

The Legality of West Bank Settlements

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The legality of West Bank settlements would seem to be, well, a legal one, or perhaps a political matter. Our sages, though, considered the question settled in this week's Torah reading.

Our portion opens with the death of Sarah in Hebron.ⁱⁱ Hebron today is a largely Arab city in the area that is known as the "West Bank," land on the west side of the Jordan River that came under the control of Jordan after Israel's War of Independence in 1948-9. Some Jews refer to that area as "Judea and Samaria," accurately indicating that the West Bank encompasses the vast majority of the ancient kingdoms of Israel and Judea. An Israeli settlement, Kiryat-Arba, is nearby, and a handful of Israelis have also settled in Hebron itself. The area was marred by the 1994 murder of "29 Palestinian worshipers in the Tomb of the Patriarchs"ⁱⁱⁱ—that is, in the very cave that Abraham is said to have purchased as Sarah's burial place—by the Jewish terrorist, Dr. Baruch Goldstein, a resident of Kiryat-Arba.

Tonight, we read of the negotiations between Abraham and Ephron the Hittite, as Abraham purchases the cave and its field to bury Sarah there.ⁱⁱⁱ Later, Torah will tell us that Abraham and other matriarchs and patriarchs are buried there. Our sages consider the entire chain of events to be of permanent importance. A 13th century French rabbi, Hezekiah ben Manoah, insists: "In this instance, the Torah records that the transfer of the cave and field adjoining Machpelah from Ephron to Abraham remains valid forever unless Abraham's descendants relinquish the claim to it freely and not under any duress."^{iv}

Modern international law, of course, does not recognize the Bible or any biblical commentator as the basis upon which Israel may justify its settlements in the occupied West Bank.

I was fortunate to study the legal terrain with Tal Becker of Israel's Ministry of Foreign Affairs, at the Shalom Hartman Institute in Jerusalem in 2017.^v

Many experts argue that the Fourth Geneva Convention absolutely outlaws Jewish settlement in any territory occupied after an armed conflict: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."^{vi}

But does the West Bank constitute occupied territory?

Becker has written: “That word, ‘occupation,’ is loaded with significance for the Jewish people...Some people reject it out of hand. How can a people occupy their own land, they say. How can Hebron and Bethlehem...be occupied by the Jewish people as if we were some kind of foreign presence in our own ancient homeland? We have come home. The label ‘occupier’ does not apply.”^{vii} This first argument would resonate with Rabbi Hezekiah ben Manoah.

But Becker continues: “For others, that word ‘occupation’—a word that is used by almost all States to describe Israel’s presence in control of territory beyond the 1949 Armistice lines—is a mark of shame. How can Jews continue to control another people, a people that aspires to self-determination as we do? The prolonged occupation of the West Bank, now [over] half a century in duration, is for them evidence of a profound failure to live up to our Jewish values, and learn the lessons of Jewish history.”^{viii}

Becker asks us to look at the League of Nations’ 1922 Mandate for Palestine. Prior to World War I, all of the land we call Israel today—along with the West Bank, Jordan, and other nations in the region—was part of the Ottoman Empire. Allied with the Germans, that empire was dismembered in defeat. The League of Nations, composed of the European victors in that Great War, bestowed Palestine upon Great Britain, with these words: “[T]he Principal Allied Powers have agreed...to entrust to [Britain]...the administration of the territory of Palestine, which formerly belonged to the Turkish Empire...[T]he Principal Allied Powers have also agreed that [Britain] should be responsible for putting into effect the [Balfour] declaration originally made on November 2nd, 1917,...and adopted by the [Allied] Powers, in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country...”^{ix} In short, the world seems to have recognized, as early as 1922, that all of Palestine belongs to the Jews.

The words of the Mandate were more easily written than accomplished, a fantasy of European powers drunk with victory. A Jewish State could not be established without impacting existing Palestinian residents. Tragically, the “rights and political status enjoyed by Jews” elsewhere, limited as they were in 1922, became nonexistent within a generation in most of Europe and in Arab lands where Jews had lived for millennia.

The United Nations would replace the League of Nations in 1945, and Becker demonstrates that the British Mandate in Palestine is enshrined in the U.N. Charter. In 1947, the U.N. would make a transformative change: The British

Mandate was abolished, with a partition plan establishing Jewish and Palestinian states between the Jordan River and the Mediterranean.

One thing the U.N. never did was to give Jordan the right to rule the West Bank. Israel argues that the prohibition against settlements in occupied territory only pertains to military engagements between sovereign parties; and since Jordan's rule over the West Bank from 1949 to 1967 was never recognized by the U.N., the Geneva Convention doesn't apply. Most of the world disagrees.

The final word ought to be United Nations Security Council Resolution 242, negotiated after the Six-Day War in 1967, including by the United States and Israel. It begins by “[e]mphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security.” It calls for “[w]ithdrawal of Israel...from territories occupied in the recent conflict” and the “[t]ermination of all claims or states of belligerency...” In short, occupation of territory taken in war is illegal, and there can be no greater sign of long-term commitment to occupation than the establishment and continued growth of permanent residential settlements in that territory. To be sure, the persistence of belligerence—the continued launching of rockets and terror attacks against Israeli civilians—is also an illegal violation of the very same Security Council Resolution. Two wrongs do not make a right.

This week, U.S. Secretary of State Mike Pompeo announced a change in American policy: This country will no longer treat Israel's West Bank settlements as illegal. This announcement upends decades of U.S. policy and contradicts a U.N. Security Council resolution that remains in force. While Israel surely doesn't consider its sanctioned settlements to be illegal, the Israeli position is internally inconsistent. While Israel quickly annexed territory directly adjacent to Jerusalem after the Six-Day War, Israel has never annexed the bulk of the West Bank, including the large settlement blocs and including Hebron and Kiryat-Arba.

Israel might take its cues from Abraham, not only in his purchase of land in Hebron, but also in the way that he behaves toward the Hittites, residents of that place before he arrives. Twice, “Abraham bowed low before the people of the land.”^x They call him “a prince of God among us,” and offer him a burial place for free.^{xi} Responding with humility, Abraham treats the people with respect and insists on paying full price.

Abraham does ultimately take full ownership of that land in today's West Bank. Today, his children share it in an uneasy truce: A synagogue for the descendants of Isaac is on one side of the crypt; a mosque, for the offspring of Ishmael, on the other. Let us look forward to the day when humility will be a virtue

on both sides of the Israeli-Palestinian conflict—and in our American government, too. Let us imagine a day when legal conflicts over that sacred land will have been resolved, the rockets will no longer fly, when Israeli and Palestinian civilians will no longer quake in fear but thrive in peace. Let our dream be real, and let that day come when the Jews and Muslims who face each other at the Cave of the Patriarchs and Matriarchs will regard one another as family once again.

Amen.

ⁱ Genesis 23:2.

ⁱⁱ Eliyahu Kamisher and Adam Rasgon, “Hebron: The conflict in a nutshell,” *The Jerusalem Post*, May 13, 2017.

ⁱⁱⁱ Genesis 23:7-16.

^{iv} Chizkuni to Genesis 23:20.

^v The legal analysis herein is attributable to Tal Becker, “1967: Occupation or Liberation,” Rabbinic Torah Seminar, Shalom Hartman Institute, Jerusalem, July 6, 2017.

^{vi} Fourth Geneva Convention, 1949. Text provided by Tal Becker.

^{vii} Tal Becker, “Judea and Samaria—Occupation or Liberation? Understanding the Legal Terrain.” Text provided by Tal Becker. As far as I can tell, this is an unpublished paper.

^{viii} *Ibid.*

^{ix} League of Nations, Mandate for Palestine, 1922. Text provided by Tal Becker.

^x Genesis 23:7, 12.

^{xi} Genesis 23:6.