

THE INTERNATIONAL LEGAL STATUS OF JUDEA AND SAMARIA/THE WEST BANK

Testimony before

House Foreign Affairs Subcommittee on the Middle East and North Africa

Hearing on “Understanding Judea and Samaria: Historical, Strategic, and Political Dynamics in U.S.–Israel Relations”

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Chairman Lawler, Ranking Member Sherman, and honorable members of the Committee, thank you for inviting me to speak on the topic of the legal status of Judea and Samaria at this hearing.

My name is Eugene Kontorovich. I am a professor at George Mason University Scalia Law School, heading its Center for the Middle East and International Law, as well as a senior research fellow at the Heritage Foundation.

What is Judea and Samaria?

Judea and Samaria is a geographic name referring to the hilly regions north and south of Jerusalem; it is largely synonymous with the term “West Bank,” which the Hashemite Kingdom of Jordan gave to the area when it conquered and annexed it in 1950. “West Bank” as a geographic designation only makes sense relative to Jordan, whose occupation ended in 1967. Using that name today is like calling the Czech Republic the Protectorate of Bohemia and Moravia. Judea and Samaria is of course a biblical term, but also one in neutral modern political usage – for example, it is how the United Nations General Assembly dubbed the region in 1947.

Regardless of the name, some claim that this territory is currently under belligerent occupation by the State of Israel and argue that international law places numerous restrictions on Israel’s presence and conduct there. I will explain how according to rules of international law applied everywhere else around the world, this territory is not occupied, and in fact Israel has a sovereign claim to it.

Historical Background

All the areas we are discussing, and most of the Levant, was part of the Ottoman Empire until its collapse at the end of World War I. The nations of the world empowered the newly created League of Nations to create independent nation states out of the former Ottoman lands. As they had no recent

experience in self-governance, these areas were turned into Mandatory Territories as a transition to full statehood.

In May 1948, the Mandate for Palestine came to an end, and the State of Israel was established. So far, this was uncontroversial. President Truman immediately recognized “the Jewish state ... proclaimed in Palestine.” Five Arab armies immediately invaded, seeking “to prevent the establishment of a Jewish State.”

Legal Background

What were Israel’s borders when it was created and recognized by the U.S. on May 14, 1948? In international law, there is a simple, clear rule to determine the borders of new countries, whether they arise from imperial collapse, decolonization, federal break up, cession, or any other means. Under the doctrine of *uti possidetis juris* a new country automatically inherits the borders of the last top-level administrative unit in that area. In other words, the pre-independence internal boundaries carry over to the new start. The continuity of prior borders is the sole factor, trumping fuzzy and hard to administer considerations like ethnic self-determination or historical title.

This rule has been applied to new states from Latin America to Europe, and is the matter of textbook international law. The reasons for it are clear. Demographics and history would give rise to multiple competing claims, while *uti possidetis* provides a unique, unambiguous solution. The virtue of *uti possidetis* is that it is easy to administer and provides certainty. Perpetuating colonial borders may be unfair, but as the drawing of legislative districts teaches, there are no “fair” borders.

To give a recent example, consider Crimea. The territory has been part of Russia for most of the past several hundred years. The majority of inhabitants were Russian-speakers. So history and self-determination may have supported Russia’s claims. Yet the international community rightly considers Russia’s annexation of territory illegal and regards it as Ukrainian territory to this day. The reason is the *uti possidetis* principle. Nikita Khrushchev redrew the borders of the Ukrainian and Russian Soviet Socialist Republics to give Crimea to the former. When the Soviet Union collapsed and Ukraine became an independent state, it automatically inherited the borders of its Soviet administrative predecessor.

The Status of Judea & Samaria

When Israel became independent, the preceding geopolitical entity was Mandatory Palestine, which included Judea and Samaria. Indeed, Judea and Samaria was never considered a distinct administrative entity. Under the application of standard rules of international law, the borders of the new state at independence would be the borders of the Mandatory territory it succeeded. Indeed, throughout the Middle East, the states that arose from Mandates acquired exactly the borders of those entities at the moments of independence. The borders of Lebanon, Syria, Jordan and Iraq all derive entirely from the prior Mandatory territories. In each of these countries, the Mandatory borders were drawn in somewhat arbitrary ways that included discontented minorities in a larger state, be it Muslims in then-Christian Lebanon or the Kurds in Iraq. But in none of these cases have such arguments been seen as a reason to redraw the borders.

Jordan and its allies failed in wiping out the Jewish State in 1948, but they did occupy much of Palestine – including the Old City of Jerusalem and Judea and Samaria, which it dubbed the West

Bank. It ethnically cleansed every single Jew from this area. But when Israel retook these areas in 1967, it was not occupying foreign territory but rather taking territory to which it had a sovereign title since 1948. Imagine if in a miracle Ukraine dislodged Russia from Crimea – would anyone say Ukraine is occupying it, simply because Russia had administered it for many years, and almost all of the current inhabitants support Russian rule?

Or consider Karabakh, a majority Armenian region within Azerbaijan with a deep Armenian history, and which Yerevan took control of in a war with Azerbaijan at the time of the countries' independence. Since that time, it had exclusively been ruled by Armenia, and all of its remaining inhabitants strongly desired Armenian rule on self-determination grounds. Yet when Baku captured the territory in Sept. 2023, no one treats it as an occupying power. The reason is simple: Karabakh had been within the boundaries of the Azeri Soviet Socialist Republic, and so it automatically became part of the new independent state of Azerbaijan, even though this tends to frustrate the self-determination aspirations of the Armenians there.

None of this is particularly controversial. Under widely agreed on international rules, Israel has sovereign rights to the territory. The rules are not in doubt – some just want to create a unique carve out for the Jewish State.

Indeed, to say that “the West Bank” – which is simply the furthest extent of Jordanian invasion in 1948 - continues to have some special legal status fifty years since the end of Jordanian occupation is to retroactively give legal effect to the aggression against Israel in 1948. It is to say that to the extent the Arab states succeeded in occupying parts of Mandatory Palestinian territory and ethnically cleansing every single Jew, those areas must permanently acquire a new legal status and must forever be *judenrein*. The demand for a distinct legal status for this territory would retroactively legitimize the illegal pan-Arab aggression of 1948 and give it permanent effect.

The policy of the United States has increasingly come to reflect this view. A 1977 memo by the State Department Legal Advisor concluded that the territory was occupied without even considering the *uti possidetis* argument, though it is the go-to rule for determining new countries' borders. Nonetheless, the memo also said that the state of occupation would end the moment the underlying state of war with Jordan ended, which happened in 1994. So even in that view, there is no longer an occupation. In any case, President Reagan refused to follow the Carter Administration's position, and President Trump in 2020 formally repudiated the memo.

Moreover, by recognizing Israeli sovereignty over the municipal borders of a unified Jerusalem – parts of which had previously been part of the “West Bank” under Jordanian occupation – the U.S. has rejected the view that Israel is an occupying power there. U.S. officials increasingly visit Israeli communities in the area, abandoning the prior practice of treating them as being untouchable.

The Future

Of course, there are still forces who seek to turn back the clock to the brief period when Jews were ethnically cleansed from the area. The United Nation's International Court of Justice in a recent non-binding July 2024 Advisory Opinion declared Israel's presence in these areas an occupation, without even considering the arguments just mentioned, despite having Vice President Sebutinde making them clearly in a powerful dissenting opinion. In his last year of office, President Biden instituted a

“West Bank” sanctions program that only targeted Jewish Israelis - and in some cases U.S. citizens by mistake.

Some who believe the road for peace depends on the creation of a sovereign Palestinian state may worry that the legal analysis presented here prevents that. That is not the case. The law is neutral as to diplomatic solutions. Israel’s sovereign title to the territory does not prevent, and indeed enables, it to cede some or all of it for a creation of a separate state. What the legal analysis does make clear is there is nothing about the 1949 Armistice Lines that make them legally-mandate borders of such a state, or that Israel has an obligation to cede all this territory. On the other hand, the contrary assumption has failed to make peace for six decades now.

I thank you for your time and attention.

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