

The lawfulness of Israeli settlements

Politicians and the media, when referring to Israeli settlements in the disputed territories of Judea and Samaria (the West Bank)¹, frequently describe them as illegal, almost as if this were a given and not open to argument.

The main legal argument against the settlements is based on the Fourth Geneva Convention (1949), which applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance" (Article 2).

By Article 49(6): "The Occupying Power shall not deport or transfer parts of its own civilian population into territory it occupies." This is the key argument against the lawfulness of the Israeli settlements.

Judea and Samaria, however, were never lawfully part of the Kingdom of Jordan, whose dominion over them was recognised only by Britain and Pakistan. Moreover, by the 1994 Peace Treaty with Israel, Jordan relinquished any claim of sovereignty it might have over those territories.

Consequently, Articles 2 and 49(6) of the Fourth Geneva Convention do not apply to Israel's settlements in Judea and Samaria because they are not on the territory of another state.

However, even if the Fourth Geneva Convention did apply, Article 49(6) would not. The late Julius Stone, a distinguished professor of international law, explained:

It is clear that in the drafting history, Article 49 as a whole was directed against the heinous practice of the Nazi regime during the Nazi occupation of Europe in World War II, of forcibly transporting populations of which it wished to rid itself, into or out of occupied territories for the purpose of liquidating them with minimum disturbance of its metropolitan territory, or to provide slave labour or for other inhumane purposes. The genocidal objectives, of which Article 49 was concerned to prevent future repetitions against other peoples, were in part conceived by the Nazi authorities as a means of ridding their Nazi occupant's metropolitan territory of Jews - of making it, in Nazi terms, *judenrein*. Such practices were, of course, prominent among the offences tried by war crimes tribunals after World War II.²

Israel did not "deport or transfer" any of its civilian population to the disputed territories. Those who went did so voluntarily. Israel authorised, i.e. consented to, those settlements (the great majority) which are legal under Israeli law (those not so authorised are illegal "outposts"). The Fourth Geneva Convention could have imposed an obligation on an occupier to prevent, or at least not to permit, the movement of populations, but it confined itself to outlawing only forced movements.

This appears to me to answer the argument that Israeli settlements are illegal. But additionally there is the positive point that Article 6 of the League of Nations' British Mandate for Palestine (1922) encourages "close settlement by Jews on the land,

¹ Israel vacated her Gaza settlements in 2005. Far from leading to peace with the Palestinians, this concession was followed by civil war in Gaza, the seizure of power by Hamas, rocket attacks from Gaza upon Israeli towns, and full scale war in December 2008 and January 2009.

² *International Law and the Arab-Israel Conflict* (2003), comprising extracts from Julius Stone's *Israel and Palestine - Assault on the Law of Nations* (1980). The paper is edited by Ian Lacey, and can be found at <http://tinyurl.com/2lqz3s>.

including state lands and waste lands not required for public use." The land, in this context, includes Judea and Samaria.

I don't believe that the authorisation of settlements precludes a Palestinian state. I believe that Israel is prepared to dismantle existing settlements, and to remove the residents (by force if necessary), in order to achieve a viable peace agreement with the Palestinians. She has already done this for dozens of settlements in Sinai and Gaza, so why not another 120 in Judea and Samaria? The real question is why the Palestinians are so insistent that their state should be *judenrein*.

I think this is a political rather than legal issue. In this connection Dr. Alan Baker, legal adviser to the Israel Foreign Ministry, has stated:

"I live beyond the Green Line [Israel's 1949 armistice frontier], but my home is not registered with the Israel Lands Administration, which is the case for all the settlements. Instead, I have a long-term rental agreement that is contingent on any future peace agreement. This is the condition by which all settlers must abide. Whether or not they are aware of or agree to this situation, they have no permanent resident status and are powerless to change their status or the land's ownership."

This account is not, by the way, an attempt to justify Israel's settlement policies, which may be politically and diplomatically unwise. Nor am I saying there have not been legal violations in individual cases. I am simply trying to demonstrate that these policies are not unlawful under international law.

The real problem, in my personal view, is that the Palestinians are unwilling or unable to settle their dispute with Israel. The Hamas branch rejects Israel's right to exist, has waged war on her and will no doubt do so again, and offers her no more than a truce for a limited period of years. As for the "moderate" Palestinian Authority which still rules in Judea and Samaria, it insists on prior concessions, including in particular the "right to return", which are unacceptable to Israel because they would lead to the disappearance of the Jewish state and are, in effect, a one state solution. Even if Israel compelled the evacuation of all settlements, and withdrew from Judea and Samaria in their entirety, the Palestinians would not be satisfied but would make the right of return their central demand. If and when the Palestinians negotiate realistically and in good faith, and are willing and able to control their extremists, there can certainly be a peace agreement including a resolution of the issue of settlements.