instances, buildings are situated partially in one lot and partially in another; and, in any event, most of the building lots cover only 500 square meters.

For example, Lot 1 in Block 7 of the lands of 'Ein Yabrud is situated in the southern neighborhood of the settlement. The lot size is almost 2.7 hectares, and under the Mandatory Plan, only one building may be built there. In reality, there are no less than 24 residential houses on this lot, four of which cross the lot's boundaries. Many of the houses also fail to comply with the building-lines requirement.

This situation repeats itself, in various forms, throughout Ofra's built-up area: residential dwellings and public buildings have been built in total disregard of the provisions of the Mandatory plan. Therefore, this plan, too, cannot grant, even *prima facie*, lawful status to the existing buildings in the settlement.

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38. This requirement also appears in the Jordanian Planning Law and is enshrined in Israeli High Court rulings. See HCJ 5194/03, *Kobi Grossman et al. v. Minister of Defense et al.*, *Piskei Din* 57 (4) 426.

39. Sections 10, 28, and 31 of the Plan, respectively.

## 4. Land ownership

In contravention of international humanitarian law, Israel's military legislation and government decisions permit the establishment of Israeli communities in the West Bank, on various kinds of land (see the frame "What is state land?"). To examine whether the built-up area of Ofra is one of these kinds of land, B'Tselem submitted a detailed request to the Civil Administration under the Freedom of Information Law.

### What is state land?

In October 1979, the Israeli High Court of Justice ruled that the seizure of privately-owned Palestinian land by military requisition order – the principal procedure that Israeli governments had used until that time to build settlements – could be deemed lawful only if the settlement concerned served a clear security interest.<sup>40</sup> A month later, the government decided that from then on, settlements would be established only on "state-owned land," without precisely defining the term.<sup>41</sup>

The Sasson opinion contains a broad definition of "state land," encompassing the following:

- land recorded in the Land Registry to the Kingdom of Jordan prior to 1967;
- land administered by the Jordanian Custodian prior to 1967 (such as lands purchased by Jews prior to 1948);
- land declared government property after 1967;
- land purchased by Israelis after 1967 and registered to them in the Land Registry.<sup>42</sup>

Most of the land in the West Bank currently defined as state land was declared as government property by Israel. The procedure for declaring them "state land" was invented by Israel and does not exist in Jordanian legislation. Israel's position is that "land that is not registered in the Land Registry, and has never been cultivated or is not suitable for cultivation, or was only cultivated in the distant past, is state land."<sup>43</sup>

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40. HCJ 390/79, *'Azat Muhammad Mustafa Dweiqat and Sixteen Others v. Government of Israel et al.*, *Piskei Din* 34 (1) 1.

41. Cabinet Decision 145, 11 November 1979.

42. Sasson, *(Interim) Opinion*, 13-14.

43. Eyal Zamir, *State Lands in Judea and Samaria: Legal Survey* (Jerusalem Institute for Israel Studies, 1985), 22 [in Hebrew].

Consequently, land registered in the Land Registry to Palestinians, even if not cultivated, is private property, and may not be declared government property.<sup>44</sup>

Prior to 1967, only 30 percent of West Bank land was registered in the Land Registry, a result of land settlements carried out by Mandate authorities and the Kingdom of Jordan.<sup>45</sup> Israel stopped the land settlement process and, as a result, most of the land in the West Bank is not registered in the Land Registry.<sup>46</sup> In addition, Israel applied a harsh interpretation to the requirement regarding land cultivation, whereby Palestinians may gain ownership rights only over land that has both been cultivated in the past and is cultivated at present. Palestinian residents were allowed to file objections to declarations of state land, and their objections were heard by a military appeals committee. However, their chance of winning a case before the committee was very slight, in part because they had the heavy burden of proof. Many did not even file appeals due to the heavy costs entailed.<sup>47</sup>

As a result, by 1992, Israel had declared 90,800 hectares, comprising 16 percent of the West Bank, as government property.<sup>48</sup> These lands were added to the 70,000 hectares that had been classified as state land during Jordanian rule.<sup>49</sup> Currently, the total of state land – approximately 160,800 hectares – amounts to some 30 percent of the West Bank.

In 1992, following the change in government in Israel and the beginning of the Oslo peace process, Israel froze declaration of state land in the West Bank. After 1996, preliminary surveys began anew for purposes of declaration of state land. To the best of B'Tselem's knowledge, declarations of state land subsequently took place, albeit on a smaller scale than before.

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44. Plia Albeck and Ron Fleischer, *Land Law in Israel* (self-published, 2005), 66, 120 [in Hebrew].

45. The term "settlement" here refers to the orderly registration of the lands of an entire community in the Land Registry, and should not be confused with the establishment of an Israeli community in Occupied Territory, which is defined "settlement" by international law.

46. Sasson, (*Interim*) *Opinion*, 14.

47. B'Tselem, *Land Grab*, 51-58.

48. State Comptroller, *Annual Report 56A* (2005), 206 [in Hebrew].

49. Aryeh Shalev, *The Autonomy: Possible Problems and Solutions* (Center for Strategic Studies, Tel Aviv University, August 1979), 117 [in Hebrew].



Within this framework, B'Tselem submitted a request to the Civil Administration for detailed information, including maps, regarding the lands of the villages of 'Ein Yabrud, Silwad, and a-Tayba, on which Ofra and adjacent unauthorized outposts were built. The Civil Administration was requested to relate to the following kinds of land and to mark them on a map: all land defined as state land, all land expropriated for public purposes, all land seized pursuant to military requisition orders, all land classified as absentee property (property of Palestinians who fled from the area in 1967 and did not return), and all land classified as a closed military zone.

After prolonged efforts, which included an administrative petition heard in the Jerusalem District Court, B'Tselem received most of the information it had requested.<sup>50</sup> The response of the Civil Administration and the documents it provided as part of it indicate that:

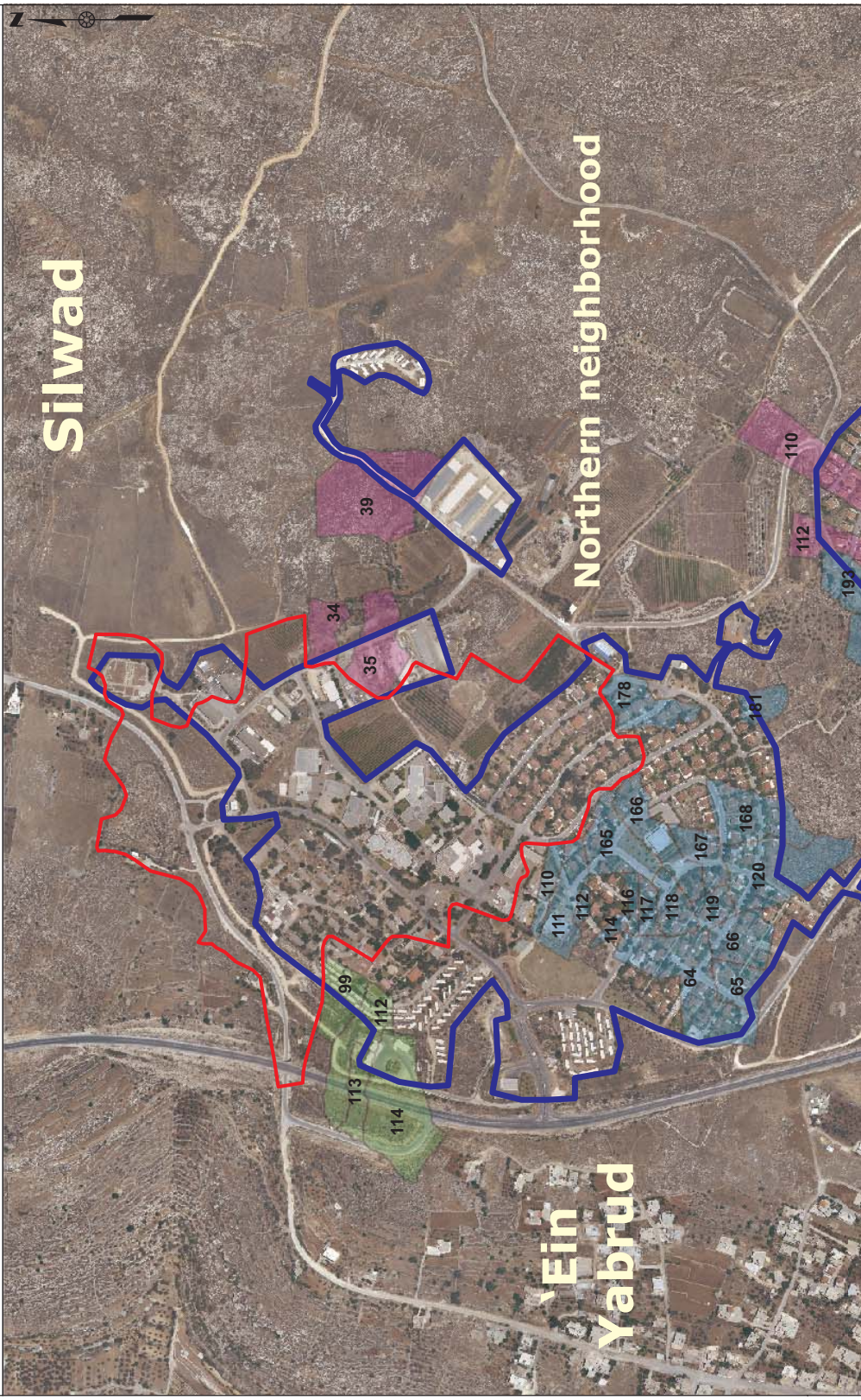
- The village lands of 'Ein Yabrud, Silwad, and a-Tayba underwent land settlement during the period of Jordanian rule and were registered in the Land Registry. Therefore, Israel could not declare the lands of these villages as state land, and no such declaration was issued.
- In the framework of the land settlement carried out by the Jordanians regarding these villages, a small amount of land was recorded as state land. Neither the built-up area of Ofra nor the unauthorized outposts are situated on this land.<sup>51</sup>
- Over the years, military requisition orders for the lands of these villages were issued for various purposes, among them, "a firing range for Ofra" and "the Ofra landing pad." Military requisition orders are limited in time and do not alter ownership of the land, which remains as registered in the Land Registry. Of the 18 military requisition orders pertaining to the three villages, only two – "the British Police Intersection film apparatus" and "fencing north of Ofra" – remain in force. These two orders, which pertain to land lying north of Ofra's built-up area, cover an area of only 590 square meters.
- Several expropriation orders were issued regarding lands of the three villages over the years. Expropriation, defined as "purchase for public needs", is a procedure whereby the state forces the landowner to sell his land. Following the purchase, which can be done only for a public purpose such as construction of roads or parks, the land becomes the permanent property of the state and is registered to it in the Land Registry. One of these expropriation orders relates

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50. Adm. Pet. (Jerusalem) 932/07, *B'Tselem v. Civil Administration – Person in Charge of the Freedom of Information Law*.

51. The Civil Administration provided B'Tselem with a map, of 6 February 2008, delineating the state land in the three villages.

# Ofra Built-up area and private Palestinian land





to land that, according to the Civil Administration, was expropriated by the Jordanians for the 'Ein Yabrud army base, a total of some 26.5 hectares of the lands of Silwad and 'Ein Yabrud. Over the years, Israel issued additional expropriation orders to build roads, primarily the Ramallah bypass road, and also to construct a sewage purification plant for Ofra, east of the settlement's built-up area.<sup>52</sup>

Thus, according to the Civil Administration's response, the built-up area of Ofra and the areas adjacent to it include only a very small portion of land that was expropriated or that is included in valid requisition orders. The only exception is the land that the Civil Administration contends was expropriated by the Jordanians for the army base, most of which now lies within Ofra's built-up area.

## The status of the Jordanian expropriation order

In May 2008, the built-up area of Ofra spanned some 67 hectares. Of these, 18 hectares (almost 27 percent) fall within the boundaries of Expropriation Order No. 77, which the Israeli military commander issued on 9 November 1977. According to the Civil Administration, the land was "expropriated by the Jordanian government for a public purpose" and, therefore, the order is not an initiated action by Israel but only the realization of the Jordanian expropriation of 1966 in order to build the 'Ein Yabrud army camp.<sup>53</sup>

However, the documents that the Civil Administration provided B'Tselem do not support this claim.<sup>54</sup> Analysis of the documents points to three fundamental failings.

### *1. The expropriation process was not completed*

Expropriation of land for a public purpose is allowed in the West Bank under a Jordanian law<sup>55</sup> (hereafter: "the Jordanian expropriation law"), as amended by the military legislation.<sup>56</sup> The Jordanian expropriation law enables the

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52. The Civil Administration provided these figures, documents, and maps to B'Tselem on 19 December 2007.

53. Letter of 24 May 2007 from Captain Zidki Maman to Dror Etkes, of Peace Now.

54. In the framework of Adm. Pet. (Jerusalem) 932/07, *supra*, the Civil Administration gave an affidavit stating that the military commander's said expropriation order of 9 November 1977 had been lost and that the Civil Administration did not have a copy. This information was provided in a letter of 22 January 2008 from Lieutenant Ariel Yosefi, on behalf of the legal advisor for the Judea and Samaria area, to Attorney Daphna Holtz-Lechner, who filed the administrative petition on behalf of B'Tselem.

55. The Jordanian Land (Acquisition for Public Purposes) (No. 2) Law of 1953.

56. Order Concerning the Land (Acquisition for a Public Purpose) Law (Judea and Samaria) (No. 321), 5729 – 1969. The order does not change the essential provisions of the Jordanian expropriation law, but transfers the powers it granted to Jordanian governmental bodies to officials in the Israeli military government.

government to force landowners to sell the land to the state or to another public authority, for compensation, provided that the land is needed for a "public purpose," such as roads or parks.

Under this law, the expropriation process comprises three stages. First, a notice must be published in the official gazette of the Kingdom of Jordan announcing the intention to expropriate the land. Second, 15 days after publication of the notice, the public authority wishing to expropriate the land must submit a request to the government to approve the expropriation. Third, the government considers the request and approves or denies it, or approves it for a limited period of time. If the government gives its approval, it delivers its recommendation to the King. The expropriation may be carried out only "following the King's approval of the government's decision, and its publication in the official gazette."<sup>57</sup>

The documents provided to B'Tselem by the Civil Administration indicate that, on 30 May 1966, a notice concerning the intention of the Jordanian army to expropriate some 20.8 hectares of the village lands of Silwad and 'Ein Yabrud appeared in the official gazette of the Hashemite kingdom. The notice indicated that the land was to be expropriated "for the use of the general staff of the armed forces." This constituted the first stage of the expropriation process. Despite B'Tselem's repeated requests, the Civil Administration did not locate other documents relating to the matter, and no evidence that the following two stages had been completed was provided. An independent investigation on behalf of B'Tselem also failed to locate any publication in the official gazette of the Kingdom of Jordan concerning either the government's recommendation to approve the proposed expropriation, or the approval of the King. As explained above, without completion of these two stages, the expropriation could not take place.

In addition, the Jordanian expropriation law requires that the expropriated land be registered in the Land Registry to the relevant public authority.<sup>58</sup> However, the land included in Order No. 77, issued by the Israeli military commander, was not registered in the Land Registry to the Jordanian crown. B'Tselem even has several up-to-date land registration abstracts of lots included in the area covered by Order No. 77 that are still registered as privately-owned Palestinian land.<sup>59</sup> In response to a question by B'Tselem, the Civil Administration explained that, essentially, the land is state land, "but it has not been registered to the state" since "the Civil Administration

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57. Sections 3, 4, and 5 of the Jordanian expropriation law.

58. Section 18(1) of the Jordanian expropriation law.

59. For example, lots 146, 147, and 164 in Block 6, in 'Ein Yabrud.

does not have documents testifying to the payment of compensation to the original landowners whose land was expropriated.<sup>60</sup> According to residents of 'Ein Yabrud, the Jordanian government indeed did not compensate the owners of the land intended for expropriation.<sup>61</sup> These points support the conclusion that the procedure of expropriation, which began under Jordanian rule, was not completed, and that the land is not state land.

From all the above, we see that the land intended for the Jordanian army base did not undergo the expropriation process specified by statute. The most that can be said is that the Jordanian army gave notice of its intention to expropriate the land. Also, in practice, the Jordanian army used only a small part of the 20.8 hectares it intended to expropriate: in an aerial photo of 1969, the buildings in the army base and the nearby roads cover only some five hectares. All the additional construction on the land intended for expropriation was carried out after Ofra was established.

Therefore, Order No. 77 is a new expropriation order, issued by the Israeli military commander in 1977, more than two years after the settlers of Ofra took over the abandoned houses of the Jordanian army base and some three months after the government of Israel decided to recognize Ofra as an official community.

## *2. The land was unlawfully expropriated to build a settlement*

A letter from Judea and Samaria Regional Headquarters, dated 8 November 1977, explicitly states: "OD [Operations Department]/ASC [Administration, Security, Coordination] has approved realization of the Jordanian expropriated area for the benefit of Ofra."<sup>62</sup> The expropriation process that began under Jordanian rule was intended for an army base. When the Israeli military commander issued Order No. 77, however, the land was expropriated for a different purpose – the building of Ofra.

Israel's official position is that under the statute, privately-owned Palestinian land cannot be expropriated for the purpose of building settlements, since this is not a "public purpose", as defined in the Jordanian expropriation law. However, the state contends that it is permissible to expropriate privately-owned Palestinian land – after an Israeli settlement has already been built – in order to pave roads for the settlers or to establish other public facilities.

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60. Letter of 22 May 2008 from Captain Ariel Yosefi, of the office of the legal advisor for the Judea and Samaria area, to Avi Berg, of B'Tselem.

61. Visit to 'Ein Yabrud on 5 July 2007; testimony of Ragheb 'Alwan, resident of 'Ein Yabrud, 5 June 2007, given to Iyah Hadad.

62. Letter of 8 November 1977 from Sergeant-Major Bar-Shalom to the survey staff officer, "Realization of Jordanian Expropriation – Ofra Camp." A copy of the letter was provided to B'Tselem in the framework of the proceedings under the Freedom of Information Law.

On these grounds, the military commander expropriated, for example, 4,500 square meters of the village land of Silwad to construct a sewage purification plant for Ofra.

Plia Albeck, former head of the Civil Department in the State Attorney's Office, who played a major role in advancing the settlement enterprise, pointed out that the Israeli government "may expropriate land for public purposes in the region, but regarding the establishment of a new community, whose residents are Israeli citizens and at the time of establishment of the community do not live in the region, it is very doubtful whether expropriating land for the construction of such a community can be said to be a public purpose."<sup>63</sup> Yitzhak Zamir, when he was attorney general, supported this position, stating in a detailed opinion that, "it is impossible to act under Jordanian law to expropriate private land" for the sake of Israeli settlements.<sup>64</sup>

Therefore, even according to Israel's official position, the purpose for which the military commander issued Order No. 77 (building Ofra) is illegal – whether it is a new expropriation or a realization of an expropriation that the Jordanian government initiated for military purposes.

### *3. Israel expropriated several hectares in addition to the area within the Jordanian expropriation order*

The notice published in 1966 in the official gazette of the Kingdom of Jordan specified the block and lot numbers of the land to be expropriated, as well as the total area of land intended for expropriation: some 13.4 hectares in the village lands of 'Ein Yabrud and almost 7.4 hectares of the village lands of Silwad, a total of approximately 20.8 hectares.

The area marked on the map of Expropriation Order No. 77 is 26.5 hectares – almost 6 hectares more than were included in the Jordanian expropriation order.<sup>65</sup> In 1977, therefore, in the framework of what is referred to as "realization" of the Jordanian expropriation, Israel added almost 6 hectares to the area that the Jordanians had intended for the army base.

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63. Plia Albeck, "What is State Land? On State Land in Judea, Samaria, and the Gaza Strip," *Halishkah* [Journal of the Israel Bar Association – Jerusalem District Committee], vol. 46, January 1999, 9-11 [in Hebrew]. Eyal Zamir, who served as assistant to the legal advisor for the Judea and Samaria area during 1982-1987, added that, "it is not permissible to purchase land for a public purpose in order to establish Israeli communities in the area." See Zamir, *State Land in Judea and Samaria*, 36, 62.

64. Gideon Alon, "Prof. Zamir in Opinion He will Submit to the Cabinet Today: It is Not Permissible to Act under Jordanian Law to Expropriate Land in Judea and Samaria," *Ha'aretz*, 11 May 1980.

65. The figure is based on the maps that the Civil Administration provided to B'Tselem on 22 January 2008. The Civil Administration did not manage to locate a copy of the original Expropriation Order No. 77. On one of the original maps, which refer to the Order, the words "about 270 dunams [27 hectares]" are written.

The above discussion indicates that Expropriation Order No. 77 is a new expropriation act by Israel, and that in order to sanction it, the authorities relied on unfounded claims. The Jordanians did not complete the expropriation process and in any event, the Israeli expropriation order relates to a larger area and was issued for a purpose that is not recognized as legitimate under international law, under the statute, and even under the military legislation. In fact, had the land indeed been expropriated by the Jordanian authorities, Israel would not have needed to issue the 1977 order, since, as stated above, land expropriated in accordance with the Jordanian expropriation law becomes state property. The fact that the Israeli military commander found it necessary to issue a new expropriation order reinforces the contention that the land covered by the order had not been expropriated earlier.

## **The built-up area outside the Jordanian expropriation order**

Of Ofra's built-up area (67 hectares), the vast majority (about 49 hectares) is not included in Expropriation Order No. 77, and was not expropriated, either by Jordan or by Israel.

The lands of 'Ein Yabrud and Silwad, on which the built-up area of Ofra is situated, underwent land settlement under Jordanian rule and are therefore registered in the Land Registry. Inspection of the relevant land registration abstracts, lot by lot, would enable precise mapping of the land in the area. However, as the Civil Administration's land registration office provides land registration abstracts only to the registered owner, his heirs, or persons empowered by the owner or heirs, B'Tselem was unable to complete this inspection. It should be noted that, in Israel, every person may acquire a land registration abstract regarding any parcel of land, regardless of the identity of the owner.<sup>66</sup>

The Civil Administration's policy makes it hard to obtain reliable information on land ownership in the Ofra area. To overcome this difficulty, B'Tselem mapped the lots inside the built-up area of the settlement, relying on maps of registration blocks that the Jordanian authorities prepared in the course of the land settlements they conducted in Silwad and 'Ein Yabrud. Then, with the assistance of the 'Ein Yabrud and Silwad village councils, B'Tselem researchers attempted to locate the lot owners and/or their heirs to obtain a power of attorney to take out land registration abstracts at the Civil Administration.

As B'Tselem was unable to locate all the registered landowners and/or their heirs, it did not obtain land registration abstracts for all the relevant lots. Obviously, the

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66. Land Law, 5729 – 1969, section 124.



failure to locate the owner/heir does not prove that the lot is not privately-owned Palestinian land. In its response to a recent High Court of Justice petition (see below), the state admitted that the built-up area of Ofra contains additional lots, for which B'Tselem did not obtain land registration abstracts, that are registered in the Land Registry to Palestinians. Therefore, the figures presented below are minimum figures, and the total of land registered to Palestinians that lies within the built-up area of Ofra is likely much larger.

B'Tselem managed to obtain land registration abstracts, all in 2008, for 43 lots that are registered in the Land Registry to Palestinians, and yet all or part of their areas are situated in Ofra's built-up area. The appendix presents a list of these lots, which are also marked on the map attached to the report.

Based on a computerized graphic measurement, the parts of these lots that lie within the built-up area of Ofra amount to 21 hectares, which comprise 43 percent of the built-up area that lies outside the boundaries of Expropriation Order No. 77.<sup>67</sup> Overall, the lands within Ofra's built-up area that are registered to Palestinians – both those for which B'Tselem obtained the land registration abstracts and those included in Expropriation Order No. 77, which was illegally issued – amount to some 39 hectares, comprising some 58 percent of the entire built-up area of the settlement.

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67. Naturally, a computerized graphic measurement is not as precise as a survey taken on the ground. Nevertheless, its precision is considered to be very high, and the Civil Administration itself relies on graphic measurement when approving detailed outline plans for settlements. In any case, the difference between a computerized graphic measurement and a survey taken on the ground will likely be insignificant.

## Claims of purchase

On 4 June 2008, five residents of 'Ein Yabrud, together with B'Tselem and Yesh Din – Volunteers for Human Rights, petitioned the High Court of Justice to demolish nine new residential buildings that were in advanced stages of construction in the southern neighborhood of Ofra, all on land registered to Palestinians in the Land Registry. On 19 June 2008, the state announced to the court that, "construction of the buildings and the very act of taking up residence on the site are illegal," that the Civil Administration had issued demolition orders for the buildings, and, more importantly, that "the relevant buildings are situated on private land registered to Palestinians in the Land Registry."<sup>68</sup> The same day, the High Court of Justice issued a temporary injunction freezing construction and prohibiting "occupancy and use of the buildings that are the subject of the petition."<sup>69</sup>

In their response to the petition, which is still pending, the Ofra Cooperative Association and the Mateh Binyamin Regional Council argued that the land on which the nine buildings are being built was purchased by the association "as far back as 1989!!! And from its lawful owners." The two respondents further indicated that settlers had purchased additional lands in the area that year. According to the respondents, to protect the lives of the Palestinian sellers, who were exposed to life-threatening danger for selling land to settlers, "the purchase of the land was carried out in secret," and the Ofra Cooperative Association avoided registering land to it in the Land Registry. They further argued that the fact that the registered owners have taken no legal action against the Association in all the years it has held the land proves that its possession of the land is lawful and that the land was purchased lawfully.<sup>70</sup>

Claims of purchase are commonly made by settlers in the West Bank. In Ofra's case, B'Tselem does not have documents indicating that the land on which it was built was acquired from the Palestinian landowners. Furthermore, the Ofra Cooperative Association failed to show purchase documents even to the Civil Administration. In its response to the High Court of Justice, the State Attorney's Office rejected the Association's arguments that it had purchased the lots under discussion.<sup>71</sup> Accordingly, the State Attorney's Office informed the settlers' attorney that "no proof has been made that the land was purchased by your client," and that it was a "mere claim."<sup>72</sup>

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68. HCJ 5023/08, *Sa'id Zahadi Muhammad Shahadeh et al. v. Minister of Defense, Ehud Barak, et al.*, Response of the State, 19 June 2008, section 11 and Appendix R/8.

69. *Ibid.*, Temporary Injunction, 19 June 2008.

70. *Ibid.*, 19 June 2008, Response of Respondents 5 and 6, sections 47-51 [freely translated].

71. Lots 1, 2, 12, 14, and 16 in Block 7, in 'Ein Yabrud. B'Tselem was unable to obtain land-registration abstracts for three of them (lots 2, 12 and 16).

72. HCJ 5023/08, *supra*, Response of the State, 19 June 2008, section 3 and Appendix R/8.

Likewise, responses of the Civil Administration to various requests for information provide no support for the claims of purchase made by Ofra's settlers. Referring to land that was acquired in this area, the Civil Administration pointed out only that the Himanuta Company, which belongs to the Jewish National Fund, had purchased a few lots in the area and had registered them to it in the Land Registry.<sup>73</sup> In its response to several inquiries on the subject, the Civil Administration never mentioned purchase of land in Ofra by companies or individuals, other than Himanuta.

Due to the restriction on issuing land registration abstracts mentioned above, B'Tselem was unable to precisely map the lots allegedly purchased by Himanuta. Also, the Civil Administration rejected B'Tselem's request for information on transaction permits, which are required under military legislation to carry out any land transaction in the region, contending that such information would violate the privacy of the sellers and purchasers.<sup>74</sup>

The computerized mapping base of the Civil Administration, obtained by Peace Now, indicates that, in the Ofra area, there are two sections of land privately-owned by Israelis; these are probably the lots purchased by Himanuta.<sup>75</sup> According to a computerized graphic measurement carried out by Peace Now, these lots comprise, in total, some 13.4 hectares. They have almost no buildings on them, other than a few industrial buildings, farm buildings, and a section of a road. These lots are adjacent to the built-up area of Ofra's northern neighborhood, and only their edges lie inside the built-up area.<sup>76</sup>

Under the local law, the existence of these lots – assuming they are indeed registered to Himanuta in the Land Registry – does not enable the extensive construction of residential and other buildings on adjacent land, which, according to the Civil Administration's computerized mapping base, is not owned by Israelis.

Under the law applying in the West Bank, every purchase of land that is registered with the Land Registry must be registered to the purchasers, and failure to do so

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73. Letter of 24 May 2007 from Captain Zidki Maman to Dror Etkes, of Peace Now. In section 5 of their response, the Ofra Cooperative Association and Mateh Binyamin Regional Council also contended that lots in Ofra's area had been purchased by Himanuta and registered to it in the Land Registry.

74. Letter of 1 June 2008 from Ariel Yosefi, on behalf of the legal advisor for the Judea and Samaria area, in response to an inquiry by Anat Barsella, of B'Tselem.

75. The computerized mapping base provides low-resolution images, which do not enable examination of individual lots with the degree of accuracy required for this report.

76. Peace Now Settlement Watch Team, *Offense Leads to Offense: Construction of Settlements on Privately-owned Palestinian Land* (October 2006), 147 [in Hebrew].

is a criminal offense.<sup>77</sup> The settlers explain the failure to register the transactions by their desire to protect the lives of the Palestinian sellers.<sup>78</sup> However, aside from concern for the sellers' lives, refraining from registering the land to them in the Land Registry can, in fact, assist the settlers. In registering land, the purported purchaser must present documents proving the purchase, and any suspicion of forgery or deceit will likely prevent registration. According to Plia Albeck, 90 percent of the transactions in which Israelis purchased land in the West Bank involved forgeries and were actually "fictitious purchas."<sup>79</sup>

Furthermore, in cases in which transactions involve registered land, Palestinian sellers benefit from a certain degree of protection as a result of the Civil Administration's policy of discretion, whereby only the registered owners or their heirs may take out a land registration abstract. In such a case, other persons cannot know whether the land was sold to settlers, and certainly cannot prove it.

As stated, the settlers have also argued that the failure of the registered Palestinian landowners to take legal measures against the settlers of Ofra proves that the latter purchased the land in accordance with the law. This argument, too, is not convincing. To the best of B'Tselem's knowledge, the Palestinian landowners indeed did not initiate legal proceedings objecting to the establishment of Ofra, or against its expansion. However, this neither proves that the land concerned was sold, nor grants the settlers ownership rights there.

Furthermore, refraining from filing a suit may result from a variety of reasons related to the reality of life under occupation. Israel took control of tens of thousands of hectares in the West Bank and established settlements there. From the perspective of the landowners, the names that the Israel gave to its bureaucratic procedures to take control of land – "expropriation for a public purpose," "requisition for military needs," "declaration of state land," and so forth – are meaningless. From their perspective, their land has been taken from them, and the differences between the various procedures mentioned above are merely formalistic-legalistic. The fact that in the case of Ofra, the local law recognizes the Palestinian residents' ownership of the land, so in this specific case their suit would have better chances of success, could not have been known to them then, and certainly cannot be held against them today.

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77. Land and Water Settlement Law (Law No. 40), of 1952, section 16(3) states: "Where land settlement actions [registration of land in the Land Registry] have been completed, the sale, exchange, and division of land or water shall not be valid unless the action is done and recorded in the Land Registry. Any person who was a party to an action made in contravention of the above shall be liable to fine following conviction by the court hearing the matter." Israel froze the land settlements in the West Bank by military order, thus suspending many of the operative provisions of the said Jordanian law. However, the military legislation did not repeal the rest of the said law, and section 16 remains in force. See Order Concerning the Land and Water Settlement Law (Judea and Samaria) (No. 291), 5729 – 1968.

78. For other instances in which this contention was made, see, for example, the response of the companies Green Park, Green Mount, The Fund for the Redemption of Land Ltd., and Ein Ami Initiatives and Development Ltd. in HCJ 8414/05, *Ahmad 'Issa 'Abdullah Yassin, Head of the Bil'in Village Council v. Government of Israel et al.*, which dealt with the route of the separation barrier on the village lands of Bil'in. The companies contended that they had purchased much land in the area, but had not registered it in the Land Registry out of fear for the lives of the sellers.

79. Plia Albeck, "Land in Judea and Samaria," lecture at Lawyers' House in Tel Aviv, 28 May 1985, p. 12 [in Hebrew].

## Harm to Palestinians

According to the Palestinian Central Bureau of Statistics, in 2007, the population of 'Ein Yabrud was 2,999 and of Silwad, 6,123.<sup>80</sup> The establishment of Ofra led to severe violation of fundamental human rights of these persons.

Directly violated was of the right of property of the Palestinian landowners, who have been prevented from possessing and exercising their ownership rights in the land, as well as from gaining a living from it. In Israel, the right of property gained constitutional status in the Basic Law: Human Dignity and Liberty, which states that "there shall be no violation of the property of a person."<sup>81</sup> It is difficult to conceive of a greater violation of the property of residents of 'Ein Yabrud and Silwad than the building of settlers' houses on their land.

International humanitarian law places responsibility on Israel, as the occupying power, to protect the private property of the Palestinian population in the West Bank. Thus, article 46 of the Hague Regulations states that,

Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected [by the occupying power].

Private property cannot be expropriated.<sup>82</sup>

The existence of the Ofra settlement, many of whose houses are built on land registered to Palestinians in the Land Registry, is a grave breach of this rule, as of the general prohibition on the establishment of settlements.

The harm to Palestinians is not limited to their inability to benefit from the crops they could have grown on their land. The land on which Ofra is built and the additional hundreds of hectares Ofra controls are reserves for future development of 'Ein Yabrud and Silwad, for residential dwellings, public buildings, and infrastructure. Even without additional planning, Mandatory Regional Outline Plan RJ/5 grants the Palestinian landowners certain building rights. Due to the existence of Ofra, they cannot realize these rights.

In the mid-1990s, the Ramallah bypass road was built to ensure settlers living in Ofra free and safe access to Jerusalem. To pave the road, dozens of hectares of farmland belonging to residents of 'Ein Yabrud were expropriated and destroyed. Had Ofra not existed, the road would most likely not have been built on these lands.

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80. The figures are available at [www.pcbs.gov.ps](http://www.pcbs.gov.ps).

81. Basic Law: Human Dignity and Liberty, 5752 – 1992, section 3.

82. Article 46 of the Regulations Attached to the Hague Convention Respecting the Laws and Customs of War on Land of 1907.

The village lands of 'Ein Yabrud cover some 1,153 hectares.<sup>83</sup> More than half of them, some 587 hectares, lie east of the Ramallah bypass road. The area to the east of the road has much fertile agricultural land, with olive and fig trees, grapevines, and seasonal crops such as cereals and vegetables.<sup>84</sup> Since the outbreak of the second intifada, in September 2000, Israel has placed harsh restrictions on the access of 'Ein Yabrud's residents to these lands, which lie adjacent to Ofra's built-up area. Testimonies given to B'Tselem also indicate that, in 2003, settlers from Ofra built, without a permit, a barbed-wire fence along a large section of the road, further restricting the access of Palestinians to the eastern farmland. The lack of access led to a sharp decline in agricultural production and income.<sup>85</sup>

The location of Ofra has serious ramifications for additional Palestinian communities, other than 'Ein Yabrud and Silwad. For example, the settlement prevents free movement between the villages lying east of the Ramallah bypass road and those situated the west of it. Were it not for the settlement, there would be Palestinian contiguity from Deir Dibwan, in the south, to Turmusaya and Sinjil, in the north. In addition, Ofra was a decisive factor in the administrative division of the adjacent area and the classification of extensive lands adjacent to and east of the Ramallah bypass road as Area C, over which Israel has full responsibility according to the Interim Agreement of 1995.<sup>86</sup> Had it not been for Ofra, this area presumably would have been defined as Area B, where the Palestinian Authority has civil responsibility for all civilian matters, including planning and construction. Had this been the case, local Palestinian communities would have had much greater control over many aspects of their daily lives.

Maher Fare' Barjes Dahabreh, a merchant with six children, lives in Ein Yabrud. He owns a few plots east of the Ramallah bypass road. Two of these lie inside Ofra's built-up area. In his testimony to B'Tselem, Dahabreh related the grave harm he and his family suffer as a result of the establishment of the settlement:

When I was a child, I helped plant olive and fig trees and grapevines on our land. We had more than two hundred trees of all kinds of fruit on this plot. A large part of my family's income came from the sale of these crops.

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83. The term "village lands" relates to the boundaries of Palestinian villages in Palestine/Eretz Israel, as defined for administrative purposes during the Mandate period. The figures appearing here are based on a computerized graphic measurement of the village lands of 'Ein Yabrud, as shown on the Mandatory map of the village.

84. Testimony of 'Awad Allah 'Alwan, resident of 'Ein Yabrud, 10 June 2007; testimony of Ragheb 'Alwan, resident of 'Ein Yabrud, 5 June 2007; testimony of 'Abbas 'Alwan, resident of 'Ein Yabrud, 4 June 2007. The testimonies were given to Iyad Hadad of B'Tselem.

85. Ibid. See, also, B'Tselem, *Access Denied*, 31.

86. Hagai Huberman, "The Oslo Accord Maps are the Maps of the Israeli Settlement Enterprise," in Avraham Shvut (ed.), *Gaining the Mountain: The Renewed Jewish Settlement in Judea and Samaria* (Jerusalem: Beit El Library and Judea and Samaria Academic College, 2002), 125-137 [in Hebrew].

We've lost all these crops. The settlers uprooted them and built houses and all kinds of structures where they had been. We did not stay silent. We filed complaints to the Israeli authorities, through the village mukhtars, but it didn't help at all.

Farming was a tradition in my family and in my brothers' families. We all helped each other with the crops and it united us and brought us closer. We used to prepare food and eat together out in the open, and we miss that a lot. When I see my land, right before my eyes, so close to my house, and I can't go there because of the settlers, I feel bitter and humiliated.<sup>87</sup>

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87. The testimony was given to Iyad Hadad, of B'Tselem, on 17 June 2007.

## Conclusions

This report shows that Ofra does not meet three of the four requisite criteria set by Attorney Talia Sasson and adopted by the government of Israel, without which an Israeli settlement in the West Bank cannot be considered lawful under local law. As we have seen, no area of jurisdiction was set for Ofra, the settlement does not have a valid detailed outline plan, and at least 58 percent of the land on which it was built is registered to Palestinians in the Land Registry.

Although each and all four criteria must be met, and failure to meet one of them suffices to render the settlement illegal under local law, the criteria are not equal in importance. As Attorney Sasson stated:

The tag of illegality applies to all the kinds of communities enumerated in the opinion, since it is sufficient for *one* of the components vital to rendering a community lawful not to be met, to say that the community is illegal... Yet there is a difference in *the degree of illegality... that affects the **prima facie** legal possibility of correcting the illegality...*

From a legal perspective, failure to comply with the provisions of the law regarding planning and building, or the lack of timely government decisions such as governmental approval to establish the community – may **prima facie** be corrected retroactively... However, if the illegality applying to outposts or to extensions of settlements results, inter alia, from *the nature of the rights over the land*, that is, *if they are built on land that is not state land, and certainly if it is privately-owned Palestinian land – **this difficulty cannot be corrected at all.*** This illegality is colossal, and cannot be corrected other than by evacuating the outpost, and the sooner the better.<sup>88</sup>

This distinction produces a relationship of cause and effect between the criteria. The inability to define an area of jurisdiction for Ofra results primarily from problems relating to ownership of the land, in that the inclusion of land registered to Palestinians within the settlement's area of jurisdiction contradicts decisions by the government and the High Court of Justice, according to which Israeli settlements may not be built in the West Bank on Palestinian land. Also, the military order, under which the Mateh Binyamin Regional Council (to which the Ofra settlement belongs in municipal terms) operates, states that the area of jurisdiction of an Israeli regional council shall not include "private lands" of Palestinians.<sup>89</sup>

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88. Sasson, (*Interim*) *Report on Unauthorized Outposts*, 93-94 [freely translated; emphases in the original].

89. Order Concerning Administration of Regional Councils (Judea and Samaria) (No. 783), 5739 – 1979, section 1.



According to the state's position, too, the planning institutions in the Civil Administration are prevented, as a rule, from approving outline plans intended for Israeli communities whose area includes land registered to Palestinians.<sup>90</sup> In the case of Ofra, it appears that the Civil Administration refused to define an area of jurisdiction for the settlement and to approve an outline plan, not because of opposition in principle to its existence, but because of the legal impediment to do so given that much of the land on which Ofra is built is registered in the Land Registry to Palestinians.

Having no option, the state indeed did not legalize the settlement of Ofra in terms of the local law, yet it also did nothing to prevent the settlers of Ofra from taking control of land registered to Palestinians in the Land Registry and from establishing hundreds of housing units there. Moreover, since the settlement was established, the state has continued to support its existence and expansion, despite the lack of a statutory detailed outline plan, and despite the illegality entailed in taking control of land registered to Palestinians.

In recent years, the Israeli government has reiterated its commitment to dismantling unauthorized outposts in the West Bank. For example, at the Aqaba summit, then-Prime Minister Ariel Sharon said: "Regarding the unauthorized outposts, I will repeat my statement that Israel is a state that operates according to the rule of law. For this reason, we shall immediately begin to remove unauthorized outposts."<sup>91</sup> Similarly, in March 2007, then-Prime Minister Ehud Olmert stated that, "We are certainly committed to fulfilling Israel's promise to evacuate unauthorized outposts."<sup>92</sup>

Officially, Ofra is a recognized settlement and not an unauthorized outpost. However, the fact that in the past, the government decided to recognize Ofra as an Israeli community does not suffice to render the settlement lawful under the local law. Essentially, Ofra is a clear-cut case of an unauthorized outpost, with the most serious flaw possible according to the Sasson report: the fact that large parts of it were built on privately-owned land registered to Palestinians in the Land Registry.

Accordingly, beyond Israel's obligations under international humanitarian law to dismantle all its settlements in the West Bank, the Israeli government must act to dismantle Ofra, along with all the other unauthorized outposts. The Palestinian landowners must be given back the land taken from them illegally, and must be remunerated for the use of their lands.

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90. See footnote 69.

91. Prime Minister's Office, Israeli statement at Aqaba, 4 June 2003.

92. The prime minister made these comments at a joint press conference with the UN secretary-general, Ban Ki-Moon, on 26 March 2007.

## Appendix

### List of Palestinian-owned lots in the built-up area of Ofra

The table below lists the lots that are found, completely or partially, in the built-up area of Ofra, as to which B'Tselem managed to obtain updated land registration abstracts. These abstracts prove that the lots concerned are registered to Palestinians in the Land Registry. All these lots lie outside the land covered by Expropriation Order No. 77 issued by the military commander. Given that the Civil Administration provides land registration abstracts only to the registered owners, their heirs, or persons authorized by them for this purpose, the figures below are not complete. B'Tselem knows of the existence of additional lots registered to Palestinians within the built-up area of Ofra, although the organization did not manage to obtain the relevant land registration abstracts.

#### Silwad, Block 20

| Lot | Area<br>(in square meters) |
|-----|----------------------------|
| 34  | 4,595                      |
| 35  | 7,749                      |
| 39  | 18,389                     |
| 110 | 13,595                     |
| 112 | 5,446                      |

#### Ein Yabrud, Block 2

| Lot | Area<br>(in square meters) |
|-----|----------------------------|
| 99  | 5,413                      |
| 112 | 8,307                      |
| 113 | 3,797                      |
| 114 | 15,987                     |

### Ein Yabrud, Block 6

| Lot | Area<br>(in square meters) | Lot | Area<br>(in square meters) |
|-----|----------------------------|-----|----------------------------|
| 64  | 15,531                     | 114 | 1,125                      |
| 65  | 3,902                      | 116 | 1,651                      |
| 66  | 5,827                      | 117 | 2,176                      |
| 91  | 2,551                      | 118 | 4,090                      |
| 93  | 8,278                      | 119 | 2,501                      |
| 94  | 6,491                      | 120 | 13,643                     |
| 95  | 6,341                      | 165 | 7,403                      |
| 98  | 2,051                      | 166 | 7,541                      |
| 99  | 2,401                      | 167 | 4,402                      |
| 100 | 5,402                      | 168 | 9,429                      |
| 101 | 5,177                      | 178 | 7,003                      |
| 102 | 6,191                      | 181 | 3,001                      |
| 110 | 2,651                      | 193 | 5,302                      |
| 111 | 6,140                      | 194 | 7,941                      |
| 112 | 1,000                      |     |                            |

### Ein Yabrud, Block 7

| Lot | Area<br>(in square meters) |
|-----|----------------------------|
| 1   | 26,698                     |
| 3   | 8,558                      |
| 9   | 33,479                     |
| 11  | 4,866                      |
| 14  | 15,113                     |



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