Israel, Ayub v. Minister of Defence

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: reproduced as summarized and partly translated by Domb, F. in *Israel Yearbook on Human Rights*, 1979, pp. 337-342; footnotes omitted.]

H.C. 606/78,AYUB, *ET AL.* v. MINISTER OF DEFENCE, *ET AL.*(THE BETH EL CASE);H.C. 610/78,MATAWA, *ET AL.* v. MINISTER OF DEFENCE, *ET AL.*(THE BEKAOT CASE)33(2) *Piskei Din* 113.

In this case, the Supreme Court of Israel, sitting as the High Court of Justice, was asked to rule on the legality of establishing Jewish civilian settlements on private Arab lands previously requisitioned by the Israeli Military Government for military and security needs. Both Arab petitioners are the owners of lands in Al-Bireh and Tubas respectively, which are in Judea and Samaria, in the West Bank Region (that has been under Israeli Military Administration since the Six Day War of 1967). The lands had been requisitioned in 1970 and 1975 pursuant to Orders issued by the Military Commander of the Region. The Orders stated that the Military Commander of the Region deemed the requisition to be necessary for military and security purposes. At the initiative of the Israeli civilian Government, and not the Military Commander, Jewish settlements were established on the requisitioned lands in 1978, whereupon the Arab land-owners petitioned the High Court of Justice for an injunction against the Requisition Orders and for the return of their lands. Two grounds were cited:

(a) the requisition was not necessary for genuine military or security purpose and does not, in fact, serve any such purpose;

(b) alternatively, even if justified for military needs, the requisition of the lands still constitutes a violation of rules of international law which the petitioners are entitled to rely upon in this Court.

With regard to the connection between these two grounds the Court at the outset proceeded to stress that

these are two separate grounds which must not be confused. An act of a military government in an occupied territory might be justified from a military, security viewpoint and yet it would not be impossible for it to be defective from the point of view of international law. Not everything that furthers security needs is permissible under international law.

The High Court bench [...] analysed both grounds separately and, finally, unanimously rejected the petition. The leading judgment was delivered by Witkon J. [...].

At the commencement, Witkon J. adds a preliminary remark clarifying [that] the Court's [...] decision will be based solely on the

rights of the parties before us, according to the current situation prevailing between Israel and the Arab States. This is a situation of belligerency and the status of the respondents with respect to the occupied territory is that of an Occupying Power.

The first argument raised by the petitioners – whereby the requisitioning was not justified by genuine military or security needs – was rejected by Witkon J. for the following reasons:

1. No distinction can be drawn, as suggested by the petitioners, between strict military needs justifying Requisition Orders and general security needs, which are allegedly beyond the scope of requisition powers. In the Court's opinion, "the military aspect and the security aspect are one and the same" because

the prevailing situation is one of belligerency, and the responsibility for maintaining order and security in the occupied territory is imposed upon the Occupying Power. It also must forestall the dangers arising out of such territory to the occupied territory itself and to the Occupying Power. These days warfare takes the form of acts of sabotage, and even those who regard such acts (which injure innocent citizens) as a form of a guerrilla war, will admit that the Occupying Power is authorized and even obliged to take all steps necessary for their prevention.

Therefore, the acts of the Military Commander are justified as serving either strict military needs or needs of general security or, obviously, both of them.

2. The Occupying State may take preventive measures against terrorist activities and acts of sabotage even in areas where they do not actually occur.

This is in line with the Court's opinion in the *Hilu* Case to which Witkon J. refers. In that case, land owned by Bedouin tribes in the Rafiah Salient (in Northern Sinai) was requisitioned and Jewish settlements were established upon it. The Bedouin's application for an injunction against the Requisition Orders was dismissed

by the Court. The arguments of the respondent that the steps taken were necessary due to the terrorist activities and acts of sabotage which in fact took place in the area were unanimously upheld by the Court. Although in the present case no terrorist activity has actually taken place in the area in question, Witkon J. refused to differentiate between the two cases maintaining that prevention was the best cure for any ailment, it being preferable to detect and thwart terrorist activity prior to its perpetration. Since one of the affidavits submitted by the respondents unequivocally indicates that the requisitioned lands are situated in sensitive strategic areas "it is difficult to expect that an Occupying Power would leave the control of such areas to elements which are likely to be hostile."

3. As long as a state of belligerency exists, Jewish settlements in occupied territories serve actual and real security needs. Witkon J. sustains the opinion he expressed in the *Hilu* Case that the fact that requisitioned lands are intended for Jewish settlements does not deprive such requisitioning of its security character. In his view

it is indisputable that in occupied areas the existence of settlements – albeit "civilian" – of citizens of the Occupying Power contributes greatly to the security in that area and assists the army in fulfilling its task. One need not be a military and defence expert to understand that terrorist elements operate with greater ease in an area solely inhabited by a population that is indifferent or sympathizes with the enemy, than in an area in which one also finds people likely to observe the latter and report any suspicious movement to the authorities. Terrorists will not be granted a hideout, assistance or supplies by such people.

Since the affidavits of the respondent confirm that the Jewish settlers are subject to the control of the army and remain there only with the permission and the authority of the army, Witkon J. still adheres to his view expressed in the *Hilu* Case that "as long as a state of belligerency exists, Jewish settlement in occupied territories serves genuine security needs."

Consequently, the Court held that the requisitions in question and the establishment of civilian settlements thereon actually serve military and security needs and are therefore in accord with Israeli internal-municipal law.

In support of their alternative argument – challenging the legality of the requisitions from the standpoint of international law – the petitioners relied on provisions of both the 1907 Hague Convention (No. IV) respecting the Laws and Customs of War on Land and the 1949 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. Turning to this argument, Witkon J. first considers and rules on the preliminary question as to whether the petitioners, as protected persons, may themselves claim their rights under these Conventions in a municipal (internal) court of the Occupying State or, whether, only the contracting States to those Conventions are entitled to claim the rights of the protected persons and that, of course, only on the international level.

In the words of the Court, the answer to this question depends on whether the invoked provisions of international law have become part of the internal-municipal law of the State whose court is asked to enforce it. A provision of an international Convention is part of the internal law – and, hence, enforceable in internal courts – if it forms part of customary international law, as distinct from conventional international law which binds only the contracting States *inter se*.

With regard to provisions of the 1907 Hague Convention and the 1949 Fourth Geneva Convention, Witkon J. refers to three judgments of the Supreme Court in which both these Conventions were held to be part of conventional international law on which individuals may not rely in an Israeli internal court. However, following these judgments, Professor Yoram Dinstein published an article stressing that a difference does exist between the two Conventions and that while the 1949 Fourth Geneva Convention has remained part of conventional international law, the 1907 Hague Regulations, which in any case only express the law as it had been accepted by all enlightened States, are considered as customary international law.

In light of this article, and after considering the views of Schwarzenberger and von Glahn, Witkon J. became convinced that the 1907 Hague Convention is generally regarded as customary international law, whereas provisions of the 1949 Fourth Geneva Convention remain conventional in their nature. Consequently the petitioners may rely in this Court on the 1907 Hague Convention – which thus forms part of Israeli internal law – but not on provisions of the 1949 ourth Geneva Convention. Since their contention as to the illegality of the settlements was totally based on Article 49 of the 1949 Fourth Geneva Convention, the Court lacks the competence to deal with it.

It therefore remained for the Court to decide only whether the requisition of the petitioners' lands violates, *inter alia*, Articles 23 and 46 of the Hague Regulations prohibiting confiscation of private property. It was proven to the Court that the lands in question were seized only to be used and that rental was offered to the petitioners, who retained their ownership of the lands. This kind of seizure – namely, requisition – is lawful under Article 52 of the Hague Regulations on which von Glahn comments that:

Under normal circumstances an occupant may not appropriate or seize on a permanent basis any immovable private property, but on the other hand a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity...

The Court also adopts von Glahn's view regarding the question of how to deal with land which the occupant army does not really need for its own purposes but which must not be left in the possession of the owners lest it serve the interests of the enemy. According to the passage quoted by the Court "common sense would appear to dictate the need for preventive measures by the occupant against such use of private property by its owners." [...]

Discussion

1. a. When may private property be requisitioned in occupied territory, according to IHL? By whom? When may private property be confiscated? By whom? Which additional limitations does IHL impose both on requisition and confiscation? (HR, Arts 23(g), 46, 52 and 55; GC IV, Art. 49; CIHL, Rules 49-52)

b. Is the opinion of the Court on the extent to which requisitions by an occupying power are admissible compatible with that of the US Military Tribunal at Nuremberg in United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al. ? Which decision is correct?

2. Was the land in this case requisitioned for a military or security purpose? Does establishment of a settlement at the initiative of the Israeli civilian government, and not the Military Commander, serve a military or security purpose? Supposing that the needs of the army of occupation or military necessity justify the temporary seizure of private land, does that permit the occupying power to settle its own civilians on that land? (GC IV, Art. 49(6); CIHL, Rule 130)

3. Because an occupation is deemed temporary, does the establishment of permanent settlements in occupied territory violate IHL? Except for security needs, when may the occupying power make permanent changes in the occupied territory? Would IHL permit the construction of such settlements if they benefited the local Palestinian population? (HR, Arts 43, 46, 52 and 55)

4. Regardless of whether the land requisition served a military purpose, do such settlements directly violate the IHL provision prohibiting the transfer of the occupying power's population into occupied territory? (GC IV, Art. 49(6); CIHL, Rule 130) What is the underlying purpose of this IHL provision? Is this purpose humanitarian? Would a voluntary settlement by Israelis, not done or assisted by the government of the occupying power, be permissible? Could military necessity or security reasons justify a violation of the prohibition of the transfer of the occupying power's population into occupied territory?

5. a. Why does the Court declare that it lacks the competence to deal with Convention IV? Why is the conventional or customary status of Convention IV relevant to its applicability in this case, particularly since Israel is a State Party? Are conventional rules less binding than customary ones?

b. May a State decide that international treaties become part of its internal law only if there is implementing legislation? Has the State an obligation to adopt such legislation? Does IHL oblige States Parties to allow the Conventions to be invoked before its courts? May Israel invoke its constitutional system, the absence of implementing legislation, or a decision of its Supreme Court to escape international responsibility for violations of Convention IV?

c. Are the Hague Regulations applicable in this case? As conventional or as customary law?

d. Does the Court explain how in its view (presumably all) provisions of the Hague Regulations are

customary and (presumably all) provisions of the Fourth Geneva Convention are not? What could be the justification for such a distinction? How could Professor Dinstein justify the argument that all provisions of Convention IV are purely conventional? Are some customary law? Is Art. 49 of Convention IV customary law? How could one assess whether Art. 49(6) of Convention IV is customary or purely treaty-based, considering that out of more than 150 States less than 10 were not bound in 1978, as Contracting Parties, to respect that provision? Should one assess only the practice of those non-party States? Should one only assess whether Art. 49(6) was customary law in 1949? Were there no developments in customary law between 1949 and 1979? Why should Art. 49(6) of Convention IV not belong to customary law?