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Human rights situation in Palestine and other occupied Arab territories

Written statement* submitted by BADIL Resource Center for Palestinian Residency and Refugee Rights, a non- governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* Issued as received, in the language(s) of submission only.



From de facto to creeping de jure annexation

Though it may be clear that particular areas of the West Bank have already been de facto annexed,¹ the actions of Israel actually indicate that a process of de jure annexation has been underway for several years in order to legally assert Israeli sovereignty and establish permanency. The recognition in law that the territory belongs to that state is the essence of the distinction between de facto and de jure annexation. Although this might ordinarily come as a formal declaration, international law is not specific as to the nature of the declaratory act required to make the distinction.

This submission demonstrates that Israel has laid the legal and judicial foundations of de jure annexation, such that any formal declaration will merely be the final step in the process of annexation and imposition of ultimate Israeli sovereignty, which clearly denies Palestinians the right to self-determination.²

Regardless, annexation, whether de facto or de jure, amounts to a serious breach of an obligation arising under a peremptory norm of international law and as such activates international obligations.

De jure acts of Annexation

The extension of Israeli sovereignty into the West Bank is not new; it has been achieved by a complex array of military orders, and by conferral of rights to Israeli-Jewish citizens wherever in the world they may be. However, recently, Israel has taken a number of formal actions to dismantle the legal distinctions between the occupied West Bank and Israel so that under the Israeli legal system this territory is increasingly indistinguishable from the state of Israel over which Israeli sovereignty exists.

First, Israel is gradually extending Knesset (parliamentary) sovereignty into the West Bank, without requisite military orders recognizing the legal distinction that the Occupied Palestinian Territory (OPT) is under military occupation.

a) In 2016, the Knesset passed the Encouragement of Capital Investments in Settlements Law, which directly extended tax benefits existing in Israel proper, to profits made in the West Bank and Gaza.³ In so doing, the Knesset acted to extend its territorial jurisdiction into the occupied territory for the first time.

b) In February 2017, the Knesset passed the Settlement Regularization Law,⁴ which takes the unprecedented step of retroactively legalizing any construction built on private Palestinian land that was done so in good faith or with government consent before or after the fact. It effectively allows the illegal expropriation of private Palestinian lands,⁵ and is the first legislation passed by the Knesset directly affecting the legal rights of Palestinians. In February 2018, the Knesset passed a bill extending the jurisdiction of the Israeli Higher Education Council to all tertiary institutions established in colonies of the West Bank. The law abrogates the military commander's authority, and extends Israeli domestic sovereignty to colonizer institutions, such as Ariel University.⁶

¹ See BADIL's Written submission to the UNHRC, 40th Regular Session, 10 February 2019, A/HRC/40/NGO/95, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/048/92/PDF/G1904892.pdf?OpenElement>.

² UNGA Resolution A/RES/3070 (XXVIII), 30 November 1973, operative para. 2.

³ The law is formally referred to as Amending the Income Tax Ordinance (no. 226) Law 5776-2016, see Yesh Din, "Annexation Legislation Database", available at <https://www.yesh-din.org/en/legislation/> [accessed 16 April 2019][hereinafter Yesh Din Annexation Legislation Database].

⁴ Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, SH No. 2604, (Isr.). English translation available at https://www.adalah.org/uploads/uploads/Settlement_Regularization_Law_English_FINAL_05032017.pdf.

⁵ Peace Now, *Legalization Law Will Stain Israel's Law Book*, January 2017, http://peacenow.org.il/en/legalization_law.

⁶ Yesh Din, "Annexation Legislation Database", available at <https://www.yesh-din.org/en/legislation/>

Second, Israel has extended the ordinary jurisdiction of domestic administrative courts into occupied territory. In 2018, the Knesset passed an amendment to the Administrative Courts Law and transferred the jurisdiction for cases from the Occupied Palestinian Territory (OPT) from Israel's High Court to the Administrative Affairs Court in Jerusalem.⁷ This amendment is another exercise of Knesset jurisdiction directly impacting the rights of Palestinians and extending territorial jurisdiction into the Occupied Palestinian Territory (OPT), without military orders. It also constitutes an erasure of the legal recognition of the exceptional nature of cases from the West Bank, which required that these cases be heard only by the Israeli High Court, which has jurisdiction to consider international law. Instead, Palestinian cases on freedom of movement and planning and zoning will now be heard by a court determining cases according to procedures of Israeli law proper.⁸

Third, the (former) Netanyahu administration adopted a number of policy position that influence the politico-legal context for decision-making with respect to the Occupied Palestinian Territory (OPT) which will further the process of de jure annexation, including:

a) Since 2012, the administration has appointed 10 new justices to the Supreme Court, from a total of 15, creating a markedly more conservative and nationalistic judiciary.⁹ This is slowly transforming the legal philosophy and jurisprudence of the Court, such that a slow judicial erasure of the Green Line distinction is manifesting in the Court's decisions. For example, in November 2017, the Supreme Court ruled that the colonizers constitute a "local population" in the West Bank.¹⁰

b) In 2012 and 2016, Knesset members tried to pass the Norms Bill, which would have seen Israeli law directly applied to the West Bank. When the bill failed to proceed, the Israeli Minister for Justice, Ayelet Shaked, put forward a set of Ministerial Committee guidelines, requiring, from January 2018, all proposed legislation coming before the Committee to be accompanied by a brief or legal opinion explaining application of the law to the West Bank, either by direct Knesset legislation or military order.¹¹

Fourth, in July 2018, the Nation State Basic Law was enacted laying the legal foundation necessary for formal annexation. In its opening article, this law constitutionally entrenches the Israeli claim to the whole of Mandatory Palestine by referring to the "Land of Israel". The law then fails to define Israel's borders, merely stating that the State of Israel was created within the Land of Israel. At Article 7 it declares "the development of Jewish settlement as a national value", requiring the State to "act to encourage and promote its establishment and strengthening." At Article 1(c) that "the right to exercise national self-determination in the State of Israel is unique to the Jewish people."¹² The cumulative effect of these provisions is two-fold: it provides the constitutional basis for future domestic Israeli laws annexing occupied territory; and, in failing to define the borders, each provision

[accessed 16 April 2019]; "Israel passes bill to extend authority over universities in West Bank", *MEMO: Middle East Monitor*, 31 January 2018, available at <https://www.middleeastmonitor.com/20180131-israel-passes-bill-to-extend-authority-over-universities-in-west-bank/> [1 April 2019].

⁷ Administrative Courts Law (Amendment No. 117), 5768 – 2018, (Isr.) available at https://www.nevo.co.il/law_word/law14/law-2745.pdf (in Hebrew) [accessed 13 March 2019].

⁸ Society of St Yves, "St. Yves Challenges the Amendment of the Administrative Courts Law Which Constitutes A Direct Step Towards Annexation", 22 October 2018, available at <http://www.saintyves.org/news/st.-yves-challenges-the-amendment-of-the-administrative-courts-law-which-constitutes-a-direct-step-towards-annexation.html> [accessed 30 May 2019].

⁹ Michael Sfar, "Israel and Annexation by Lawfare", *The New York Review of Books*, 10 April 2018, available at <https://www.nybooks.com/daily/2018/04/10/israel-and-annexation-by-lawfare/> [accessed 31 March 2019].

¹⁰ Michael Sfar, "Israel and Annexation by Lawfare", *The New York Review of Books*, 10 April 2018, available at <https://www.nybooks.com/daily/2018/04/10/israel-and-annexation-by-lawfare/> [accessed 31 March 2019].

¹¹ "Guideline to Ministers: Government Bills Must Not Overlook Judea and Samaria", Hezki Baruch, Arutz Sheva, 6 June 2017 available at <https://www.inn.co.il/News/News.aspx/347950> (Hebrew).

¹² Basic Law: Israel - the Nation State of the Jewish People, 5778-2018, (Isr.). An English translation of the law is available at <https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf>.

preserving Israeli-Jewish superiority will automatically apply to any expanded 'State of Israel.'¹³

Conclusion and recommendations

In conclusion, Israel has clearly achieved de facto annexation in parts of the West Bank, which is evolving into creeping de jure annexation, resulting in the establishment of Israeli sovereignty and the denial of Palestinian self-determination. As such, the international community is required to take all measures to fulfil its obligations and hold Israel accountable.

Such measures include:

a) Third party states, the UN, regional and international bodies recognize and apply appropriate legal terminology to the situation of unlawful de facto and de jure annexation that is already underway in the West Bank, and fulfil their obligations to cooperate to bring an end to the unlawful acts. This includes non-recognition of these unlawful acts and immediate cessation in aid to and military cooperation with the Israeli military, and sanctions on Israel.

b) The UN and UN Member States publish the UN database of companies involved in business activities with Israeli colonies in the Occupied Palestinian Territory (OPT), as a key mechanism by which to impede the process of annexation.

Third party states, international and regional organizations and the State of Palestine, to challenge Israeli policies in Occupied Palestinian Territory (OPT), in particular policies of the discriminatory zoning and planning, permit regime, land confiscation and denial of access and use of natural resources. These actors should invest in and take measures to protect infrastructure and services, particularly transportation, water, sanitation and health and services for Palestinian communities in Area C, in order to reinforce and improve their resilience.

¹³ BADIL, The Nation State Law: the Culmination of 70 years of Israeli Apartheid and Colonization, (Bethlehem, Palestine, October 2018), available at <http://www.badil.org/en/publication/press-releases/87-2018/4905-pr-en-221008-33.html>.