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# The Settlements in Judea and Samaria: A Legal View

JUSTUS R. WEINER

Several passages from the Torah must be examined in order to clarify the position of Jewish Law with respect to the Jewish settlements in the Administered Areas, historically known as Judea, Samaria, and the Gaza District.

According to the Torah, God gave the Land of Israel\* to the Jews.

And the Lord said to Abram . . . lift up thy eyes and look from the place where thou art, northward, and southward, and eastward, and westward; for all the land which thou seest to thee I will give it, and to thy seed forever. [Gen. 13:14-15]

This promise is repeated: God commands Abram:

Arise, walk through the land in the length of it and in the breadth of it; for I will give it to thee. [Gen. 13:17]

This pledge was made to Abram as he stood in Beit-El (now in the Administered Areas). Indeed, the Scriptures are replete with references to Jewish ownership and promises by God to Jews regarding locations in the Administered Areas. For example, Abraham bought the field of Ephron with the Cave of the Machpelah in Hebron. Jacob bought land in Shechem (Nablus), and the Lord promised Joshua conquest and possession of Jericho. There can be no question that the Administered Areas lie within the boundaries of the Land of Israel as promised by God to the Jews. This is confirmed by Moses' description of such boundaries:

The Lord our God spoke unto us in Horeb [Sinai], saying: . . . turn you, and take your journey and go to the

\*This term will be used to refer to the area promised to the Jews in the Torah (and inhabited by them for more than 1,000 years until they were expelled by the Romans). It should not be confused with the much smaller area covered by the modern State of Israel.

hill country of the Amorites and unto all the places nigh thereunto, in the Aravah, in the hill country, and in the Lowland, and in the South, and by the sea-shore; the land of the Canaanites, and Lebanon, as far as the great river Euphrates. Behold I have set the land which the Lord swore unto your fathers to Abraham, to Isaac, and to Jacob, to give unto them and to their seed after them. [Deut. 6:7-8]

Even after most Jews were exiled by the Romans, the Talmud and medieval Jewish authorities encouraged Jews to return and settle in the Land of Israel. The Talmud and the Rambam (Maimonides) specifically state that Jews should live in the Land of Israel and even in those localities where non-Jews are the majority. The Ramban (Nachmanides), who represented a minority view on the question of Jewish settlement of the Land of Israel, stated that Jews have a duty to live in the Land. In an idiomatic expression emphasizing the significance of this obligation the Ramban claimed that its importance is equal to all the other 613 mitzvot (obligations) combined.

Though they were promised the Land of Israel, the Torah shows that God did not intend the Jews to deny others living in their midst the right to own land, as was the practice among other ancient peoples. The higher standard of behavior demanded by God of the Jews is revealed in the method King David used to acquire Mount Moriah, upon which the Temple would be built. As the military conqueror of Jerusalem, David could have simply seized the land; instead, he bought it.

Thus, it can be seen that the Administered Areas are part of the Land promised by God to the Jews and inhabited by them in biblical times. Indeed, only during the 19-year period of Jordanian occupation were no Jews present. Further-

more, Jewish law holds that Jews have a duty to settle this land, although there is disagreement over the primacy of this duty vis-à-vis other religious obligations. Significantly, the above-quoted passages make clear that although the Land of Israel was promised to the Jews, non-Jews living in their midst were not denied the right to own land.

World leaders and international forums have periodically condemned Israel's settlements in the Administered Areas as illegal under the International Law of Belligerent Occupation. This assertion is clearly erroneous. When the claims of illegality are not purely polemical attacks on Israel, they typically rest on Article 49, paragraph 6 of the Fourth Geneva Convention. It is doubtful whether this Convention is applicable to the settlements issue. I will, for purposes of the ensuing discussion, assume that it applies.

The Fourth Geneva Convention does not forbid Israel's settlement activities. First, Israel has not occupied territory belonging to another state. According to the November 29, 1947 U.N. General Assembly Resolution 181(2) Concerning the Future Government of Palestine, a Jewish and an Arab state were to be established in the area of the Palestine Mandate west of the Jordan River. The Jews accepted this partition plan but the Arabs rejected it and attacked Jewish settlements throughout the area. In the following months, as part of this attack, Jordanian troops occupied Judea and Samaria in a war of aggression. Jordan's subsequent annexation of this area therefore lacked validity under International Law and was, in fact, recognized by only two countries, Pakistan and England. Furthermore, no member of the Arab League extended recog-

dition to this annexation. Likewise, Egypt's occupation of the Gaza Strip was illegal and, in fact, it never claimed title there. Therefore, prior to 1967, the previous legitimate sovereign in the Administered Areas was Britain, under the terms of the Mandate. According to the explicit terms of the Mandate received from the League of Nations, Britain was charged with the duty to "encourage . . . close settlement by Jews on the land. . . ." (Article 6) Most significantly, this charge referred to the entire territory of the Mandate including what is today known as the Administered Areas of Judea, Samaria, and the Gaza Strip — not just Israel within its pre-1967 boundaries.

Second, the Fourth Geneva Convention is probably irrelevant to Israel's presence in Judea, Samaria, and the Gaza Strip because in Article 2 of that Convention it states that, "The present convention shall apply to cases of partial or total occupation of the territory of a High Contracting Party." Judea, Samaria, and Gaza were not the territory of any High Contracting Party.

Third, the Geneva Convention is considered conventional International Law. Since the Knesset has not passed a statute making this Convention part of internal Israeli law, the Supreme Court of Israel has ruled that its provisions cannot be relied upon by petitioners bringing claims in Israeli courts. Were the Fourth Geneva Convention considered customary International Law, such as the Hague Regulations of 1907, there would have been no need for enactment by the Knesset to make it part of Israel's internal law. It should be noted, however, that while not legally bound to apply the Fourth Geneva Convention, Israel has nonetheless chosen to be guided by that Convention's humanitarian provisions in its administration of the Areas.

For purposes of ensuing analysis, however, I shall assume that the Fourth Geneva Convention applies. It does not, in any event, forbid Israel's settlement activities. Article 49, paragraph 6, prohibits three kinds of activities: "individual or mass forcible transfers, as well as deportations . . . from occupied territory."

**T**he Convention nowhere prohibits the establishment of the settlements at issue, which are voluntary and generally based on each settler's deep feeling of attachment to the land. These strong feelings developed because the Administered Areas contain many key religious sites for Jews (e.g., Rachel's Tomb, the burial cave of Abraham and Sarah, and the place where Jacob wrestled with the angel). Other Jewish settlers are motivated by conviction that without the Administered Areas, Israel, which is only nine miles wide at its center, would be a vulnerable and tempting target for Arab attacks. Current government policy offers economic incentives to those Israelis willing to uproot themselves and settle the new towns and villages in the Administered Areas. These incentives do not, however, amount to mass deportation or transfer as proscribed by the above-quoted provision of the Fourth Geneva Convention.

Nor can the charge that the settlements were established without due process of law be substantiated. The fact is that no Arabs have been involuntarily displaced by Jews. About 90 percent of the Jewish settlements have been built on state-owned land and are typically remote from areas of Arab inhabitation. The local Arab population's property rights are fully respected by the relevant procedures for determining the ownership of land being considered for settlement. These procedures include examination of old aerial photographs, notification of representatives of any nearby Arab towns that land has been designated for settlement, and the right of local Arabs who claim title to a hearing before an Appeals Commission and subsequently to appeal to the Supreme Court of Israel.

Contrary to repeated allegations, Israel does not expropriate private land for the purpose of establishing Israeli settlements. Such settlements may be established only on public land after a thorough investigation has established that the land in question is not in any way privately owned.\*

\*Nevertheless, an occupying power is enti-

Approximately 10 percent of the settlements are built on land privately owned by Jews. Some of this land has been Jewish owned for many years. Other parcels have been bought privately by Jews from Arabs since 1967. Such purchases of land are often for sums far in excess of the property's economic worth. This is due to the fact that the seller regards his property as infertile farmland, while to the settlers the land holds religious significance.

Thus, while it is doubtful whether Israel is strictly bound by the International Law of Belligerent Occupation, Israel's settlement activities in the Administered Areas have been consistent with both International Law and traditional concepts of due process. The Jewish settlements at issue are not illegal. In addition, they are not situated on land which was acquired in violation of International Law or the human rights of Arabs.

**O**nce the legality of the Jewish settlements in Judea and Samaria has been established there remains the pressing question: Are these settlements, as is often alleged, an obstacle to peace? In my opinion the settlements are a two-edged sword. While, undoubtedly, some Arabs see the establishment of settlements as a sign that Israel is not interested in a peace settlement involving territorial compromise, many other Arabs have, for the first time, been spurred by the settlement activity to favor negotiations with Israel.

History teaches us an interesting lesson in this regard. Since Israel's creation in 1948, of the more than 20 surrounding Arab states, only Egypt has ever ratified a peace agreement with Israel. During these 38 years, five "holy" wars and thousands of terrorist incidents have been directed at the Jewish state by its Arab neighbors. Clearly, the pre-

ded, for reasons either of public welfare or military necessity, to make use of private property or limit the owner's use of it. Israel has used the power to expropriate private land for public purposes (i.e., road construction) sparingly. In all instances, it has done so in full compliance with local law and the owner is given a choice between full cash compensation or alternative land.

dominant Arab aim was and remains elimination of the State of Israel. Significantly, up until the end of the Six-Day War, each war was pursued against an Israel that did not include the Administered Areas. This belies the claim made by some Arab "moderates" that their only objective is to set up a Palestinian Arab state alongside of Israel in the Administered Areas.

Persistent threats of destruction, extermination, and economic boycott have characterized the attitude of most of Israel's neighbors toward it. Recognition of Israel and negotiations aimed at peace have been repeatedly refused. This implacable, multi-faceted hostility had as its basis the belief that, given the population

of the Arab states, their oil wealth, and their political clout, eventually Israel would be defeated. Time, Arab spokesmen often pointed out, was on their side, and the messy business of negotiation and compromise was therefore unnecessary.

The Jewish settlements in the Administered Areas have injected a new element into the picture. Increasingly, Arab leaders, especially those living in the Administered Areas, see time as running out for them. They fear that the growth of Jewish settlement in these areas will foreclose Israel's willingness to compromise in any future peace talks. They have therefore begun speaking out in favor of negotiation and compromise with Israel. This is a rel-

atively new and hopeful phenomenon.

Alarmists on both the Jewish and Arab sides, who see Jewish settlement in the Administered Areas as obviating the chance for compromise, are mistaken. If 700,000 Arabs have learned to live among the Jews within the pre-1967 borders of Israel, why should 60,000 Jews be unable to live among the Arabs of the Administered Areas? ■

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JUSTUS R. WEINER is Director of the American Law Division of the Israeli Ministry of Justice, and a member of the New York State and Israeli Bar Associations. The views expressed in this essay are personal; they do not represent the government of Israel.

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## A Plant

MORDECHAI GELDMANN

In the vase a plant took root  
and I planted it by a pillar of my house and watered it  
and fertilized the soil, and it had already taken  
when the neighbor came and uprooted it, fearing for the pillar.  
I planted the remnant then, behind the house near the window.  
I said, I'll guard it against vandals,  
and the cleaning woman threw a rug out the window and it broke.  
I mourned and talked of it with a friend, a woman, and the dog Toot —  
I asked for comfort and they gave me comfort  
but I was not comforted.

For in a plant is a hint of forests, the plant is a reminder  
that from the forests I came, the forests of Poland.  
From the snows I came, from the village of my mother.  
There she sat in the window to see the falling of woolly snow,  
in the pear tree, on the raspberry fences, in the black fields.  
When the lightning struck the cows kneeled frightened  
and rain splashed as if the sea wall in heaven broke.  
In spring the river silvered from the scales of fat fish;  
in summer the delicate fowl mated in glass air.

And I am from the sea, I remembered,  
from the Mediterranean, that I thought would go on to the end of the world.  
Summer after summer, morning after morning, I would go with a lunch bag  
to the peacocks' blue as to school.  
I saw how bodies turn gold,  
how desire ripens in beautiful flesh.  
There I examined the eternal possible changes of the shading of blue.  
Boats were lost happily in the good hearted blue.  
The white balls did not fall from the air.  
I was a narrow waisted lifeguard as good as I was handsome