Israel Law Review **51**(2) 2018, pp 165–168. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2018.
doi:10.1017/S0021223718000109

The Status of Judea and Samaria Revisited: A Response to Eyal Benvenisti

Yehuda Z Blum[*]

The July 2017 issue of the *Israel Law Review* celebrated the fiftieth anniversary of its publication, and for that occasion selected five articles (one for each decade) which, in the Editors' view, 'had a lasting impact on scholarly debate and beyond'. For the first decade the Editors chose my article 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', which appeared in the July 1968 issue, and asked Professor Eyal Benvenisti to comment on my piece, which he did under the title 'An Article that Changed the Course of History?' Not unexpectedly, Benvenisti has made a frontal attack on the central thesis of my article, which he reproduced in virtually identical language in the April 2017 issue of the *American Journal of International Law*.[1]

In the wake of the Six-Day War of 1967 Jerusalem experienced an influx of visitors – including many distinguished authorities on international law. Among them were Sir Elihu Lauterpacht of Cambridge, Professor Julius Stone of Sydney (Australia), and Professor Stephen Schwebel of Johns Hopkins University (later to become Judge and President of the International Court of Justice). That gave me a rare chance to discuss with them some of the legal problems relating to the outcome of the 1967 hostilities. While we had different ideas on these problems, we were agreed on two points:

1. Jordan and Egypt had lost whatever rights they might have possessed in the territories of the former Palestine Mandate they had captured in the course of the hostilities of 1948.
2. Israel had potentially better title to those territories than any other Power.

It was against this background that I published the article under scrutiny here. Elihu Lauterpacht had just published his book *Jerusalem and the Holy Places*[2] and, while I agreed with his conclusions, I did not accept entirely his line of argumentation. Julius Stone was perhaps the closest to my way of thinking (it was he who actually suggested the words 'missing reversioner' in the title of my article), and he then published a piece of his own along those lines.[3] Stephen Schwebel offered the 'better title' argument to which I made a cursory reference in my article. In 1970 Schwebel published an editorial comment in the *American Journal of International Law* under

[*] Hersch Lauterpacht Professor of International Law (Emeritus), The Hebrew University of Jerusalem

[1] Eyal Benvenisti, 'The Missing Argument: The Article that Changed the Course of History?' (2017) 111 *AJIL Unbound* 31–35.

[2] Elihu Lauterpacht, *Jerusalem and the Holy Places* (Anglo-Israel Association 1968).

[3] Julius Stone, *No Peace – No War in the Middle East: Legal Problems of the First Year* (Maitland Publications for the International Law Association (Australian Branch) 1969).

the title 'What Weight to Conquest?', in which he stated that 'Israel has better title in the territory of what was Palestine, including the whole of Jerusalem, than do Jordan and Egypt'.[4]

As Benvenisti pointed out, I was a young lecturer at the time – a deficiency that is normally cured by the passage of time. I somehow felt that I had not sufficiently dealt with the basic issues of my article. I therefore engaged in further research and tried to expand and elaborate (or, if you will, even refine) my line of argumentation.

The product of my further research was published in two stages: first, in 1971 my book *Secure Boundaries and Middle East Peace*;[5] second, in 1974 an article entitled 'The Juridical Status of Jerusalem'.[6] Regrettably, all this seems to have escaped Benvenisti's attention.

My position, as it evolved in the late 1960s and early 1970s, may be summarised as follows:

1. The Arab armies, including those of Transjordan and Egypt, committed armed aggression when they crossed the boundaries of Palestine on the expiry of the British Mandate. Both the United States and the Soviet Union, along with most members of the UN Security Council, condemned the Arab states as aggressors. Soviet Ambassador Gromyko went so far as to speak of aggression against 'the national liberation movement in Palestine' – meaning Zionism.[7]
2. An aggressor can *at best* claim the rights of belligerent occupant in the territory captured by his aggression and loses whatever rights he might have possessed when ousted from the illegally captured territory.
3. It follows that Transjordan's purported annexation of Judea and Samaria was invalid from the outset and certainly devoid of all legal effect after that (Egypt never asserted any rights of sovereignty in the Gaza Region).
4. Israel has better title than any other Power within the territory of the former Palestine Mandate, including the whole of Jerusalem. Schwebel's argument rests on solid legal foundations. This approach had been applied by the International Court of Justice in the *Minquiers and Ecrehos* case, in which it stated that the Court, when faced with competing claims to territory, will 'appraise the relative strength of the opposing claims to sovereignty'.[8]
5. As the very title of the Fourth Geneva Convention of 1949[9] indicates, the Convention deals with the *protection of civilians*; it is *not* concerned with the *protection of claims of states* (including claims to sovereignty, especially when such claims are based on acts of armed aggression).

[4] Stephen Schwebel, 'What Weight to Conquest?' (1970) 64 *American Journal of International Law* 344, 346.
[5] Yehuda Z Blum, *Secure Boundaries and Middle East Peace* (Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Faculty of Law, The Hebrew University of Jerusalem 1971).
[6] Yehuda Z Blum, 'The Juridical Status of Jerusalem' (1974) *Jerusalem Papers on Peace Problems* No 2, Leonard Davis Institute for International Relations, The Hebrew University of Jerusalem.
[7] Yaakov Ro'i, *Soviet Decision Making in Practice: The USSR and Israel 1947–1954* (Transaction Books 1980) 236.
[8] *Minquiers and Ecrehos (France v England),* Judgment [1953] ICJ Rep 47, 67.
[9] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

https://doi.org/10.1017/S0021223718000109 Published online by Cambridge University Press

6. Article 49 of the Fourth Geneva Convention does not apply to Jews settling in Judea, Samaria and the Gaza Region, for the local residents were not 'deported' or otherwise expelled from their homes and the Jewish settlers were not 'transferred' to those areas by the Israeli government, but went there voluntarily.

When the former Kingdom of Transjordan – situated entirely beyond the east bank of the Jordan River – purported to annex Judea and Samaria on the west bank of that river, it also changed its name to The Kingdom of Jordan. Leaving aside the fact that all of Israel is situated west of the Jordan River, it is clear that the use of the term 'West Bank' to connote Judea and Samaria is dictated by political rather than geographical considerations. In the 1930s, under the Palestine Mandate, Hugh Foot – better known as Lord Caradon, Britain's Ambassador to the United Nations in the 1970s and the formal sponsor of Security Council Resolution 242 – served as Assistant District Commissioner of Samaria. The current well-nigh universal use of the term 'West Bank' in preference to Judea and Samaria not only prejudges the matter at issue, but also serves as clear evidence that, when it comes to Israel, more often than not political considerations prevail over legal ones.

It is undeniable that international law is inextricably intertwined with politics, both international and domestic. It cannot be otherwise, for states are not only the main subjects of international law, but also actively participate in the formation and development of its norms, thereby seeking to safeguard their own interests.

In introducing the bill that was to become the 'Jerusalem Law' of 27 June 1967, Minister of Justice Ya'akov Shimshon Shapira told the Knesset:[10]

> What needs to be stated – for the purpose of the bill which I am now introducing … – is that the Israel Defence Forces have liberated from foreign yoke considerable areas of Eretz Israel [the land of Israel] … which have now been for more than a fortnight under the control of the Israel Defence Forces.
>
> The legal conception of the State of Israel – an organic conception adjusted to the practical political realities – has always been based on the principle that the law, jurisdiction and administration of the State apply to all those parts of Eretz Israel which are *de facto* under the State's control.
>
> It is the view of the Government – and this view is in conformity with the requirements of international law – that in addition to the control by the Israel Defence Forces of these territories there is required also an open act of sovereignty on the part of Israel to make Israel law applicable to them … It is for this reason that the Government has seen fit to introduce the bill which I now submit to the Knesset.

It will be recalled that the provisions of the law of 27 June 1967 have so far been applied merely to the eastern part of Jerusalem, but its non-application to other parts of Eretz Israel that came under Israeli control as a result of the Six-Day War is explained by *political* – as distinct from *legal* – considerations.

[10] *Divrei HaKnesset* [Parliamentary Records], vol 49 (27 June 1967), col 2420 (in Hebrew, translated by the author).

https://doi.org/10.1017/S0021223718000109 Published online by Cambridge University Press

If one assumes that Minister of Justice Shapira, a former Attorney General and a leading member of Prime Minister Eshkol's cabinet, sought guidance from a young lecturer on the juridical status of Jerusalem, and did so based on an article that was to be published more than one year later, one must also assume that Minister Shapira was endowed with prophetic powers and was walking in the footsteps of fellow Jerusalemites Isaiah and Jeremiah. The same also applies to the Military Governor of Judea and Samaria who, in December 1967, repealed Article 35 of his Proclamation No 3 of August 1967 in anticipation, as it were, of my article published in the July 1968 issue of the *Israel Law Review*. It is to such absurdities that ideological 'lawfare' has led Benvenisti in his remarks.

In the Introduction to my book *Will 'Justice' Bring Peace?*,[11] containing a selection of my articles and legal opinions written over half a century, I wrote: 'It is quite likely that the article discussing the juridical status of the West Bank in the wake of the Six-Day War of 1967 ("The Missing Reversioner: Reflections on the Status of Judea and Samaria") would have undergone, if written now, some changes in the light of later developments, primarily the Israel-PLO Declaration of Principles of 1993 and subsequent agreements based on it (commonly referred to as the "Oslo Accords")'. *Tempora mutantur et nos mutamur in illis*.

For the first decade after the publication of the 'Missing Reversioner' article Israel was governed by successive Labour-led coalitions. In actual fact, Minister of Labour (later Foreign Minister) Yigal Allon of the Labour Alignment championed the establishment of settlements in Hebron and the Jordan Valley (the 'Allon Plan') as well as in the Gaza Region. Minister of Defence Shimon Peres initiated the establishment of settlements in Samaria. Thus, the policy initiated by the Labour-led governments was only continued – and intensified – when Begin's Likud Party won the elections in 1977.

Benvenisti would have done well to heed and apply to himself the admonition of Meir Shamgar – whom he quotes with approval – who, in 1971 as Attorney General (later a Justice and President of Israel's Supreme Court), spoke of[12]

> the great difficulty in approaching problems connected with the actual implementation of the rules of warfare without influence by innate prejudices and deep-seated subjective outlook.

For some reason, Benvenisti seems to imply that his reasoning is above 'innate prejudices and deep-seated subjective outlook'.[13]

[11] Yehuda Z Blum, *Will 'Justice' Bring Peace? International Law – Selected Articles and Legal Opinions* (Brill/Nijhoff 2016).
[12] Meir Shamgar, 'The Observance of International Law in the Administrated Territories' (1971) 1 *Israel Yearbook on Human Rights* 262.
[13] Benvenisti (n 1) 31.

https://doi.org/10.1017/S0021223718000109 Published online by Cambridge University Press