

Kretzmer, The Occupation of Justice, p. 77-79

LEGALITY OF SETTLEMENTS

Arguments against the legality of Israeli settlements in the Occupied Territories may be divided into three categories:

1. *General Prohibition.* Article 49 of Geneva Convention IV prohibits transfer of part of the occupying power's civilian population into the occupied territory. While it may be argued that this prohibition does not apply to the purchase of land in the occupied territory by residents of the occupying country and establishment of residence there on land purchased or rented, the widely accepted view is that it does apply to establishment, or even promotion, of civilian settlements by the government itself.⁷ Furthermore, under principles of customary international law an occupying power may only employ measures and promote projects in occupied territory if they serve one or both of two purposes: military needs or benefit of the local population.⁸ Establishing civilian settlements in occupied territory in order to further the economic or political interests of the occupying power is incompatible with these principles.⁹
2. *Use of Private Land.* International law outlaws *confiscation* of private property by the occupying army,¹⁰ but recognizes the power of the army to *requisition* land for the needs of the occupying army.¹¹ Expropriation of private land for establishment of settlements is clearly illegal. Use of requisitioned land may be challenged on a number of grounds. First, a civilian settlement is not a "need of the occupying army" for which requisition is permitted. Second, because the salient feature of requisition (as opposed to confiscation or expropriation) is its temporary nature, requisitioned land may not be used for a permanent settlement.
3. *Use of Public Land.* Under article 55 of the Hague Regulations, the occupying power must administer public property as a usufructuary. Establishment of a settlement, which changes the nature of the land use, is inconsistent with the notion of usufruct.

Given the political controversy over the settlements, the Supreme Court was reluctant to deal with the issue. It was especially reluctant to address general arguments that challenged the government's entire settlement policy (as opposed to more restricted arguments that could affect the legality of a particular settlement, but not of the whole policy).

The argument based on article 49 of Geneva Convention IV is a general argument of principle; its acceptance could have provoked a major confrontation with the government. It is unlikely that the government (especially one made up of parties with a strong ideological commitment to the Greater Land of Israel) would have abandoned its political program and ideology on the settlement issue in response to a decision of the Supreme Court. One can only guess what the reaction would have been to a judgment declaring all government-sponsored settlements in the Occupied Territories illegal; it might well have been legislation overruling the precedent or restricting the Court's jurisdiction in petitions relating to the Occupied Territories.¹²

It will be recalled that the Court offered two rationales for its refusal to address the legality of settlements under article 49 of Geneva Convention IV.¹³ First, because article 49 does not reflect customary law it may not be relied on before the domestic courts of Israel. Second, given their political sensitivity *general* arguments relating to legality of settlements are not justiciable.

The Court itself has ruled that the Hague Regulations reflect customary international law that will be enforced by Israel's domestic courts. Thus, the first of these rationales does not apply to arguments resting on the Hague Regulations that relate to general limitations on the powers of an occupying power, requisition of private land, or use of public land. The Court addressed the issue of requisitioning private land for establishment of settlements in a number of cases. Its judgment in one of these cases forced the government to abandon use of private land for settlements. However, the Court made every effort to avoid ruling on the use of public land for settlements and on the general limitations on an occupying power. In doing so it resorted to two judicial doctrines. When a private individual attempted to challenge the use being made of land that had been declared public land, the Court denied his *standing* to raise this question.¹⁴ When an attempt was made to confront the entire settlement policy of the government on the basis of the argument, *inter alia*, that establishing permanent settlements is prohibited under the Hague Regulations, the Court held that the matter was nonjusticiable.¹⁵

Although the Court was not prepared to tackle the settlement *policy*, it rejected the claim that every petition relating to settlements should be regarded as nonjusticiable; the political nature of settlements could

not empower the authorities to take an individual's land without the right to challenge the action in court.¹⁶ Thus, the main cases dealing directly with the settlement issue are cases of land requisition.