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An Article that Changed the Course of History?

Eyal Benvenisti[*]

This contribution is a reflection on the article 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' by Yehuda Z Blum, originally published in (1968) 3 *Israel Law Review* 279.

Yehuda Blum's article, ostensibly devoted to an examination of the lawfulness of a military order under the law of occupation, actually explored a preliminary question – whether Jordan had valid title to the West Bank (referred to as 'Judea and Samaria'). Concluding that Jordan had no title, Blum concluded that the law of occupation did not apply. This reflection revisits Blum's thesis. It suggests that Blum's argument failed to elucidate the relevant legal questions and therefore his conclusion was hasty. It would be distressing to think that it was Blum's article that convinced Israeli decision-makers to deny the formal applicability of the law of occupation to the West Bank and Gaza.

Keywords: international law, law of occupation, Israeli–Palestinian Conflict

1. Background

In July 1967 – one month after Israel's occupation of the West Bank, Gaza Strip, Sinai Peninsula and Golan Heights – the Military Advocate General (MAG), Colonel Meir Shamgar, appeared before a Knesset committee to discuss the responsibilities and obligations of the Israel Defence Forces (IDF) in the areas that came under its control.

Colonel Shamgar had prepared the MAG Corps for the event that a future war would find the army as an occupying force outside Israel's borders.[1] In doing so, he was following Israel's traditional legal opinion that saw the 1949 Armistice Agreements as reflecting Israel's international borders.[2] Shamgar was also abiding by a legal position that had been clarified in 1956, during the short-lived occupation of the Gaza Strip and the Sinai Peninsula in the Suez Crisis. Reacting to a draft proclamation that would have resulted in the annexation of those areas to Israel, Shabtai Rosenne, legal adviser to the Ministry of Foreign Affairs, prepared a memo explaining the basic principles of the laws of occupation. He emphasised that '[i]t is a rule of international

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[*] Whewell Professor of International Law, University of Cambridge; C.C. Ng Fellow, Jesus College; Law Professor, Tel Aviv University; Global Professor, NYU School of Law. I thank Benjamin Rubin and Eliav Lieblich for their comments and Yuval Spitzer for his research assistance.

[1] Meir Shamgar, 'Legal Concepts and Problems of the Israeli Military Government – The Initial Stage', in Meir Shamgar (ed), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects* (1st edn, Harry Sacher Institute for Legislative Research and Comparative Law 1982) 13, 13; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press 2002) 32.

[2] Shabtai Rosenne, *Israel's Armistice Agreements with the Arab States: A Juridical Interpretation* (Blumstein 1951).

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law that a transfer of sovereignty occurs only under subsequent diplomatic agreements'.[3] Rosenne acknowledged the special status of the Gaza Strip under Israeli law, being part of former Palestine. He pointed out that according to Israeli law, the Minister of Defence had the authority to proclaim the area as subject to Israeli law, but he added:[4]

> [U]sing the powers granted by domestic Israeli law neither adds nor detracts from the international validity of the act, and in view of the overall circumstances, I am of the opinion that any country in the world will have the right to regard the annexation of the Gaza Strip to the State of Israel at this time as a step which contravenes international customary law.

In line with this doctrine, Colonel Shamgar began his presentation before the Knesset Committee, stating:[5]

> In terms of the legal background, our point of departure is that we have to respect both the fundamental pursuits of the State of Israel as its military forces begin to control an area that has been liberated by the IDF, and the rules of public international law that apply to the actions of any military in control of an area that was, until its entry, subject to the sovereignty of a foreign political entity.
>
> The guiding rules in this realm are the rules of public international law, which are reflected in the Hague Regulations of 1907 … and in the … Fourth Geneva Convention on the Protection of Civilians in Times of War.

Reflecting the same approach, on 11 August 1967 the West Bank Military Commander issued the Order Concerning Security Provisions.[6] The Order stipulated (in Article 35):

> The Military Courts and the Military Courts Administration shall observe the provisions of the Geneva Convention of August 12 1949 Relative to the Protection of Civilian Persons in Time of War in any matter connected with judicial proceedings. In any contradiction between this Order and the said Convention, the provisions of the Convention shall prevail.

2. THE ARTICLE APPEARS

Shortly thereafter, Dr Yehuda Blum, a young lecturer at the Hebrew University of Jerusalem, penned the article 'The Missing Reversioner: Reflections on the Status of Judea and

[3] Shabtai Rosenne, 'The Legal Status of the New Territories Recently Occupied by the IDF', Opinion No. 43/56, 6 November 1956 (trans), http://akevot.org.il/wp-content/uploads/2016/12/CRDR13595e.pdf.
[4] ibid para 11.
[5] Transcript No 126 of the Constitution, Law and Justice Committee Session, 5 July 1967, http://akevot.org.il/wp-content/uploads/2016/09/MAG-Briefing-Eng.pdf.
[6] Proclamation No 3 regarding Entry into Force of the Provisions of Security Order, 7 June 1967, *Compilation of Proclamations, Orders and Appointments of the IDF Command in the West Bank Area No 1* (11 August 1967).

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Samaria'.[7] As Beni Rubin relates,[8] '[l]ess than five months later, on 29 December 1967, Article 35 was repealed. This change of heart was based on [the] article published by Yehuda Blum'.

The same article became the centrepiece of Israel's official position as it was articulated in 1971 by Meir Shamgar, now Israel's Attorney General. Shamgar began his essay by warning himself and his audience against 'the great difficulty in approaching problems connected with the actual implementation of the rules of warfare without influence by innate prejudices or deep-seated subjective outlook'.[9] However, the view he offered might not have been devoid of the same concerns. Arguing that the West Bank (or in his words, 'Judea and Samaria') and Gaza were not occupied territories, Shamgar invoked the said article by Blum, and concluded that:[10]

> [t]he territorial position [of the West Bank and Gaza] is thus sui generis … and the Israeli government tried therefore to distinguish between theoretical juridical and judicial problems … and the observance of the humanitarian provisions of the Fourth Geneva Convention.

The same conclusion applied, in Shamgar's view, to the Hague Regulations.[11]

Shamgar incorporated Blum's slender but tantalising thesis almost in its entirety into his essay. In fact, nested within a 23-page article, Blum's argument was merely one paragraph long.[12] Blum presented his provocative thesis as if it were self-evident, and perhaps therefore not in need of extended and rigorous examination.

3. ASSESSING THE ARGUMENT

Blum's article, ostensibly devoted to an examination of the lawfulness of a military order under the law of occupation, actually explored a preliminary question: whether Jordan had valid title to the West Bank (referred to as 'Judea and Samaria'). Concluding that Jordan had no title, Blum continued effortlessly to find, 'clear[ly] from the preceding discussion', that the law of occupation did not apply. Blum stipulated that there were two conditions (which he called 'assumptions') for the applicability of the laws of occupation: (i) the existence of 'reversionary rights' of the ousted legitimate government to the territory in question, and (ii) the occupier's lack of territorial claims over the area under its control. Having refuted the first condition in his preliminary assessment of Jordan's title, he concluded that 'those rules of belligerent occupation

[7] Yehuda Z Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279.
[8] Benjamin Rubin, 'Israel, Occupied Territories', *Max Planck Encyclopedia of Public International Law*, October 2009, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301; Kretzmer ((n 1) 33) also attributes the change of heart to Blum's article.
[9] Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 *Israel Yearbook on Human Rights* 262.
[10] ibid 266.
[11] ibid.
[12] Blum (n 7) 294.

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directed to safeguarding that sovereign's reversionary rights ha[d] no application' to Israel's control of the West Bank and, for similar reasons, also to Gaza.[13]

In a long footnote, Blum alludes to the 'far-reaching implications' of his conclusion – namely, that '[s]ince in the present view no State can make out a legal claim that is equal to that of Israel, this relative superiority of Israel may be sufficient, under international law, to make Israel['s] possession of Judea and Samaria virtually indistinguishable from an absolute title, to be valid *erga omnes*'.[14] This argument implies that the occupier can evade its responsibilities by unilaterally asserting its relative superior title to that of the ousted government. This view undercuts the purpose of the law of occupation – namely, to preserve the legal status quo until an agreement is reached.

While Blum acknowledged that the part of the law of occupation 'which is intended to safeguard the *humanitarian* rights of the population' did apply,[15] he failed to identify the scope of those 'humanitarian rights'. In a footnote, Blum refers to Article 47 of the Fourth Geneva Convention[16] to prove the 'severability of the rules of a humanitarian nature from those protecting the ousted sovereign's reversion',[17] but the necessary conclusion, that *all* of the provisions of the Convention must qualify as 'humanitarian' and are hence applicable, is not raised. The text of Article 47 secures to the inhabitants of occupied territories in unqualified terms all 'the benefits of the present Convention' regardless of the political status of the territory. *Pace* Blum, the only conclusion must be that the said Convention applied in its entirety, despite the alleged lack of a lawful reversioner.

The ramifications of the ostensible distinction between the humanitarian rights of the population and the rights of the lawful sovereign would become clear only a decade later. Then, under a Likud government, Israel contended that Article 49 of the Fourth Convention, which prohibited the transfer of the occupier's own civilians to occupied territories, was 'intended to protect the rights of the "legitimate sovereign"', hence '[did] not apply in respect of Jordan', and therefore did not prohibit Jewish settlements.[18] Blum, now the Israeli Ambassador to the United Nations, asserted during a Security Council debate on 13 March 1979 that '[w]e do not regard ourselves as foreigners in those areas. The Israeli villages in Judaea [sic], Samaria and the Gaza District are there as of right and are there to stay'.[19] Blum sought to assure the audience that 'no Arab inhabitants have been displaced by the establishment of the villages in question'.[20]

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[13] ibid 293.

[14] ibid 294 fn 60.

[15] ibid 294.

[16] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287

[17] Blum (n 7) 294 fn 59.

[18] Israeli Ambassador to the UN, Chaim Herzog, before the General Assembly of the UN on 26 October 1979, cited in Nissim Bar-Yaacov, 'The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip' (1990) 24 *Israel Law Review* 485, 488.

[19] Provisional Verbatim Record of the 2125th Meeting of the United Nations Security Council (13 March 1979), UN Doc S/PV.2125, 36, http://dag.un.org/bitstream/handle/11176/68795/S_PV.2125-EN.pdf?sequence=2&isAllowed=y.

[20] UN Security Council Official Records, Thirty Fourth Year, 2131st Meeting (19 March 1979), UN Doc S/PV.2131, 11 para 122, http://dag.un.org/bitstream/handle/11176/68298/S_PV.2131-EN.pdf?sequence=16&isAllowed=y.

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To support Blum's thesis, his article refers only to one authority, Gerhard von Glahn's treatise, *The Occupation of Enemy Territory*,[21] although the reference hardly supports Blum's conclusion. Blum draws on von Glahn's reference to 'the sovereign, the legitimate government of the occupied territory' and seeks to draw from it that the ousted government must have a valid title over the area to be 'legitimate'. However, this was not von Glahn's view at all. Throughout his book, von Glahn refers to 'the legitimate government' or 'the legitimate sovereign' to distinguish it from the occupier (von Glahn was obviously relying on the text of Article 43 of the Hague Regulation,[22] which refers to '[t]he authority of the legitimate power', to emphasise that the passing of that authority 'in fact' to the occupier does not assign to the latter any legal title). Von Glahn never recognises an occupation of a territory to which title is disputed as a distinct type of occupation.[23]

The quote from von Glahn's book upon which Blum relies is taken out of a special chapter devoted to 'The Legal Status of Defeated Germany'. In this chapter, von Glahn singles out the unique situation of Germany after its unconditional surrender in 1945. Von Glahn does not discuss relative claims to title but an entirely different matter: the situation of *debellatio*, when the ousted government ceases to exist. In other words, von Glahn's quote was taken out of context.

What for von Glahn is a unique and 'most perplexing legal controversy' that merits a separate chapter becomes for Blum the sole example to support his thesis. What for von Glahn were '[f]our major schools of thought [which] have developed among the numerous writers who have speculated on the legal status of post-surrender Germany'[24] becomes for Blum – who again relies only on von Glahn on this point:

> a considerable number of authors [who] have taken the view that when the last Government of the Third Reich … was dissolved … the Hague Regulations as such ceased to apply to that situation, since German sovereignty ceased to exist.

While the Allies' title to Germany was not challenged, its seemingly logical consequence – namely, the inapplicability of the law of occupation to the administration of the territory – was convincingly contested, especially by German scholars.[25] They emphasised the predicament of the population under what was actually alien domination. Formal legal principles aside, they argued, international law must not abandon its concern for the local population only because the national institutions had disappeared. Max Huber, a towering figure in international law and the

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[21] Gerhard von Glahn, *The Occupation of Enemy Territory* (University of Minnesota Press 1957).
[22] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461, art 43 ('The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country').
[23] von Glahn (n 21) 27, where he discusses various types of occupation.
[24] ibid 276.
[25] Eyal Benvenisti, *The Law of Occupation* (2nd edn, Oxford University Press 2012) 162.

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then President of the International Committee of the Red Cross, voiced his discomfort with the Allied legal claim in a letter to US Secretary of State James F Byrnes:[26]

> Unconditional surrender of the German and Japanese forces which resulted in their laying down arms without the special reservations usually inserted in armistice conventions, does not ipso facto imply that the capitulating power abandons all claim to the benefits of the Hague and Geneva Conventions in favour of its nationals.

The drafters of the Fourth Geneva Convention sought in 1949 to clarify the scope of protection of inhabitants in occupied territories. They did so in Article 2 of the Convention. As von Glahn points out, this article 'represents a definite and, in the opinion of this writer, successful attempt to void some of the shortcomings of the Hague Conventions and Regulations'.[27] Blum does not refer to von Glahn on this point; nor does he even mention Article 2. However, this article is pertinent as it emphasises that the law of occupation applies regardless of the status of the territory, and what matters is the existence of an international armed conflict (even if an effective attack meets with no armed resistance):

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The famous debate about Israel's narrow interpretation of Article 2 with regard to the West Bank and Gaza (namely, whether the reference to 'the territory of a High Contracting Party' signifies a condition that the ousted government must have valid title over the territory) did not begin with Blum's article. This claim was elaborated for the first time more than a decade later by Shamgar, by now the Deputy President of the Israeli Supreme Court, soon to become its President.[28]

Blum's argument reflects the understanding in the early days of the crystallisation of the concept of occupation, when the occupation regime was designed as a 'pact between state elites, promising reciprocal guarantees of political continuity'.[29] In those days, the complete subjugation of territory might assign title to the conqueror (based on the doctrine of *debellatio*), but even such an early understanding of the regime would eschew the view that a claim for a relative better title could undermine the temporary measure that the concept of occupation was designed to provide.

Blum's article was written in 1967, long after the claim of *debellatio* was rejected in the context of Second World War occupations (the recognition of governments in exile, the status of

[26] ibid 163.
[27] von Glahn (n 21) 20.
[28] Shamgar (n 1) 34.
[29] Benvenisti (n 25) 71.

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Germany and Japan), long after it was laid to rest by Article 2 of the Fourth Geneva Convention.[30] By 1967, the principle of self-determination of peoples had gained the status of a legal right, and human rights of individuals had been inscribed in solemn declarations and covenants.[31] By that time, the ousting of a government could no longer divest the inhabitants of an occupied area of their entitlement.

Was Blum's article an exercise in what some today would call 'lawfare', or a serious effort to approach the problem 'without influence by innate prejudices or deep-seated subjective outlook'?[32] All one can conclude from revisiting Blum's text is that it offered less than a serious effort to elucidate the legal questions. His brief argumentation leaves out too much to enable an informed assessment of the underlying claim. Did the article influence Israeli decision-makers or has it served as an apology for their preferred agenda? It would be distressing to think that indeed it was this article that was responsible for the legal about-face in 1967.

[30] ibid 161–64.
[31] On the relevance of the self-determination principle and right in this context see Rubin (n 8) paras 48–52.
[32] Shamgar (n 9).

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THE MISSING REVERSIONER: REFLECTIONS ON THE STATUS OF JUDEA AND SAMARIA

*By Yehuda Z. Blum**

I. *General*

Two recent decisions handed down by the Hebron magistrate, Mr. Hussein El-Shajuchi, and by the Bethlehem magistrate, Mr. Tawfik El-Sakka, on February 5, 1968 and on February 27, 1968, respectively, have brought to the fore some interesting legal problems arising from the Six Day War of June, 1967 as a result of which Judea and Samaria (formerly known as the "West Bank" of the Kingdom of Jordan) have come under Israeli control.

The immediate cause that has given rise to the elaboration by the two learned magistrates of the problems to be dealt with in this paper was the promulgation by the Officer Commanding, Israel Defence Forces in Judea and Samaria, on October 23, 1967, of Order No. 145, concerning the status of Israeli advocates in the courts of Judea and Samaria.[1] Article 2 of the said Order provides that "notwithstanding any existing provisions to the contrary, any party to civil proceedings and any defendant in criminal proceedings may authorise an Israeli advocate to represent him in such proceedings."[2] Article 4 of the same Order stipulates that the Order shall be in force for a period of six months from the date of its entry into force (i.e. October 23, 1967) unless it is terminated at an earlier date by the Officer Commanding, Israel Defence Forces in Judea and Samaria.[3] In the preamble to the Order the reasons given for its promulgation are "to ensure the efficient maintenance of the law, to enable the uninterrupted functioning of the Courts in the District [of Judea and Samaria] and to make available the services of advocates to the local population."[4] As will be more fully explained later, the reason for

* M.Jur. (Jerusalem), Ph.D. (London), Lecturer in International Law, Hebrew University of Jerusalem.

[1] See *Collection of Decrees, Orders and Appointments by the Officer Commanding, Israel Defence Forces in the West Bank District*, No. 8 of December 29, 1967, p. 306 (in Hebrew and Arabic).

[2] *Ibid.* An "Israeli advocate" is defined in Art. 1 of the Order as "a person who is a member of the Israeli Bar." All translations from the Hebrew are by the present writer.

[3] *Ibid.*

[4] *Ibid.* In view of the fact that the Arab lawyers in Judea and Samaria had not resumed their professional activities by the time the Order expired, it was announced

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promulgating this Order was the strike of Arab lawyers in Judea and Samaria, which threatened to deprive courts and clients there of legal services.

An Israeli lawyer appearing before the Hebron magistrate in accordance with the provisions of the Order here under consideration was disqualified by the latter on February 5, 1968 on a number of grounds which may be summarised as follows:

(a) The "West Bank" constitutes an integral part of the Kingdom of Jordan which remains the legitimate sovereign over it, in spite of the temporary occupation of the territory by Israel;

(b) The occupying authorities may not legislate for the occupied territory or alter in any manner the law in force there, save as far as is required for the protection of their military forces and for the promotion of their military objectives;

(c) Order No. 145 constitutes as impermissible act of legislation and an unauthorised interference with the activities of the courts of the legitimate sovereign.

The learned magistrate further held that under international law he was required to hand down his judgments and other judicial decisions "in the name of the legitimate ruler of the West Bank, His Glorious Majesty King Hussein."

The Bethlehem magistrate, on the other hand, in a decision of February 27, 1968, reached a diametrically opposed legal conclusion concerning the validity of Order No. 145. He too took the view that the West Bank being under the military occupation of Israel, the relevant rules of international law applied to the matter. Citing Article 43 of the Hague Regulations of 1907[5] and Article 64 of the Fourth Geneva Red Cross Convention of 1949,[6] he

on April 23, 1968 that the duration of the Order was extended and that it was to remain in force so long as it was needed to maintain the functioning of the judicial system. ("The Jerusalem Post" of April 24, 1968, p. 7.)

[5] Art. 43 reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[6] Art. 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949 (the official designation of the Fourth Red Cross Convention) provides: "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government

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expressed the view that since an occupant was responsible for public order and safety in the occupied territory, he was entitled—and indeed under the duty—to enact such laws as he might deem necessary for ensuring the well-being of the local population. He further held that it was for the occupant alone to determine whether a given enactment was in fact necessary for the said purposes. In his view, the occupant's determination on this point could not be challenged by the local courts for whom such determination must be regarded as conclusive. In view of the preambular provisions of Order No. 145 referred to above, the magistrate therefore decided that he was not entitled to question the legality of the said Order. In his decision, handed down "in the name of Law and Justice", he accordingly allowed the Israeli advocate to plead before him.

Four legal problems touched upon in the two decisions referred to appear to be worth discussing in greater detail:

(a) What is the juridical status, under international law, of Judea and Samaria, and what are the respective rights of Jordan and Israel over that territory?

(b) Assuming that the status of Israel in Judea and Samaria is merely that of a "belligerent occupant", can Order No. 145 be justified on legal grounds?

(c) Are courts in occupied territory authorised to review the legislative activities of the occupant and to pass on their legality?

(d) Is the occupant entitled to alter the formula employed by the local courts for the pronouncement of judgments?

It is now proposed to deal in turn with these questions.

II. *The International Juridical Status of Judea and Samaria*

Both the Hebron and the Bethlehem magistrates seem to have based their decisions on the premise that legal sovereignty over Judea and Samaria is vested in the Kingdom of Jordan. However, for reasons to be explained presently, such an assumption appears to be at least questionable from the legal point of view. In fact, a careful examination of the legal issues involved seems to lead to the opposite conclusion, namely, that the Kingdom of Jordan never acquired, from the point of view of international law, the rights of a legitimate sovereign over those parts of former Mandatory Palestine that came under its control in the course of the Palestine hostilities of 1948–9.

For a better understanding of this problem it is necessary to recapitulate briefly the pre-1948 situation. At that time Palestine, under British Mandate, with a territory of approximately 27,000 km², included also Judea and Samaria, the combined size of which is roughly 6,000 km².

of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

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As is well known, ever since the inception of the mandate system international lawyers and theorists have been puzzled by the question of sovereignty over mandated territories. According to Chowdhuri,

> "[d]uring the past . . . decades, legal experts have tried their best to apply to this unique institution [of Mandates], the old juridical conception of sovereignty and the result was the enunciation of not less than six theories which attribute sovereignty to:
> (A) the Principal Allied and Associated Powers;
> (B) the League [of Nations] . . .;
> (C) the Mandatory Powers . . .;
> (D) the Inhabitants of the Mandated . . . Territories;
> (E) the theory of joint sovereignty [of (A) and (B) or (C) and (B)];
> (F) the theory of suspended sovereignty."[7]

Chowdhuri himself seems to favour theory (D)—at least by implication—for he maintains, with regard to the question of sovereignty within the context of the Trusteeship System that has succeeded the League Mandates System, that

> "[o]nce the goal of full self-government or independence is reached by the inhabitants of the Trust Territories on the termination of Trusteeship, . . . sovereignty would automatically be vested in the people of the Trust Territory."[8]

It would seem idle to pursue this question any further, for as has been justly pointed out by Sir (now Lord) Arnold McNair in his Separate Opinion in the Advisory Opinion of the International Court of Justice on the *International Status of South West Africa,*

> "the Mandates System . . . is a new institution—a new relationship between a territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new System."[9]

[7] Chowdhuri, *International Mandates and Trusteeship Systems* (1955) 230. Of the extremely rich literature on this subject, the following are particularly referred to: Stoyanovsky, *La théorie générale des mandats internationaux* (1925) 83–86; Wright, *Mandates under the League of Nations* (1930) 319–39; Pelichet, *La personnalité distincte des collectivités sous mandat* (1932) 81–98; Springe, *Die Beendigung des völkerrechtlichen Mandats durch Zweckerreichung* (1935) 18–21; Comisetti, *Mandats et souveraineté* (1934) 77–125; Hall, "International Trusteeship" (1947) 24 British Year Book of International Law, 33, 48–56; Sayre, "Legal Problems arising from the United Nations Trusteeship System" (1948) 42 Amer. J. of Int. Law, 263, 268–72; Leeper, "Trusteeship compared with Mandate" (1951) 49 Mich. L.R. 1199, 1204–08.

[8] Chowdhuri, *op. cit.*, 236.

[9] *I.C.J. Reports,* 1950, p. 150.

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It is at the same time revealing that in the view of Judge McNair,

> "[s]overeignty over a Mandated Territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent State, as has already happened in the case of some Mandates, *sovereignty will revive and vest in the new State.*"[10]

All the different theories referred to above—for all their divergences—seem to have one feature in common, namely, the assumption that sovereignty over mandated territories is located *somewhere*. From this assumption it necessarily follows that no mandated territory can be regarded, on the termination of the mandate over it, as a *res nullius* open to acquisition by the first comer. Any other conclusion would lead to the absurd result that a mandated territory would become, upon the termination of the mandate over it, the helpless prey of external forces. This would frustrate with regard to such territories the application of the principle enunciated in Article 2(4) of the United Nations Charter which imposes on Members the duty "to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." And this result would be the more unacceptable in view of the protective purpose of the Mandate institution.

It is submitted that the external military intervention that took place on the termination of the British Mandate over Palestine on May 15, 1948, across the frontiers of former Mandatory Palestine—including the armed intervention of the Kingdom of Transjordan of those days—constituted a use of force in violation of the rule embodied in Article 2(4) of the Charter, since that use of force cannot be justified by any of the recognised exceptions to that rule.[11] In addition, of course, it was aimed to defeat a resolution by the United Nations General Assembly. The use of force by the contiguous Arab States having been illegal, it naturally could not give rise to any valid legal title. *Ex injuria jus non oritur*. And as has been seen above, acquisitive occupation *stricto sensu* must be excluded.

The initial justification given by the Arab States for their armed inter-

[10] *Ibid*. Emphasis supplied.

[11] For a discussion of the various justifications for the use of force under the Charter régime, see Brownlie, *International Law and the Use of Force by States* (1963) 251–349. See also Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) 197–221.

Transjordan was not a member of the United Nations in 1948, but, as has been pointed out by Kelsen (*The Law of the United Nations* (1950) 107), "[t]he Organisation is certainly authorised to ensure that non-Member states shall act in conformity with the principles laid down in Article 2, paragraphs 3, 4 and 5; that is to say, that non-Member states are obliged by the Charter, just as Members are, . . . to refrain in their relation to other states from the threat or use of force." See also Soder, *Die Vereinten Nationen und die Nichtmitglieder* (1956) 156–57.

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vention is well illustrated by the following passages from an Egyptian communication sent to the Security Council on May 15, 1948:

> "... now that the British Mandate in Palestine has ended, the Egyptian armed forces have started to enter Palestine to establish security and order in place of chaos and disorder which prevailed .... The Royal Egyptian Government cannot in face of ... brutal crimes against humanity in a contiguous country and against the Arabs of Palestine who are strongly bound by many ties to the people of the neighbouring Arab States, remain inactive. They deem it their bounden duty as the Government of an Arab State and a civilized nation to intervene in Palestine with the object of putting an end to the massacres raging there and upholding law and principles recognised among the United Nations .... This intervention has no other object in view except the restoration of security and order in Palestine ... until a just and equitable solution is reached."[12]

Similarly, King Abdullah of Transjordan, in a cablegram to the Security Council, stated that

> "[w]e were compelled to enter Palestine to protect unarmed Arabs against massacres .... We are aware of our national duty towards Palestine in general and Jerusalem in particular and also Nazareth and Bethlehem ....[W]e shall be very considerate in connexion with Jews in Palestine and while maintaining at the same time the full rights of the Arabs in Palestine ...."[13]

This argument for the justification of Arab armed intervention in Palestine was refuted by Mr. Tarasenko, the representative of the Ukraine in the Security Council, who rightly pointed out that

> "[a]t the end of the declaration by Egypt the assertion was made that the intervention has no other object in view than the restoration of security and order in Palestine. It is known, however, that according to the rules of the international community each Government has the right to restore order only in its own territory."[14]

Mr. Tarasenko further developed this idea at a subsequent meeting of the Security Council when he stated that

> "none of the States whose troops have entered Palestine can claim that Palestine forms part of its territory. It is an altogether separate territory, without any relationship to the territories of the States which have sent their troops into Palestine."[15]

And he once again reverted to the same conception when, at a meeting of the Council on May 27, 1948, he said:

[12] U.N. Doc. S/743.

[13] U.N. Doc. S/748.

[14] S.C.O.R., 292nd meeting of May 15, 1948, p. 25.

[15] S.C.O.R., 297th meeting of May 20, 1948, p. 5.

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"What can the Security Council do today? It can only note the same situation as it did on 17 May, namely, that an armed struggle is taking place in Palestine as a result of the unlawful invasion by a number of States of the territory of Palestine, which does not form part of the territory of any of the States whose armed forces have invaded it."[16]

The Arab States apparently must have felt the inherent legal weakness of their initial argument, for they subsequently sought to justify their armed intervention in Palestine by invoking Chapter VIII of the Charter which deals with regional arrangements within the framework of the United Nations system. The lead on this point was given by the League of Arab States, which in a memorandum to the Security Council maintained that the Arab States, as members of the Arab League which is a regional organization within the meaning of Chapter VIII of the Charter, were compelled to intervene to restore peace and security in Palestine.[17] The individual Arab States soon followed suit. Thus it was asserted by Mr. El-Khouri on behalf of Syria that

"[i]n the pact of the Arab League, Palestine was considered an associate member of the League .... Palestine being a member of the Arab League and the Arab League constituting a regional arrangement, ... Article 52 of the Charter applies .... [P]acification [within its meaning in Article 52] means restoring peace—that is, suppressing the disturbance by applying the necessary measures, having regard to the methods and weapons used by the disturbing party."[18]

The Egyptian representative, likewise, claimed that

"[t]he neighbouring Arab Governments which are members of the Arab League consider themselves responsible for the maintenance of security in their area as a regional organization in conformity with the provisions of the United Nations Charter."[19]

This attitude was maintained by the Arab Governments in their replies to a questionnaire sent to them by the Security Council, in which they had been asked, *inter alia,* on what basis they claimed that their forces were entitled to enter Palestine. The Governments of Egypt, Syria, Iraq and the Lebanon explicitly invoked Article 52 of the Charter,[20] while Transjordan evaded any direct reply on the ground that the United States, the sponsor of the questionnaire, had not recognized it and had objected to its admission to the United Nations.[21]

16 S.C.O.R., 306th meeting of May 27, 1948, p. 7.

17 U.N. Doc. S/745.

18 S.C.O.R., 299th meeting of May 21, 1948, pp. 13–15.

19 S.C.O.R., 301st meeting of May 22, 1948, p. 7.

20 The replies of the Arab States may be found *ibid.*, p. 7 (Egypt), p. 12 (Syria), p. 14 (Iraq) and p. 15 (Lebanon).

21 S.C.O.R., 302nd meeting of May 22, 1948, p. 42; also reproduced in Schwadran, *Jordan—a State of Tension* (1959) 258, n. 10.

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The Arab States' reliance on Chapter VIII of the Charter to justify their armed intervention in Palestine was shown by the United States delegate to be devoid of any legal merit. Senator Austin stated that

> "[t]heir statements are the best evidence we have of the international character of this aggression.... They tell us quite frankly that their business in Palestine is political.... Of course, the statement that they are there to make peace is rather remarkable in view of the fact that they are waging war. We find that this is characterized on the part of King Abdullah by a certain contumacy towards the United Nations and the Security Council. He has sent us an answer to our questions. These were questions addressed to him, as a ruler who is occupying land outside his domain, by the Security Council, a body which is organized in the world to ask these questions of him.... The contumacy of that reply to the Security Council is the very best evidence of the illegal purpose of this Government in invading Palestine with armed forces and conducting the war which it is waging there. It is against the peace; it is not on behalf of peace. It is an invasion with a definite purpose.... Therefore here we have the highest type of the international violation of the law: the admission by those who are committing this violation."[22]

Commenting specifically on the Arab States' arguments based on Chapter VIII of the Charter, the Senator observed:

> "The representative of Syria... walked right into the Charter of the United Nations,... and saw fit to call to our attention Articles 51 and 52 of the Charter as justification for their invasion. He omitted, probably by inadvertency, to refer to that Article which shows that their act of regional organization in Palestine is contrary to the Charter, that it is in violation of the Charter, and strictly an illegal act. The representative of Syria omitted to refer to Article 53, which provides among other things:
>
> > '[The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.] But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.'
>
> Those States defined in paragraph 2 [i.e. States which during the Second World War were enemies of any signatory of the Charter] are enemy States. Of course, this is not the case here."[23]

[22] S.C.O.R., 302nd meeting of May 22, 1948, pp. 41–2.

[23] *Ibid.*, 42–3.

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It must, therefore, be concluded that the armed intervention of the various Arab States—including Transjordan—was a violation of international law. Its real aim was of course to crush by military force the newly-established State of Israel which had come into being on the expiry of the British Mandate, in pursuance of General Assembly Resolution 181(II) of November 29, 1947.[23a]

The illegality of the presence of the various invading forces on the soil of former Mandatory Palestine was not removed—and was not intended to be removed—by the different Armistice Agreements concluded in 1949 by Israel with Egypt, Lebanon, Transjordan and Syria, respectively, between February 24 and July 20 of that year.[24] We do not need to enter, for present purposes, the controversial questions relating to the nature and scope of armistice agreements in general.[25] For the various agreements concluded between Israel and

[23a] Thus, at the meeting of Premiers and Foreign Ministers of Arab League States held in Cairo between December 8 and December 17, 1947, following the General Assembly's resolution recommending the partition of Palestine, it was decided that the Arabs were "determined to enter battle against the United Nations decision to partition Palestine and, by the will of God, to carry it to a successful conclusion." ((1946–8) 6 *Keesing's Contemporary Archives,* 9244). At the same meeting it was also agreed to take "decisive measures" to prevent the partition of Palestine, and the General Assembly's resolution on the matter was defined as a violation of the "principles of right and justice." (*Ibid.*)
On April 22, 1948 (i.e. less than one month before the termination of the British Mandate over Palestine), King Abdullah of Transjordan declared that the Arab world must "take joint action against Zionism" and issued a call to all Arab countries to join with the Transjordan Army "in a movement to Palestine to retain the Arab character of that country." (*Ibid.*)

[24] The Israel-Egypt General Armistice Agreement may be found in 42 *United Nations Treaty Series,* 251; the Israel-Lebanon Agreement *ibid.,* at 287; the Israel-Jordan Agreement *ibid.,* at 303; the Israel-Syria Agreement *ibid.,* at 327.
The name of the "Hashemite Kingdom of Transjordan" was changed in 1949 to the "Hashemite Kingdom of Jordan," the reason for this change being the fact that "the country to-day includes a large part of Arab Palestine . . . thus extending geographically on both banks of the Jordan [River]." (Official announcement of the Jordan Government of June 2, 1949, reproduced in (1948–50) 7 *Keesing's Contemporary Archives,* 10050). In view of the fact that the official announcement regarding the change of name was made only on June 2, 1949, it is not clear why the Armistice Agreement with Israel was signed on April 3, 1949 by "Jordan", rather than by "Transjordan".

[25] See Rosenne, *Israel's Armistice Agreements with the Arab States* (1951) 24–32; Feinberg, *The Legality of a "State of War" after the Cessation of Hostilities* (1961); Levie, "The Nature and Scope of the Armistice Agreement" (1956) 50 Amer. J. of Int. Law, 880.

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her neighbours contain specific provisions on the question here under consideration. Thus Article 2(2) of the Israel-Jordan General Armistice Agreement stipulates, *inter alia,* that

> "[i]t is ... recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated *exclusively by military considerations.*"[26]

Similar provisions are to be found also in the agreements with Egypt, Lebanon and Syria, respectively.[27]

It follows that the effect of the various General Armistice Agreements between Israel and her neighbours was to freeze, as it were, the rights and claims of the parties as they existed on the day of their conclusion. In consequence, no subsequent unilateral act could, as long as the Agreements were in force, improve, affect or alter the rights of any party as they existed when the Agreements were concluded. The purported annexation by the Kingdom of Jordan of the "West Bank" in April, 1950[28] was therefore, from the point of view of international law, devoid of any legal effect.

This conclusion is warranted not only by the just-quoted provisions of the Israel-Jordan General Armistice Agreement, but also by legal considerations of a more general nature.

For the reasons elaborated above, the most favourable construction—from the Jordanian viewpoint—that can be placed on the presence of armed elements of Transjordan on Palestinian soil after May 15, 1948 is that they enjoyed there the rights of a belligerent occupant,[29] within the meaning of this term under international law. According to Stone, "the position of the State of Jordan on the West Bank and in East Jerusalem itself, insofar as it had a legal basis in May, 1967, rested on the fact that the State of Transjordan had overrun this territory during the 1948 hostilities against Israel. It was a belligerent occupant there."[30] And it is a cardinal rule of the international law of belligerent occupation that

> "occupation does not displace or transfer sovereignty. The occupant is entitled to exercise military authority over the territory occupied, but he does not acquire sovereignty unless and until it is ceded to him by a treaty of peace (which is the commonest method), or is simply aban-

[26] 42 *United Nations Treaty Series,* 306; emphasis supplied.

[27] See Art. 5 of the Israel-Egypt Agreement (*ibid.,* 256); Art. 2 of the Israel-Lebanon Agreement (*ibid.,* 290); Art. 2 of the Israel-Syria Agreement (*ibid.,* 330). For a commentary on the meaning of these clauses, see Rosenne, *op. cit.,* 42–44.

[28] Schwadran, *op. cit.,* 295–7.

[29] Stone, *The Middle East under Cease-Fire* (A Bridge Publication), October 1967, p. 12.

[30] *Ibid.*

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> doned in his favour without cession, or is acquired by him by virtue of subjugation, that is, extermination of the local sovereign and annexation of his territory . . . ."[31]

Castrén, likewise, points out on this matter that "*sovereignty* over occupied territory . . . is not transferred to the occupying Power . . . . [O]ccupied territory may not be *annexed*, and unilateral declarations to this effect are consequently void of legal effect."[32]

Stone expresses the same view stating that "an Occupant is not legally entitled to annex until the state of war out of which the occupation arose has ceased."[33] And Kelsen, in somewhat different terms, seems to agree:

> "It is a rule of general international law that by mere occupation of enemy territory in the course of war the occupied territory does not become territory of the occupying belligerent, or—as it is usually formulated—the occupying belligerent does not acquire sovereignty over this territory . . . ."[34]

Another consideration to which regard must be had is that, according to the prevailing view, an armistice agreement does not affect the status of the belligerent occupant who—unless it is otherwise stated in the agreement—remains bound in respect of the occupied territory by the Hague Regulations. Thus, in Glahn's view, "the Hague Regulations would apply to . . . [an armistice] occupation, subject to such modifications as might have been included in the armistice agreement."[35] And, according to Greenspan, "[t]he situation in occupied territory during an armistice remains unchanged from that during hostilities."[36]

It follows from all this that, just as annexation of occupied territory by a belligerent occupant is obviously prohibited before the cease-fire or the armistice, it is equally prohibited, under international law, after the cease-fire or armistice, as long as this remains in force. Thus, it should not occasion surprise that the resolution adopted on April 24, 1950 in a joint session of both Houses of the Jordanian Parliament, proclaiming "its support for complete unity between the two sides of the Jordan and their union into one State, which is the Hashemite Kingdom of Jordan",[37] has not met with international recognition.

[31] McNair, *The Legal Effect of War* (3rd ed., 1948) 320.

[32] Castrén, *The Present Law of War and Neutrality* (1954) 215–16; emphasis in original.

[33] Stone, *Legal Controls of International Conflict* (rev. ed., 1959) 720.

[34] Kelsen, *Principles of International Law* (2nd ed., edited by Turner, 1967) 139. See to the same effect Glahn, *The Occupation of Enemy Territory* (1957) 274.

[35] Glahn, *op. cit.*, 28.

[36] Greenspan, *The Modern Law of Land Warfare* (1959) 390. See also to the same effect Castrén, *op. cit.*, 214; Stone, *op. cit.*, 696, n. 14.

[37] For the text of the resolution in English, see Schwadran, *op. cit.*, 296–7.

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In fact, there are only two States who have recognised this extension of the territory of the Kingdom of Jordan, namely, the United Kingdom and Pakistan.[38] The various Arab States themselves were strongly opposed to this Jordanian measure. On April 13, 1950, that is, eleven days before the adoption of the Jordanian parliamentary resolution referred to above, the Council of the Arab League decided that "annexation of Arab Palestine by any Arab State would be considered a violation of the League Charter, and subject to sanctions."[39] Three weeks after the said proclamation—on May 15, 1950—the Political Committee of the League, in an extraordinary session in Cairo, decided, without objection (Jordan herself was absent from the meeting), that the Jordanian measure constituted a violation of the Council's resolution of April 13, 1950.[40] The Committee also considered the expulsion of Jordan from the League, but it was decided that discussion of punitive measures be postponed to another meeting, set for June 12, 1950.[41] At that meeting of the League Council, it had before it a Jordanian Memorandum asserting that "annexation of Arab Palestine was irrevocable, although without prejudice to any final settlement of the Palestine question."[42] This formula enabled the Council to adopt a face-saving resolution "to treat the Arab part of Palestine annexed by Jordan as a trust in its hands until the Palestine case is fully solved in the interests of its inhabitants."[43] The Council thereupon constituted itself as the League's Political Committee[44] and invited Jordan to

[38] Three days after the Jordanian resolution, on April 27, 1950, Mr. Kenneth Younger, Minister of State, announced in the House of Commons: "His Majesty's Government have decided to accord formal recognition to the union." (*Parliamentary Debates, Commons,* vol. 474, col. 1137). See also Stone, *The Middle East under Cease-Fire,* (1967) 13.

[39] (1950–2) 8 *Keesing's Contemporary Archives,* 10812.

[40] *Ibid.*

[41] Schwadran, *op. cit.,* 298.

[42] (1950–2) 8 *Keesing's Contemporary Archives,* 10812.
The use of the term "Arab Palestine" is rather interesting, for it constitutes an oblique and indirect admission of the existence of a "non-Arab" part of Palestine. In view of the fact that Transjordan originally invaded Palestine "to retain the Arab character of that country" (see *supra,* n. 23a), the terminology employed here would appear to reflect a hitherto unacknowledged change in the official Arab position. See also footnotes 24, 39 and 43.

[43] Schwadran, *op. cit.* 298.

[44] (1950–2) 8 *Keesing's Contemporary Archives,* 10812. The adoption of the resolution by the Political Committee rather than by the Council is explained by the fact that, according to Art. 7 of the Pact of Arab States of March 22, 1945, only the Council's decisions are binding; the Political Committee's decisions, on the other hand, are only in the nature of recommendations. (See 70 *United Nations Treaty Series,* 237, at 254.)

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agree that the annexation should cease to be valid if the frontiers of Palestine as they existed under the British Mandate were restored.[45]

Some seventeen years later, on May 31, 1967 (i.e. less than a week before the outbreak of the Arab-Israel hostilities of June, 1967), Jordan herself seems to have called in question—unwittingly, perhaps—the validity of her annexation measures of April, 1950, when her representative, Mr. El-Farra, told the Security Council:

> "There is an Armistice Agreement. The Agreement did not fix boundaries; it fixed the demarcation line. The Agreement did not pass judgement on rights—political, military or otherwise. Thus I know of no boundary; *I know of a situation frozen by an Armistice Agreement*."[46]

At this juncture it seems pertinent to raise the question whether the lack of protest on the part of Israel—the State most directly affected by the Jordanian territorial claims—can be construed as indicating her acquiescence in the Jordanian measure, thus validating an originally invalid claim. In considering this question, we must recall a generally-accepted principle of international law—and indeed of law in general—namely, that while silence can in some circumstances amount to consent in a given situation, it can equally, in other circumstances, negative consent. In the words of Schwarzenberger,

> "silence is ambiguous. It is always a question of circumstances and specific rules of international law governing a particular subject or underlying the principle of good faith what the implications of silence are."[47]

Thus the governing principle is not simply *qui tacet consentire videtur*, but rather, as has been pointed out by the International Court of Justice in the *Preah Vihear* case, *qui tacet consentire videtur si loqui debuisset ac potuisset*.[48] It therefore follows that "silence *per se*, even if persisting for a long period of time, should not be credited with absolute validity unless the circumstances would have required and enabled anybody wishing to signify his disapproval to do so."[49]

It is believed, however, that in the circumstances under consideration Israel was not required to signify her disapproval of the purported annexation by Jordan of the "West Bank" in the form of an open protest and that her

[45] (1950–2) 8 *Keesing's Contemporary Archives*, 10812.

[46] U.N. Doc. S/PV. 1345 of May 31, 1967, p. 47; emphasis supplied.

[47] Schwarzenberger, "The Fundamental Principles of International Law" (1955–I) 87 Hague Recueil, 191, at 257.

[48] *I.C.J. Reports*, 1962, p. 23.

[49] Blum, *Historic Titles in International Law* (1965) 133. See to the same effect Brüel "La protestation en droit international" (1932) 3 *Acta Scandinavica Juris Gentium*, 75; Suy, *Les actes juridiques unilatéraux en droit international public* (1962) 63–64.

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silence could not be construed as indicating lack of objection to the newly-created situation. The rule applicable in the circumstances here under review would appear to be *qui tacet negat*. This contention is based on the provisions of Article 2(2) of the Israel-Jordan General Armistice Agreement which has already been referred to above, in which the parties agreed that

> "no provision of this Agreement shall in any way prejudice the rights, claims or positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations."[50]

The intention of the quoted paragraph—to use again the words of the Jordanian representative—was to bring about "a situation frozen by an Armistice Agreement",[51] and to ensure that the final determination of the respective claims of the parties be left for the ultimate peace settlement between them. In this respect it has an effect analogous to that of Article 4 of the Antarctic Treaty of December 1, 1959.[52] It seems clear, against this background, that no onus rested on Israel to signify her objection to the purported annexation by Jordan of the "West Bank" in the form of a formal protest. The operative provision of the Israel-Jordan General Armistice Agreement obviously barred any such unilateral change as against Israel, quite apart from the illegality of such a change *erga omnes,* under general international law.

If the analysis here submitted is correct, the Kingdom of Jordan never acquired the status of a legitimate sovereign over Judea and Samaria and enjoyed *at the most* the rights of a belligerent occupant there. We say "at the most", for in recent years controversy has arisen over the question whether a State that has illegally acquired control over foreign territory (e.g. in violation of Article 2(4) of the United Nations Charter) is entitled to claim even the benefits conferred by international law on the belligerent occupant. Thus, it is asserted by Seyersted that *"it can no longer be maintained that the laws of war apply in all respects equally to the aggressor and the defenders.* Basically the aggressor could not derive from his illegal act any rights under the customary laws of war . . . ."[53] The same writer further points out that "[although] both parties must observe the humanitarian rules of the law of occupation which are intended to protect individuals and cultural property . . . this does not necessarily mean that one has to recognize the validity of the

[50] 42 *United Nations Treaty Series,* 306.

[51] U.N. Doc. S/PV. 1345 of May 31, 1967, 47.

[52] Art. 4 of that Treaty provides, *inter alia,* that "no acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty", and that "no new claim . . . shall be asserted while the present Treaty is in force." (402 *United Nations Treaty Series,* 70, at 74.)

[53] Seyersted, *United Nations Forces in the Law of Peace and War* (1966) 224; emphasis in original.

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legislation enacted by the illegal occupant within the limits of Article 43 of the Hague Regulations."[54]

The validity of legislation enacted by the illegal occupant *beyond* the limits of Article 43 of the Hague Regulations (including here, of course, measures by the illegal occupant purporting to annex the occupied territory) would on this view be regarded as *a fortiori* incompatible with existing principles of international law. It is not necessary, however, for the present purpose, to elaborate further on this point.

On the interpretation more favourable to the Kingdom of Jordan, her rights over Judea and Samaria could thus not exceed those of a belligerent occupant. By the same token, her rights could not amount to those of a legitimate sovereign. It is this conclusion which is of decisive legal significance as regards the nature and scope of the present rights of Israel over these territories.

For it will be clear already from the preceding discussion that the traditional rules of international law governing belligerent occupation are based on a twofold assumption, namely, (a) that it was the legitimate sovereign which was ousted from the territory under occupation; and (b) that the ousting side qualifies as a belligerent occupant with respect to the territory. According to Glahn, "[b]elligerent occupation . . . as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government, of the occupied territory, is at war with the government of the occupying forces."[55] This assumption of the concurrent existence, in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognising and sanctioning the occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign. It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application.

It is for this reason that a considerable number of authors have taken the view that when the last Government of the Third Reich (that of Admiral Dönitz at Flensburg) was dissolved by the Allies on May 23, 1945, the Hague Regulations as such ceased to apply to that situation, since German sovereignty ceased to exist.[56] Conversely (though not otherwise here relevant) the view has been expressed by different writers[57] that when the occupant is not a government (e.g. the United Nations), the traditional laws of occupation must be maintained in such a situation only within the humanitarian field and that

[54] *Ibid.*, 245.

[55] Glahn, *op. cit.*, 273.

[56] For a survey of the widely divergent views on this question, see Glahn, *op. cit.*, 273–86.

[57] See e.g. Seyersted, *op. cit.*, 281; Bowett, *United Nations Forces* (1964) 491.

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outside that field there might be room for giving such an occupant a privileged position.[58]

The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal "legitimate sovereign" with that of a "belligerent occupant" of the territory, only that part of the law of occupation applies which is intended to safeguard the *humanitarian* rights of the population. Conversely, as already stated, the rules protecting the reversionary rights of the legitimate sovereign find no application, there being no such sovereign.[59]

The legal standing of Israel in the territories in question is thus that of a State which is lawfully in control of territory in respect of which no other States can show a better title. Or, if it is preferred to state the matter in terms of belligerent occupation, then the legal standing of Israel in the territories in question is at the very least that of a belligerent occupant of territory in respect of which Jordan is *not* entitled to the reversionary rights of a legitimate sovereign.[60]

* * *

In view of the conclusion reached here any further answers to the remaining questions, concerning the compatibility of Order No. 145 with the provisions of the Hague Regulations and the Fourth Geneva Red Cross Convention, the right of judicial review of the occupant's legislative acts, as well as the formula to be employed in handing down judgments in occupied territory, are strictly

[58] While the partial inapplicability of the traditional law of occupation was explained in the case of Germany by the disappearance of the legitimate sovereign, here the same conclusion has been reached because of the absence of a "genuine" belligerent occupant, in the technical meaning of that term.

[59] This severability of the rules of a humanitarian nature from those protecting the ousted sovereign's reversion is probably implied in Art. 47 of the Fourth Geneva Red Cross Convention of 1949 which stipulates, *inter alia:* "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by . . . any annexation by the [Occupying Power] . . . of the whole or part of the occupied territory."
It must be noted, however, that according to the Commentary published by the International Committee of the Red Cross, "the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty." (Pictet, General Editor, *Commentary on Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) 276.)

[60] The conclusion reached here, according to which Israel is *more* than a "belligerent occupant" with regard to Judea and Samaria, while Jordan could be regarded, during the period 1948–67, *at the most* as a "belligerent occupant" there, has, of course, far-reaching implications. It must be remembered that title to territory is normally based not on a claim of *absolute* validity (few such claims could be substantiated), but rather on one of *relative* validity. Thus, e.g. in the *Minquiers and Ecrehos* case, the International Court of Justice, when called upon to adjudicate in the territorial dispute between the United Kingdom and France, decided *"to appraise*

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unnecessary, if not irrelevant. Their subsequent discussion here is therefore undertaken merely on the alternative (and in the present view incorrect) assumption that Jordan can show some reversionary title to Judea and Samaria to be protected by the rules of belligerent occupation.

III. *The Occupant's Right to Legislate for the Occupied Territory*

The basic provisions governing the legislative rights of the occupant are to be found in Art. 43 of the Hague Regulations of 1907 and in Art. 64 of the Fourth Geneva Red Cross Convention of 1949. Since the latter deals merely with the *penal* legislation in occupied territory—which is not relevant to the matter here under consideration—it is the former that merits more detailed examination. It lays down the rule that the occupant "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Although certain writers have interpreted this provision as authorising only such legislative changes which are dictated solely by considerations of military necessity,[61] it now seems sufficiently firmly established that the occupant's legislative rights are wider than that. For, to use the words of Glahn,

> "[i]t has to be remembered that the secondary aim of any lawful occupation is the safeguarding of the welfare of the native population, and this secondary and lawful aim would seem to supply the necessary basis for such new laws as are passed by the occupant for the benefit of the population and are not dictated by his own military necessity and requirements."[62]

the relative strength of the opposing claims to . . . sovereignty." (*I.C.J. Reports,* 1953, p. 67; emphasis supplied.)

Since in the present view no State can make out a legal claim that is equal to that of Israel, this relative superiority of Israel may be sufficient, under international law, to make Israel possession of Judea and Samaria virtually indistinguishable from an absolute title, to be valid *erga omnes.* The same conclusion would hold good also in respect of the "Gaza Strip" (an area of roughly 200 km², which was under Egyptian military occupation until June, 1967) as well as in respect of certain minor Palestinian border areas which were held by the Syrians—who had invaded them in 1948—until June, 1967.

However, these possibilities cannot be futher explored in the present paper.

On the questions relating to the relative strength of territorial claims in general, see Blum, *op. cit.,* 229–29, 335–36 and the authorities referred to there. See also O'Connell, *International Law* (1965) vol. I, 468.

61 Thus, for instance, says Oppenheim-Lauterpacht (*International Law* (1952) 7th ed., vol. II, 437), that the occupant "has no right to make changes in the laws . . . other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war." *Cf.,* however, *ibid.,* 446.

62 Glahn, *op. cit.,* 97.

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In fact, this secondary aim of occupation not only confers on the occupant certain legislative rights, but also imposes on him the duty to legislate for such purposes. In the words of Kelsen:

> "The occupying belligerent has the duty to ensure public order and safety, and, so far as this is possible, to do so in accordance with the law of the occupied territory."[63]

Commenting on Article 43 of the Hague Regulations, Stone has pointed out that

> "the Occupant's legislative power has the dual basis of his duty to ensure 'public order and safety' under Article 43, and his right to pursue his own military ends."[64]

Moreover, as has been stated by Glahn,

> "the occupant is generally conceded very extensive powers to change, alter, or suspend the ordinances and decrees (as distinct from laws) of the legitimate sovereign of the occupied territory. It is held that administrative regulations and executive orders are quite sharply distinct from the constitutional and statute law of a country and that they do not constitute as important or as vital a part of the latter's legal structure. Hence the occupant is held to have the power to interfere and to enact such regulations and ordinances as are deemed fitting and proper in his interests and in the interests of his armed forces."[65]

In view of the foregoing there is indeed little doubt as to the right—or even the duty—of the Israeli authorities, under international law, to enact Order No. 145. The reasons that prompted them in their action are rather straightforward: at the behest of the Jordanian Bar, the lawyers of Judea and Samaria have been boycotting the local courts and have declined their professional services to the local population, after having been warned over Radio Amman that any advocate "collaborating" with the local courts will automatically be expelled from the Jordanian Bar. Under these circumstances the activities of the local courts came to a complete standstill and it was the duty of the Israeli authorities to reactivate them so as to give the local population the legal assistance to which they are entitled as part of the "public order" for which the occupant is held responsible.[65a] This duty implies, according to Glahn, that "i[f] native judges refuse to serve under the administration of the occupant, the latter is usually held to be responsible for finding new judges to

[63] Kelsen, *op. cit.*, 141.

[64] Stone, *Legal Controls of International Conflict* (rev. ed. 1959) 698.

[65] Glahn, *op. cit.*, 99.

[65a] That this was indeed the Israeli authorities' intention in issuing Order No. 145, is clearly evidenced by the fact that in the "Gaza Strip"—where local members of the legal profession have been engaging in their various professional activities also under Israeli rule—no similar Order has been promulgated by the military authorities there.

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replace those who resigned."[66] The same view is expressed also by Greenspan who asserts that "[i]t is the duty of the occupant to establish courts of his own where the courts which formerly existed in the country cease to exist."[67]

The local population, however, will not greatly benefit from the mere existence of courts of law, if it is unable to draw on the legal assistance of properly trained and qualified lawyers to advise them on their legal problems and to represent them before the courts. This is the background for the promulgation of Order No. 145 the preamble of which aptly emphasises this point. It is worth adding that the Order was to be in force only for a period of six months—unless repealed at an earlier date—in the expectation that the lawyers' strike would be called off by then, thus rendering the renewal of the Order superfluous.[68]

It is accordingly submitted that the Officer Commanding, Israel Defence Forces in Judea and Samaria, was perfectly within his rights—even under the international law of belligerent occupation—in issuing Order No. 145.

IV. *The Right of Local Courts to Review the Validity of Order No. 145*

The right of local courts of the occupied territory to pass on the validity of the legislative and other acts of the occupant has been the subject of much speculation. According to Greenspan,

> "[t]he question has been termed controversial and decisions can be found favoring either point of view."[69]

According to the same writer,

> "[l]ogically, it would appear that since the occupant is limited by international law in his power to rule the occupied territory, the local courts are entitled to refuse to apply laws and measures which are patently beyond his powers under international law. However, the circumstances of an occupation do not permit the courts of the conquered territory to prescribe to the conqueror the extent of his powers."[70]

Morgenstern, likewise, has pointed out that

> "[w]hile municipal courts during the occupation have affirmed that they will not enforce measures of the occupant which go beyond the powers permitted him by international law, they have been reluctant to inquire whether legislative measures which prima facie could be intended to safe-

66 *Ibid.*, 107.

67 Greenspan, *op. cit.*, 258.

68 The fact that the Order has been limited to a period of six months only, has led the Hebron magistrate to the curious argument that "the characteristics of a legislative act being continuity and stability", the Order under discussion did not fulfil the necessary requirements.

69 Greenspan, *op. cit.*, 246, n. 120.

70 *Ibid.*

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> guard public order, and thus to satisfy the requirements of Article 43 of the Hague Regulations, were in fact necessary. They have considered themselves bound to apply them."[71]

This reluctance of the local courts has been explained by Morgenstern on the ground that

> "[m]unicipal courts during the occupation are, clearly, ill equipped to determine the necessity for a particular enactment of the occupant.... [T]he phrasing of Article 43 of the Hague Regulations shows that the occupant is invested with a certain discretion—as any administering power must be. It is consonant with justice and legal principle to suggest that his decision on administrative matters cannot be reviewed on its merits, and to require that claims alleging an abuse of his discretion be established to the satisfaction of an impartial tribunal."[72]

The same point is made by Glahn when he says that

> "[i]n view of conditions usually existing during belligerent occupation (including military security regulations), native courts are at best ill equipped to decide, on scanty factual information, whether or not a given order or act of an occupant conforms to necessity. Hence when the question of the need for the occupant's act, as distinct from its conformity to conventional law is raised, the courts ordinarily will wisely hesitate to hand down a decision and will prefer to allow claims based on the occupant's act to await a future settlement by an impartial tribunal."[73]

The hesitancy of doctrine and practice alike to confer on local courts a general right of judicial review of the occupant's acts has been cogently explained by Fraenkel:

> "In decisions concerning the legal basis of actions taken by the occupation authorities the high courts [of the occupied territories] were clearly influenced not so much by definite legal principles as by considerations of opportunism and political expediency. ... And in all ... cases in which the courts implicitly exercised a right of judicial review, the unilateral repudiation of occupation measures ... served only to diminish the prestige of the occupying powers .... Such a situation is to be carefully prevented in any well-planned occupation regime .... But whether this power [of judicial review of occupation measures] should be accorded to the courts of the occupied country is far more than a question of mere technicality. Judicial review is not a technical legal device but a protective mechanism imbued with tradition. It is based on the idea that one branch of the government exercises a check over another branch—of the same government—and that both branches 'are equally the representatives of the people'—of the same people. Since judicial review is

[71] Felice Morgenstern, "Validity of the Acts of the Belligerent Occupant" (1951) 28 British Year Book of International Law, 291, at 306.

[72] *Ibid.*, 307.

[73] Glahn, *op. cit.*, 110.

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meaningless unless the reviewing court has confidence in the intentions of the legislature, it must be used sparingly and with the utmost sense of responsibility.

If judicial review is mechanically extended from the field of constitutional law to the field of occupation law, it is transformed into something different. When the Germans [in the Rhineland after the First World War] exercised this right in regard to occupation measures they were animated not by confidence but by mistrust, not by wholehearted co-operation but by nationalistic assertiveness, not by a disinterested desire to examine constitutionality but by a wish to annul. And judicial review coupled with resentment undermines rather than safeguards the basic legal instrument that is interpreted by the reviewing court .... [I]t is highly doubtful whether the courts of the occupied country are the proper agencies to review the actions of the occupants. Considerations of reason as well as of legal philosophy suggest that this function can be properly fulfilled only by an independent international body."[74]

The whole tenor of reasoning by the Hebron magistrate would seem to justify and to support the arguments raised by Fraenkel against the right of judicial review of local courts. Moreover, if one is to go by the judgment itself, he seems to have been unaware of the very existence of certain limitations imposed on him in the exercise of this right, even in the view of those who tend to accord such a right to the local courts of occupied territory.

The Bethlehem magistrate, on the other hand, who approached this problem in a much more cautious and prudent manner—in conformity with international law and practice on this question—appears to have taken an unnecessarily limited and narrow view of the problem when he considered himself "not permitted and unable to pass on the legality of Order No. 145, since in its preamble there is mentioned the need for its promulgation ...."

The test applied by the learned magistrate appears to be a rather mechanical one. Occupation authorities may legislate—within their powers—without indicating the reasons for their acts. The mere absence of the formula setting out the reasons for legislating does not affect the legality of a given legislative act. On the other hand, the existence of such formula in a legislative act of the occupant is not in itself conclusive evidence of the legality of such act. If it were, the occupant could easily resort to the "necessity" formula to cover up legislative activities which are beyond his authority under international law.

Thus the formula used in the preamble of Order No. 145 can be regarded merely as a *prima facie* evidence of the good faith of the Israeli authorities.

V. *Pronouncement of Judgments—on whose behalf?*

It will be recalled that, while the Bethlehem magistrate pronounced his decision "in the name of Law and Justice", the Hebron magistrate maintained

[74] Fraenkel, *Military Occupation and the Rule of Law* (1944) 222–24.

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that "courts must hand down their sentences and decisions in the name of the legitimate ruler of the West Bank, that is, His Glorious Majesty King Hussein."

Once again, the Hebron magistrate seems to have ignored the authorities on this point. According to Oppenheim-Lauterpacht, the occupant

> "has . . . no right to constrain the courts to pronounce their verdicts in his name, although *he need not allow them to pronounce verdicts in the name of the legitimate Government*."[75]

Even if we were to assume—for the sake of argument—that the Kingdom of Jordan *is* the "legitimate Government" of Judea and Samaria, the Israeli authorities would still be entitled not to allow the pronouncement of verdicts in the name of the King of Jordan. The Hebron magistrate's failure to grasp this point is all the more surprising as he quotes extensively from Oppenheim-Lauterpacht in his decision and seems to be utterly familiar with the history of this problem, as it is set out in a footnote to the just-quoted passage from Oppenheim-Lauterpacht, the text of which footnote he summarises in his decision (without expressly referring to it). It is therefore extremely difficult to explain his position on this point as a matter of sheer oversight.

Greenspan too is of the view that

> "[t]he occupant may not compel local officials to carry on their functions in his name. Usually the local (indigenous) courts will conduct their proceedings in the name of the legitimate sovereign, but in a dispute as to where the legitimate sovereignty lies it would be correct for them to use a neutral formula such as 'In the name of the Law' when pronouncing judgments."[76]

And Glahn sums up the matter by saying that

> "some writers go so far as to insist that decisions of . . . [local] courts should be handed down in the name of the legitimate sovereign of the territory. Such a point of view must be regarded as unusual, however, and in at least one instance (occupied parts of France during the Franco-Prussian War) the wisest solution to an unpleasant and undignified series of quarrels between native judges and the occupying authorities would have been to pronounce decisions 'in the name of the Law'. The current view of the question seems to be that use of the sovereign's name in pronouncing decisions is permissible but depends entirely on the occupant's wish."[77]

The Officer Commanding, Israel Defence Forces in Judea and Samaria, was therefore perfectly within his rights—again, on the assumption that the State of Israel is merely a "belligerent occupant" in Judea and Samaria—when he decreed, in Article 2a of Order No. 57 of July 21, 1967, that "legal pro-

[75] Oppenheim-Lauterpacht, *op. cit.*, 447; emphasis supplied.

[76] Greenspan, *op. cit.*, 262.

[77] Glahn, *op. cit.*, 107.

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ceedings shall be instituted, and judgments be given, in the name of Law and Justice."[78]

VI. *Conclusions*

From all the foregoing the following conclusions emerge:

(a) Since the Kingdom of Jordan never had the status of a legitimate sovereign over Judea and Samaria, the rules of international law limiting the occupant's rights with a view to safeguarding the reversionary rights of the legitimate sovereign have no application as against Israel with regard to these territories. This proceeds, of course, on the assumption that Israel control of these territories is not unlawful. For it is important to recall, in these conclusions, that the often-repeated Arab-Soviet charge of "Israeli aggression" in June 1967 was not accepted either by the Security Council or the General Assembly;[79] and that this attitude of the two organs towards the repeated Soviet accusations "must in law be regarded as removing any doubts of either fact or law.... [It] is also proper and highly persuasive confirmatory evidence that the resort to force did not violate the Charter."[80] Furthermore, there is also no problem with regard to the Israel-Jordan General Armistice Agreement. The initiation by Jordan of military activities across the armistice lines with Israel on June 5, 1967, in violation of that Agreement, was unquestionably in the nature of "a material breach of a bilateral treaty by one of the parties [which] entitles the other to invoke the breach as a ground for terminating the treaty."[81]

(b) Even if it were assumed that Israel is merely a "belligerent occupant" subject to the reversionary rights of some legitimate sovereign in respect of Judea and Samaria, she would still be entitled to promulgate Order No. 145, the aim of which was to restore "public order" and to provide the necessary legal assistance to the local population.

(c) Since, in any case, the said Order is not patently *ultra vires* the occupant's rights, no local court is permitted to pass on its validity.

(d) The Israeli authorities were entitled, in any case, under the international law of belligerent occupation, to decree that judgments handed down by the local courts should be proclaimed "in the name of the Law", rather than in that of the alleged "legitimate sovereign".

[78] *Collection of Decrees, Orders and Appointments by the Officer Commanding, Israel Defence Forces in the West Bank District,* No. 5 of November 15, 1967, p. 157 (in Hebrew and Arabic).

[79] For the abortive fate of the various Soviet-sponsored resolutions in the Council and in the Assembly, see Stone, *The Middle East under Cease-Fire* (1967) pp. 6 ff. and nn.

[80] *Ibid.*, 14.

[81] Article 57(1) of the International Law Commission's final draft articles on the law of treaties, 1966 *Yearbook of the . . . Commission*, vol. II, p. 184.

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