

ISRAEL
AND
PALESTINE
Assault on the Law of Nations
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**Jewish Settlements in Judea and Samaria (the West Bank) and
Geneva Convention, IV, Article 49(6) Relative to the Protection
of Civilian Persons in Time of War**

Perhaps the central current criticism against the government of Israel in relation to its administration of the territories occupied after the 1967 War concerns its alleged infractions of the final paragraph (6) of Article 49, of the Fourth Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949. The preceding paragraphs deal with deportation or transfer of a population out of the occupied territory. The final paragraph (6) reads as follows: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The Supreme Court of Israel in the *Beit-El* and *Elon Moreh* cases regarded this issue as not within its purview on the ground that that convention had not been enacted into the municipal law of Israel, and that, according to common law principles, it is only the rules of customary international law that are deemed to be so incorporated without enactment, and are thus applicable in that municipal court.¹ In view of its importance the writer ventures some observations as to the correctness of the above current assertions that settlement of Jews in the "occupied" territories is "illegal," presumably for violating the above provision.²

It has been shown in Chapters 3 and 7 that there are solid grounds in international law for denying any sovereign title to Jordan in the West Bank, and therefore any rights as reversioner state under the law of belligerent occupation. The grounds on which Israel might now or in the future claim to have such title have also there been canvassed. The initial point that arises under Article 49(6) of Geneva Convention IV of 1949 is more specific. Not only does Jordan lack any legal

title to the territories concerned, but the Convention itself does not by its terms apply to these territories. For, under Article 2, that Convention applies "to cases of ... occupation of the territory of a High Contracting Party," by another such Party. Insofar as

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the West Bank at present held by Israel does not belong to any other State, the Convention would not seem to apply to it at all. This is a technical, though rather decisive, legal point.

It is also important to observe, however, that even if that point is set aside, the claim that Article 49 of the Convention forbids the settlement of Jews in the West Bank is difficult to sustain.

It is clear that in its drafting history, Article 49 as a whole was directed against the heinous practice of the Nazi regime during the Nazi occupation of Europe in World War II, of forcibly transporting populations of which it wished to rid itself, into or out of occupied territories for the purpose of "liquidating" them with minimum disturbance of its metropolitan territory, or to provide slave labor or for other inhumane purposes. The genocidal objectives, of which Article 49 was concerned to prevent future repetitions against other peoples, were in part conceived by the Nazi authorities as a means of ridding the Nazi occupant's metropolitan territory of Jews—of making it, in Nazi terms, *judenrein*. Such practices were, of course, prominent among the offenses tried by war crimes tribunals after World War II.³ They were covered by counts in the charter of the International Military Tribunal of 1945 for the trial of major war criminals, including "deportation to slave labour or for any other purpose, of civilian population of or in occupied territory,"⁴ and also (under Article 6[c]) as crimes against humanity, defined to include "murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population" or "persecution on political, social and religious grounds," committed before or during the war in connection with another crime within the Tribunal's jurisdiction.

In the words of Dr. Jean Pictet's commentary on the convention:

It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service. The thought of the physical and mental suffering endured by these "displaced persons," among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.⁵

These remarks were directed primarily to paragraph 1 of Article 49 prohibiting "regardless of their motive" all "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country."

Article 49, paragraph 6, uses similar language, though with significant differences, forbidding the occupying power to "deport or transfer parts of its own civilian population into the territory it occupies." Notably, paragraph 6 does not include the peremptory clause "regardless of motive," so that the spirit of its provision, as well as the letter, requires attention. Dr. Pictet's commentary acknowledges "some hesitation" and some doubts in the drafting as to its relation to the above main preoccupation of Article 49. He observes, "It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the

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economic situation of the native population and endangered their separate existence as a race."⁶ He feels it to be particularly difficult that the terms "deportation" and "transfer" are used in paragraph 1 to refer to "protected persons" (which under Article 4 excludes nationals of the occupying power); and in paragraph 6, where they clearly refer to the occupant's own civilian population (which obviously includes the occupant's own nationals).

It is clear that historically the victims of the terrible abuses that Dr. Pictet, as well as this writer, regards as a key to interpreting paragraph 1, included many thousands who were nationals of the Nazi occupying power in Nazi metropolitan territory, and who were deported (e.g., to Poland). Many of these, for example the Jews, had shortly before the relevant time been deprived of German nationality, presumably in order to expose them more easily to arbitrary action. Dr. Pictet, somewhat ambiguously, refers to this when he describes the transfers of the occupant's own population forbidden by paragraph 6 as "transfers for political and racial reasons."⁷ He tends, however, in the end (still with some ambiguity) to think that the gist of paragraph 6 is to protect the "native population" of the occupied territory against impairment of their "economic situation" or "their separate existence."

In the present view, the ambit of the text of Article 49(6) is wide enough to forbid conduct of the occupying power that involves either of the above evils. As there indicated, the historical background would make it quite incongruous for a legislator to ignore in relation to the occupant's own population, those same heinous and inhuman acts against civilians that (as Dr. Pictet freely acknowledges) were the immediate background for the provisions of Article 49. If and insofar, therefore, as Israel's position in Judea and Samaria (the West Bank) is merely that of an occupying power, Article 49 would forbid "deportation" or "transfer" of its own population onto the West Bank whenever this action has the consequence of serving as a means of either (1) impairment of the economic situation or racial integrity of the native population of the occupied territory; or (2) inhuman treatment of its own population. These were the two aspects of the application of Article 49(6) detected by the present writer as long ago as 1954.⁸ It is necessary to consider separately each of these possible taints.

Impairment of Racial Integrity of the Native Population of the Occupied Territory. The prominence of the question of legality of Jewish settlements on the West Bank reflects the tensions of the peace process, rather than the magnitude of any demographic movement. There appear to be in the whole of Judea and Samaria (the West Bank) about 20,000 (excluding 2,500 in military postings in the Jordan valley) Jews amid a native population approaching 700,000 (excluding 111,000 Arabs of East Jerusalem). Despite vociferous political warfare pronouncements on both sides, it seems clear, therefore, that no serious dilution (much less extinction) of the "separate racial existence" of the native population has either taken place or is in prospect. Nor do well-known facts of dramatic improvement in the "economic situation" of the inhabitants since 1967 permit any suggestion that that situation has been worsened or impaired.

Insofar, moreover, as these or future settlements are merely directed to the requirements of military security in the occupied territory they do not violate either the spirit or the letter of this aspect of Article 49. And they also conform, as the preceding discourse has shown, to the general requirements of customary interna-

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tional law, embracing the relevant provisions of the Fourth Hague Convention of 1907, and its annexed regulations.

Inhuman Treatment of the Occupant State's Own Population. The second aim of the prohibition in Article 49(6) was, as has been seen, to protect the inhabitants of the occupant's own metropolitan territory from genocidal and other inhuman acts of the occupant's government. That this was part of, if not the main intention of Article 49(6) seems clear from the use of the term "deport," which clearly refers to a coerced movement of its population. The addition of the term "or transfer" does not alter this import. The word "deport" is usually associated with the involuntary removal by a government of aliens from its territory, and the addition of "transfer" as a synonym seems only directed to indicate that the prohibition was intended to protect the occupant state's own nationals as well as other elements in its population. In the case of the genocidal transfer of German Jews to Poland for destruction, as observed above, the Nazi government had indeed first deprived most of the victims of German nationality. So that it is understandable that the draftsmen might wish to make it clear that the prohibition of forced transfer of elements of its own population is in no way dependent on technicalities of nationality. And the word "transfer" in itself implies that the movement is not voluntary on the part of the persons concerned, but a magisterial act of the state concerned.

As contrasted with this main evil at which Article 49 was aimed, the diversion of the meaning of paragraph 6 to justify prohibition of the voluntary settlement of Jews in Judea and Samaria (the West Bank) carries an irony bordering on the absurd. Ignoring the overall purpose of Article 49, which would *inter alia* protect the population of the state of Israel from being removed against their will into the occupied territory, it is now sought to be interpreted so as to impose on the Israel

government a duty to prevent any Jewish individual from voluntarily taking up residence in that area. For not even the most blinkered adversary of Israel could suggest that the individual Jews who (for example) are members of the small Gush Emunim groups, are being in some way forced to settle in Judea and Samaria (the West Bank)! The issue is rather whether the government of Israel has any obligation under international law to use force to prevent the voluntary (often the fanatically voluntary) movement of these individuals.

On that issue, the terms of Article 49(6), however they are interpreted, are submitted to be totally irrelevant. To render them relevant, we would have to say that the effect of Article 49(6) is to impose an obligation on the state of Israel to ensure (by force if necessary) that these areas, despite their millennial association with Jewish life, shall be forever *judenrein*. Irony would thus be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that Judea and Samaria (the West Bank) must be made *judenrein* and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants.

Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6). So does the consideration, discussed at the end of Chapter 7, that Judea and Samaria (the West Bank) are residual areas of the original Palestine mandate. As such, in Eugene Rostow's cogent view there examined, they have to be regarded as still subject to the substantive obligations of

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that mandate.⁹ Among these the establishment of a Jewish national home, if not "the soul of the Mandate" (as stated in the Permanent Mandates Commission in 1935), was at least its "primary purpose." A demand that this territory be kept *judenrein* would be a gross travesty of this legal position, turning international law on its head.

This is, of course, quite a separate issue from that of the limits of the government of Israel's power to requisition land owned by Arabs, and of its general powers to see to its own security and the security of its forces. It is, however, a very fundamental issue. Insofar as we must reject the interpretation of Article 49(6) that would require the areas concerned to be *kept Judenrein*, the issue of the extent and conditions for entry and residence by Jews, now and in the future, is a matter to be negotiated as a part of the peace process.

It is true that during its period of unlawful possession from 1948 to 1967, Jordan did apply a Nazi-type law of exclusion of Jews from Jerusalem and Judea and Samaria. If the unlawfulness of these Jordanian positions there were overlooked, it could conceivably be argued that when Jordan was ousted by Israel's lawful entry in 1967, Israel's occupation was nevertheless subject to the limits of Article 43 of the Hague Rules, under which it must respect the laws in force unless "absolutely

prevented." Therefore, it might be said, Israel as a belligerent occupant was bound to maintain the Jordanian law excluding Jews—of *Judenreinlichkeit*. Even on such assumptions, however, it would have to be said, most emphatically, that such a demand that international law sanctify the obnoxious policy of *Judenreinlichkeit* for Judea and Samaria (the West Bank) would fly in the face of principles of belligerent occupation law established after World War II. The Allies in Germany in 1944 provided immediately for the abolition of the basic Nazi discriminatory legislation. And the authorities seem to hold that this was justified squarely on the ground that the occupants were "absolutely prevented," within the terms of Article 43, from continuing laws so repugnant to elementary conceptions of justice.¹⁰ The removal therefore by Israel, even in the role of belligerent occupant, of the Jordanian discriminatory laws against Jews, was equally lawful on precisely the same ground.

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