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SYMPOSIUM ON REVISITING ISRAEL'S SETTLEMENTS

# SETTLEMENTS IN THE SUPREME COURT OF ISRAEL

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One of the unique features of Israel's legal, military, and political control over the Occupied Palestinian Territories (OPT) has been the review by the Supreme Court of Israel of the actions and decisions of the authorities in those territories.[1] Sitting as a High Court of Justice that has the competence to review the actions of all persons exercising public functions under law, the Court has entertained thousands of petitions relating to the legality of such varied actions as house demolitions, deportations, land requisition, entry permits, and establishment of settlements. There can be little doubt that the very existence of judicial review has had a restraining effect on the authorities. While the Court has not ruled against the government that often, and has provided legitimization for acts of dubious legality, such as punitive house demolitions and deportations, it has handed down some important rulings on questions of principle.[2] Furthermore, in the shadow of the Court, many petitions have been settled without a court ruling, allowing for a full or partial remedy for the Palestinian petitioner.[3]

In this essay I examine how the Court has approached the most loaded and politically sensitive of Israel's policies in the Occupied Palestinian Territories (OPT)—the establishment of settlements for Israeli citizens. Establishment of such settlements is widely regarded as incompatible with the law of belligerent occupation.[4] The UN Security Council, the International Court of Justice (ICJ), and the International Committee of the Red Cross, as well as many states, have declared that by establishing civilian settlements in the OPT Israel violates Article 49(6) of the Fourth Geneva Convention, which prohibits an occupying power from transferring part of its civilian population into the occupied territory. Notwithstanding this legal consensus, given the wide split in Israeli public opinion on the issue of settlements, and the fact that the settlement project is a part of official government policy, the Court has done all it could to avoid having to rule on the legality of the settlement project.

Petitions challenging the legality of settlements first reached the Court after the Begin government came into power in 1977. This government was ideologically and politically committed to settling Jews in all parts of the historic land of Israel. Settlements were being built on private land of Palestinians that had been requisitioned for military needs. The Palestinian landowners argued that establishment of a settlement could not be regarded as "needs of the army of occupation," the only legitimate grounds for requisition of private property in occupied

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[1] *See* David Kretzmer, The Occupation of Justice (2002); Sharon Weill, The Role of National Courts in Applying International Humanitarian Law 18–45 (2014).

[2] David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 ICRC Rev. (2012).

[3] Kretzmer, *supra* note 1, at 189–191.

[4] *See* Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL (forthcoming 2017).

territory recognized in Article 52 of the Hague Regulations.[5] The Court rejected the argument. Giving a wide interpretation to "needs of the army of occupation" that includes measures to protect the security of the occupying power, the Court held that if the authorities showed that the settlement was established to fulfill a particular security function, requisition of land was lawful. On the other hand, in the famous *Elon Moreh* decision, the Court ruled that if the dominant motivation for establishing the settlement had been political/ideological, rather than military, the requisition was unlawful.[6] In that case, the Court ordered evacuation of the settlement and return of the land to its Palestinian owners.

In the above cases, the Palestinian petitioners also argued that all settlements are unlawful under Article 49(6) of the Fourth Geneva Convention. The Court refused to consider the argument on two grounds. First, it held that the prohibition in Article 49(6) is not part of customary international law, which is enforced by Israel's domestic courts. Second, it held that the general question of settlements is a political question that is best left to the other branches of government to resolve. In two later cases, the Court reaffirmed its position on the nonjusticiability of the general legality of settlements (as opposed to use of private land for a specific settlement).[7]

While the *Elon Moreh* decision did not entirely rule out use of private land for settlements, it certainly restricted such use to cases in which it could be shown that the settlement would fulfill a specific and defined military purpose. The authorities subsequently abandoned the requisition of private land for settlements and embarked on a land grab of "public land," which the authorities then allocated for settlements.

From a legal perspective, there were two problems with this new policy. The first relates to the system of declaring land as public land; the second to use of such land for the benefit of the civilians of the occupying power.

Declaration of land as "state lands" or "government lands" was based on a military order promulgated soon after the occupation began. Under this order, the Custodian of Government Property appointed by the military governor is empowered to take possession of government property and regulate its use.

During the seventies, a survey was completed of land registered in the name of absentees or of the Jordanian government and the Custodian of Government Property took possession of this land. Following the *Elon Moreh* decision, the Cabinet decided that all uncultivated rural land would be declared state land.[8] The onus would then be placed on individuals to prove their rights in the land. This could be done only by producing a *kooshan* (title deed) or by proving both possession and cultivation of the land for a period of at least ten years. This legal structure paved the way for a policy of taking possession of large areas of land declared state lands.

The connection between widening the scope of state land and the settlement policy of the Likud government was quite explicit. The Drobles plan of 1978, which formed the basis for the original settlement policy of the Likud government, declared:

> State land and uncultivated land must be seized immediately in order to settle the areas *between* the concentrations of minority population and *around* them, with the object of reducing to the minimum the possibility for the development of another Arab state in these regions.[9]

The declaration of land to be state land, and especially the policy regarding uncultivated *miri* land, were intimately connected to the government's settlement policies. The fundamental assumption of the authorities was

[5] HCJ 606/78, Ayyub v. Minister of Defence, 33 PD (2) 113 (Beth El case) (1978) (Isr.); HCJ 258/79, Amira v. Minister of Defence, 34 PD (1) 90 (1979) (Isr.).

[6] HCJ 390/79 Duweikat et al. v. Government of Israel et al., 34(1) PD 1 (1979) (Isr.).

[7] HCJ 4481/91 Bargil et al. v. Government of Israel et al., 47(4) PD 210 (1993) (Isr.); HCJ 3125/98, I'ad v. IDF Commander in Judea and Samaria, 58 (1) PD 913 (1998) (Isr.).

[8] Meron Benvenisti, The West Bank Data Project, a Survey of Israel's Policies 34 (1984).

[9] Matityahu Drobles, Settlement in Judiea and Samria: Strategy, Policy and Planning 3 (1980).

that public or state land was at the disposal of Israeli authorities for use that would serve the political interests of Israel and Israelis. This is totally incompatible with Article 55 of the Hague Regulations, which obligates an occupying power to administer public property as a trustee.[10] That trusteeship is supposed to benefit the public to which the land belongs, namely the residents of the occupied territory, and not the public of the occupying power.

The approach of the Supreme Court when efforts were made to challenge the policy both of declaring land to be state land and of the use of such land for Israeli settlements is highly revealing. In the *al-Naazer* case, Justice Shamgar mentioned the duty of an occupying power under Article 55 of the Hague Regulations to safeguard the capital of public properties and to administer those properties in accordance with the rules of usufruct.[11] He presented the system as one aimed at fulfilling the duty of the occupying power to protect public property against intrusion. However, in a later case a person unsuccessfully challenged declaration of land that had been in his possession as state land. He also challenged use of that land for a settlement, but Justice Shamgar held that he lacked the standing to challenge the use being made of public land.[12] Finally, when an attempt was made by the Peace Now movement to challenge the legality of the whole settlement enterprise, including the issue of land use, the petition was dismissed as nonjusticiable.[13]

A great deal has already been written about the decisions of the Supreme Court of Israel and the Advisory Opinion of the ICJ relating to the separation barrier being built on the West Bank.[14] It is not my intention here to rehearse what has already been written on the topic. I will confine my remarks to the issue of settlements in the two opinions.

The ICJ stated that the settlements on the West Bank had been established in violation of Article 49 of the Fourth Geneva Convention.[15] Its conclusion was that since building the separation barrier in the West Bank, rather than on the Green Line or in Israel itself, had been largely determined by the desire to protect settlements, its construction was unlawful. More generally, it opined that "the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements" and should therefore be seen as a severe impediment on exercise by the Palestinian people of their right to self-determination.[16]

When the issue of settlements later arose before the Supreme Court of Israel in cases connected with the separation barrier, the Court was faced with a dilemma. It could have taken issue with the ICJ on the legality of the settlements, but it was obviously reluctant to do so. On the other hand, accepting the ICJ view would have meant ignoring the Court's own earlier role in legitimizing settlements, and would probably have led to a major confrontation with the government. The Court's solution was to attempt to skirt the issue by holding that the lawfulness of the settlements was irrelevant in judging the legality of the separation barrier. The Court held that even if the settlers, as citizens of the occupying power, were not protected persons under the Fourth Geneva Convention, the military commander had a duty to protect their lives and security. The Court's conclusion was that

> the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*. It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law or defies it, as determined in the

[10] MERON, *supra* note 8.

[11] Al-Naazer v. Commander of IDF in Judea and Samaria, 36 PD (1) 701 (1981) (Isr.).

[12] HCJ 277/84 Ayreib v. Appeals Committee et al., 40(2) PD 57 (1986) (Isr.).

[13] HCJ 4481/91 Bargil et al. v. Government of Israel et al., 47(4) PD 210 (1993) (Isr.)

[14] *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AJIL 6 (2005).

[15] Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136 (July 9).

[16] *Id.* at para. 122.

> Advisory Opinion of the International Court of Justice at the Hague. For this reason, we shall express no position regarding that question. The authority to construct a security fence for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve "public order and safety" (regulation 43 of *The Hague Regulations*). It is called for, in light of the human dignity of every human individual. It is intended to preserve the life of every person created in God's image. The life of a person who is in the area illegally is not up for the taking. Even if a person is located in the area illegally, he is not outlawed.[17]

The Court was clearly correct in stating that the military commander has a duty to protect the lives of persons who are present in the occupied territory, whether they are protected persons under the Geneva Convention or not. However, one cannot jump to the conclusion that the commander's choice of means to fulfill this duty is unlimited. The fact that persons are unlawfully in a certain location does not turn them into outlaws; but when examining how to protect such persons against threats posed by their very presence there the first measure to be considered must surely be their removal from that place. In all events, if the commander determines that persons are unlawfully in a location, one would assume that measures to protect them should be temporary measures, needed until such time as they can be removed from that location.

Rather than questioning the authority of the military commander to protect settlers by including them on the western side of the barrier, the Court subjected each section of the barrier's route to a test of proportionality, weighing the harm to Palestinians against the security benefit of the particular route chosen. Even if one accepts this method of analysis, it is hard to understand how the unlawfulness of the settlements could be regarded as irrelevant. When balancing the hardship caused by the barrier to Palestinians lawfully in their villages or towns against the security of Israelis in the settlements, the unlawful nature of those settlements should surely be a relevant factor. Why should people living in lawful settlements have to face considerable hardship because of the need to protect persons living in settlements that should not be there in the first place? The obvious solution in such a situation is to remove the unlawful settlements, thus obviating the need to take measures to protect their inhabitants. Thus, it would seem that however one looks at the issue, the question of whether a settlement was established lawfully or not should be a relevant factor in judging the lawfulness of a barrier built to protect persons in that settlement, especially when the location of the barrier has a deleterious effect on the rights of others.

Before concluding we should mention that while the Court has refused to rule that the settlements are unlawful and has therefore obviously helped to legitimize them, there is another side to the coin. The Court has ruled on more than one occasion that the settlements may remain where they are only as long as Israel retains control over the area, and that a political decision to withdraw from territory will justify dismantling the settlements and requiring the settlers to relocate in Israel.[18] Furthermore, in a number of cases the Court has ordered the evacuation and demolition of houses built on private Palestinian land.[19] This has increased hostility to the Court in right-wing circles and led to passing of legislation by the Knesset which in fact involves expropriation of private land on which some unauthorized settlements have been built.[20] At the time of writing, a number of petitions challenging this legislation are pending before the Court.

[17] HCJ 7957/04 Zaharan Yunis Muhammad Mara'abe et al v. The Prime Minister et al., 60(2) PD 477 (2005) (Isr.).

[18] HCJ 4400/92, Kiryat Arba Local Council v. Government of Israel, 48 (5) PD 587 (1992) (Isr.); HCJ 606/78, Ayyub v. Minister of Defence, 33 PD (2) 113 (Beth El case) (1978) (Isr.); HCJ 1661/05, Gaza Beach Regional Council et al v. Knesset of Israel et al., 59 (2) PD 481 (2005) (Isr.).

[19] *See, e.g.,* HCJ 8887/06, Al-Naavot v. Minister of Defense (Mar. 25, 2012) (Isr.); HCJ 9949/08, Hamed v. Minister of Defence (Nov. 14, 2016) (Isr.).

[20] Law for the Regularization of Settlement in Judea and Samaria, 5777–2017 (Isr.).