ISRAEL AND THE WEST BANK AFTER ELON MOREH: THE MECHANICS OF DE FACTO ANNEXATION

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UPON its accession to power in 1977 Israel's Likud government, under the leadership of Prime Minister Menahem Begin, embarked on a steady and energetic policy of permanent incorporation of the West Bank into Israel. The core of this policy has been the rapid expansion and diffusion of Jewish settlement and land acquisition throughout the entire area. As of April 1981, at least 54,000 acres had been requisitioned for use by West Bank settlements, while another 130,000 acres had been requisitioned or "closed," mainly for military purposes. Altogether approximately 13 per cent of the West Bank's land area has been either "requisitioned," "closed," or "expropriated." An additional 20,000 to 50,000 acres have been purchased.[1] While the number of settlers in the area (excluding East Jerusalem) has risen from less than 5,000 to 18,500 by mid-1981, the number of settlements has doubled, with at least 20 new settlements established in heavily populated Arab areas that had generally been off limits to Jewish settlers in previous Labor governments.[2] Rapid expansion of housing construction, road construction, and infrastructural facilities for these settlements has been supported by expenditures averaging more than $100 million per year since 1977.[3] The purpose of this intensive and, in

1. *Jerusalem Post*, April 6, 1981, April 7, 1981. These figures do not include more than 5,000 acres seized in the East Jerusalem area. Most statistics dealing with land on the West Bank are in "dunams" (4 dunams = 1 acre). For estimates of land purchased by Israel or Israelis in the West Bank see *Haaretz*, November 1, 1979, February 8, 1980. Including absentee, state, and unregistered or disputed land Israeli authorities control or supervise the use of more than one-third of the West Bank. See below, footnote 23.

2. Ned Temko, "All is not Quiet on the Western Bank," *Christian Science Monitor*, February 7, 1980; *Al-Hamishmar*, July 10, 1980; *Maariv*, February 17, 1981, December 30, 1980. Jerusalem Domestic Service radio broadcasts, reported in *Daily Report: Middle East and North Africa*, Foreign Broadcast Information Service (FBIS), June 18, 1981, p. I5.

3. Tzvi Shuldiner, "The Real Cost of the Settlements," *Haaretz*, July 25, 1980; *Jerusalem Post Magazine*, January 30, 1981; Jerusalem Domestic Television Service, FBIS, April 15, 1981, p. I5.

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Israel's straightened economic circumstances, expensive effort, has been to create such an elaborate network of vested interests and established facts that no future Israeli government will be able to relinquish operational sovereignty over the area.

Israeli policies related to land acquisition in the West Bank have been developed to overcome administrative, legal and political constraints on the expansion of land acquisition and settlement in the occupied areas. Although Israeli policies and procedures in this sphere have never been systematically described by the authorities, recent Israeli Supreme Court cases, as well as public discussion of how administrative and legal modalities might be developed to compensate for Court-imposed constraints, reveal much more than had been known about the mechanics of *de facto* annexation. The Supreme Court's 1979 ruling in the Elon Moreh case, that the Hague Convention of 1907 not only applies to the occupied territories, but can be enforced by Israeli courts, also sheds important light on the legal obstacles (in Israeli terms) that remain to the West Bank's complete incorporation into Israel and that confront those in Israel who wish to facilitate that process.

International Law and West Bank Lands

The legal status of Israel's land acquisition and settlement activities in the occupied territories has been a matter of widespread debate ever since the occupation began. The official position of the United States, as articulated by the Department of State's legal adviser in a letter to Congress on April 21, 1978, is that the Fourth Geneva Convention (1949), to which Israel is a signatory, is binding on Israeli actions in the West Bank and that the establishment of civilian settlements in the occupied territories is inconsistent with its terms. The legal adviser further stated that the prohibition in paragraph 6 of Article 49 of the Fourth Geneva Convention, against making land available for civilian settlements or financing their establishment, applies to Israeli activities in the territories occupied by Israel in June 1967.[4] It is on this basis that the United States government, until the advent of the Reagan administration, had consistently maintained that Israeli settlements in the occupied territories were "illegal and an obstacle to peace."

The legal framework within which Israel sees itself as operating in regard to land acquisition and settlement in the occupied territories is still evolving. Nevertheless, three unanimous decisions by the Israeli Supreme Court, sitting as the High Court of Justice, *viz.* Abu-Hilu (1973), Beit-El—Toubas (1979), and Elon Moreh (1979), provide an authoritative framework for

4. *Israeli Settlements in the Occupied Territories,* Hearings before the Subcommittees on International Organizations and on Europe and the Middle East of the Committee on International Relations of the House of Representatives (Washington, D.C.: Government Printing Office, 1978) Appendix, pp. 167–172.

interpreting the international legal constraints which Israel presently recognizes as operative in this sphere.[5] These cases each involve attempts by Arab inhabitants of the territories occupied by Israel in 1967 to reclaim lands registered in their names—lands that had been seized by the military government and placed at the disposal of Jewish civilian settlements.

The lands in question in the Abu Hilu case were located in the Rafah district of the Gaza Strip while those in the Beit-El—Toubas case involved lands near the West Bank village of Toubas and near the Beit-El military camp near El-Bireh (also in the West Bank). In both these cases the High Court dismissed the petitioners' argument that the lands were seized for political rather than security reasons, and in both cases upheld the seizure of the lands in question. In doing so the Court reaffirmed its traditional reluctance to interfere in the exercise of authority by professional military commanders entrusted with the security of the country. However, in the substantive arguments presented in support of these judgments, it provided the legal machinery with which the seizure of privately owned lands for the settlement at Elon Moreh (near Nablus) was successfully challenged.

In the Abu Hilu case the Court accepted the government's contention that the seizure of Bedouin lands for the establishment of Jewish civilian settlements was necessary for security. In doing so, however, the court indicated 1) that the sincerity of the military authorities and the genuineness of security motives were justiciable and decisive issues; and 2) that it would countenance claims by private landowners in the occupied territories that their lands had been taken under false "security" pretenses. The significance of the Beit-El—Toubas decision rests on the Court's explicit recognition of the applicability and enforceability of the Hague Convention of 1907 to Israel's rule of the West Bank and its stress that, in line with Article 52 of those regulations, privately owned land seized by the authorities could, even if justified by security considerations, only be "requisitioned" (not "confiscated" or "expropriated") on a temporary basis and in exchange for rental payments.

Speaking for the Court in the Beit-El—Toubas case Justice Vitkon declared that "the Hague Convention is indeed customary law, and one can claim under it in the municipal courts."[6] West Bank inhabitants were thus recognized as "protected persons," under the terms of the Hague Convention, obliging the Court to "deal with the claims of the petitioners to the degree that they are based on the provisions of the Hague Convention."[7]

5. The official names of these cases are, respectively, Sheik Abu Hilu *et al.* vs. State of Israel (HCJ 302/72), Ayyub *et al.* vs. The Minister of Defence (HCJ 606/78, 610/78), and Dwikat *et al.* vs. The Government of Israel (HCJ 390/79).

6. Unofficial English translation of HCJ 606/78, undated mimeo of the Beit-El—Toubas case, Jerusalem, p. 6.

7. *Ibid.*, p. 6.

Indeed the government accepted the Court's judgment that the matter would be decided on the basis of the Hague Convention and argued that, in accordance with it, the lands in question had not been "confiscated" but "that the use of the lands was seized in exchange for offered rental payment." The Court agreed with the government that the seizures in question had been "requisitions" and as such were permissible under Article 52 of the Hague Convention.[8] The Court was very clear, however, that it would be open to challenges of land seizures if landowners involved could demonstrate that violations of the Hague Convention had taken place.[9]

The Elon Moreh case of 1979 involved 31 acres of land near Nablus that had been seized by the military authorities and put at the disposal of Jewish civilian settlers. The settlers established themselves on the site, and the landowners petitioned the Court for the return of their land. In October 1979 the Court handed down its unanimous decision that the settlement (Elon Moreh) be dismantled, the seizure orders cancelled, and the lands returned to the petitioners. The importance of the Elon Moreh decision derives from its precedent setting illustration of how the legal machinery established in the Abu-Hilu and Beit-El—Toubas cases could be used to the benefit of Arab litigants.

In the Elon Moreh case, as in previous cases, the Court was prepared to accept security justifications for civilian settlements that involved relatively indirect contributions to the needs of the army or to military security as a whole. Nor was the Court inclined any more than it had been in the past to question the motives or professional judgment of those entrusted with the security of the state. But in this case it emerged that those so entrusted were divided in their opinion as to the security significance of the Elon Moreh settlement. Chief of Staff Rafael Eitan submitted an affidavit arguing for the security significance of the settlement, but admitted that the Minister of Defense, Ezer Weizman, disagreed with him. According to the Court "an extraordinary situation had thus been created,"[10] which had forced it to probe more deeply into the motives behind the land requisition and

8. "Hague Convention (IV) Respecting the Laws and Customs of War on Land," reproduced in *The Law of Nations: Cases, Documents, and Notes,* Herbert W. Briggs (ed.), (New York: Appleton-Century-Crofts, 1952) p. 1023.

9. The attitude of the Court toward petitioners' arguments that the Geneva Convention of 1949, to which Israel was a signatory, was contradictd by the land seizures, was that since the Geneva Convention is classified as "contractual international law," i.e. the product of an agreement reached among sovereign states, individual inhabitants of occupied areas such as the West Bank do not have standing to claim their rights under the Convention in internal Israeli courts. The High Court ruled that therefore it could not enforce the terms of the Geneva Convention (which explicitly forbids the establishment of civilian settlements in occupied territory). Rather the Court stated that "enforcement is a matter involving the countries which are parties to the Convention." The Court expressly refrained from ruling on the theoretical question of whether Article 49 of the Geneva Convention "is applicable to the case before us." Beit-El—Toubas mimeo, *op. cit.*, p. 8.

10. *Piskoi Din,* (Judgments of the Court), 1980, HCJ 390/79/vol. 34 (I), Jerusalem, p. 7, (the Elon Moreh case).

settlement than it had in past cases. It found that the initiative for the action had come not from the military authorities out of concern for the needs of the "army of occupation," but that "the driving force for the taking of said decision in the Ministerial Defense Committee and in the Cabinet plenum . . . (was) the powerful desire of the members of Gush Emunim to settle in the heart of Eretz-Israel, as close as possible to the town of Nablus. . . . both the Ministerial committee and the Cabinet majority were decisively influenced by reasons lying in a Zionist worldview of the settlement of the whole land of Israel."[11]

In the process of coming to the conclusion that in the Elon Moreh case security arguments had been advanced to disguise the true political intentions of the authorities, the Court articulated several criteria with respect to which the legality of land requisition from individual Arabs for settlement purposes can be evaluated.

1) The initiative for the measures, including the precise location of the lands involved, must come from the military. In this case the Court found the initiative to have come not from the military, but from the ultranationalist pro-settlement political group, Gush Emunim (Bloc of the Faithful). The Army's *post facto* justification for the location of the settlement came in response to decisions made by the Interministerial *Settlement* Committee (not, the Court pointed out, by the Interministerial Defense Committee).

2) The security justification for Elon Moreh which the Chief of Staff did advance, although accepted as sincere, was judged to be too vague. To be legal, settlement on requisitioned private land must be more than "consistent" with national security objectives. It must make a direct contribution to their attainment.

3) The expressed beliefs and intention of settlers themselves, to the effect that their purpose was ideological and political, and only incidentally related to security, was accepted as evidence that the settlement in question was not being established for security reasons. The settlers at Elon Moreh were Gush Emunim members who explicitly told the Court that the security argument was of "no importance" to them.[12]

4) The affidavit submitted by the Gush Emunim settlers prompted the Court to set another important precedent. Based on a strict interpretation of the Hague Convention, the Court judged that permanent settlements cannot be established on land that is by definition temporarily "requisitioned" by the Army. The settlers testified that they and Prime Minister Begin considered Elon Moreh as permanent. The Court determined that this commitment to permanence could have stood "on its own," apart from any

11. *Ibid.*, p. 16.

12. Quoted from affidavit submitted by Elon Moreh settlers to the High Court of Justice, *ibid.*, pp. 21–22.

consideration of whether the settlement served a necessary security purpose or not, as a reason for rescinding the requisition order.

In sum, the Hague Convention of 1907 is now officially recognized as binding on Israel's governance of the territories it occupied in June 1967. Though not as categorical as the terms of the Geneva Convention, considered unenforceable by Israel's High Court of Justice, the regulations of the Hague Convention do constrain Israeli land acquisition and settlement in the occupied territories in several important respects.

—No land, whether public or private, can be permanently confiscated. Land may only be "requisitioned" on a temporary basis.
—No settlement, whether established on private or public land, can be considered permanent.
—If requisitioned land is privately owned, title remains in the hands of the owner, and rental payments are to be made while the land is in use.
—If requisitioned land is publicly owned, the "rules of usufruct" apply to the occupying power's use of the land. At minimum this means that its possession cannot be permanently alienated, nor its basic character transformed.
—Settlements on privately owned land in the occupied territories are legal only if their establishment and the land requisitions involved are "really necessary for the army of occupation."[13]

Search for a New Legal Formula

Although the Court did refrain from entering into the overall question of the legality of civilian settlements in the occupied territories, the Elon Moreh decision nonetheless triggered a storm of protest among ultranationalist settlers and their political supporters. Minister of Agriculture Ariel (Arik) Sharon, acknowledged "godfather" of the West Bank settlements in the Likud government, saw the ruling as a threat to all settlements.

> The question is not only that of Elon Moreh. The question pertains to the existence of all existing and future settlements in Judaea, Samaria and the Jordan Valley. We already hear that Arab residents in these areas are going to submit appeals to the High Court of Justice. Settlement on private or disputed lands has been carried out for many years in different places, including the Jordan Valley. Therefore, the goverment must find a comprehensive solution. The issue is not the transfer of one settlement from its place to another place; the issue is the existence and development of all settlements.[14]

As Sharon noted, one specific problem raised by the Court decision was that many of the score of settlements established by Gush Emunim and the Likud government in heavily populated Arab areas, and even some estab-

13. *Ibid.*, p. 17.
14. Jerusalem Domestic Service radio broadcast FBIS, October 31, 1979, p. N7.

lished by the previous Labor government, were surrounded by privately owned land. The settlers and their supporters argued that unless such lands could be transferred to Jewish control these settlements would be prevented from expanding and would eventually collapse. Another concern was that other settlements, even some established before the Likud took power, such as Kiryat Arba near Hebron and Gush Etzion settlements south of Jerusalem, that had been established on lands that were at least partially privately owned, might be dismantled by Court order.

However, the fundamental problem for Gush Emunim posed by the Elon Moreh decision was the direct challenge it constituted to its effort to erase the "green line" (Israel's June 5, 1967 borders, i.e. the 1949 armistice lines) dividing Israel proper from "Judea and Samaria" (the West Bank). By officially declaring these areas to be occupied, by applying the Hague Convention's terms to the administration of these areas, and by ruling that no Jewish settlements established during the occupation could be considered permanent, the Court had cut the ground out from under the ultranationalist position. Not only did the Court say the green line existed, but also that the "creation of facts" could not change that circumstance.

The Elon Moreh decision was handed down on October 22, 1979. The settlers and Gush Emunim responded immediately, declaring their determination not to evacuate the site lest a precedent be set which would jeopardize Jewish settlement throughout the West Bank and trigger "the collapse of the Jewish hold on Judaea and Samaria."[15] Supporters of the settlers, both inside and outside the government, advanced a host of suggestions for complying with the Court order *without* dismantling the settlement. These suggestions included a new law to legalize another expropriation order for the area on which Elon Moreh was located, efforts to purchase the land on which the settlement had been established, plans to relocate several of the buildings of the settlement on plots adjacent to but not within the 31 acres of privately owned land at issue in the case, the idea of establishing a military base at the Elon Moreh site, and a call for the government to issue a declaration that the West Bank was not in its eyes, occupied territory.

In the weeks and months of acrimonious debate that followed, it emerged that none of these steps was feasible, primarily because, in the opinion of the Foreign Ministry's legal adviser, Ruth Lapidot, the Minister of Justice, Shmuel Tamir, and the Attorney General, Yitzhak Zamir, none could be implemented without contradicting the Court decision. While the landowners sued again to prevent further delay in the evacuation of the settlement, the government moved forward with plans to relocate the Elon Moreh

15. Jerusalem Domestic Service radio broadcasts, FBIS, October 23, 1979, p. N8; November 14, 1979, p. N2.

settlers to a nearby hill-top, Jabal al-Kabir, on lands that were not registered as privately owned. The debate within the ultranationalist camp revolved around whether there should be confrontation with the soldiers that would eventually be sent to evacuate the settlement in an effort to bring down the government, or whether the interests of the settlers would be better served by moving to the new site, keeping the pro-settlement Likud government in power, while demanding that the government enact a comprehensive and fundamental change in the legal status of the West Bank and the status of the settlements.

On January 10, 1980, the settlers at Elon Moreh announced their decision to comply with the Court order and move to Jabal al-Kabir, where housing units were being erected. Gush Emunim spokesmen announced that their decision to "regard Jabal al-Kabir as the permanent site of our settlement" was taken "following serious hesitations and with sincere good will to prevent a confrontation, not to disrupt the government's course . . . to strengthen our actual hold on the Nablus approaches. . . ." The settlers further stated that they viewed the government's decision on Elon Moreh as "serious, harmful and unnecessary," and that the Court's ruling had "uncovered a serious situation regarding the legal status of the settlements in Judaea and Samaria." They stressed that their decision was influenced by the impression gained from their meeting with Prime Minister Begin that he "would act to improve the situation" and a commitment undertaken by 30 Knesset members to "act to change the legal situation in Judaea and Samaria."[16]

The Begin government did indeed devote considerable energy to its search for a legal formula to preclude further successful challenges to settlement related land seizures. By March at least five proposals were under consideration by the cabinet and the Attorney General's office. These included application of Israel's law of eminent domain for Jewish settlements in the West Bank, use of the Jordanian Law for Expropriation of Land for Public Purposes, passage of a new law declaring the right of Jewish settlement in any location within the "Land of Israel" determined as appropriate by the government, and legislation to deprive Arabs of access to the High Court of Justice in the land seizure cases. In the meantime the government declared it would abide by the commitment it made at the time of the Elon Moreh decision to avoid expropriation of privately owned land for Jewish settlements.

Impatient with the government's hesitation to propose new legislation, the heads of Jewish local councils in the West Bank, on March 19, 1980, began a hunger strike outside the Knesset demanding immediate cabinet

16. *Yediot Ahronot*, January 17, 1980, in FBIS January 18, 1980, pp. 6–7.

action in fulfillment of commitments made to the Elon Moreh settlers. Prime Minister Begin pleaded with the mayors to end their hunger strike, explaining that "[you] do not seek something that is contrary to the views of the government." The problem, said Prime Minister Begin, was that "This is a complex legal matter. The bill has to be worded clearly and we have to take all kinds of legal aspects under consideration. Therefore, this takes time."[17]

As it transpired, the Attorney General reported to the cabinet that in fact it was not possible to legislate changes in the legal situation on the West Bank that would permit the expropriation of privately owned land for Jewish settlements without extending Israeli sovereignty over the area, which was contrary to the commitment made in the Camp David Accords that determination of the ultimate legal disposition of the occupied areas would take place only after a transitional autonomy regime had been functioning for five years. But the cabinet was deeply split over the issue. Prime Minister Begin himself had strong personal sympathies for the hunger strikers. Hawkish ministers, including Agricultural Minister Ariel Sharon (Council of the Interministerial Settlement Committee) and National Religious Party representatives Zevulun Hammer, Minister of Education, and Yosef Burg, Minister of the Interior, favored the enactment of legislative guarantees, though the latter admitted that there was not a parliamentary majority in favor of such a step. Deputy Prime Minister Yigal Yadin, Defense Minister Ezer Weizmann, and Justice Minister Shmuel Tamir opposed new legislative measures. Deadlock in the cabinet resulted in repeated postponement of an official decision until finally, on May 2, the hunger strikers declared an end to their fast. The leader of the striking mayors explained that the fast had been concluded as a result of "binding and unambiguous guarantees, very strong commitments . . . from determining factors in our state." Although the settlement heads did not claim that promises of "legislation" had been received, they described the "essence of the commitments" to involve "legal means" for the "immediate solution . . . for the problem of the existence, development and expansion of the existent settlements in Judea, Samaria, and the Gaza District and of settlements to be established in the future."[18]

Administrative Adaptation and the Expansion of West Bank Land Acquisition

A week after this commitment had been made, the cabinet adopted the recommendation of Attorney General Zamir to create a special ministerial committee to develop administrative measures to safeguard existing settlements from legal challenges, provide land for seven particular settlements

17. FBIS, March 28, 1981, p. N7. For the fears of the hunger strikers see their leaflets: "Why are we hunger striking?" and "Who will get the land: the legal situation," in Tsvi Raanan, *Gush Emunim* (Tel Aviv: Workers Press, 1980) Appendix.

18. Jerusalem Domestic Service radio broadcast, FBIS, May 5, 1980, p. N1.

surrounded by privately owned Arab land, and create opportunities for expanded settlement and land acquisition within the legal constraints established by the High Court. Ultranationalist settlement advocate Ariel Sharon, who in the end cast the sole vote against Zamir's recommendation, and who himself favored sweeping new legislation, was appointed to head the special ministerial committee. The rapid expansion of land acquisition and settlement in the West Bank since the spring of 1980 has been due in large measure to his energy and imagination and to the sizeable resources at his command.

Since joining the cabinet in 1977 Sharon has never wavered from his declared objective of maximizing the number of Jewish settlements established in the West Bank, the number of settlers living therein, and the amount of land transferred to Jewish control.[19] Enjoying close political and personal ties with Gush Emunim, he has had, within the budget of the Agriculture Ministry itself, tens of millions of dollar a year for construction and support projects for Jewish settlements in the West Bank. In addition, the Finance Ministry has made large special allocations available to him for this purpose.[20] The Jewish Agency Settlement Department, which plans and coordinates the development of most West Bank settlements, is represented on the Interministerial Settlement Committee which Sharon has chaired. One of the Settlement Department's co-directors, Mattityahu Drobles, is an outspoken supporter of Sharon and of maximum Jewish settlement and land acquisition throughout the West Bank.[21] A less well known, though crucial component of Sharon's bureaucratic and political power base has been the Israel Lands Administration (ILA). As Minister of Agriculture he has been, *ex officio,* the director of this body, comprised of representatives of the Jewish National Fund (the World Zionist Organizations' land acquisition and development arm) and the Agriculture Ministry. Within Israel proper this administrative unit supervises the use of 93 per cent of the country's land area. It also has effective responsibility for the supervision of land acquisition and use in the territories occupied in 1967, and has thus constituted an administrative apparatus of enormous importance for Sharon and his settler supporters.

19. See *Jerusalem Post,* September 4, 1977, and Yehuda Litani, "West Bank Minefield," *Haaretz,* January 16, 1981, for Sharon's views and ultimate objectives.

20. Regarding settlements one Sharon aide was quoted as saying "budgeting is not a problem." *Jerusalem Post International Edition,* April 6–12, 1980. For a breakdown of expenditures on settlements in the occupied territories by ministry see Shuldiner, *op. cit.* Concerning special allocations for settlements see, for example, Jerusalem Television Service broadcast, FBIS, June 19, 1981, p. I6.

21. See Mattityahu Drobles, *Master Plan for the Development of Settlement in Judea and Samaria, 1979–1983,* World Zionist Organization Department for Rural Settlement (mimeo), Jerusalem, October 1978. For a convenient discussion of the main outlines of this document see Temko, *op. cit., Christian Science Monitor,* February 7, 1980.

In the West Bank (including East Jerusalem) the ILA functions primarily through the Office of the Custodian of Absentee Property. The staff of this office are seconded to the military government from the ILA and the Justice Ministry, and operate under the command of the military governor of Judea and Samaria. With branches throughout the West Bank this office has served Arik Sharon as a direct pipeline through the military government to the inhabitants of the West Bank and their property.[22]

The Custodian's office was created by virtue of military government directives 58 and 59, issued in June 1967, entitled "Abandoned Property of Private Individuals Order" and "Order in Regard to State Property." Altogether it administers the use of between 420,000 and 665,000 acres of state land, absentee property, and "disputed" land.[23] Among its responsibilities are survey and ownership classification of parcels being considered for requisition, leasing of property to local Arabs and collection of leasehold fees, and returning land classified as absentee to individual owners able to claim their property. The ILA, through this office of the military government, also "assists in the settlement of the area by designating the location of land, the concentration and the acquisition . . . (and) supervises the transfer to the settlement unit of the Zionist organization."[24] Sharon and his supporters, inside and outside of the government, have used control of this office to circumvent constraints placed on Israeli land acquisition and settlement by the High Court of Justice, and thereby "solve" the land problems of the settlements thought to have been threatened by the Elon Moreh decision, to expand land acquisition and settlement, and thus to strengthen the ties that bind the future of the West Bank to Israel. These objectives have been accomplished by administrative, not legislative, action, without contradicting the High Court's decisions, without formally abandoning the government's stated intention of expropriating no privately owned land for settlement purposes, and without providing domestic and international opponents of the government's *de facto* annexation policies easy targets for their criticism.

Of special importance in this complicated but largely successful effort was

22. Following Likud's victory in the 1981 Knesset elections Sharon was named Defense Minister, with overall responsibility for affairs in the occupied territories. By expanding the jurisdiction of the Defense Ministry in settlement-related matters and by naming a close personal aide as chairman of the Interministerial Committee on Settlement, Sharon appears to have made the transition from the Agriculture Ministry to the Defense Ministry without sacrificing his dominant role in land acquisition and settlement matters.

23. *Haaretz,* November 1, 1979; David Lennon, "The Great Land Barrier to Palestine Peace," *Financial Times,* October 29, 1979; Aryeh Shalev, *The Autonomy—Problems and Possible Solutions.* Paper No. 8, January 1980 (Tel Aviv: Center for Strategic Studies, Tel Aviv University) p. 105. This office is to be distinguished from the Office of the Custodian of Absentee Property established by Israel in 1950 to administer the lands of Arab refugees following the 1948 war, which operates only within the green line.

24. Minister of Agriculture, *Report on the Activities of the Israel Lands Administration for the Year 1976/77,* (Hebrew) (Jerusalem, December 1977) p. 177.

the Sharon committee's appreciation of two loopholes in the High Court's judgments. The first loophole was that the Hague Convention distinguishes between privately owned and "public land." While the Court agreed that private individuals whose lands had been seized had legal standing to sue for return of their lands, no representative body exists on the West Bank that can claim standing to sue in Israeli municipal courts (the High Court of Justice) for lands seized illegally from the public or "state" domain, i.e. for purposes not in accord with the "rules of usufruct," as stipulated in Article 55 of the Hague Convention. Thus only seizures of privately owned land can be prevented or reversed through recourse of the High Court of Justice. This places enormous importance on the determination of the status of land parcels as "privately" or "publicly" owned. The second loophole discovered by the settlement authorities, however, was that the High Court had refused to intervene in any disputations over the ownership status of a parcel of land. Since 1967 disputes over land ownership and title have been assigned to administrative tribunals of Israeli Army officers appointed by the military government. These appeals tribunals make non-binding "recommendations" to the area commander who usually acts on their advice. There is no further avenue of appeal for a West Bank resident who disputes the decision of the military government on matters of land ownership.

To use these two loopholes to expand opportunities for the requisition of "public" or "state" land, the cabinet decided, as early as December 1979, to accelerate a comprehensive survey of the ownership and registration status of all land in the West Bank. The task was assigned to the Office of the Custodian of Absentee Property within the military government, and specifically to a land survey team directed by Mrs. Plia Albeck, an expert on land ownership and registration seconded to the military government from the Justice Ministry. The allocation of additional personnel and funds for this effort was explicitly justified as a means to increase the tempo and facilitate the consummation of land acquisition for settlement purposes.[25]

The detailed results of this survey, exploited by the Sharon Committee and reportedly nearing completion in April 1981, have not been made public. Nor is systematic information available regarding methods and criteria used by the survey team, though tax receipts from Ottoman, British, Jordanian and Israeli authorities do appear to have figured in Albeck's classification of parcels as "privately owned," "disputed," "unregistered," or "state lands." In addition Albeck has indicated that lands that have been cultivated within ten years would not be classified as "state land." On the other hand, it has also been reported that lands whose records are considered "vague" have been classified as "state lands," and it is well known that the files of land registration offices on the West Bank, which include

25. *Jerusalem Post,* December 25, 1979; *Maariv,* March 21, 1980.

unsorted collections of miscellaneous Turkish, British, Jordanian and Israeli documents, are highly disorganized.[26]

Partly in response to the utter complexity of land law in the area and the chaotic state of land registration files, and partly due to inefficiencies attendant upon certain traditional land use practices, the Jordanian government, in 1953, began a process of "land settlement," comprised of a cadastral survey and the distribution of title deeds. Although the process had been completed by 1957 on the East Bank, by the outbreak of the Six Day War in June 1967, less than half of the West Bank had even been surveyed by teams sent from Amman. Moreover, even within the three-eighths of the West Bank for which the cadastral process had been completed, only a portion of the landowners had received their title deeds, either because of uncompleted paper work, failure to remit the small registration fee required by the Land Survey Office, or because of the interruption in mail service caused by the war. (See map.)

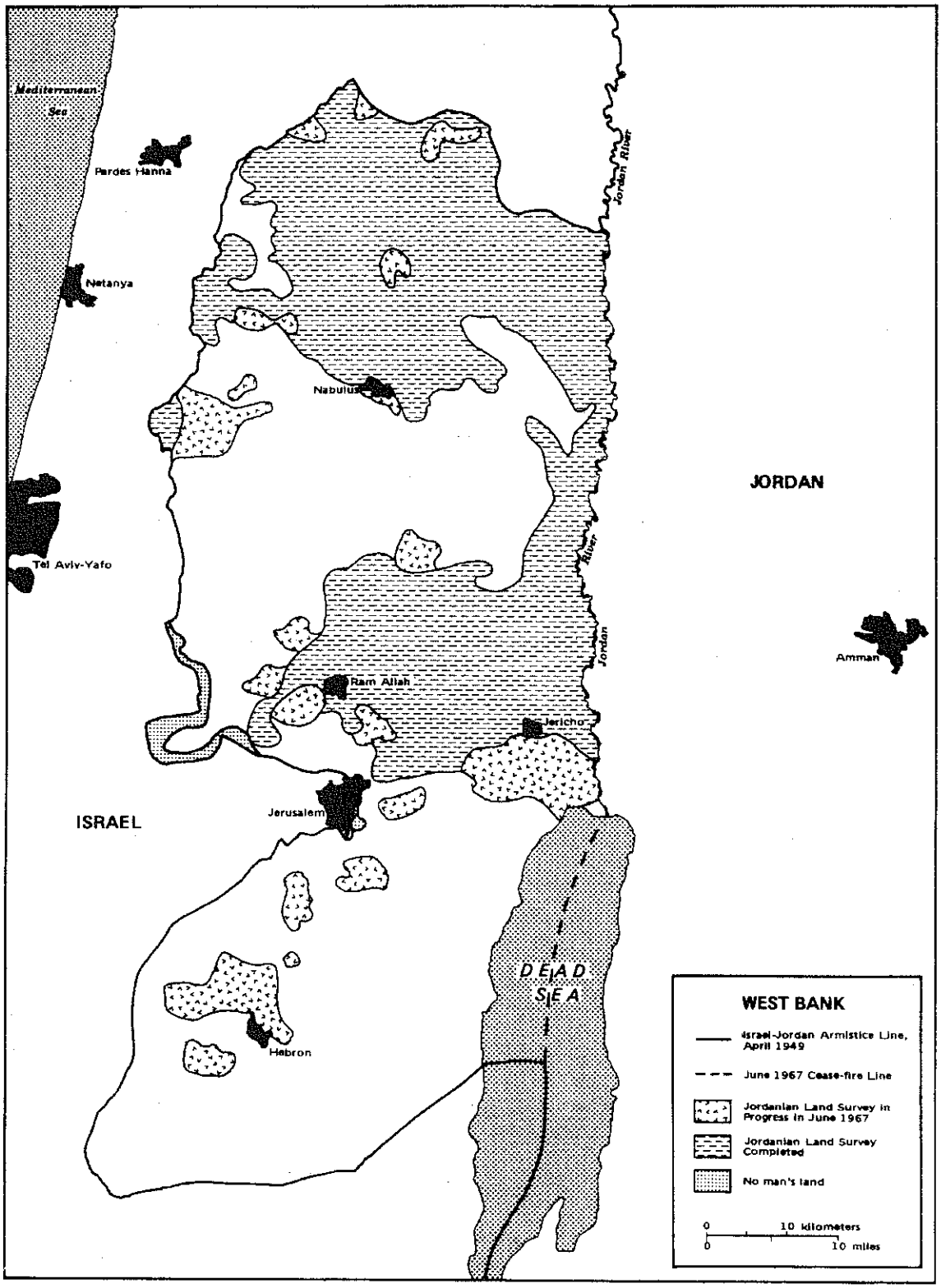
This process, and its incompleteness, have assumed enormous importance on the West Bank. In May 1980, the preliminary findings of the Israeli land survey team indicated that, for a "decisive majority" of the populated hill country of both Judea and Samaria (the southern and northern bulges of the West Bank), private ownership claims of various sorts existed.[27] This report was consistent with an independent survey of the area compiled under the auspices of the United Nations and published in 1950. Appended to the report of the Ad Hoc Committee on the Palestinian Question to the United Nations General Assembly, and including a detailed breakdown of land ownership district by district, this document indicates that no more than eight per cent of the entire area could be considered "public land," while approximately 88 per cent of the land was privately owned by Arabs.[28] To permit substantial requisitions of land for Israeli settlements in the locations favored by the Likud government, the legal validity of these claims to private ownership had to be challenged. This has been done by military appeals tribunals which, in deciding disputes over land ownership, recognize as authoritative proof of "undefeatable title" only formal Jordanian title deeds, granted under the Jordanian Land Settlement Law of 1953, and in the phsyical possession of West Bank landowners. By using its access to land

26. For example, sharp disputes have arisen over whether a given parcel has been, or is, under cultivation. For references to the criteria used by the Albeck survey and the non-decisiveness of tax receipts see *Jerusalem Post*, February 9, 1981; May 23, 1981; Elias Khoury, "The Problem of West Bank Lands," letter to the Office of the Legal Adviser to the Government, Ministry of Justice, Jerusalem, February 11, 1981, (Hebrew, mimeo) p. 5; and *Zoo Haderech*, March 25, 1980.

27. Dani Rubinstein, *Davar*, May 2, 1980.

28. United Nations, Official Record of Second Session of the General Assembly, Ad Hoc Committee on the Palestinian Question, *Summary Records of Meetings*, September 25–November 25, 1947, Appendix V, UN presentation 583(b), (Lake Success, New York, August 1950).

Extent of Official Jordanian Land Survey on the West Bank



From original obtained from Government Land Office in Ramallah.

office records on the West Bank the settlement authorities and the military government were able to locate tracts that could be "realized" (declared as "state land") without fear that local inhabitants would be able to prove otherwise.[29]

But the search for uncultivated and unregistered land was a tedious process. In key areas the Sharon committee's survey team had found relatively little land that Arabs could not claim as privately owned, even under the government's strict criteria. By the summer of 1980 the Begin government had become increasingly nervous about the possible impermanence of Israel's presence in the West Bank. Anticipating new elections in 1981 and the possibility of its fall from power, the "realization" of state land was expanded. Instead of declaring as "state land" preselected parcels whose history of use and registration status had been thoroughly investigated by the land survey team, large tracts, mainly outside the areas within which the Jordanian land survey had been completed, were declared "state land." In the two years following the Beit-El—Toubas and Elon Moreh decisions the military government is reported to have issued more "declarations of state land" than in the preceding 12 years of the occupation, with the trend accelerating in early 1981.[30] The purpose of these wholesale "realizations" was to shift the burden of proof and litigation onto the shoulders of Arab landowners, and thereby to put at the disposal of Israeli settlements private lands whose ownership could not, within 21 days, be demonstrated to the satisfaction of the military tribunals. The largest of these tracts were 3,700 acres southwest of Nablus, 5,000 acres northwest of Hebron, 4,000 acres between Jerusalem and Jericho, and 1,000 acres southeast of Nablus.[31] The effectiveness of this technique arises in part from the brevity of the time allowed for the presentation of an appeal, the expense involved in the preparation of the detailed maps and other documents required by the tribunal and in the hiring of a lawyer, and the bewilderment of semi-literate peasants faced with legal proceedings over issues and in a language (Hebrew) that they do not comprehend. Yet, by April 1981, it was reported that at

29. The calculated intent to use the incompleteness of the Jordanian land survey to expand the amount of land available for Israeli settlement can be clearly inferred from Mattityahu Drobles, *Master Plan . . ., op. cit.*, p. 1. After excluding "private Arab-owned land which is duly registered," Drobles maintains that 22 "settlement blocs" could be expanded or created throughout the West Bank, including the heavily populated hill country. From the map attached to this document fully one half of the area of the West Bank is to be included in these settlement blocs. For a description of the decisive importance of in-hand Jordanian title deeds in appeals to the military government in disputes over land ownership see Elias Khoury, "The Problem of West Bank Lands," *op. cit.* pp. 1–2. See also Yehuda Litani, *Haarety*, February 11, 1981.

30. Khoury, "The Problem of West Bank Lands," *op. cit.*, p. 3.

31. *Jerusalem Post*, February 9, 1981; April 6, 1981; *Haaretz*, March 1, 1981. For a critical analysis of the effectiveness of this "tactic" see *Haaretz*, editorial, March 23, 1981; and Dani Rubinstein, in *Davar*, March 20, 1981.

least 17 separate appeals were pending before military tribunals.[32]

By "realizing" and then "requisitioning" state lands the Sharon committee and the military authorities were able to solve the land problems of most of the Gush Emunim settlements that were threatened by the Elon Moreh decision. In a few cases, however, particularly of settlements located within the areas in which the Jordanian land settlement process had been completed, and consequently where many Arab landowners held authoritative proof of ownership, other techniques were adopted. Of special interest, from a legal point of view, has been the use of the Jordanian Law for the Expropriation of Land for Public Purposes, e.g. the seizure of one and one-half acres to build a sewer system for the settlement of Ofra, northeast of Ramallah, and expropriation of land from the village of Deir el-Hatab, east of Nablus, to build a road to the settlement on Jabal al-Kabir, to which the Elon Moreh evacuees had been transferred.[33] These were the first times that land used solely for the benefit of Jewish settlements was expropriated under the Jordanian law of eminent domain. Additional lands throughout the West Bank have been reserved for future use by settlements by military government orders forbidding construction in, and/or closing, wide strips where roads are planned or under construction and substantial tracts in the immediate vicinity of various existing settlements.[34] Quasi-public and private efforts to purchase land from local and absentee landlords have also intensified, although the secrecy involved and the fact that the majority of these sales are not registered at the land records office, makes the extent of their success difficult to estimate.

Settler fears that the Elon Moreh ruling could lead to Court orders dismantling settlements established previously on requisitioned private land were alleviated by the High Court's decision in July 1980 in the case of Migdal Oz, a settlement south of Jerusalem. In this ruling the Court denied the petition of 27 landowners from the Arab village of Beit Ummar for the return of their lands—lands which had been seized in 1977 for what had been claimed as "security reasons," but which had subsequently been allocated to the civilian settlement of Migdal Oz. The Court argued that too

32. *Jerusalem Post,* April 6, 1981. For a detailed account of the practical difficulties facing landowners who wish to appeal the declaration of property as "state land" see Khoury, "The Problem of West Bank Lands," *op. cit.,* pp. 3–4.

33. Jerusalem Domestic Service, FBIS, January 30, 1980, p. N9; *Jerusalem Post,* July 15, 1980.

34. Concerning substantial amounts of land set aside for roads in various locations throughout the West Bank see *Davar,* January 8, 1980; Joint Publications Research Service (JPRS), *Near East/North Africa Report* (Springfield, Virginia: National Technical Information Service) July 28, 1980, No. 2155, *Jerusalem Post,* January 26, 1981, March 22, 1981; *Zoo Haerech,* September 22, 1980, April 22, 1981; May 20, 1981. For examples of large areas in the vicinity of settlements which have been closed to new construction projects see Yehuda Litani, *Haaretz,* February 11, 1981; and JPRS, *Near East/North Africa Report,* March 4, 1981, No. 2279, p. 42.

much time had elapsed between the seizure and the formal presentation of the petition.[35]

The Future of West Bank Settlement and Land Acquisition: Constraints and Opportunities

Contrary to the hopes of West Bank Arabs and the fears of Gush Emunim settlers, the Beit-El—Toubas and Elon Moreh High Court of Justice rulings did not bring a halt to the expansion of Israeli settlement and land acquisition. On the other hand, the rulings have had significant consequences that will shape the struggle in Israel over the process of *de facto* annexation by affecting the political, legal and administrative instruments available to the participants in that struggle.

Ironically, although its substantive demands were fulfilled by the government's administrative response to the Elon Moreh decision, the break-up of Gush Emunim as a unified political force can be traced to that ruling. The fundamental and explicit nature of the issues addressed in the Elon Moreh case led the settlers and the hunger striking mayors to demand official, formal, and legal sanction for the permanent incorporation of the West Bank in Israel. But the government refused to change the legal status of the territories. In their arguments before the Court, and in subsequent cases, government lawyers have accepted the High Court's reasoning in regard to the status of the West Bank as under "belligerent occupation" and the applicability of the Hague Convention's prohibition of "permanent" settlements and the "expropriation" of land for settlement purposes (as opposed ot its temporary "requisition"). The government's unwillingness to move toward formal annexation resulted in a serious political defeat for Gush Emunim and exposure of its demands as outside the "national consensus" in Israel. Its subsequent rupture into at least three groups which share a wide range of purposes, but disagree on tactics and organization, was triggered by personal rivalries, religious vs. secular orientations, partisan political loyalties, and important disagreements over whether a basically sympathetic government should repeatedly be confronted with acts of protest and civil disobedience to bring about radical and formal changes in the status of the West Bank, or whether the permanent incorporation of the area could be better ensured by cooperation, administrative maneuver, and fait accompli.[36]

35. *Al-Fajr*, July 16, 1980, reprinted in *Israleft: Biweekly News Service*, Number 172, August 1, 1980, p. 6. See also JPRS, *Near East/North Africa Report*, August 19, 1980, No. 2167 p. 95; and *Zoo Haderech*, April 30, 1980.

36. The main organizational foci of the ultranationalist camp are "Yesh," (The Association of Jewish Local Councils in Judea, Samaria and the Gaza District) which supports the settlement movement "Amana;" "Tehiya," a new political party, and the contingent of settlers in Hebron loyal to Rabbi Moshe Levinger and his wife Miriam. See *Maariv*, May 23, 1980; and Yosef Goell, *Jerusalem Post Magazine*, January 30, February 13, February 27, and June 5, 1981.

The success of the "realization of state land" technique as a means of consolidating and expanding Jewish settlements in heavily populated areas, the increases in estimates of absentee, disputed, and state land available to the military government, the effective use of the Jordanian Law for the Expropriation of Land for Public Purposes to acquire parcels necessary for roads and other facilities for these settlements, and the scale of the resources devoted to the establishment of faits accomplis all suggest that the new Likud government will be able to proceed apace with its plans for comprehensive settlement and permanent incorporation. The complexities and formal legality of the proceedings, as well as the secrecy and administrative discretion attending the deliberations and judgments of the military government appeals tribunals have diverted and confused critics of the government's *de facto* annexation policies. Moreover, the government has at its disposal administrative maneuvers that either have not been used, or have not been used as extensively as they could be in the future.

For example, in the absence of publicly available written leases signed by settlers and the military government, Israel may eventually countenance claims by West Bank settlers that, under the terms of the Jordanian Law of Prescription, their "adverse possession" and use of West Bank lands for periods of ten to 15 years entitles them to squatters' rights and, indeed, to the granting of title deeds. Restrictions on the sale and purchase of land by absentees may, especially in light of the high rate of emigration from the West Bank, enlarge the amount of absentee property available for requisition by the military government. Compilation of detailed maps and title searches for all parcels of West Bank land may enable the settlement authorities to streamline the military government's "realization of state land," interspersing government claimed plots among fragmented parcels of privately owned land, and therby encouraging sale of the property. Restrictions on the issuance of building permits and permits for the importation of irrigation equipment, as well as prohibition of the drilling of water wells for agricultural purposes have impeded and will continue to impede economically efficient use of real property owned by Arab farmers and potential developers, thereby encouraging emigration and land sales. Greater care taken by the government in the presentation of evidence and in the choice of settlement sites could prevent Court rulings that security motives were secondary in the requisition of privately owned land. Indeed the military authorities could revert to a tactic adopted in past cases dubbed by Israeli jurists the "Sphinx strategy," whereby explanation of the security rationale for a particular action is itself deemed impossible for "security reasons." More fundamentally, if political circumstances change, Israel might interpret itself as unbound by the Camp David "Framework for Peace," committing the parties to leave the sovereignty question on the West Bank open for future negotiations. In that event new legislation could be passed, changing

the status of the West Bank in Israeli law and thereby cancelling enforcement of the Hague Convention in that area.[37]

Yet real constraints on settlement and land acquisition and new possibilities of legal resistance to such activities have emerged in the aftermath of the Elon Moreh decision. The High Court's ruling that, in principle at least, Jewish settlements in the West Bank are "temporary" and that those located on requisitioned private land are legal only as long as the area remains "occupied," weakens the ultranationalist camp's ability to recruit setters. Raising a family on a barren hill-top surrounded by hostile Arabs is a difficult enterprise under any circumstances, but with the evacuation of Jewish settlers from the Sinai, as that area is returned to Egypt, and with the legal uncertainties created by the High Court's rulings, prospective settlers may be increasingly wary about making the personal investment necessary to settle permanently on the West Bank. Moreover, recognition of Jordanian title deeds as authoritative proof of land ownership has put important chunks of the West Bank beyond the bounds of Jewish settlements and has definitely interfered with their establishment and expansion in the first half of 1981.

While the government has found administrative techniques to circumvent the force of the Court's ruling, and prevent its use against settlements established in previous years on seized private land, West Bank landowners have been inspired by their limited success in the courts to engage in litigation over land seizures much more energetically and imaginatively than before the Elon Moreh decision. Although most lawyers on the West Bank refuse to appear before Israeli courts or tribunals, a small number of Arab and Jewish attorneys have developed impressive expertise in this complex area of law. While it is still impossible to move disputes over land ownership from the military appeals tribunals to the civil courts or the High Court of Justice, these lawyers, acting on behalf of hundred of claimants, have managed to slow the establishment of settlements on "realized state land" by demanding restraining orders from the High Court of Justice against construction or site preparation on parcels whose seizure is being appealed.[38] Petitions have also been submitted to the High Court of Justice challenging the appeals procedure as contrary to Jordanian law, the Hague

37. For a legal analysis of the Beit-El—Toubas and Elon Moreh decisions which seeks to lay the groundwork for such a move see Julius Stone, "Aspects of the Beit-El and Eilon Moreh Cases," *Israel Law Review,* Volume 15, No. 4, October 1980, pp. 476–495. For a differing legal opinion see Shabtai Rosenne, communication to the editor, *Israel Law Review,* Volume 15, No. 4, July 1980, pp. 463–466.

38. See, for example, Jerusalem Domestic Service, FBIS, June 19, 1981, p. I6; *Jerusalem Post: International Edition,* April 5–11, 1981. To reduce the number of appeals of public land "realizations" and the delays attendant upon those appeals, the Ramallah Military Government Tribunal has begun requiring appellants to deposit substantial sums as collateral against appeals that are not sustained. ITIM, July 21, 1981, in JPRS, *Near East/North Africa Report,* August 10, 1981, No. 78711.

Convention, due process and even to Israeli law (according to which no parcel of land may be declared "state land" except by a court of law).[39] In May 1981, in response to litigation brought by Arab landowners from Qalqilya, on the edge of the West Bank west of Nablus, the High Court ruled that the Jordanian Law for the Expropriation of Land for Public Purposes could not be used by the authorities if the project involved was designed solely for the benefit of Israeli settlements.[40]

Other challenges to Israeli land acquisition and settlement have been discussed but not yet employed. If a self-governing authority is established on the West Bank, under one form of "autonomy" or another, it may be able to sue in court against uses of "state land" that contradict the Hague Convention's injunction that such property be requisitioned and exploited only "according to the rules of usufruct." In lieu of such an authority, groups of farmers or municipal councils may succeed in gaining recognized standing to protect communally farmed lands. Finally, as precedents develop and procedures become more formal, regularized and public, Israel's unwritten commitment to avoid explicit discrimination between Jews and Arabs may have to be sacrificed to prevent West Bank Arabs from leasing, developing and settling substantial tracts of "state land" under whatever criteria permit Israeli Jews to do so.[41]

As long as no formal agreement between Israel and Jordan, Egypt or the Palestinians on the fate of the West Bank can be reached, and as long as the constellation of political forces does not change drastically, the eventual disposition of the area will be determined by a series of small but cumulatively decisive political battles over provisional administrative and legal arrangements, the establishment of implicit and explicit precedents, and the imposition of faits accomplis. The participants in this struggle will wage it far beyond the narrow confines of the West Bank, but in such a fluid political environment the crystallization of legal precedent and administrative procedure regarding questions of land ownership and control assumes extraordinary importance. Proponents of Israeli withdrawal from the West Bank, both inside Israel and out, will focus on the High Court's recognition of Israel's status in the area as a belligerent occupier with limited and temporary rights. Those who favor incorporation of the area into Israel will use the threat of the Hague Convention to support demands for formal

39. Darwish Nasser (Advocate), petition submitted to the High Court of Justice against the Military Commander of the Judea and Samaria District and the Custodian of Government and Absentee Property, Jerusalem, May 5, 1981, (mimeo, Hebrew), pp. 3–5. See also *Zoo Haderech*, May 20, 1981.

40. *Zoo Haderech*, May 20, 1981.

41. To an extent this has already happened in connection with the High Court's sanction for the government's refusal to entertain a bid by an Arab for an apartment in the Jewish Quarter of the Old City in East Jerusalem. Yet in its ruling the Court rejected the argument that "discrimination" was involved. *Jerusalem Post*, July 5, 1978. Concerning an Arab application for permits to construct a new Arab town west of Nablus see Jerusalem Domestic Service, FBIS, March 17, 1980, p. N9.

annexation or the extension of Israeli law to the West Bank. While searching for administrative techniques to erase the green line and minimize the practical consequences of the Court decisions, the ultranationalist camp will strive to sustain a politically irreversible process of *de facto* annexation.

If the consequences of the Beit-El—Toubas and Elon Moreh decisions are not clear enough or decisive enough to tip the balance of this struggle in one direction or the other, yet they have provided both sides with potent new legal, administrative and rhetorical resources.