

SETTLEMENT FREEZE LOOPHOLES: THE FAILURE OF PARTIAL “FREEZE” FORMULAS

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On-going Israeli colonization of the Occupied Palestinian Territory (OPT), particularly in and around East Jerusalem, in violation of international law and Israel's Road Map obligations, continues to undermine prospects for a viable and contiguous Palestinian state and the peace process as a whole. A cessation of Israeli settlement activity – or settlement freeze – is essential to ensuring that no further harm is done to Palestinian interests and, by extension, to the two-state solution.

Since the early 1990s, successive Israeli governments have responded to international demands for a settlement freeze by adopting various “freeze” formulas (part I) that failed to stop Israeli settlement activity (part II) due to the inclusion of loopholes that effectively negate the impact and intent of a genuine freeze.

The language in the Road Map was intended to close these loopholes. In line with international law, the Road Map 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...”

Regrettably, like its predecessors, the current Israeli government seems intent on pursuing a “freeze” formula that will fall far short of what is required to stop Israeli settlement activity.

I. Settlement “Freeze” Loopholes

Since the start of the peace process in the early 1990s, successive Israeli governments have adopted a variety of “freeze” formulas aimed at appeasing international calls for a cessation of settlement activity, all the while continuing to pursue their colonization of Palestinian territory:

Allowing “natural growth” – Whereas “natural growth” usually refers to population growth resulting from births, Israel typically uses the term to justify any and all growth in the settler population, including through migration. 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. Therefore, this loophole permits both unrestrained settler population growth, as well as the construction ostensibly needed to accommodate that growth. This is precisely why “natural growth” is explicitly excluded by the Road Map, not (as many pro-settlement voices have alleged) “to prevent settlers from having babies”, but to plug an enormous loophole that has led to unprecedented settlement expansion.

Example 1: Whereas the Jewish population inside Israel grew at an average annual rate of 1.5% between 2002-07, the Israeli settler population grew at an average annual rate of 4.0%—nearly 3 times as fast—during the same period. Meanwhile, the populations of several individual settlements grew at far higher rates, such as Har Homa (73.4%), Geva' Binyamin (18.1%) and Yitzhar (17.3%), among others.¹

Example 2: The “natural growth” myth is further refuted by the fact that many of the settlements that have been the focus of Israeli expansion efforts actually have shown negative growth since 2002, including Giv'at Ha-Matos (-10.5%), East Talpiot (-0.6%), Gilo (-0.4%), Elqana (-0.2%) and others.

“No new settlements” – In addition to allowing for unlimited expansion of existing settlements, this formula allows for the establishment of new settlements under another name. New settlements

have gone up as settlement “neighborhoods” or “outposts”, even though the new built-up area is often several hundred meters or even a few kilometers away from the ‘parent’ settlement.² Israel tries to justify these new settlements as falling within the ‘municipal boundaries’ of existing settlements; the reality, however, is that these boundaries are many times the size of the built-up areas of the settlements. Moreover, in Israel’s view, this formula does not apply at all to the Israeli-defined Jerusalem municipality or to the Latrun No-Mans-Land because it regards development of these areas not as “settlement” activity, but as development like in any part of Israel proper.

Example 1: According to existing plans for Efrat, some 3,400 housing units are to be added to the existing settlement in three new settlement “neighborhoods”: Giv’at Ha-Tamar (500 units) and Giv’at Ha-Dagan (400 units), several hundred meters to the north, and Giv’at Ha-Eitam (2,500 units), over 1 km to the northeast, of the existing built-up area.

Example 2: New plans for Sansana settlement depict it as an expansion of Eshkolot settlement, even though 3 km and the Wall separate them.

“No construction beyond the construction line” – Also sometimes referred to as limiting settlement growth to within “the periphery” or existing “built-up” areas of settlements, this formula involves drawing a line around each of the settlements and allowing settlement growth within that line. In addition to the inherent subjectivity, if not arbitrariness, involved in drawing the “construction line”, this formula allows for increases in the density of settlements through unlimited “upward” expansion. Moreover, it allows Israel to continue expanding settlements territorially as well, by incorporating non-contiguous settlement areas along with the undeveloped land that lies between them within a single “construction line.”

Example: By incorporating the non-contiguous built-up areas inside the municipal boundary of Arieel, Israel could expand the settlement to as much as 3.5 times its current size.

“No land expropriation for construction” – Since Israel has already confiscated, through various means, some 40% of the West Bank for the use of settlements and settlement-related infrastructure, it already has ample land reserves for future expansion. Furthermore, the strict language of this formula refers only to one means of land confiscation – expropriation – and excludes the many other ways Israel confiscates Palestinian land, such as requisitions and declarations of state land. Meanwhile, this loophole 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 February 2009, some 1,700 dunums of land belonging to Aritas village, south of Bethlehem, were declared ‘state’ land. The expropriated lands correspond to existing plans to build a new settlement with 2,500 housing units near Efrat settlement.

“No special economic incentives for settlements” – This formula allows settlements and settlers to continue receiving economic incentives 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*.

Example: Israeli settlers receive discounted land lease fees, low-interest mortgages and grants, tax breaks, research and development grants, among other economic incentives.³

“No new tenders / building permits” – While this formula ostensibly promises a moratorium on the issuing of additional construction tenders and/or building permits by the government, it nevertheless allows Israel (or other parties) to act upon existing tenders or building permits already issued by Israeli authorities on the pretext that such activities are being pursued by private parties and, therefore, “out of the hands” of the Israeli government. In reality, however, 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.

Example: In the 18 months after the A nnapolis Conference, the Israeli government issued tenders for the construction of some 2,300 new housing units in Israeli settlements. Similarly, building permits were issued for at least 2,230 units in West Bank settlements (excluding those in and around East Jerusalem) in the first 15 months after A nnapolis. Thus, even if no further tenders or building permits were issued, Israel would still be able to carry out the construction of at least 4,500 additional housing units, capable of housing some 20,000 new settlers, over the next several years,

Exempting East Jerusalem – Under this loophole, Israeli settlements within Israel’s unilaterally-defined municipal boundary of Jerusalem are exempted from a settlement freeze. However, like the rest of the West Bank, East Jerusalem is *occupied territory* and, hence, is subject to the same provisions of international law that prohibit settlement activity in any other part of the OPT.

II. Failure of Past Partial “Freeze” Formulas

For the reasons described above, the various “freeze” formulas adopted by successive Israeli governments have failed to stop settlement activity. On the contrary, thousands of settlement housing units and tens of thousands of settlers have been added during each Israeli government, with devastating consequences for Palestinian rights and interests, as well as for prospects of a negotiated two-state solution.

The following table includes a summary of the “freeze” formula(s) adopted by each previous Israeli government, as well as settlement expansion figures during that time.

Rabin/Peres Governments (Jul 1992-Jun 1996)

“Freeze” Formula:

- No new settlements without government approval.⁴
- No new private construction.⁵
- Less generous terms for “local loans” for settlers in some settlements - what was once the grant portion would become part of the payable loan.⁶
- “Natural growth” allowed.⁷
- Completion of 11,000 units already under construction allowed.⁸
- Exception for ‘Greater Jerusalem’ and the Jordan Valley.

Settlement Expansion:	<i>Population Increase</i> ⁱ	~63,000	<i>Building Permits</i> ⁱⁱ	941 ⁱⁱⁱ	
<i>Construction Starts</i> ^{iv}	9,520	<i>Construction Completions</i> ^v	13,727	<i>Active Construction</i> ^{vi}	5,209
<i>Other</i>	• Construction proceeded at an average rate of 3,800 housing units per year — triple the historical rate of 1,200 per year. ⁹				

ⁱ Total increase in the settler population (including East Jerusalem). Based on Foundation for Middle East Peace figures. Applies to all tables.

ⁱⁱ Total number of building permits issued for private construction (excluding in and around East Jerusalem). Based on Israeli Central Bureau of Statistics (ICBS) figures. Applies to all tables.

ⁱⁱⁱ Jan. 1995 – Jun. 1996 only.

^{iv} Total number of settlement construction starts (excluding in and around East Jerusalem). Based on Israeli Ministry of Construction and Housing (MoCH) and ICBS figures. Applies to all tables.

^v Total number of settlement construction completions (excluding in and around East Jerusalem). Based on MoCH and ICBS figures. Applies to all tables.

^{vi} Average number of settlement housing units under active construction (excluding in and around East Jerusalem) at any point in time. Based on ICBS figures. Applies to all tables.

Netanyahu Government (Jul 1996-Jul 1999)**“Freeze” Formula:**

- No new settlements.
- No “substantial or meaningful” expansion;¹⁰ expansion limited to “contiguous areas”; and building avoided “beyond the periphery”.

Settlement Expansion:	<i>Population Increase</i>	~42,000	<i>Building Permits</i>	5,788	
<i>Construction Starts</i>	9,593	<i>Construction Completions</i>	7,497	<i>Active Construction</i>	4,910
<i>Other</i>	<ul style="list-style-type: none"> • Established new settlements as “new neighborhoods” and “outposts”, in addition to establishing several new “official” settlements.¹¹ • Built major settler-only roads and other settlement infrastructure. 				

Barak Government (Jul 1999-Mar 2001)**“Freeze” Formula:**

- Similar to previous terms.

Settlement Expansion:	<i>Population Increase</i>	~30,000	<i>Building Permits</i>	2,342	
<i>Construction Starts</i>	7,147	<i>Construction Completions</i>	6,630	<i>Active Construction</i>	6,508
<i>Other</i>	<ul style="list-style-type: none"> • Approved Netanyahu’s plans for 11,000 new apartments and 2,830 housing tenders.¹² • “Legalized” 32 of the outposts established under Netanyahu and established 3 additional “official” settlements.¹³ 				

Sharon Government (Mar 2001-Apr 2006)**“Freeze” Formula:**

- Exemption for the settlement “blocs”.
- No new settlements.¹⁴
- “Natural growth” permitted¹⁵ within “existing community outlines”.^{16,17}
- No land expropriations to expand existing settlements.¹⁸
- No “settlement encouraging” budgets to be allocated.¹⁹

Settlement Expansion:	<i>Population Increase</i>	~70,000	<i>Building Permits</i>	4,411	
<i>Construction Starts</i>	9,142	<i>Construction Completions</i>	11,457	<i>Active Construction</i>	4,472

Olmert Government (Apr 2006-Mar 2009)**“Freeze” Formula:**

- Exemption for the settlement “blocs”.²⁰
- No new settlements.²¹
- No expansion of existing settlements beyond the originally approved master plan.²²
- No land expropriations for settlement construction.²³
- No new tenders or building permits.²⁴
- Economic incentives for residents of existing settlements to be canceled.²⁵

Settlement Expansion: ^{vii}	<i>Population Increase</i>	~38,000	<i>Building Permits</i>	3,673	
<i>Construction Starts</i>	4,594	<i>Construction Completions</i>	4,901	<i>Active Construction</i>	2,885

^{vii} All figures are from Apr. 2006-Dec. 2008.

¹ Based on Israeli Central Bureau of Statistics (ICBS) population figures for the years 2002-2007.

² 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." 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.

³ B'tselem, *Land Grab: Israel's Settlement Policy in the West Bank* (May 2002).

⁴ *Elements of the Government of Israel's 1992 Policy of Settlement Restraint*, online: Foundation for Middle East Peace (FMEP) <http://www.fmep.org/settlement_info/settlement-freeze/elements-of-the-government-of-israel2019s-1992-policy-of-settlement-restraint>; Geoffrey Aronson, "Settlement Freeze Redux" in FMEP, *Report on Israeli Settlement in the Occupied Territories* (May-June 2009), Vol. 19, No. 3, online: <FMEP <http://www.fmep.org/reports/archive/vol.-19/no.-3/settlement-freeze-redux>> ["Settlement Freeze Redux"].

⁵ *Elements of the Government of Israel's 1992 Policy of Settlement Restraint*, *ibid.*

⁶ *Ibid.*

⁷ "Settlement Freeze Redux", *supra* note 4.

⁸ *Ibid.*

⁹ FMEP, "Reports on Israeli Settlement in the Occupied Territories" (1996).

¹⁰ "Settlement Freeze Redux", *supra* note 4.

¹¹ *Ibid.*

¹² Peace Now (<http://peacenow.www.peacenow-org.il>).

¹³ FMEP, "Report on Israeli Settlement in the Occupied Territories" (November-December 1999), Vol. 9, No. 6, online: FMEP, online: <<http://www.fmep.org/reports/archive/vol.-9/no.-6/PDF>>.

¹⁴ "Settlement Freeze Redux", *supra* note 4.

¹⁵ *Official Response of Israel to the Mitchell Report*, online: FMEP <http://www.fmep.org/settlement_info/settlement-freeze/excerpts-from-the-report-of-the-sharm-el-sheikh-fact-finding-committee>.

¹⁶ *Ibid.*

¹⁷ Ethan Bronner, "Israeli say Bush agreed to West Bank growth" in *New York Times* (3 June 2009).

¹⁸ "Settlement Freeze Redux", *supra* note 4.

¹⁹ Bronner, *supra* note 17.

²⁰ Tovah Lazaroff & Hilary Leila Krieger, "US remains ambiguous over settlement construction rules" in *Jerusalem Post* (12 February 2007).

²¹ Tovah Lazaroff & Gil Hoffman, "Shas vows more settlement construction" in *The Jerusalem Post* (12 March 2008), online: <<http://www.jpost.com/servlet/Satellite?apage=2&cid=1205261308516&pagename=JPost%2FJPostArticle%2FShowFull>>.

²² *Ibid.* Similarly, Lazaroff & Krieger suggested that the Israeli government would 'confine' natural growth to within 'construction lines'.

²³ *Ibid.*

²⁴ Nadav Shragai, "PM completely freezes new construction in W. Bank settlements" in *Ha'aretz* (23 January 2008).

²⁵ Lazaroff & Hoffman, *supra* note 21.