

PLO NEGOTIATIONS AFFAIRS DEPARTMENT

SETTLEMENT FREEZE ‘LOOPHOLES’ THE FAILURE OF PARTIAL-FREEZE ARRANGEMENTS

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Israel continues to colonize the West Bank, particularly in and around occupied East Jerusalem, in violation of its Roadmap obligations and threatening the Quartet’s vision of a viable and contiguous Palestinian state and, hence, of a just and lasting peace between Israelis and Palestinians. A *freeze* on Israeli settlement activity (as distinct from a *reversal*) could put an end to any further settlement activity and ensure that no further harm is done to Palestinian needs and interests and, by extension, to the two-state solution (though it would not undo existing settlement construction or damage therefrom).

The Roadmap explicitly calls for a comprehensive freeze in the following terms:

- “Consistent with the Mitchell Report, GOI freezes all settlement activity (including natural growth of settlements).”
- “GOI immediately dismantles settlement outposts erected since March 2001.”
- “GOI takes no actions undermining trust, including deportations, attacks on civilians; confiscation and/or demolition of Palestinian homes and property, as a punitive measure or to facilitate Israeli construction...”

The freeze language in the Roadmap is not accidental. It reflects efforts to close loopholes that existed in “freeze” arrangements agreed between Israel and the United States during the Oslo era. Indeed, such partial-freeze arrangements in the past have led to unprecedented settlement growth, thereby prejudicing the outcome of permanent status negotiations and undermining chances for a viable two-state solution.

I. The Oslo Years: A Period of Unprecedented Settlement Growth

Various partial-freeze arrangements during the Oslo years led to unprecedented rates of settlement growth. Between 1993 and 2000, Israel’s total settler population grew by nearly 40%, while the number of settler housing units in the West Bank (not including East Jerusalem) increased by 52%.¹ Moreover, the settler population grew by 5.5% a year,² or twice that of the Jewish population inside Israel, which at the time had an average annual growth rate of 2-3%. Similarly, during this period, the Israeli government confiscated some 215,700 dunums (~54,000 acres) of Palestinian land, allowing settlements such as Bitar Illit, Mitzpe Rahel, and Giv’at Ze’ev to more than triple in size.³

- **Rabin/Peres Governments (1992-96):** The 1992 arrangement between Prime Minister Yitzhak Rabin and the U.S. government allowed Israel to continue settlement construction at a rate unparalleled during the previous 26 years of Israeli occupation. Under Rabin, settlement construction proceeded at an average rate of 3,800 housing units per year—triple

¹ Peace Now.

² FMEP, “Report on Israeli Settlement in the Occupied Territories” (May-June 2007), Vol. 17, No. 3.

³ PNA Ministry of Planning, GIS and Mapping Unit Data Base (2000).

the historical rate of 1,200 per year.⁴ In addition, by mid-1996, the settler population in the West Bank, excluding those in and around occupied East Jerusalem, increased by 50% to approximately 153,000.⁵

Though Rabin promised he would build “no new settlements” without government approval and prohibit private construction, the Bush Administration acquiesced to Israeli demands to allow completion of 11,000 units under construction and unrestricted settlement construction in and around occupied East Jerusalem and the Jordan Valley, as well as for unlimited “natural growth needs”. In particular, the agreement exempted construction of housing units and settler-only bypass roads for settlements in the “Greater Jerusalem” area, such as Ma’ale Adumin, Gush ‘Etzion and Giv’at Ze’ev—key settlements designed to sever northern and southern West Bank territory and further isolate Palestinian East Jerusalem.

- ***Netanyahu Government (1996-98):*** Similar understandings allowed the Netanyahu government to increase housing starts in 1998 by 100% to 4,210, the highest rate of settlement growth since Ariel Sharon’s term as Minister of Housing in 1991-92. Rather than insisting on a full freeze, U.S. officials asked only that Israel avoid “substantial or meaningful” expansion, and to limit growth to “contiguous areas” and avoid building “beyond the periphery”. Israel exploited the arrangements by disguising the creation of new settlements as “new neighborhoods” and encouraging the creation of settlement “outposts” that expanded from hilltop to hilltop, in addition to establishing several new “official” settlements. The partial freeze also allowed Israel to continue building major settler-only bypass roads and other settlement infrastructure and to enlarge its settler presence in occupied East Jerusalem. In all, during his brief 32-month tenure, Netanyahu’s policies led to the construction of more than 20,000 housing units, more than 14,000 of which were sold, and increased the total settler population (*not* including those in East Jerusalem), by more than 20% (from 153,000 to 180,000).⁶
- ***Barak Government (1998-2001):*** Prime Minister Ehud Barak, who continued to operate under previous arrangements, surpassed both of his predecessors in accelerating the rate of settlement expansion in the Occupied Palestinian Territory (OPT) during the lead-up to permanent status negotiations. In addition to approving Netanyahu’s plans for 11,000 new apartments and 2,830 housing tenders,⁷ Barak “legalized” 32 of the outposts established under the previous government and established three additional “official” settlements of his own.⁸ In addition, Barak authorized the construction of approximately 4,800 additional housing units throughout the OPT.⁹
- ***Sharon Government (2001-2006):*** In the context of Israel’s construction of the Wall and Prime Minister Ariel Sharon’s “disengagement” plan, the Bush Administration and Israel agreed on new terms for limiting settlement growth. Articulated in an April 2004 letter from Dov Weisglass, Sharon’s Chief of Staff, to U.S. National Security Advisor Condoleezza Rice, these arrangements would have allowed Israel to continue settlement construction and

⁴ See FMEP, “Reports on Israeli Settlement in the Occupied Territories” (1996).

⁵ FMEP, “Report on Israeli Settlement in the Occupied Territories” (July 1996), Vol. 6, No. 4; (March 1999), Vol. 9, No. 2 (available at: <http://www.fmep.org/reports/jul1996>).

⁶ See FMEP, “Report on Israeli Settlement in the Occupied Territories” (November-December 1997), Vol. 7, No. 6 (available at: <http://www.fmep.org/html>).

⁷ Peace Now (<http://peacenow.www.peacenow-org.il>).

⁸ FMEP, “Report on Israeli Settlement in the Occupied Territories,” (November-December 1999), Vol 9, No. 6, (available at: <http://www.fmep.org/reports/v9n6.html>).

⁹ B’Tselem, *Land Grab: Israel’s Settlement Policy in the West Bank*, May 2002.

expansion for “natural growth” within existing “construction lines” in key settlement areas. However, the Bush Administration’s plans to draw physical “construction lines” delineating the extent to which Israeli settlements could continue expanding proved to be unworkable due to the problematic nature of the exercise for Israel, both technically and politically, and were formally abandoned in the summer of 2005.

II. Settlement Freeze “Loopholes”

Nearly 40 percent of the roughly 460,000 Israeli settlers now living in the OPT, and a full one-fourth of the more than 170 settlements scattered throughout the OPT, were established during the Oslo period. This is because, as noted above, the various partial-freeze formulas employed during this time created “loopholes” that allowed continued settlement growth, effectively negating the impact and intent of the freeze. Following are some common freeze “loophole” arrangements that have repeatedly failed to curb settlement growth over the years.

- **Allowing “natural growth”** – “Natural growth” refers to growth of the settler population resulting from births and migration. However, there is nothing “natural” about Israeli settlement growth: Due in large part to Israeli government financing and incentives, the growth rate of Israel’s settler population in the OPT is *several times higher* than that of Israel itself. In addition to unrestrained settler population growth, this formula also allows for the kind of territorial and infrastructural expansion ostensibly needed to accommodate that growth. This is precisely why “natural growth” is explicitly excluded by the Roadmap.
 - *Example: Whereas towns and cities inside Israel grew at a rate of 1.7% between 2003-04, Israeli settlements in the OPT grew by 5.5%—or more than 3 times as fast—during the same period. Meanwhile, individual settlements grew at far higher rates, such as Bet Aryeh (36.6%), Yitzhar (21.4%) and Geva‘ Binyamin (12.8%), among others.*¹⁰
- **“No new settlements”** – While ostensibly prohibiting the establishment of new settlements, this formula nevertheless does allow for the continued creation of new settlements under the guise of building settlement “neighborhoods” or “outposts” in practice, as well as for ongoing territorial, physical and demographic expansion of existing settlements. Indeed, during an investigation commissioned by the Israeli government in 2005, the director of Israel’s Administration for Rural Construction admitted in a letter to Attorney Talia Sason that “when, because of international relations, it is not possible to establish new settlements in Judea and Samaria, policymakers decided that existing settlements would instead be expanded, even if the expansion is not contiguous with an existing settlement.”¹¹ Moreover, since most land allotted for settlement construction *and* future expansion is already under settlement “jurisdiction”, comprising 42% of the entire West Bank,¹² and most settlement “master plans” have already been approved by past Israeli governments, this would allow existing settlements to continue expanding by several times their current size.
 - *Example: Three new settlements (“neighborhoods”) have been established near the settlement of Talmon (northwest of Ramallah): ‘Talmon B’, ‘Talmon C’, and ‘Talmon D’. All are non-contiguous and lie between 0.5-1.5 km from Talmon itself.*

¹⁰ Israeli Central Bureau of Statistics (2004).

¹¹ Sason interprets this to mean that “the Administration for Rural Construction, according to its director, with permission of the various Ministers of Housing, ignored government decisions and assisted in the establishment of unauthorized outposts in the guise of neighbourhoods and expansions of existing settlements.” See Talia Sason, *Opinion Concerning Unauthorized Outposts* (Unofficial Translation), p. 148.

¹² B’Tselem, *Land Grab*, p. 116.

- **“No construction beyond the construction line”** – This formula involves limiting settlement growth to within a particular area of a settlement, as delineated by a line. Variations on this formula include limiting settlement growth to within “the periphery” or existing “built-up” areas of settlements. In addition to the inherent subjectivity, if not arbitrariness, involved in identifying exactly where a “construction line” might be drawn, this formula allows for practically unlimited “upward” growth by permitting increases in the population and density of settlements. Moreover, it allows Israel to continue expanding settlements territorially as well, by incorporating non-contiguous settlement areas and the vacant land between them within a single, expanded “construction line.”
 - *Example:* By incorporating the non-contiguous built-up areas inside the “municipal” boundary of Ariel, in the very center of the northern West Bank, Israel could expand the settlement to as much as 3.5 times its current size.

- **“No land expropriation for construction”** – This formula is completely ineffective for slowing settlement activity because, as noted above, Israel has already confiscated most of the land it seeks for settlements and their future expansion, leaving Israeli settlements with an expansion reserve amounting to more than 40% of the West Bank. Furthermore, the strict language of the formula applies to only one means of land confiscation – expropriation – and excludes the many other ways Israel confiscates Palestinian land, such as requisitions and declarations of state land. It also allows Israel to continue seizing Palestinian land for “non-construction” purposes, such as agriculture, settlement by-pass roads and fences, and unspecified “security” reasons, as well as to execute outstanding confiscation orders.
 - *Example:* In April 2005, the Israeli army ordered the confiscation of 280 dunums (~70 acres) around the settlements of Avne Hefetz and ‘Enav near Tulkearem for the construction of fences around the two settlements, while effectively seizing an additional 1,550 dunums (~388 acres) of land situated inside the settlements’ new perimeters belonging to nearby Palestinian villages.

- **“No special economic incentives for settlements”** – This loophole allows settlements and settlers to continue receiving economic incentives (such as tax breaks and mortgage subsidies) because the settlements are “national priority areas”. Some “national priority areas” also exist within Israel, and consequently, the Israeli government can argue that there are no special governmental incentives for the settlements *per se*. This formula also excludes private financing and construction, which is responsible for most settlement construction activity in the OPT. As it were, Israeli settlements continued to receive substantial financial support and economic incentives from various Israeli government ministries, as documented by the *Sason Report*.¹³
 - *Example:* The Israeli government grants ‘National Priority’ status to settlements in the OPT as part of its efforts to encourage Israeli citizens to settle in the West Bank (including East Jerusalem), entitling the settlements to millions of dollars in annual government funding and subsidies.

- **No new tenders or building permits** – This formula allows Israel (or other parties) to act upon tenders or building permits already issued by Israeli authorities on the pretext that such activities are pursued by private parties and, therefore, “out of the hands” of the Israeli government. In fact, under Israeli administrative and contract laws, the executive branch has the power to release itself from such contractual agreements when their fulfillment is inconsistent with the public interest.

¹³ See Talia Sason, *Summary of the Opinion Concerning Unauthorized Outposts*.

- *Example:* In June 2006, there were 3,461 housing units under active construction in the West Bank (excluding East Jerusalem). Some 952 tenders (excluding those in East Jerusalem) were issued for new settler housing units in 2006.
- **Exempting East Jerusalem** – Under this usually unspoken loophole, Israeli settlements within Israel’s self-declared and unilaterally expanded municipal boundary of Jerusalem are exempted from a settlement freeze. However, like the rest of the West Bank, East Jerusalem is occupied territory. As such, it is subject to the same provisions of international law that prohibit the establishment of Israeli settlements as any other part of occupied Palestinian territory. Thus, despite the extension of Israeli law to East Jerusalem and surrounding villages, nearly all nations of the world, including the United States, do not recognize Israel’s illegal annexation of East Jerusalem. Nevertheless, for reasons of political expediency, Israeli settlements in East Jerusalem, which contain some 185,000 of the approximately 460,000 settlers (42%) in the OPT, typically have been exempted from past freeze arrangements.