Israel's Legal right of Civilian Presence and Settlement in the West Bank

INTRODUCTION

1. The spate of anti-Israeli articles published in the print and electronic media over the years, particularly since 2000 when the Palestinian violence of Intifada II replaced the Oslo peace process, has presented Israel's supporters with a number of formidable challenges.

   - First, the volume of anti-Israeli invective has increased recently, especially after last year's Operation Cast-Lead.
   - Secondly, the propaganda effect of such articles is long term such as to inject into general daily discourse a general and negative attribution to Israel instead of what is in reality the occasional aberration from an acceptable norm.
   - Thirdly, the greatest challenge confronting Israel's supporters is to become proactive instead of responding, generally belatedly, after the damage caused to Israel's position has become all but irreparable.
   - Finally, Israel's opponents spread their views not only in the mainstream press but also in medical, legal and other professional journals where the specialist issues are marginalised. Instead, they are coloured and subverted by what essentially is a political programme directed at the grass-roots intelligentsia of the profession. Such has been the case of the British Medical Journal and more recently in the hard-copy and electronic issues of the professional journal distributed to members of the Law Society of Scotland, "Journal on Line."

2. In an article entitled "Unequal Before the Law" which appeared in the June 2009 issue of the Journal, http://www.journalonline.co.uk/Magazine/54-6/1006656.aspx Fraser Ritchie, a retired Scottish solicitor purportedly "discovers, to his shock, how the law is manipulated to the disadvantage of Palestinians in the occupied West Bank."

3. Not only did the article contain many errors of fact and law but it omitted any reference to the crucial background and context which necessitated Israel's military action in the West Bank and Gaza. In so doing, it created considerable discomfort among pro-Israeli activists in general and those of them in the legal profession in particular.

4. As a consequence, Dr. Gerald M. Adler, an honorary member of our Association, prepared an extensive response. After extended negotiations with the editor of the Journal, a severely truncated version appeared in the paper issue published in September entitled "West Bank: A Response." http://www.journalonline.co.uk/Magazine/54-9/1006961.aspx,. This occurred some three 3 months after the offensive article had been published and consequently the response may have lost some its effect.

5. In parallel with the publication of the paper edition, Dr. Adler's full response appeared on the internet website of the Journal on Line but not before further negotiation with the Editor regarding its title. Due to pressure of time, and with great reluctance, Adler was compelled to accept the Editor's proposal and the internet edition of the response was ultimately entitled "Preserving a Legal Inheritance: Settlement Rights in the "Occupied Palestinian Territories" http://www.journalonline.co.uk/Extras/1007008.aspx, a weak neutral title which probably failed to attract readers' attention to the main thrust of the Author's arguments.

6. The material presented below is an extract from Professor Adler's excellent response and deals in summary form with the ***legal*** justification for Israel's settlement activity in the West Bank and Gaza without in any way taking a political stance on Israel's claims.

7. The sole objective of this note is to provide Jewish (and non-Jewish) pro-Israeli members of the legal profession with certain basic information of which they may be unaware and which can be used proactively should the occasion arise.

8. If any member wish to receive more detailed information on the topic they should contact Dr. Adler directly at gerald.adler@ntlworld.com

His Honour Dennis Levy Q.C.
Chairman United Kingdom Association of Jewish Lawyers & Jurists

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EXTRACT

ISRAEL'S LEGAL RIGHT TO SETTLE IN

THE WEST BANK: YEHUDAH AND SHOMRON

The declared objective of Mr Ritchie's Quaker sponsor and that of EAPPI, the programme organiser, is to bring about the cessation of Israeli

"occupation" in the West Bank. The real issue, which both they and Mr Ritchie avoid, is not opposition to the "occupation", but Arab-Islamic opposition to any Jewish right of presence in the West Bank.

Israeli settlements in the OPT barely account for more than 2% of the land area captured in 1967. As a result of the IDF troop withdrawal in accordance with Oslo II, Fatah and Hamas – and not Israel – currently exercise personal jurisdiction over approximately 97% of the Arab population, as they do in respect of over 65% of the West Bank territory. In the failed Final Status negotiations of 2000, Israel offered to withdraw from approximately 97% of the OPT, making up the 3% balance in a land exchange.

Apart from Jewish neighbourhoods in East Jerusalem, the relatively small proportion of land in the West Bank utilised by settlers is located mainly on stony hilltops – state owned *Mewat* land incapable of being cultivated or developed without a large input of investment capital.

Mr Ritchie accepts uncritically the Palestinians' claim that Israeli settlement activity following the 1967 occupation is contrary to international law and is therefore illegal. The claim is rooted in article 49(6) of Geneva IV: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

The objective of paragraph (6) was to prevent a practice adopted by Germany during the Second World War of the involuntary transfer of portions of its own population to occupied territory for political and racial reasons. Legal scholars disagree with the allegation that this provision was ever intended to mean a *voluntary, non-coercive movement* of a civilian population. The provision therefore does not provide the solid foundation which the Palestinian position claims.

Notwithstanding article 49(6), Israel has *an independent legal claim to occupy, and settle in, the West Bank Territory*, which can be traced through a number of international legal instruments, the most significant of which are:

(i) League of Nations Covenant 1920 formed part of the peace treaty negotiations following the conclusion of World War I. Article 22 deployed the Roman-Dutch legal concept of "mandate", similar to the equity concept of a trust. It was anticipated that the mandate for a territory would reflect the stage of the development of the people, its geographical situation, economic conditions and other similar circumstances.

(ii) San Remo Resolutions 1920 continued the peace negotiations in respect of the disposition of the territories formerly held under Ottoman control. Purporting to act in accordance with article 22 of the Covenant, the Principal Allied Powers concluded, inter alia:

- Syria and Mesopotamia (Iraq) should be provisionally recognised as independent states, subject to the rendering of administrative advice and assistance by a Mandatory Power until such time as they might be able to stand alone; and
- separately, Palestine was to be entrusted to a Mandatory Power, yet to be selected, that would be "responsible for putting into effect the [Balfour] declaration originally made on November [2] 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people".

Both Britain and the Allied Powers were cognisant of the fact that the Zionist Jews hoped that the homeland in Palestine would ultimately develop politically as an independent Jewish state. The Arab leadership on the other hand was divided on the matter at best, and opposed to it at worst. Consequently, the language expressed in the Declaration, and included in the Resolution quoted above, continued:

"it being clearly understood that nothing shall be done which may prejudice the *civil and religious rights* of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country" (emphasis added).

Significant by its absence is the word "political" from the rights of the communities which were not to be prejudiced by the establishment of the Jewish homeland. Furthermore, these communities were not referred to as Arab but as "non-Jewish" religious (rather than ethnic) communities. This differentiation became even more apparent in the terms of the actual Mandate.

(iii) Treaty of Sèvres, 1920 gave expression to the San Remo Resolutions in the peace agreement concluded between the Allied Powers and the Government of Turkey then in power. Inter alia, it provided for the dissolution of the former Ottoman Empire, with Turkey ceding all rights of sovereignty over North Africa and Arab Asia. (This waiver was subsequently confirmed in the Treaty of Lausanne 1923, which replaced the unratified Treaty of Sèvres.) The Allied Powers' dissolution and the politically artificial delineation of Middle Eastern territory laid the foundations of the present conflict between Jews and Arabs and between Israel and the Palestinians.

Thus there is a clear link between the act of renunciation of Turkish sovereignty over Palestine in favour of the Allied Powers and its transfer to Britain – under the Mandate - designed for putting into effect the establishment of a Jewish homeland, as expressed in the Balfour Declaration and the San Remo Resolutions.

(iv) Palestine Mandate, 1922 reiterates in its preamble the policy declared in the Balfour Declaration and acknowledges the historical connection of the Jewish people with Palestine and the grounds for reconstituting their national home there.

Article 6 of the Mandate imposes a positive obligation on the British Mandatory "to *facilitate Jewish immigration under suitable conditions and shall encourage… close settlement* by Jews on the land, including State lands and waste lands not required for public purposes".

The obligation to facilitate Jewish immigration is supported by the provisions of article 7, which impose on the Mandatory a duty to enact a nationality law, "and to include therein provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine".

The terms "Palestinian" and "Palestine" at this period (1922) were applied solely to Jews and their ancient homeland. Yasser Arafat's "creation" of a separate "Palestinian" people out of the South Syrians (as they were known under Ottoman rule) did not occur until 1964.

While article 6 implies that Jews were to be allowed to settle anywhere in the mandated territory, article 25 empowered the Mandatory "to withhold the application of… such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions".

This provision enabled the Mandatory Administration to confine the establishment of the Jewish homeland to territory lying cis-Jordan, while giving Arab-Palestinians and others the right of settlement and land acquisition in trans-Jordan and excluding the Jews therefrom.

That the drafters of the Mandate contemplated the realisation of a Jewish majority in cis-Jordan is supported by the recognition of the Jewish Agency in articles 4 and 11 as an active partner with the Mandatory Government in the stimulating of Jewish immigration and development of Palestine. By contrast, the presence in the mandate instrument of language protective of Arab and other non-Jewish interests appearing in the preamble, article 6, and particularly in article 9, would have been superfluous if the drafters had envisaged an eventual Arab sovereignty over a Jewish minority.

(v) UN Charter Article 80

This article provides in part: "Nothing in this Chapter [dealing with the establishment of Trusteeships and Trustee Agreements] shall be construed in or of itself to alter in any manner the rights whatsoever of… any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

Mandates approved by the League did not, upon the League's dissolution, fall automatically within the new Trustee system established under the UN Charter. Until a Trustee agreement concluded in accordance with article 77 replaces it, a Mandate and the rights of the beneficiaries under it remain intact. To the best of the author's knowledge no such agreement in relation to Palestine was ever prepared in accordance with this Chapter, nor was one even considered. While Britain may have surrendered her obligations as Mandatory-Trustee in 1948, the Mandate itself did not lapse.

The Mandate has never been formally amended or repealed – nor can it be "wound up" so long as the beneficiary and an undistributed part of the corpus of the trust continue to exist. The Jewish people, as beneficiary, now represented by the state of Israel, appropriated part of the trust corpus lying to the west of the River Jordan, following the surrender by Britain of its obligations as Mandatory trustee in 1948 after the withdrawal of British troops. The legal right of sovereignty over that unappropriated portion of the West Bank formerly held under Jordanian control remains in abeyance and the right thereto is in dispute. Until this issue is resolved, the Jewish people still have a legal right of settlement in that territory.

(vi) UN General Assembly Resolution 181, which recommended a two-state partition of the West Bank, did not change the legal situation, having no dispositive effect and having been rejected by the Arab states. (It also contemplated that each nationality would have "expatriate" communities living within the other nationality's state, with rights of residence but not of citizenship.)

(vii) Israeli-Jordanian Armistice Agreement, April 1949
The inability of the UN to enforce UNGA Resolution 181 induced five Arab armies to launch a full scale war against the nascent state of Israel on the day immediately following the British withdrawal from Palestine. In the process, Egypt occupied the Gaza strip and Jordan occupied part of the land on the West Bank designated in UNGA 181 for the Palestinian-Arab state. Although under the proposed plan of partition Jerusalem was to be internationally governed under the auspices of the United Nations, Jordan also took control of Eastern Jerusalem, from which a large Jewish population was ejected, creating a Jewish refugee crisis to which little reference is ever made. Israel nevertheless succeeded in retaining the western part of the city.

A ceasefire between the belligerents was achieved by the United Nations and given legal effect in the respective Armistice Agreements.

As mentioned in Part 3(c) above ("The Fence and the Green Line"), articles II(2) and IV(2) of the Israeli-Jordanian Armistice Agreement make it quite clear that none of the Agreement's terms has any impact on

the ultimate question of sovereignty over the disputed area, and that the Green Line was specifically excluded from having any political significance. Israel's legal claim to settle in the West Bank remains unchanged from that which prevailed before 1948 or afterwards.

Thus, Israel is perfectly entitled, as a matter of law, to permit the voluntary settlement of her population beyond the Green Line and to take such steps as the construction of the Fence, in order to protect her population on both sides of that line. Whether it is politically wise for Israel to allow her citizens to settle in that portion of the undistributed West Bank territory whose sovereignty is still in dispute is a different question.

A command of the above facts together with the legal analysis will hopefully allow Fraser Ritchie to reassess his stringent condemnation of Israel.

Professor Gerald M Adler, LLM, JSD (Yale) qualified as a barrister in Canada (Ontario), an advocate in Israel, and a solicitor in England & Wales. He taught law at the University of Western Ontario and the Israel Institute of Technology, Haifa. Inter alia, he also served as senior assistant to the Israeli Attorney General and as the Chief Legal Advisor to the Israel Electric Corp Ltd. Now retired from active practice, Dr Adler has spent the last five years researching "Legal Aspects of the Arab-Israel Conflict Within a Historical and Political Context", part of which can be accessed on the internet.