



הקמפיין לחיזוק ההכרה בזכויות המשפטיות של מדינת ישראל על כל חלקי ארץ ישראל

CONTRIBUTION OF ISRAEL'S SUPREME COURT TO THE BDS DELEGITIMIZATION MOVEMENT

EXECUTIVE SUMMARY

The official position of the state of Israel, with respect to the legal status of Judea and Samaria, has consistently been that this land is not occupied. This has been the official position of both left wing and right wing governments.

However, at the same time that this has been the official position of the government of Israel, the Supreme Court of Israel has promoted an opposing perspective.

By dismissing Israel's legal foundation, and thus figuratively pulling the rug out from under Israel's feet, the Court has provided tools to those who seek to delegitimize Israel.

ISRAEL'S OFFICIAL POSITION ON THE LEGAL STATUS OF JUDEA AND SAMARIA

Israel's position with respect to the legal status of Judea and Samaria has been constant ever since 1967.

In fact, it was first officially formulated by Meir Shamgar – the Attorney General of Israel who later became Chief Justice of the Supreme Court – in 1971¹. It should be noted that it was also the opinion of many academics at the time².

The position is based on article 2 of the Fourth Geneva Convention³ which states that the convention applies only to High Contracting Parties, and therefore, there can be an occupation only when occupying a High Contracting Party (the territory belonging to a fellow state). Since the presence of Jordan in Judea and Samaria before 1967 was illegal according to the British Mandate, and this presence was not recognized by most nations, the liberation of these territories should not be seen as an occupation. In other words, Israel's official position is that it does not see itself *de jure* [as a matter of law] to be an occupying power.

¹ Meir Shamgar, "The Observance of International Law in the Administered Territories," 1 *Is. Yearbook of Human Rights* 262 (1971), esp. pp. 262-266.

² See Yehuda Z. Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', in *Israel Law Review*, Vol. 3, 1968, pp. 279–301.

³ Fourth Geneva Convention, Article 2

This position has been reaffirmed several times by Israel, including recently. For example, in the Annex to the decision “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory” by the ICJ of 2004, there is a summary of Israel’s official position with regards to the status of Judea and Samaria⁴:

Israel does not consider that the Fourth Geneva Convention “is applicable to the occupied Palestinian territory, citing the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt and, therefore, not a territory of a High Contracting Party as required by the Convention.”

More recently, on 9 July 2012, the government-mandated Levy Report came out with similar conclusions⁵:

“Our basic conclusion is that from the point of view of international law, the classical laws of ‘occupation’ as set out in the relevant international conventions cannot be considered applicable to the unique and sui generis historic and legal circumstances of Israel’s presence in Judea and Samaria spanning over decades... Therefore, according to International law, Israelis have the legal right to settle in Judea and Samaria and the establishment of settlements cannot, in and of itself, be considered to be illegal.”

In December of the same year, when a new government was formed, the Israeli cabinet passed cabinet resolution 5251 which reads: "The Jewish people has a natural, historical and legal right to its homeland and to its eternal capital, Jerusalem... The State of Israel, as the state of the Jewish people, has a right and claim to areas, the status of which is under dispute, in the Land of Israel..."

The conclusion is clear: Israel’s official position rejects the “occupation” narrative and embraces Israel’s rights to all parts of the land of Israel.

THE SUPREME COURT’S POSITION ON THE LEGAL STATUS OF JUDEA AND SAMARIA

The early years after the liberation of Judea, Samaria and Gaza, saw an interesting legal paradigm applied: The Israeli government rejected the *de jure* application of occupation law in Judea and Samaria but voluntarily took upon itself to apply the humanitarian sections of the Fourth Geneva Convention. Thus, Israel opposed the description of the situation as an occupation but found ways to properly handle the territories and to protect the rights of the Palestinians.

However, in no time, the court chose to ignore this important distinction. We see here some of the statements issued by the Courts in describing Judea and Samaria:

Since 1967, Israel has been holding the areas of Judea and Samaria in belligerent occupation⁶.

The Judea and Samaria areas are held by the State of Israel in belligerent occupation⁷.

⁴ Please note this is a summary based on materials provided to the United Nations by the Government of Israel and other publicly available sources..

⁵ Levy Report

⁶ HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel.

⁷ HCJ 7957/04 Zaharan Yunis Muhammad Mara'abe. 62 v. The Prime Minister of Israel.

The territory that is the object of the petition is under a regime of “belligerent occupation.”⁸

We should remember that the territories of Judaea and Samaria, and until August 2005 also the territory of the Gaza Strip, have been subject to a belligerent occupation for almost forty years.⁹

In 2007, in the decision rendered in *HCI 9132/07 Albassioni v. Prime Minister*, the Supreme Court held that the occupation of the Gaza Strip had now ended, thus implying that there had been an occupation in Gaza before the disengagement. This was also expressed in *A. v. State of Israel*, where the Court said: “A change occurred in September 2005, when Israeli military rule in the Gaza Strip ended and the territory ceased to be subject to belligerent occupation”, differentiating Gaza from “the territories that are under the belligerent occupation of the State of Israel (Judaea and Samaria).”

These instances are only a few of the many times the Supreme Court affirmed that the territories were under occupation, rather than specifying, as it should have, that Israel is voluntarily applying the humanitarian parts of Occupation Law in order to better the lives of the Palestinians.

The actual position of Israel as to the legal nature of Judea and Samaria was never really considered. Nor was the *de jure* nature of the territories ever referred to. This would have been completely legitimate if the court had been careful not to refer to the territories as being under a regime of “belligerent occupation.” However, ignoring Israel’s strong arguments and calling the territories occupied is outrageous.

THE DAMAGE CAUSED BY THE SUPREME COURT

One of the greatest challenges faced by Israel is the delegitimization campaign against Israel.

This campaign operates on many fronts, including via the BDS movement that calls for a boycott of Israel. Some of the BDS initiatives demand that all products coming from what they call “the Occupied Palestinian Territories (OPT)” be marked. The state of Israel completely opposes this. However, as long as Israel’s own Supreme Court calls these territories occupied, the BDS movement will keep getting stronger. It is impossible to expect foreign countries to block such initiatives while the Supreme Court plays into their hands. One cannot expect the foreign nations to be more Zionist than Israel’s institutions.

CASE STUDY: SECURITY FENCE

One of the more powerful charges of the BDS movement against Israel involves the security fence, which is referred to as the “separation wall.” On this subject, the delegitimization movement against Israel achieved a significant victory when the International Court of Justice (ICJ) decided the fence was in fact illegal. Since then, and until today, the BDS movements use this decision in order to justify and strengthen their campaigns.

One must ask: What was the ICJ’s case based on?

The answer is simple: The law of occupation. And how did the ICJ get to the conclusion that there is an occupation in Judea and Samaria?

⁸ HCI 2150/07, Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head, et al., v. Minister of Defence et al., Judgment, 29 December 2009.

⁹ HCI 8276/05 - Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defense et al.

After admitting that the State of Israel's official position was that there was no *de jure* occupation in Judea and Samaria, the court went on to claim that there were other possible interpretations. In order to demolish the position of the Israeli government, the ICJ cited **the Supreme Court of Israel**, which referred to an "occupation" in its HCJ 201/09 Physicians for Human Rights v. Prime Minister ruling!

In other words, the Supreme Court of Israel, via its unfortunate characterization of the status of Judea and Samaria, provided a means for the delegitimization movement to attack Israel for allegedly occupying Judea and Samaria.

INTERNAL ISRAELI DISCUSSION

We note here that in our discussions with Members of Knesset from various parties, we have come to realize that most MKs, even from the most right wing parties, do not realize that the official position of Israel is that Israel is not an occupying force. They themselves were convinced by the discourse of the legal elite. Those who oppose territorial compromises call on Israel to change its official position with respect to Judea and Samaria, when in fact what they need to do is call upon the Israeli government to publicly reaffirm its legitimate position.

CONCLUSION

At a time when Israel's very legitimacy is being attacked, it is exceedingly important that Israel's own official institutions not play into the hands of its enemies.

Israel has a very strong case for the legality of its control of Judea and Samara – a strong legal case that argues against characterizing this control as a "belligerent occupation."

It is time for Israel's Supreme Court to incorporate this legal case into its decisions, rather than ignoring it and thus providing assistance to those who would undermine Israel.